Insurance cover for

‘cross border’ workers

Effective date: November 2016

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# Disclaimer

The information produced by ReturnToWorkSA in this publication is correct at the time of printing and is provided as general information only. In utilising general information about workplace health and safety and work injury management, the specific issues relevant to your workplace should always be considered. This publication is not intended as a substitute for the requirements of the *Return to Work Act 2014* or the *Work Health and Safety Act 2012*.

## 

# Introduction

## Purpose of guidelines

The purpose of these guidelines is to assist employers, ReturnToWorkSA’s claims agents, and workers to understand the cross-border/territorial provisions.

These guidelines are not intended to constitute legal advice and should not be relied upon by employers to make the important decision of which State(s) you are required to be registered in or ensure an existing registration covers ‘cross-border’ workers. Advice should be sought from your industry association or solicitor, or contact the relevant compensating authority listed on page 15 for further guidance.

These guidelines are divided into two main sections. The first section contains details of the ‘State of connection’ tests, and the second contains examples of the tests operating across a range of industries.

### Background

In the past, employers sometimes found themselves being required to obtain work injury insurance for an individual worker in more than one State or Territory.

To remedy this situation, the six States and two mainland Territories of Australia adopted a national model for territorial or ‘cross-border’ coverage, thus enabling employers to only need to obtain, or ensure cover for, work injury insurance for a particular worker in one State or Territory (for their entire workforce an employer may need to be registered in more than one State or Territory), and providing certainty for workers about the benefits available if they are injured at work.

In South Australia the test for determining work injury insurance cover for cross-border workers (the ‘State of connection’ test) is set out at section 10 of the *Return to Work Act 2014* (the Act).

### ‘State of connection’

Under these provisions, the State or Territory in which work injury insurance relating to a particular worker is required is ascertained by determining the worker’s ‘State of connection’. The ‘State of connection’ of a worker is determined by a series of tests, details of which are contained on pages 4 to 8 of these guidelines. Similarly, the benefits available to an injured worker are also determined by the ‘State of connection’ test, in so far as that test will determine which State or Territory legislation applies.

All States and Territories have introduced the same or very similar cross-border provisions, resulting in uniform national laws.

Important information:

These provisions do not mean that every employer will only require work injury insurance in one State or Territory for all their workers (as noted above).

## How to determine a worker’s ‘State of connection’

The following series of tests is to be applied to determine a worker’s ‘State of connection’. It is important to note that these tests apply to the particular contract of employment applying at the time a worker suffers a work injury, not past different and separate contracts.

Note: Reference to a ‘State’ includes a Territory.

A worker’s ‘State of connection’ is:

1. the State in which the worker **usually works** in that employment
2. if no State or no one State is identified by (1), the State in which the worker is **usually based** for the purposes of that employment
3. if no State or no one State is identified by (1) or (2), the State in which the **employer’s principal place of business in Australia** is located
4. if no State or no one State is identified by (1), (2) or (3), the State in which the **worker was injured**, provided that they are not entitled to benefits for the same injury under the laws of another country.

There are special provisions for workers on ships (see page 8).

Each of the steps to identifying a worker’s ‘State of connection’ is discussed in further detail below. They are the same as the tests used in other States and Territories that have adopted the nationally agreed model for cross-border coverage.

## Supporting documentation

To ensure that a worker’s ‘State of connection’ can be readily determined, contracts of employment or other documentation which contain the terms of employment should be clear and specific. Employers should clearly state what work a worker is engaged to undertake, where and for how long (if possible) it is intended that workers will be working in a particular State(s).

Employers should keep accurate records of any arrangements to send workers temporarily to other States or overseas. These records could include copies of relevant contracts of employment, letters of offer, occupational licences, site agreements, travel/accommodation records or other documentation that might confirm that the arrangement is temporary.

It is important to note that employment documentation, while important, is not the sole determinant of a worker’s ‘State of connection’. A worker’s ultimate job location/s may differ from what was intended and documented by the worker and employer. In these cases the worker’s job history is just as important as, if not more important than, the documentation.

## First test: State in which the worker usually works

A worker ‘usually works’ in the State(s) where they spend their time working (although this may not always be the case). This first test is about where, as a matter of fact, a worker usually undertakes the work they are engaged to undertake. Many workers are required to travel to other States in the course of their duties, in which case they do not “usually” work in one State.

The word “usually” does not imply a quantitative test i.e. time spent working in a State. It means habitual or customary, or “in a regular manner”.

If a worker usually undertakes their work in this State and another State, the first test is not met. However, in such a situation regard must also be had to the following:

In deciding whether a worker usually works in a State—

1. regard must be had to the worker's work history with the employer over the preceding 12 months and the intentions of the worker and employer; but
2. regard must not be had to any temporary arrangement under which the worker works in a State for a period of no longer than 6 months.

In deciding whether a worker usually works in a particular state, you should consider:

* the terms of the contract of employment (when in writing or implied by some documents such as a letter of offer)
* the worker’s work history and role with that employer over the 12 months preceding the date of injury, and the proposed future arrangements
* where the worker actually performs the work, rather than where they may be required to work under the contract of employment
* the location/s where the worker works in a regular manner – the amount of time spent in a State is not determinative of a ‘connection’.

The employer’s and worker’s intentions in relation to current and ongoing employment must also be considered.

If it is intended that the worker will work in a particular State for the full term of their contract of employment, it is intended that the worker ‘usually works’ in that State for the purpose of section 10 of the Act.

A worker can work temporarily outside their ‘usual’ State for up to six months with the same employer under the same contract of employment without it affecting their ‘State of connection’.

However, if longer than six months, the employer must review coverage for the worker. At this point, the employer may determine that:

1. the arrangement remains temporary (the employer should keep copies of documentation supporting the temporary status of the arrangement), or
2. the arrangement is now permanent, and that there may be a new ‘State of connection’ for the worker (the employer must register for work injury insurance for that worker in the new ‘State of connection’).

Note: a lengthy ‘temporary’ arrangement may require a review of the worker’s ‘State of connection’.

### Example: Worker usually works in a single State/Territory

A worker is employed as an Electrical Trade’s Assistant with a South Australian based employer. The worker performs all of their employment duties on worksites in Victoria, taking their own vehicle to work and providing their own tools and equipment. They do not attend their employer’s premises in South Australia in the course of their day-to-day duties and receive all of their instructions by the relevant project manager on sites in Victoria.

In this case, the worker performs work for their employer in Victoria and under the first test, the ‘State of connection’ is Victoria. The employer would be required to register or ensure cover for this worker for work injury insurance with WorkSafe Victoria.

### Example: Worker usually works in more than one State/Territory

An employer conducts business as an interstate bus operator from premises in Adelaide, South Australia. A worker is engaged by the employer as a bus driver, mainly driving buses between Adelaide and Sydney but also on the Adelaide/Melbourne and Adelaide/Geelong routes. Occasionally the worker drives charter buses entirely within South Australia for the employer.

In this example the worker carries out their employment in South Australia, New South Wales and Victoria. Therefore the first test does not ‘connect’ the worker’s employment to a single State or Territory and consideration should be given to the second test.

## Second test: State in which the worker is usually based

There may be cases where a worker works in a number of States. In these cases there is no one State in which the worker ‘usually works’ and it is necessary to move to the second of the four tests: the worker’s employment is ‘connected’ to the State where they are ‘usually based’ for the purposes of that employment.

When deciding where a worker is usually based, the following factors should be considered:

* the location from which the worker is expected to operate
* the location the worker will attend routinely during the contract of employment to receive directions or instructions in relation to the work
* the location the worker routinely attends to collect materials or equipment for work
* the location the worker reports to for administrative, human resources and other non-specific related employment issues.

### Example: Worker is usually based in a single State/Territory

A worker is employed as a sales representative. Each morning they are required to attend a warehouse near the border in South Australia to collect their employer’s products, which they are then required to distribute at various retail outlets in South Australia and Victoria. They use a vehicle supplied by their employer, which the worker garages at their home in South Australia. At the end of each day the worker is required to return any unsold merchandise to the warehouse in South Australia.

The worker operates without day-to-day supervision. Their immediate manager is located in the employer’s Victoria office and is the person to whom they are required to send reports and time sheets and to whom they report verbally by telephone from time to time.

The worker sends all written correspondence to their manager via a facsimile located at their home in South Australia. All invoice books, which the worker needs to carry out their duties are mailed to their home in South Australia from where they prepare all documentation related to their employment. The employer does not provide facilities elsewhere for this purpose.

In this example it is likely that the worker is usually based in South Australia for the purposes of their employment. The employer’s South Australian warehouse is the location that the worker routinely attends to collect their employer’s products and return any unsold merchandise. The worker completes all of the necessary documentation and carries out all other administrative tasks in South Australia and their employer uses this as the base to send new invoice books.

### Example: Worker has no single State/Territory from which they are usually based

A worker is employed by an interstate trucking company that transports textiles across Australia. The worker is supplied with a truck for the purposes of their employment and is permitted to garage it at their home in South Australia while not in use.

The worker transports goods between South Australia, the Northern Territory and Western Australia. Their contract of employment specifies that they are employed to undertake transporting services across each of these States.

The worker routinely receives instructions from each of the depots they stop at in South Australia, the Northern Territory and Western Australia, receiving ad hoc instructions via radio while in transit.

In this example, it is unlikely that the worker’s employment is usually based in any single State or Territory. The third test would need to be considered to determine the State to which the worker is connected for work injury insurance purposes.

## Third test: State in which the employer’s principal place of business is located

There may be cases where a worker works in a number of States, and there is no one State in which they are usually based. In these cases the worker’s employment is ‘connected’ to the State in which the employer’s principal place of business in Australia is located. The employer’s principal place of business is:

* the most important or main place of business from where the employer manages or controls its business.

Note: “principal place of business” is not necessarily the same as the principal place of business registered with ASIC – an employer may not be a corporation

## Special situation: workers on ships

Except where workers are covered by the Commonwealth *Seafarers Rehabilitation and Compensation Act 1992* (the Seafarers Act) in which case the *Return to Work Act 2014* does not apply at all, the ‘State of connection’ of workers on ships is determined in the same way as other workers. However, if no State or no one State can be identified by using the first three ‘State of connection’ tests, a worker’s employment is, while on a ship, ‘connected’ with the State in which the ship is registered or, where the ship is registered in multiple States, the State in which the ship was most recently registered.

## Fourth test: State in which the worker was injured

If no State or no one State is identified by any of the first three tests, or the test for a worker working on a ship, the worker is ‘connected’ to the State in which they were injured, provided that they are not entitled to benefits for the same injury under the laws of another country.

# Employer obligations

Everyone who hires workers must have work injury insurance for those workers in the correct ‘State of connection’.

Authorities may take legal action against the employer and/or impose a penalty or fine if it is determined that an employer does not have appropriate work injury insurance in the relevant ‘State(s) of connection’ or if the employer is registered in what transpires to be the ‘State of connection’ but has not included the remuneration of such worker respectively. An employer may avoid prosecution or penalty or fine if a court or authority determines that the employer had work injury insurance for the worker in another State, believing in good faith that the worker was ‘connected’ to that other State.

# Diseases of gradual onset

The following procedure should be applied to determine the ‘State of connection’, and the benefits applicable to a worker who suffers an injury or disease gradually.

1. Apply the series of tests to determine the worker’s ‘State of connection’.
2. Determine, using the provisions of the legislation of that worker’s ‘State of connection’, the date of injury and the employment out of which the injury arose.
3. If the injury actually arose from work with the worker’s previous employer, the worker should be advised to submit a further claim in respect of employment with the previous employer, the worker’s first claim should be rejected on the basis that the worker’s injury did not arise from that employment and then apply the territorial tests to determine the worker’s ‘State of connection’ in respect of the previous employment.

## Industry examples

**ReturnToWorkSA**

13 18 55

[info@rtwsa.com](mailto:info@rtwsa.com)

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# The following industry examples have been developed to provide some guidelines as to how the territorial provisions can be applied to establish a worker’s ‘State of connection’.

### Agriculture/pastoral

# Example 1

* A grazier has a property on the border between South Australia and New South Wales.
* The homestead from which the grazier runs the business is on the South Australian side of the border.
* The shearing sheds and shearers’ accommodation are located some distance from the homestead on the New South Wales side of the border.
* The grazier engages shearers under a fixed contract.
* The shearers only work in the shearing sheds for the period of the contract and at no time are required to visit the homestead for the purposes of their employment.

# To establish in which State the worker’s employment is ‘connected’, it is necessary to work through the territorial tests.

# The first test identifies the State in which the worker usually works in that employment. It establishes that, in this example, the workers (the shearers) are engaged to work in New South Wales (in the shearing sheds) for the period of the contract.

# The first test therefore identifies the ‘State of connection’ to be New South Wales. There is no need to consider the remaining tests.

# Example 2

* A grazier has a property on the border between South Australia and New South Wales.
* The homestead from which the grazier runs the business is on the South Australian side of the border.
* The grazier employs several farmhands who work across the property.
* The workers do not usually work in either South Australia or New South Wales (they work in both States) but the workers report to the homestead at the start of each working day to receive instructions /directions and collect equipment.

# The first test does not identify a ‘State of connection’. The farmhands’ work is spread across the property, which spans South Australia and New South Wales (unless they are specifically engaged to usually work on only one area of the property which is in only one of the States).

# Therefore they ‘usually work’ in both South Australia and New South Wales.

# The second test needs to be considered. The workers report every morning to the homestead in South Australia, to be assigned work and collect their equipment.

# Based on this information, when the second test is applied, it can be established that South Australia is the State in which the workers are usually based for the purposes of that employment, and therefore South Australia is the workers’ ‘State of connection’.

# Example 3

* A contract shearer employs several full time workers who work as a single team and report directly to the shearing sheds as required.
* The shearer has his business records and operates from his principal place of business in Bordertown,

South Australia.

* He secures contracts across two States that require work by his shearers.

# In this example, the first two tests do not identify a ‘State of connection’, as there is no State in which the workers usually work in that employment. Nor are the workers usually based in any one State, as the workers move to the various worksites as directed rather than report to a base each morning.

# By applying the third test we can establish the employer’s principal place of business is in Bordertown, where he has his business records and secures contracts. Therefore the workers’ ‘State of connection’ would be South Australia.

### Building and construction

Example 1

* A building company operates from a principal place of business in Perth, and has work injury insurance coverage in Western Australia.
* The company wins a four-month contract in Adelaide.
* The company sends a number of its key permanent Western Australia-based personnel to Adelaide to oversee work during the four-month contract, with the intention that they return to Perth after completion of that contract.
* The company also recruits additional staff specifically to work in Adelaide in respect of that contract.
* The company has made no commitment to employ these additional workers once the contract in Adelaide is completed.

In this example, each group of employees must be considered separately as their contracts of employment are different.

The first test establishes that the company’s existing permanent workers usually work in Western Australia and are only working in South Australia for the duration of the Adelaide contract which is for less than six months. Their ‘State of connection’ continues to be Western Australia and the workers continue to be covered by work injury insurance in that State.

By applying the first test to the additional staff who have been employed solely to work on the Adelaide contract, it establishes the workers usually work in South Australia and, as such, have a ‘connection’ to South Australia.

Example 2

* A construction company with its office in Melbourne undertakes building contract work in both Victoria and South Australia.
* Based on past contract experience, the work is evenly distributed between the two States.
* The workers work in both States from time to time depending on where the employer gains a contract.
* The workers do not have a permanent base, rather they report directly to the site on which they are working at that time.

In this example, the first test does not apply as the workers work both in Victoria and South Australia, and cannot be said to work primarily in any one State.

The second test is unlikely to apply, as the workers are not based in any one State and report directly to the site on which they are working at that time.

To identify the workers’ ‘State of connection’ the third test needs to be considered. By applying the third test it can be established that the employer’s principal place of business is Victoria, and therefore the worker’s ‘State of connection’ is Victoria.

### Labour hire

Example

* A worker is registered with the Queensland office of a labour hire agency as a casual employee. The worker has had continuous employment through the labour hire agency with various employers in Queensland for two years.
* The worker is offered a fixed period contract of employment in Western Australia by the South Australian office of the labour hire agency (separate corporation). The worker is paid their wages by the South Australian office for the period of the contract.
* The worker intends to return to Queensland at the end of the contract and resume work through the Queensland office as and when work becomes available.

The worker’s contract of employment was with the South Australian office of the labour hire agency and the South Australian office is paying the worker’s wages. It is the work under this contract of employment which needs to be considered.

Under the first test, Western Australia is the State where the worker will usually work for the period of the contract of employment with the South Australian office of the labour hire agency. As the first test decides the matter, there is no need to consider either the work-base (second test) or the employer’s principal place of business (third test).

The South Australian office of the labour hire agency will need to register to obtain work injury insurance in Western Australia for this worker.

### Mining

Example 1

* A mining company has its principal place of business in Queensland.
* The company operates mines in Queensland, New South Wales and South Australia.
* Workers are employed to work full-time in a South Australian mine but are flown home for rostered rest days on a regular basis.

For the purposes of identifying the worker’s ‘State of connection’, it is necessary to consider the location where they actually work (that is, the first test).

In this example, the miners usually work in the South Australian mine, therefore these workers’ ‘State of connection’ would be South Australia. The fact that these employees are flown home on a regular basis is immaterial, as time-off is not considered to be ‘work’.

As the issue is decided by applying the first test, the second and third tests are not needed.

Example 2

* A mining company has its principal place of business in South Australia.
* It operates mines in Queensland, Victoria and South Australia.
* A Quarry Manager who has previously worked at the South Australian mine is sent to Victoria to take up a new position of mine manager. He works full time in the Victorian mine.

In this example it is clear from the application of the first test, the intent of the employment relationship is that the worker now usually works in Victoria, as the worker has taken up a new contract of employment with the same employer. The employer would need to obtain work injury insurance for the worker in Victoria.

Since this issue has been decided by application of the first test, the remaining tests are not required.

### Performers

Example 1

* A theatre company is registered in and operates from an office in South Australia.
* It employs a core troupe of performers from all over the world and tours Australia, with performances running for up to two months in each State.
* Additional performers and ancillary workers may be engaged at any time throughout the tour.

An individual performer’s ‘State of connection’ in this example would depend on the terms of their contract of employment and the history of where they worked during that contract. Each performer’s circumstances must be assessed on a case-by-case basis to establish their ‘State of connection’.

By applying the first test, it is clear that the core troupe of workers employed to tour throughout Australia would not usually work in any one State.

The second test does not identify any one State where the workers would usually be based.

As the first two tests have failed to identify these workers’ ‘State of connection’, the third test needs to be considered. This test identifies the company’s principal place of business as South Australia, which would therefore be the workers’ ‘State of connection’.

Variation: Should a worker be employed under a contract solely to perform work in a particular State, for example Western Australia, the first test would establish that Western Australia was the State in which the worker usually worked, and as such, Western Australia would be their ‘State of connection’.

Example 2

* A theatre company is registered and operates from an office in South Australia and tours Australia with performances running for up to two months in each state.
* A performer resigns halfway through the tour in New South Wales.
* The employer engages another performer in New South Wales with the intention that this employee will complete the tour around the country.
* This intention is clearly specified in the worker’s contract of employment. However, the new worker is injured after a couple of weeks while the company is still performing in New South Wales.

In this example, the worker’s contract provides evidence that the worker was going to be working in several States.

When the first test is applied, it can be established that there is no one State in which the worker usually would have worked in that employment.

The second test establishes that, due to the transient nature of this employment, there is no one State in which the worker is usually based. Any base the worker had was of a temporary nature.

As the first two tests have not identified a ‘State of connection’, the third test needs to be considered. The employer’s principal place of business is in South Australia. Therefore this worker’s ‘State of connection’ is South Australia.

Example 3

* A theatre company is registered and operates from an office in South Australia and tours Australia with performances running for up to two months in each State.
* A performer becomes ill halfway through the tour in New South Wales, but intends resuming work once the company moves to Victoria in six weeks’ time.
* The employer engages a replacement performer in New South Wales with the intention that this employee will only complete the New South Wales section of the tour.

In this example, the new worker’s contract will show that the worker is only engaged to work in New South Wales. The first test identifies New South Wales as the State in which the worker usually works in this employment, and as such, New South Wales is the worker’s ‘State of connection’.

As the issue is decided by the application of the first test, the second and third tests are not considered.

### 

### Sales and consulting

Example 1

* A sales representative is employed by a company in South Australia to cover New South Wales and the Australian Capital Territory sales territories.
* The company has only one office – in Adelaide.
* The worker spends their time equally across New South Wales and the Australian Capital Territory, with occasional visits to the office in Adelaide.
* The worker uses accommodation in Canberra, Australian Capital Territory as their base for the purposes of carrying out their work, and the employer covers the costs of such accommodation.

The first test does not identify a ‘State of connection', as the worker does not usually work in any one State.

The second test determines that the State in which the worker is usually based is the Australian Capital Territory. They use accommodation in Canberra as their base for the purpose of carrying out their work. The worker’s State of connection is likely to be the Australian Capital Territory.

As the issue is decided by the application of the second test, the third test is not needed.

Example 2

* An IT consulting company has its principal place of business in South Australia. It operates data warehousing facilities throughout Australia.
* Full-time ‘trouble-shooters’ are employed by the company and are flown to various sites where they remain until the issue is resolved. This can be anything from a few weeks to several months.
* Following a short break, the trouble-shooters are then directed and flown to the next location.
* These workers are not designated to work in any one State, nor do they usually report to any one location or base to collect equipment or materials.

Under the first test, these workers do not usually work in any one State. Nor do they report to any one location or base to collect equipment or materials, as would be required to satisfy the second test.

As the first and second tests have not identified the ‘State of connection’, the third test needs to be considered. South Australia would be the ‘State of connection’, as this is where the employer has its principal place of business.

### Transport

Example 1

* A courier service has its office in Mount Gambier, South Australia and employs workers from both Victoria and South Australia.
* Workers report daily to the South Australian office to collect the courier vans and initial deliveries.
* Directions are received via radio throughout the day.
* The workers cross the border regularly and do not ‘usually work’ in either Victoria or South Australia.

The first test does not identify a State in which the workers usually work as the workers are working in Victoria and South Australia as part of their daily duties.

In this scenario, the workers report to the South Australian office on a daily basis to collect their vans and pickup initial deliveries. Therefore under the second test, South Australia is the State of connection as it is where the workers are usually based for the purposes of their employment.

Example 2

* An interstate bus company has its head office and a depot in South Australia.
* The company also has offices and depots in Queensland, New South Wales and Victoria.
* Drivers spend time driving throughout the four States, but usually have contact and deal with one of these depots.
* The drivers do not usually work in any one State.

The first test fails to identify a State in which a driver usually works.

In this scenario, each driver is usually based in the office or depot from which they operate. Therefore under the second test, the drivers are ‘connected’ to the State in which their base depot is located i.e. Queensland, New South Wales or Victoria.

## Work injury insurer contacts

ReturnToWorkSAwww.rtwsa.com or phone 13 18 55

WorkSafe Victoria www.worksafe.vic.gov.au

WorkCover NSW www.workcover.nsw.gov.au

WorkCover Queensland www.workcover.qld.gov.au

WorkSafe ACT www.worksafe.act.gov.au

WorkCover Tasmania www.workcover.tas.gov.au

WorkCover WA www.workcover.wa.gov.au

NT WorkSafe www.worksafe.nt.gov.au

Comcare www.comcare.gov.au

Seacare Authority www.seacare.gov.au



**ReturnToWorkSA**

13 18 55

[info@rtwsa.com](mailto:info@rtwsa.com)

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The following free information support services are available:

If you are deaf or have a hearing or speech impairment you can call ReturnToWorkSA through the National Relay Service (NRS):

* **TTY users** can phone 13 36 77 and ask for 13 18 55.
* **Speak & Listen (speech-to-speech) users** can phone 1300 555 727 and ask for 13 18 55.
* **Internet Relay users** connect to NRS on [www.relayservice.com](http://www.relayservice.com) and ask for 13 18 55.

For languages other than English call the Interpreting and Translating Centre on 1800 280 203 and ask for an interpreter to call ReturnToWorkSA on 13 18 55. For Braille, audio or e-text call 13 18 55.

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