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THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

EMPLOYMENT AND WORKPLACE SAFETY LEGISLATION AMENDMENT BILL 2020

EXPLANATORY STATEMENT
and
Human Rights Compatibility Statement
(*Human Rights Act 2004*, s 37)

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EMPLOYMENT AND WORKPLACE SAFETY LEGISLATION AMENDMENT BILL 2020

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

BACKGROUND

The Employment and Workplace Safety Legislation Amendment Bill 2020 (the Bill) makes amendments to three Acts within the responsibility of the Minister for Employment and Workplace Safety.

Specifically, the Bill would amend the:

- *Workers Compensation Act 1951*;
- *Dangerous Goods (Road Transport) Act 2009*; and
- *Work Health and Safety Act 2011*.

In addition, the Bill would also amend the *Public Sector Management Act 1994*.

Workers Compensation Act 1951

Workers' compensation in the ACT is a statutory insurance scheme regulated under the *Workers Compensation Act 1951* (WC Act) and supporting *Workers Compensation Regulation 2002* (WC Regulation).

The ACT's Workers' Compensation Scheme (the Scheme) is privately underwritten and requires all employers to take out a workers' compensation insurance policy with an approved insurer unless they are exempt under section 151 of the WC Act. An exempt employer is an employer who has a written notice of exemption issued by the Minister, referred to as a self-insurer.

There are currently seven approved insurers operating in the ACT market and eight employers operating in the ACT as self-insurers. While the workers' compensation insurer and self-insurer market has operated with relative stability over the last 13 years, the legislative framework applying to workers' compensation insurers and self-insurers has remained largely unamended since their introduction.

Dangerous Goods (Road Transport Act) 2009

The transport of dangerous goods is regulated under the *Dangerous Goods (Road Transport) Act 2009* (DG(RT) Act), which is based on a nationally agreed Model Act on the Transport of Dangerous Goods by Road or Rail (model Act). The model laws were adopted in the ACT as part of the ACT Government's commitment under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport*, signed October 2003 (IGA).

Under the IGA, the National Transport Commission (NTC) has responsibility for maintaining the model legislation which is published by the Australasian Parliamentary Counsel's Committee. The NTC is overseen by the Transport and Infrastructure Council (TIC), a ministerial council formed by the Council of Australian Governments (COAG).

The *Dangerous Goods (Road Transport) Act 2009* was enacted based on the model law and establishes:

- a Competent Authority for the ACT which is declared as the person occupying the position of the chief executive of the administrative unit responsible for regulatory services;
- a licensing scheme for the transport of dangerous goods;
- packing and placarding requirements for the transport of dangerous goods;
- authorised persons and the inspection of vehicles, in relation to the transport of dangerous goods;
- fees and charges and applications in relation to packing, segregation, exemptions, driver licenses; and
- offences in relation to the transport of dangerous goods.

The *Dangerous Goods (Road Transport) ACT 2009* has not been amended since it was enacted in 2009.

Work Health and Safety Act 2011

The *Work Health and Safety Act 2011* (WHS Act) sets out the framework for securing the health and safety of workers and workplaces. The WHS Act adopts the nationally agreed model WHS laws in the Territory.

Part 7 of the WHS Act sets out the right of entry powers provided to WHS permit holders to enter workplaces to inquire into suspected WHS breaches. The powers a WHS permit holder may exercise when at a workplace in relation to a suspected contravention are set out in section 118 of the WHS Act and include the power to:

- inspect any work system, plant, substance, structure or other thing relevant to the suspected contravention;
- consult with the relevant workers in relation to the suspected contravention;
- consult with the relevant person conducting a business or undertaking about the suspected contravention;
- require the relevant person conducting a business or undertaking to allow the WHS entry permit-holder to inspect, and make copies of, any document that is directly relevant to the suspected contravention.

Further, section 148 of the WHS Act sets out the authorised use and disclosure of documents and information obtained in the exercise of a right of entry.

Public Sector Management Act 1994

The ACT Public Sector (ACTPS) enterprise agreements are made under the *Fair Work Act 2009* (FW Act) and provide many of the terms and conditions of employment for all employees in the ACTPS. The *Public Sector Management Act 1994* (the PSM Act) provides

the legislative framework for sector-wide employment conditions, including the ACTPS values. All ACTPS officers and employees are employed under the PSM Act.

Where there is an inconsistency between the terms and conditions in the enterprise agreement and the PSM Act, the terms and conditions in the enterprise agreement prevail.

Section 8 of the PSM Act defines the merit and equity principle. The Head of Service exercises a function under the PSM Act in accordance with the merit and equity principle if the Head of Service is an equitable employer and employs a person in a job who is best able to do the job in all the circumstances.

Section 27 of the PSM Act sets out how the merit and equity principle can be applied. Section 27(1) provides that this section applies in relation to the selection of people in specified situations. Section 27(2) provides that the Head of Service must ensure all eligible people have, as far as practicable, a reasonable opportunity to apply for selection and that the selection of the most suitable applicant is made based on a comparative assessment of the applicant's relevant behavioural capabilities, skills, knowledge, qualifications, experience, and the potential for development in relation to the duties and responsibilities of the position.

PURPOSE OF THE BILL

The purpose of the amendments in the Bill are set out separately for each Act amended by the Bill.

Workers Compensation Act 1951

Amendments to the *Workers Compensation Act 1951* (WC Act) would modernise the provisions of the Act that deal with insurer and self-insurer approval to align with a best practice licensing framework. The objective of modernising the insurer and self-insurer provisions is to ensure injured workers can expect a consistent standard of service, regardless of whether their employer has a workers' compensation insurance policy or is self-insured.

By updating the licensing framework for insurers and self-insurers, the Bill would increase the efficiency and effectiveness of the legislative framework applying to insurers and self-insurers. Specifically, the amendments would:

- update the approved insurer provisions to a licensing model which supports an ongoing insurer licence; and
- bring the exempt self-insurer provisions into line with a licensing model to improve the service delivery and performance monitoring of self-insurers.

It will also make amendments that would:

- reduce redundant and duplicative reporting requirements; and
- align the regulatory licensing functions with the new Office of the WHS Commissioner.

Dangerous Goods (Road Transport Act) 2009

Since the DG(RT) Act was enacted, there have been some technical and structural changes to the model dangerous goods road transport laws that have not been adopted by the Territory.

The Bill would make technical and minor amendments to the *Dangerous Goods (Road Transport) Act 2009* that will better align the Territory's dangerous goods road transport laws with the current version of the model dangerous goods road transport laws. This will support the ongoing harmonisation and alignment with the model legislation as it is updated over time.

Work Health and Safety Act 2011

The Bill would amend the WHS Act to insert a new power on exercising a right of entry at a workplace. The new power will allow WHS entry permit-holders to take audio and visual recordings when inquiring into a suspected WHS contravention. This power is consistent with the powers provided to right of entry permit holders applying in the Territory prior to the adoption of the model WHS laws. The powers exercisable under section 118 would also be extended to any other WHS contraventions observed by a permit-holder while exercising a right of entry at the workplace.

The Bill would also make amendments recently included in the nationally agreed model WHS laws to expressly allow the work safety regulator to issue a compliance notice for the removal of asbestos or asbestos containing material that has been illegally installed.

Public Sector Management Act 1994

Section 27(1)(c) of the PSM Act provides that the section 27 applies when selecting an officer to be transferred to a higher level vacant office for a period of more than 3 months. This is when a permanent employee is temporarily transferred to perform higher duties while another employee goes on a period of leave, is transferred to another position or resigns from the ACTPS.

Clause C7.2 of the *ACT Public Sector Enterprise Agreements 2018-2021* provides in relation to selection for higher duties, that if a position is expected to be available for a period of six months or longer, the position must be advertised in the gazette.

Historically, positions of under six months duration have not required advertisement. The previous Enterprise Agreement (EA) expressly stated at subclause C7.3 that "if a position is expected to be available for a period of less than six months advertisement in the gazette is not required." Subclause C7.3 created an inconsistency with the PSM Act, and therefore, the subclause prevailed over the provision in the PSM Act. The subclause was removed during the last round of bargaining because it was perceived as a duplication of the preceding subclause that stated that advertising was only required for a position with a duration of six months or longer. It was articulated clearly in negotiations, by the respective parties, that there was no change intended by the removal.

However, there is a view that the removal of the subclause from the Enterprise Agreements has opened up the possibility that the EA provisions could operate concurrently with those in the PSM Act as there is no longer an inconsistency between the EA and the PSM Act. Consequently, the removal of subclause C7.3 has introduced some confusion within directorates and the application of the PSM Act and Standards. It would be unnecessarily burdensome to require Directorates to advertise and conduct a full merit and equity recruitment process for vacancies under 6 months, particularly under the current public health emergency.

The intent of the Enterprise Agreement provisions remain unchanged and should continue to prevail in relation to advertising requirements. This amendment would allow the rules in the EA and the PSM Act and PSM Standards to work in unison together rather than creating conflict and confusion for the public sector workforce.

It should also be noted that Directorates are not precluded from advertising these positions in circumstances where the expected duration is less than 6 months and often do so if it is appropriate in the circumstances.

Climate Change Vulnerability Assessment

There are no climate change implications associated with the Bill.

CONSISTENCY WITH HUMAN RIGHTS

This section provides an overview of the human rights which may be engaged by the Employment and Workplace Safety Legislation Amendment Bill 2020 (the Bill), together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act 2004* (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) of the HR Act contains a framework that is used to determine the acceptable limitations that may be placed on human rights, specifically a number of relevant factors to be considered, including:

- the nature of the right affected;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The Bill may be considered to engage and potentially limit the following rights under the HR Act:

- section 12 (Privacy and reputation);
- section 17 (Right to take part in public life);
- section 21 (Right to a fair hearing);
- section 22 (Rights in criminal proceedings);

Section 12 (Privacy and reputation)

The nature of the right affected — WC Act

Section 12 of the HR Act protects the right of individuals not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. It further provides to protect the right of individuals not to have their reputation unlawfully attacked.

Generally, an interference with privacy will not be unlawful where it is permitted by a law which is precise and appropriately circumscribed. Interferences with privacy will not be arbitrary, provided they are reasonable in the circumstances, just and proportionate to the end sought.

In relation to the proposed amendments to the WC Act, the Bill sets out the obligations of Territory licensed insurers and licensed self-insurers to include provisions to require that a person must not provide workers' compensation insurance services unless the person or corporation holds a licence. The new requirements will apply to all providers of insurance, including providers that are based interstate but provide workers' compensation insurance in the Territory.

The Bill sets out the foundation for establishing licences in the Territory. Under the Bill, the licence provisions may lawfully require providers seeking to obtain a licence in the Territory to provide information about the entity so that the regulator may decide whether an applicant is a suitable person to hold a licence. This consideration may include:

- whether the applicant has a history of compliance with workers' compensation laws in another state or territory; and
- whether the applicant has previously held a licence that has been cancelled or suspended.

The importance of the purpose of the limitation

The purpose of the Bill is to support an effective and best practice licensing framework for the ACT workers' compensation insurer sector and to ensure that insurers operating in the ACT meet their obligations and responsibilities to injured workers. The Bill provides the Territory with a mechanism to satisfy itself that licensed insurers and licensed self-insurers are able to effectively manage claims from injured workers that is able to support their

health, safety and return to work. Information regarding a licensee allows the Territory to ensure that providers are complying with their conditions of the licence.

The nature and extent of the limitation

Any request for information to be provided by insurers as part of the licensing framework is in relation to details that would be reasonably required for the regulator in order to decide an insurer's licence application. In this way, any potential for requiring personal information would be limited and only necessary for this purpose.

As indicated, the measure will only apply to providers of workers' compensation insurance in the Territory that choose to be licensed in the Territory. These entities are already regulated under the current WC Act under an approval/exemption system. The nature of these amendments would transition the current arrangements to establish a modern licensing approach that is more responsive and better able to ensure the service delivery of managing claims is effective regardless of whether an employer is insured or operates as a self-insurer. In addition, the *Information Privacy Act 2014* will apply to any of the information collected under the Bill and, as such, the Territory Privacy Principles would apply to that information being personal information with regards to any disclosure.

The relationship between the limitation and its purpose

The WC Act is aimed at ensuring the effective return to work and rehabilitation of injured workers. The amendments in the Bill, to establish a modern licensing framework for the licensing of insurers and self-insurers, require the provision of information to support the assessment of an insurer or employer's suitability to hold a licence. This is necessary to ensure the effectiveness of the Bill by facilitating communication and engagement between those with a legislative duty in respect of the workplace and the Territory.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitation under the Bill is considered to be the least restrictive means of ensuring the Bill's effectiveness and is reasonably justified on the basis that it:

- will only apply to those applying for a licence to provide workers' compensation insurance in the ACT;
- the *Information Privacy Act 2014* will apply to the collection and use of the information;
- without collecting the information, it would not be possible to assess the suitability of a prospective licensee in providing workers' compensation insurance.

The nature of the right affected — WHS Act

In relation to the proposed amendments to the WHS Act, the Bill would insert a new power within section 118 that would allow WHS entry permit holders to take audio and visual recordings relevant to a suspected WHS contravention when exercising a right of entry at a workplace and any other WHS contravention reasonably suspected to be occurring while at the workplace.

This new right of entry power, by recording at a workplace, may in some instances engage and potentially limit the privacy of employees and other persons present at a workplace where the WHS entry permit holder is exercising a right of entry and makes a recording.

International human rights law recognises that individuals could have a reasonable expectation that their privacy would be respected and protected at their own place of work.[1] The existence of a reasonable expectation is a significant though not necessarily conclusive factor in determining if certain aspects of the workplace fall within the meaning of 'privacy' in section 12(a) of the HR Act, thereby attracting the application of section 12(a) of the HR Act.

The European Court of Human Rights (the **ECHR**) considers that the notion of "private life", which is a term that bears no material difference to the notion of "privacy" in section 12(a), may include professional activities. The ECHR said that—

> Restrictions on an individual's professional life may fall within [the right to privacy] where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. It should be noted in this connection that it is in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity to develop relationships with the outside world. [2]

<u>The importance of the purpose of the limitation</u>

The WHS Act establishes a legislative framework to ensure the health and safety of workers and workplaces. A necessary role of the WHS Act is to ensure the effective deterrence of behaviour and minimisation of risks that increase the likelihood of injuries or deaths in the workplace.

The ability for WHS permit holders to inquire into suspected WHS breaches at a workplace is a part of the effective deterrence of WHS breaches. This augments the role of the WHS regulator and inspectors under the WHS laws in effectively ensuring the health and safety of workers and workplaces.

[1] See, eg, *Bărbulescu v Romania* (European Court of Human Rights, Grand Chamber, Application No 61496/08, 5 September 2017); *Libert v France* (European Court of Human Rights, Chamber, Application No 588/13, 2 July 2018)

[2] *Bărbulescu v Romania* (European Court of Human Rights, Grand Chamber, Application No 61496/08, 5 September 2017) [71].

Currently, under part 7 of the WHS Act, WHS entry permit holders have a right to enter workplaces to:

- inquire into suspected contraventions of work health and safety laws affecting workers who are members, or eligible to be members of the relevant union and whose interests the union is entitled to represent; and
- consult and advise such workers about work health and safety matters.

The right of entry by permit holders was built into the model WHS laws, adopted in the Territory, and recognises the involvement by unions in WHS matters at the workplace as an important mechanism for the effective operation of consultation and participation mechanisms for workers.

However, the power of WHS entry permit-holders to take audio and visual recordings does not form part of the model WHS laws.

The nature and extent of the limitation

The right to enter a workplace is limited as to when entry may be sought (division 7.4 of the WHS Act), for example it must be in relation to the area of the workplace where the relevant workers work or any other work area that directly affects the health or safety of those workers, it must also be exercised during usual working hours at the workplace.

Further, the following principles in relation to right of entry are relevant to the nature and extent of the limitation under the proposed amendment:

- right of entry can only be exercised in relation to stated purposes, i.e. a suspected WHS breach at a workplace;
- right of entry powers that can be exercised by a WHS permit holder while at a workplace are limited to those set out in section 118 of the WHS Act;
- the use and disclosure of material obtained in the exercise of a right of entry at a workplace is limited to the uses set out in section 148 of the WHS Act;
- an application may be made to revoke a WHS entry permit holder's permit under section 138 of the WHS on stated grounds, including the contravention of the conditions of an entry permit and acting improperly in exercising any right under the WHS Act;
- it is also possible for the WHS Commissioner to place conditions on a WHS permit-holders permit should issues arise about the exercise of a power by permit-holders;
- where the WHS entry permit-holder is exercising their functions as a union official, the Commonwealth *Privacy Act 1988* (Cth) would apply a number of protections around the collection, use and retention of records obtained by the permit-holder.

In addition, in relation to the exercise of the right of entry power to take audio and visual recording, notice must be given, as soon as reasonably practicable after entry, to the person conducting a business or undertaking (PCBU) that the permit-holder intends to use the new audio/visual recording power while at the workplace in relation to the suspected contravention (or another contravention observed while at the workplace).

Where it is not reasonably practicable to provide notice beforehand, in relation to another contravention observed onsite, this notice must be given afterwards so that the PCBU is aware that a recording has been made. The intent of this requirement is to ensure that in all cases, whether at the point of entry or as soon as reasonably practicable after entry, that the PCBU is notified that the permit holder intends to use, or has used, their recording powers under right of entry.

This safeguard has been included as it is may not be practical for the permit-holder to notify every individual who may be captured in a recording, however the PCBU is likely to be in a position to inform employees and others on the site about the recording and to manage any privacy concerns. This safeguard is also intended to ensure that permit-holders do not take concealed or covert recordings while at the workplace.

The relationship between the limitation and its purpose

The insertion of a new power for WHS entry permit holders when exercising a right of entry at a workplace to be able to make recordings that capture WHS breaches is directly linked to the objectives of the WHS Act in preventing and minimising WHS risks to the health and safety of workers and workplaces. Essentially, if a WHS breach is able to be captured by audio or visual recording it will act as a greater deterrence to non-compliance and provides better tool for identifying and evidencing WHS breaches occurring at a workplace.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The proposed amendment, properly exercised and used, is considered to be the least restrictive means of achieving better WHS objectives under the WHS Act. It is consistent with the objectives of the WHS Act and recognises the existing role of WHS entry permit-holders in matters relating to health and safety. Specifically, the WHS Act already recognises a role for WHS entry permit-holders to inquire into suspected breaches. This new power would assist the role of permit-holders when inquiring into a suspected WHS breach, and in some cases may be the only way of effectively capturing a WHS breach, by allowing better tools to capture WHS breaches in the workplace. This is an important part of the effective regulatory framework established by the WHS Act.

Currently, when inquiring into WHS breach, WHS entry permit-holders are restricted to consulting with workers, inspecting plant and work systems and looking at/copying relevant documents. Unfortunately, this does not enable permit-holders to capture breaches in relation to how work may be being performed on-site, plant being used and work systems being applied in practice. By allowing audio and visual recordings of suspected WHS non-compliances this will better facilitate the collection of evidence of a breach.

The limitation created by the proposed amendment is considered to be reasonable and proportionate.

A permit-holder will only be permitted to make a recording where the recording is relevant to a suspected contravention of the WHS Act. While a different threshold is provided for the copying/inspection of documents under section 118 (1)(d) of the WHS Act (where the

documents must be directly relevant to a suspected WHS contravention and the copying must be necessary) this different threshold reflects the practical difference in making a recording compared with inspecting and copying documents.

Requiring that a recording only be made if directly relevant and necessary would add additional complexity to the question of whether the recording power could be exercised during an evolving WHS incident. In these cases, if the recording is not made, because a permit-holder is uncertain regarding the degree of relevance, then the opportunity to capture evidence of a breach may be lost altogether. This is in contrast to documents which could be obtained at a later date if they were subsequently determined to be directly relevant.

The test of relevance also aligns with the threshold for other powers under section 118 that can be exercised if relevant to a suspected contravention, such as inspecting unsafe work systems or consulting with workers. Where these powers are being exercised it may be important to also document these matters contemporaneously through recording, so it is important that the same threshold applies.

Accordingly, to limit the proposed new right of entry power to take recordings to circumstances that are 'directly' relevant would unnecessarily frustrate the purpose of the amendment by potentially preventing the taking of evidence of a WHS breach.

Overall, the new notice requirement and existing safeguards provided by the regulatory framework under the WHS Act to respond to the misuse of the new recording power are considered to be adequate safeguards to ensure that the limitation on the right to privacy is reasonable and proportionate.

Section 17 – taking part in public life

The right to take part in public life is contained in section 17 of the HR Act. It states that, amongst other things, every citizen in the ACT has the right to access the public service and public office. This means ensuring that there is equal opportunity for all citizens to access positions within the ACT Public Service.

Amendment to the *Public Sector Management Act 1994* – section 27 – application of merit and equity principle - the nature of the right affected and the limitation (s28 (2) (a) and (c))

Clause 46 of the Bill amends section 27(1)(c) of the *Public Sector Management Act 1994* (PSM Act) to provide that in relation to selection for higher duties, if a position is expected to be available for a period of six months or longer, the position must be advertised in the gazette. This amendment engages and potentially limits the right to take part in public life under section 17 of the HR Act.

Legitimate purpose (s28 (2) (b)) and rational connection (s28 (2) (d))

The PSM Act currently requires a position to be advertised if it is available for a period of three months or longer. In addition to a requirement to advertise the position in the gazette, there also must be an application of the merit and equity principle under the provisions of the PSM Act and PSM Standards.

Previous Enterprise Agreement expressly stated at subclause C7.3 that "if a position is expected to be available for a period of less than six months advertisement in the gazette is not required." The subclause was removed during the last round of bargaining because it was perceived as a duplication of the preceding subclause that stated that advertising was only required for a position with a duration of six months or longer. It was articulated clearly in negotiations, by the respective parties, that there was no change intended by the removal.

The amendment aligns the statutory requirement in the PSM Act with the practice that has been carried out under clause C7.3 of the previous Enterprise Agreement. The alignment will remove the confusion stemming from the conflicting requirements between the PSM Act and the clear intention of the parties to the current Enterprise Agreement.

The threshold of six months was deemed appropriate through earlier enterprise agreement negotiations between the Government, the Unions and other employee representatives. It was considered consistent with other timelines under the PSM Act and PSM Standards. For example, section 11 of the PSM Standard 2016 requires that applications for short-term employment for 6 months or longer must be sought in the gazette. In addition, section 101 of the PSM Act requires that a notification of a temporary transfer of more than 6 months be placed in the gazette. The proposed legislative amendment to section 27(1)(c) would bring the arrangements that apply to short term higher duties transfers into line with the arrangements that apply to short-term employment where temporary employees are engaged under section 110 of the PSM Act.

The existing subsection 27(1)(c) only operates when a permanent employee is to be selected to fill a higher level vacancy, it does not apply to individuals who are not already a permanent employee within the ACT Public Sector. As such, only the rights of existing permanent ACTPS employees may be potentially limited.

Proportionality (s28 (2) (e))

To the extent that existing permanent employees would have less chance to apply for vacancies with duration of less than 6 months, the right in section 17 of the HR Act may be limited. However, it has always been the intention, and the actual practice that a position need only be advertised if it is available for a period of six months or longer.

It is also important to note that agencies are not precluded from advertising a vacancy in circumstances where the expected duration is less than 6 months. Agencies often do choose to advertise vacancies of such duration where appropriate and may continue to do so.

Therefore, the amendment is not considered to actually limit or diminish the right in section 17 of the HR Act. Rather, the amendment would merely allow the rules in the Enterprise Agreement and the PSM Act and Standards to work in unison together instead of creating conflict and confusion amongst the workforce.

Section 21 (Right to a fair hearing)

Section 21(1) of the HR Act states that everyone has the right to have criminal charges, and rights and obligation recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The nature of the right affected

The right to a fair hearing includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, the right of all parties in proceedings to be heard and respond to any allegations, and the requirement that the court be unbiased and independent. The nature of the right may be absolute in itself, in that it can never be justified to hold an unfair hearing, but many of the principles that characterise a fair hearing are not absolute.

In relation to the proposed amendments to the WC Act, Division 8.1.2, the Bill provides for offences and penalties for: providing an insurance service without a licence; being a person that falsely represents that they hold an insurer licence; breaching a condition of an insurer licence; being an employer that does not hold a compulsory workers' compensation insurance policy and failing to hold a self-insurer licence; breaching licence conditions on a self-insurer licence; or being an employer that falsely represents It holds a self-insurer licence. The Bill provides for maximum penalties for a breach of these clauses.

The importance of the purpose of the limitation – WC Act

Allowing for penalties for providing an insurance service without a licence; being a person falsely representing that they hold an insurer licence; breaching a condition on an insurer licence; being an employer that does not hold a compulsory workers' compensation insurance policy and failing to hold a self-insurer licence; breaching licence conditions on a self-insurer licence; or as an employer falsely represents it holds a self-insurer licence would support the objective of integrity in the regulatory reforms to the insurer and self-insurer framework in the WC Act. It would encourage responsible practices in the Territory's workers' compensation sector and assist in creating a framework that is effective in increasing the efficiency and effectiveness of the insurer legislative framework while protecting employees who are injured during the course of their employment.

The nature and extent of the limitation

The penalties involve minimal limitation on protected rights and these limitations will only apply in specific circumstances, namely providing workers' compensation insurance services, either as an insurer or as a self-insurer, without a licence. The penalties apply in a regulatory scheme where insurers wishing to provide workers compensation insurance policies and services chose to be subject to the requirements and obligations including penalties for non-compliance.

The relationship between the limitation and its purpose

The overarching intent of the offences and penalties in the Bill is to protect workers in the Territory from inadequate workers' compensation coverage.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitation under the Bill is considered to be the least restrictive means of ensuring the effectiveness of the purpose of the Bill. Insurers are already required to be approved in the ACT to provide a compulsory insurance policy for workers' compensation under the WC Act and employers are only not required to hold a compulsory insurance policy if they are exempt (akin to the approval framework for insurers) with a penalty framework applying for non-compliance with the legislation. Given this, the move to a licensing approach is not substantially different to the current approval process and penalty framework and is considered to implement a more modern best practice approach to regulating the services provided by licensed insurers/licensed self-insurers to injured workers.

Section 22 (Rights in criminal proceedings)

Section 22 (1) of the HR Act states that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.

DG(RT) Act s 159A

Section 32 of the Bill, which introduces the new section 159A (2) of the DG(RT) Act places an evidential burden on the defendant to prove that the defendant had no knowledge of the offence, and that the defendant took reasonable precautions and exercised appropriate diligence to prevent the commission of the offence. This alters the default position that the prosecution is required to prove all elements of an offence beyond reasonable doubt.

The primary objectives of the DG (RT) Act is to protect public safety, protect property and the environment. Extending the criminal liability of an employee to the employer will achieve the statutory objectives by making sure employers would not put the safety of their employees and the public at risk through reckless management of their businesses.

It is considered that the reversal of the onus of proof is justified in these circumstances where proving the converse beyond reasonable doubt: that the defendant did not know of the offence, and did not take reasonable precautions would be extremely difficult, if not impossible, for the prosecution to establish as it relies on information almost entirely within the knowledge of the defendant. Thus, the limitation of section 22(1) here is reasonable and proportionate.

DG (RT) Act s 190A

Section 38 of the Bill, which amends subsection 190A (2) of the DG(RT) Act makes an element of the offence in subsection (1) an absolute liability. Subsection (1)(d) provides that it is an element of the offence that a person makes a false or misleading statement to an authorised person who is exercising a function under the DG(RT) Act. In doing so it removes the requirement for prosecution to prove that the defendant knew or was reckless about whether the person to whom the statement was provided was an authorised officer, and whether the authorised officer was exercising a function under the Act.

To achieve the statutory objectives of the Act, it is important for authorised officers to be able to rely on the representations made by a person who is involved in the compliance of the Act. It would be operationally burdensome and significant resources would have to be used in verifying the truthfulness of representations, if such certainty does not exist. Section 190A adds value to such certainty.

Under part 2.2 of the DG(RT) Act authorised officers must have and carry an identity card. Identify cards must state the authorised officer's name, show a photo of the officer, the card's issue date and anything else prescribed by regulation. Identity cards must be carried by authorised officers while exercising a function under the Act and must be shown before exercising a function under the Act. In these circumstances, it is extremely unlikely that a person would not know they are providing a statement to an authorised officer.

Besides, the element in subsection (1)(d) is not the only element of the offence. The prosecution will have to prove the fault elements of other elements: the making of a statement, the falsity of the statement, and the defendant's knowledge of the statement's falsity. Consequently, this limitation is considered reasonable and proportionate in achieving the objectives.

The importance of the purpose of the limitation – WHS Act

The provisions in the Bill from sections 108 to 121 adopt amendments to the nationally agreed model work health and safety (WHS) laws that will allow the WHS regulator to issue compliance notices for the removal of illegally installed asbestos or asbestos containing materials.

A total ban on asbestos came into effect in Australia on 31 December 2003 making it illegal to make, use or import asbestos in Australia. Despite this ban, asbestos that has been fixed or installed since 2003 is still being found in Australian workplaces. The model WHS laws have been amended to ensure WHS regulators have appropriate powers to deal with prohibited asbestos when it is found in a workplace. Under the WHS laws there is already a duty on persons conducting a business or undertaking (PCBU) to eliminate or minimise exposure to airborne asbestos at the workplace so far as is reasonably practicable. Enabling the WHS regulator to address the risks of illegally installed asbestos promptly will lead to better outcomes for workers' health and safety.

In particular, strict liability applied as a result of section 12A of the WHS Act arises in a regulatory context where, for reasons of ensuring workers and others health and safety at a workplace and ensuring the provisions of the regulatory scheme are observed, the penalties are justified. The offence also arises in a context where a PCBU can reasonably be expected because of their position to know the requirements of the law. As such, the mental or fault element can justifiably be excluded. In this particular case, the PCBU would have been issued with a prohibited asbestos notice informing the PCBU of their obligations in respect of the notice.

The nature and extent of the limitation

The model WHS laws, being adopted in the changes to the WHS Act in this Bill, has been amended to ensure WHS regulators have appropriate powers to deal with prohibited asbestos when it is found in a workplace. These changes ensure greater certainty in the regulation of prohibited asbestos, even if the asbestos is discovered long after any work involving it has been completed. Existing provisions for improvement notices and prohibition notices already cover many cases where prohibited asbestos is identified. However, there was some uncertainty that the conditions for those notices meant some cases could only be addressed through a prosecution. These changes fulfil the intention that a notice be issued in all cases where prohibited asbestos is identified, to ensure the risks it poses are promptly addressed.

Under the changes, the WHS regulator must issue a prohibited asbestos notice if they reasonably believe prohibited asbestos is present in a workplace. When issued, a prohibited asbestos notice will require measures to be taken to deal with the prohibited asbestos. The measures required to be taken will be detailed in the notice.

The regulator will determine who is to receive the notice, recognising that there may be various people with responsibility for prohibited asbestos at a workplace because of different workplace arrangements and the complexity of modern supply chains. For example, the person conducting a business or undertaking (PCBU) at the workplace at the time the prohibited asbestos is discovered may not have caused the asbestos to be at the workplace, or be most able to comply with the notice and carry out measures to deal with the prohibited asbestos.

In some circumstances, the regulator may issue multiple notice in relation to the same workplace. Importantly, there is flexibility for the regulator to determine what measures must be taken. While immediate removal of asbestos is the ideal outcome, it may not always be appropriate. For example, there may be circumstances where the prohibited asbestos does not present a risk to health and safety in its current state, but its removal may create a risk to workers or others at the workplace.

A notice will specify a period for compliance. The period must be reasonable in the circumstances.

Compliance with duties and obligations is enforced by a range of regulator tools and offences under the WHS Act. In addition, section 12A applies strict liability for the physical elements of offences as part of the WHS penalty framework, including the new prohibited asbestos notice provisions. This is consistent with the operation of the WHS Act in relation to other compliance notices issued under the Act such as improvement or prohibition notices. The maximum financial penalty is consistent with the model WHS laws and recognises the importance of the WHS laws in protecting the health and safety of workers at work.

<u>The relationship between the limitation and its purpose</u>
The limitation imposed by applying strict liability to the offences for non-compliance with a prohibited asbestos notice are necessary and justified under the WHS regulator scheme in

protecting the health and safety of workers. Asbestos in the workplace poses a risk and it is important that the risk is addressed promptly. The amendments allowing the WHS regulator to issue a compliance notice for prohibited asbestos will enable its removal to be addressed promptly and appropriately.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitation under the Bill is considered to be the least restrictive means of ensuring the effectiveness of the purpose of the Bill. The application of a penalty for non-compliance with a prohibited asbestos notice is appropriate within a regulatory framework to protect the health and safety of workers and is consistent with the existing compliance notice framework operating under the WHS Act and model WHS laws. This amendment addresses a gap in the current model WHS laws to ensure that the regulator's powers are capable of responding to illegally installed asbestos in the workplace.

In applying penalties for non-compliance on an insurer's licence obligations, the insurer would have the benefit of:

- a review of decisions made by the regulator;
- a usual right of appeal for offences; and
- would not be compelled to provide self-incriminating information.

The objects of the WHS Act are to firstly eliminate all risks to health and safety and only secondly to minimise those risks if it is not possible to remove them entirely. In this way, it is appropriate in enforcing compliance with a prohibited asbestos notice (which takes into account the health and safety risks posed by the presence of asbestos) that it be subject to a strict liability offence. Non-compliance with a notice that has been issued by the WHS regulator to ensure the protection of the health and safety of workers and others at a workplace is a serious non-compliance that warrants reversing the onus of proof under a strict liability offence, particularly in the case of asbestos where the adverse health effects are significant.

Employment and Workplace Safety Legislation Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Employment and Workplace Safety Legislation Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004.*

…….

Gordon Ramsay MLA
Attorney-General

Employment and Workplace Safety Legislation Amendment Bill 2020

CLAUSE NOTES

Part 1 Preliminary

Clause 1 Name of Act

This clause provides the name of the Act as the Employment and Workplace Safety Legislation Amendment Act 2020.

Clause 2 Commencement

This clause provides for the commencement of the Act. Part 1, Part 3, sections 110 to 123 and schedule 1, part 1.4 will commence the day after the Act is notified.

Part 2 (*Dangerous Goods (Road Transport) Act 2009*) commences on a day fixed by the Minister by written notice. Part 2 will automatically commence 12 months after the notification date if no written notice is made earlier by the Minister.

Part 4 (*Workers Compensation Act 1951*) commences on a day fixed by the Minister by written notice. Part 4 will automatically commence 6 months after the notification date if no written notice is made earlier by the Minister.

Sections 106 to 109 will commence 6 months after the notification date.

Clause 3 Legislation amended

This clause provides for the amending of the legislation mentioned in part 2, 3 and 4 and schedule 1.

Part 2 Dangerous Goods (Road Transport) Act 2009

Clause 4 Meaning of *consigns and consignor* Section 10 (5)

This clause omits s 10 (5).

Clause 5 Meaning of *fit* to drive vehicle or run engine Section 16 (c)

This clause replaces the words ‘an ACT law’ with ‘a territory law’.

Clause 6 New section 16 (d)

This clause inserts a new section which provides, a person is *fit* to drive a vehicle, or run its engine, if the person—is not, at the relevant time, found to have a drug in the person's blood or oral fluid in contravention of a territory law. This section is consistent with the *Road Transport (Alcohol and Drugs) Act 1977* (ACT).

Clause 7 Meaning of *unattended* vehicle Section 18 (2)

This clause is a consequential amendment.

Clause 8 Production of identity cards Section 25 (1) (b)

This clause omits the words 'if practicable' from 25 (1) (b).

Clause 9 Section 25 (2)

This clause substitutes s 25 (2).

Clause 10 New sections 25A and 25B

This clause inserts new sections 25A and 25B.

- 25A Impersonating authorised person – gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 27. A person must not impersonate an authorised officer.

  It further provides for a maximum penalty of 60 penalty units.

- 25B Obstructing or hindering authorised person – gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 76. A person commits an offence if the person obstructs or hinders—an authorised or a person assisting an authorised person in the exercise of the authorised person's, or person assisting the authorised person's functions under this Act.

  It further provides for a maximum penalty of 60 penalty units.

Clause 11 Offence—s 33 conduct causing death or serious injury Section 34 (2)

This clause is a consequential amendment to the definitions in section 34.

Clause 12 Application—pt 3.2 Section 38 (1) (b) (iii)

This clause amends the section to include premises owned or occupied by the competent authority or any other public authority.

Clause 13 Direction to stop a pt 3.2 vehicle Section 39 (3) and (4) (a)

This clause is a consequential amendment that corrects wording of the section.

Clause 14 Direction to produce record, device or other thing New section 59 (1) (c)

This clause is a consequential amendment that extends the section to include—a record, device or other thing that contains or may contain a record, in the person's possession or under the person's control relating to or indicating an offence.

Clause 15 Power to enter premises and vehicles Section 72 (2)

This clause is a consequential amendment that gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 55 (5) (b).

This section does not authorise, without consent, the entry or inspection of premises that are, or any part of premises that is, used predominantly for residential purposes.

Clause 16 Section 72 (5)

This clause amends the section to clarify conditions for authorised persons entry to premises or vehicle with necessary assistance.

It further provides clarification to conditions for authorised persons entry to premises or vehicle with necessary assistance and force.

Clause 17 New section 72 (7)

This clause inserts a new section that provides for *necessary assistance* for authorised people entering premises or a vehicle.

It further provides for *reasonable time* for entry into premises.

Clause 18 Consent to entry Section 74 (1) (a)

This clause amends the section to require an authorised person—

i. (other than a police officer) – produce the person's identity card; or

ii. a police officer – produce evidence that the person is a police officer.

Clause 19 General powers on entry to a premises and vehicles New section 75 (1) (aa)

This clause inserts a new section that empowers an authorised person to inspect and take copies of, or extracts from, any records required to be kept under the Act.

Clause 20 New section 75 (1) (ba)

This clause inserts a new section that empowers an authorised person to check the existence of and inspect any devices required to be installed, used or maintained under the act and to inspect and take copies of, or extracts from, any readout or other data obtained from any of the devices.

Clause 21 New section 75 (1A)

This clause inserts a new section to give effect to Model Act on the Transport of Dangerous Goods by Road or Rail, s 55(7).

The section does not authorise the use of force, but the officer may under this section do any or all of the following:

a) open unlocked doors and other unlocked panels and objects;

b) inspect anything that has been opened or otherwise accessed under the power to use reasonable force in the exercise of a power to enter or move a vehicle under this Part;

c) move but not take away anything that is locked or sealed.

Clause 22 New section 75 (4)

This clause inserts – an authorised person who enters a premises under the section must not unnecessarily impede any activity being conducted at the premises.

Clause 23 Use of equipment to examine and process things New section 79 (1A)

This clause inserts a new section to give effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 63 (2).

If:

a) it is not practicable to examine or process the things at the vehicle or premises; or

b) the occupier of the vehicle or premises consents in writing;

the things may be moved to another place so that the examination or processing can be carried out in order to determine whether they are things that may be seized.

Clause 24 Warrants generally Section 89 (6) (a)

This clause is a consequential amendment that corrects wording in the section.

Clause 25 Section 89 (6) (a), note 1

This clause is a consequential amendment that corrects wording in the note.

Clause 26 Section 128

This clause provides for the substitution of Division 3.8.A1 Proceedings for offences.

It further provides for Division 3.8.1B Available Penalties. A court that convicts a person, or finds a person guilty of an offence against the Act, may impose 1 or more penalties under this part.

It further provides that without affecting a court's discretion, the court must consider the combined effect of the penalties imposed if more than 1 penalty is imposed.

It further provides that if orders are made under this part, whether by the same or different courts, which result in a supervisory intervention order and an exclusion order being in force at the same time, the exclusion order takes precedence and the supervisory intervention order is suspended for the period the exclusion order is in force.

Clause 27 Supervisory intervention orders Section 133 (5), note 2

This clause is a consequential amendment that omits the note at section 133 (5), note 2.

Clause 28 Definitions—pt 3.9 Section 141, new definition of *recovery of costs order*

This clause is an amendment consequential to the insertion of new section 146A (2).

Clause 29 Section 144 (2) (d), examples

This clause is a consequential amendment.

Clause 30 New division 3.9.2A

This clause inserts a new division 3.9.2A to give effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, Part 8, Division 3.

Clause 31 New sections 156A and 156B

This clause inserts new sections in division 3.11.1.

This clause inserts a new Section 156A that gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, Section 115 Multiple offenders. Each of 2 or more persons is liable for an offence.

This clause inserts a new Section 156B that gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, Section 116 Double Jeopardy. A person may be punished only once in relation to the same failure to comply with a particular provision in the Act, even if the person is liable in more than one capacity.

Clause 32 New section 159A

This clause inserts a new section to give effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, Section 117.

Clause 33 Acts and omissions of representatives Section 162 (3) (a)

This clause is a consequential amendment that corrects wording of the section.

Clause 34 Section 166 heading

This clause is a consequential amendment that substitutes the heading of the section.

Clause 35 New section 166 (2)

This clause inserts a subsection that provides, a signature purporting to be a signature of an authorised person is evidence of the signature it purports to be.

Clause 36 Use of codes of practice etc in proceedings Section 168 (4), definition of *relevant document*

This clause replaces the words 'Australian Transport Council' with 'Transport Infrastructure Council'.

Clause 37 Applications for internal review Section 171 (3), note

This clause is a consequential amendment.

Clause 38 New sections 190A and 190B

This clause inserts new sections 190A and 190B.

The new section 190A adapts the Criminal Code, s 337 (making false or misleading statements) to give effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 145 (1) and (2).

The new section 190B adapts the Criminal Code, s 339 (producing false or misleading documents) to give effect the Model Act on the Transport of Dangerous Goods by Road or Rail, s 145 (3) and (4).

Clause 39 New section 191A

This clause gives effect to the Model Act on the Transport of Dangerous Goods by Road or Rail, s 147 Recovery of costs of public authorities.

This section applies to an incident that relates to the transport of dangerous goods by road. If a public authority incurs costs as a result of the occurrence of an incident to which this section applies, so much of the costs as were reasonably incurred are recoverable as a debt due to the authority by action in a court of a competent jurisdiction.

Clause 40 Approved forms Section 195

This clause omits s 195. Smart forms will be used administratively to perform this function.

Clause 41 Regulations—competent and corresponding authorities etc Section 199 (b) (i) and (ii).

This clause is a consequential amendment that corrects wording of the section.

Clause 42 New section 199 (ba)

This clause inserts a new section providing for the approval by a competent authority of the form in which applications are to be made to the competent authority and the form in which documents are to be issued by the authority for a regulation.

Clause 43 Regulations—application etc of laws of other jurisdictions and instruments Section 202 (1) and examples and note

This clause substitutes ‘or a provision of a law of another jurisdiction or instrument, as in force at a particular time or from time to time’ with ‘as in force at a particular time or from time to time’.

Clause 44 Dictionary, note 2

This clause amends Dictionary, note 2 to include ‘territory law’.

Clause 45 Dictionary, new definitions

This clause inserts new definitions for employment order and recovery of costs order.

Part 3 Public Sector Management Act 1994

Clause 46 Application of the merit and equity principle Section 27 (1) (c)

This clause amends section 27(1)(c) of the PSM Act to provide that section 27 applies in relation to the selection of an officer to be transferred to a higher level vacant office for a period of more than 6 months. The amendment increases the period from 3 months to 6 months.

Part 4 Workers Compensation Act 1951

Clause 47 Meaning of *insurer* for ch 5 Section 86A (1) (a) and (b)

This clause provides for the substitution of 'a licensed insurer' or 'a licensed self-insurer' and is consequential on moving to a licensing framework for workers' compensation insurance.

Clause 48 Functions Section 103D (b)

This clause provides for the word 'self insurer' to be replaced with the words 'a licensed self-insurer'.

Clause 49 Without prejudice payments Section 133

This clause provides for the words 'an insurer' to be replaced with the words 'a licensed insurer'.

Clause 50 Liability on claim not accepted or rejection Section 134 (4)

This clause provides for the addition of the word 'licensed' before the word 'self-insurer'.

Clause 51 New division 8.1.1, heading etc

This clause provides for the addition of a new division 8.1.1 in the Act which set out definition for the Act.

Clause 52 Section 145

This clause provides for the substitution of the existing section 145 with provisions that set out the licensing of insurers and self-insurers for the Act. It modernises the section to ensure that an insurer can only provide insurance services if they hold an insurer licence and is consequential on moving to a licensing framework.

Section 145A provides that a person must apply to the regulator for a licence. The clause further provides that an application must be in writing and must include any information prescribed by regulation.

Section 145B provides for when the regulator may, by written notice, require an applicant for a licence to provide more information. The clause further provides that failure to comply with a requirement under this clause may result in the regulator refusing to consider the application further. The effect of a refusal to consider the application further would be considered to be a refusal of the regulator to grant a licence.

Section 145C provides that if the information in an application for a licence changes before the application is decided, the applicant must give the regulator written notice of the details of the change.

Section 145D provides that if a person applies for a licence, the regulator must, within a reasonable period, issue the licence or refuse to issue the licence. The regulator may issue a licence if the insurer meets the licence criteria.

Section 145E provides that an insurer licence includes a condition that the licensee must comply with the Act and any other conditions the regulator imposes when the licence is issued. It also prescribes that a licensee must notify the regulator of any regulatory action taken against the licensee in any State or Territory.

This clause also provides that the regulator may amend or revoke a regulator condition included in a licence at any time and specifies that the regulator must advise the licensed insurer within 30 days of when the regulator decides the amendment.

Section 145F provides that a licence starts on the day stated in the licence and that a licence is in force until it is either surrendered or cancelled.

Section 145G provides that a licensed insurer may surrender their licence, but it must be in writing and accompanied by the licence or a statement verifying that the licence has been stolen, lost or destroyed. If a licence is surrendered the insurer licence is taken to be cancelled.

Section 145H provides that a person commits an offence if the person provides insurance services and does not hold a licence.

The clause further provides for a maximum penalty for non-compliance of 100 penalty units.

The clause further provides that a person commits an offence if the person falsely represents that they hold a licence.

The clause further provides for a maximum penalty of 100 penalty units for non-compliance.

Section 145I provides that a person commits an offence if that person holds a licence that is subject to a condition and the person fails to comply with the condition.

The clause further provides for a maximum penalty of 100 penalty units for non-compliance.

Section 145J allows regulations to be prescribed which specify how an insurer may apply for a licence; the criteria for applying for a licence; the conditions that may be imposed on an insurer licence; the records to be kept by licensed insurers, to whom the records must be provided and the way to provide the records; how insurance premium calculations may be reviewed; how insurers performance will be monitored and reviewed; reporting obligations by licensed insurers; and why and how an insurer licence may be suspended or cancelled.

Section 145K provides that an employer must hold a self-insurance licence unless they have a compulsory workers' compensation policy with a licensed insurer.

Section 145L provides that a person must apply to the regulator for a self-insurer licence. The clause further provides that an application must be in writing and must include any information prescribed by regulation.

Section 145M provides for when the regulator may, by written notice, require an applicant for a self-insurer licence to provide more information. The clause further provides that failure to comply with a requirement under this clause may result in the regulator refusing to consider the application further. The effect of a refusal to consider the application further would be considered to be a refusal of the regulator to grant a licence.

Section 145N provides that if the information in an application for a licence changes before the application is decided, the applicant must give the regulator written notice of the details of the change.

Section 145O provides that if a person applies for a self-insurer licence, the regulator must, within a reasonable period, issue the licence or refuse to issue the licence. A licence may be issued if the regulator is satisfied that the self-insurer meets the criteria for issuing a licence.

Section 145P provides that a self-insurer licence includes a condition that the licensee must comply with the Act and any other condition the regulator imposes when the licence is issued. It also prescribes that a licensee must notify the regulator of any regulatory action taken against the licensee in any State or Territory.

This clause also provides that the regulator may amend or revoke a regulator condition included in a self-insurer licence at any time and specifies that the regulator must advise the licensed self-insurer within 30 days of when the regulator decides the amendment.

Section 145Q provides that a licence starts on the day stated in the licence and that a licence is in force until it is either surrendered or cancelled.

Section 145R provides that a licensed self-insurer may surrender their licence, but it must be in writing and accompanied by the licence or a statement verifying that the licence has been stolen, lost or destroyed. If a licence is surrendered the self-insurer licence is taken to be cancelled.

Section 145S provides that an employer commits an offence if they do not hold a compulsory insurance policy with a licensed insurer and fails to hold a self-insurer licence.

The clause further provides for a maximum penalty for non-compliance of 100 penalty units.

The clause further provides that a person commits an offence if the person falsely represents that they hold a self-insurer licence.

The clause further provides for a maximum penalty of 100 penalty units for non-compliance.

Section 145T provides that a person commits an offence if that person holds a self-insurer licence that is subject to a condition and the person fails to comply with the condition.

The clause further provides for a maximum penalty of 100 penalty units for non-compliance.

Section 145U allows regulations to be prescribed which specify how a self-insurer may apply for a licence; the criteria for applying; the conditions that may be imposed on a self-insurer licence; the renewal of self-insurer licences; and the suspension and cancellation of self-insurer licences.

Clause 53 Section 146

This clause substitutes section 146 with a new section 146 and section 146A.

The new section 146 deals with when a licensed insurer's licence is cancelled or suspended and makes consequential changes to the language to reflect the licensing framework.

The new section 146A inserts a new section as to the effect of cancellation or suspension of self-insurer licences. The regulator may assign rights, obligations and liabilities incurred by a former self-insurer in relation to an injured worker to the Default Insurance Fund.

It further provides that the Fund is taken to be the licensed insurer for the former self-insurer in relation to a claim by an injured worker.

It further provides that if the Fund is assigned to be the licensed insurer, the former self-insurer must not fail to provide the Fund with copies of all documents relating to a claim by an injured worker.

It further provides for a maximum penalty of 50 units for a breach of this provision.

For this section, a former self-insurer means a licensed self-insurer whose licence is cancelled, is suspended or ends.

Clause 54 Effect of failure to maintain compulsory insurance on other insurance etc for this Act Section 148 (2) (c)

This clause provides for the word 'licensed to be inserted before the word 'self-insurers'.

Clause 55 Failure to maintain compulsory insurance policy—director-general entitled to recover amount Section 149 (4), note

This clause provides for the word 'director-general's' to be substituted with the word 'regulator's'.

Clause 56 Self-insurers Section 151

This clause provides for the omission of section 151 from the Act.

Clause 57 Section 152 heading

This clause provides for the substitution of the heading of section 152 - Compulsory insurance – licensed insurers.

Clause 58 Sections 152 and 153 (1)

This clause provides for the words 'An approved insurer' to be replaced with the words 'A licensed insurer'.

Clause 59 Cover notes Section 154 (1) and (3)

This clause provides for the words 'An insurer' to be replaced with the words 'A licensed insurer'.

Clause 60 Section 154 (3)

This clause provides for the words 'the insurer' to be replaced with the words 'the licensed insurer'.

Clause 61 Sections 155 – 158 headings

This clause provides for the substitution of the headings for sections 155, 155A, 156, 157 and 158 consequential on moving to a licensing framework for insurers.

Clause 62 Avoiding payment of premium—director-general entitled to recovery amount Section 162A (3), note

This clause provides for the word 'director-general's' to be substituted with the word 'regulator's'.

Clause 63 New division 8.1.5

This clause provides for a new division 8.1.5 - Regulatory action.

Section 164A provides for the definition of licence; licensee; and regulatory action.

Section 164B provides that the regulator may take action against a licensee only if satisfied on reasonable grounds that the licensee has stopped providing an insurance service; no longer meets the criteria for licensing a self-insurer prescribed by regulation; used false or misleading information to obtain the licence; contravened a condition of the licence; fails to give the Minister information requested under the Act; fails to comply with a provision under the Act; or has contravened a workers' compensation law of a Territory or State or a law prescribed by regulation.

Section 164C provides that the regulator must give written notice to the licensee before commencing regulatory action with details of the proposed action. It further provides that a licensee can provide a written submission to the regulator about the proposed regulatory action and that the regulator must consider any written submission when making a decision to take regulatory action against the licensee.

Section 164D provides that if the regulator, after complying with section 164C, is satisfied on reasonable grounds that it is appropriate to take regulatory action, the regulator may amend or revoke a condition on the licence; may suspend a licence; may disqualify a licensee from applying for a further licence; may disqualify a licensee from applying for a further licence for a period; and may cancel the licence.

It further provides that before taking regulatory action against a licensee under this section, the regulator must tell the licensee by written notice the regulatory action to be taken and the day on which the action takes effect.

Section 164E provides that if the regulator receives a written submission from a licensee, and is satisfied on reasonable grounds that regulatory action may not be taken or is not appropriate, the regulator must give the licensee written notice advising that regulatory action will not be taken.

Section 164F provides that if a licensee holds a licence under another Territory or State workers' compensation law, and regulatory action is taken or proposed in relation to that licence, the licensee must tell the regulator as soon as possible of the regulatory action to be taken and the day on which the action takes effect.

Section 164G provides that if the regulator suspends a licence, the licensee is taken not to hold a licence during the period of suspension.

Clause 64 Purpose of DI fund Section 166A (3) (b) and (5) (b)

This clause provides for the word 'self-insurer' to be replaced with the word 'licensed self-insurer'.

Clause 65 Section 168

This clause provides for the substitution of section 168 – Licensed insurers and licensed self-insurers must give information. It amends the current section 168 to no longer require quarterly reporting. It is no longer necessary for licensed insurers to report data quarterly as this data is already reported elsewhere under the Act.

The provision does however retain the ability for the Default Insurance Fund manager to request the gross written premium of a licensed insurer by written notice and total wages from licensed self-insurers.

Clause 66 Section 168A heading

This clause provides for the substitution of the heading of section 168A – Contributions to DI fund by licensed insurers and licensed self-insurers.

Clause 67 Section 168A (1)

This clause provides for the words 'approved insurers and self-insurers' to be replaced with the words 'licensed insurers and licensed self-insurers'.

Clause 68 Section 168A (1) (b) (i)

This clause provides for the word 'approved' to be replaced with the word 'licensed'.

Clause 69 Section 168A (1) (b) (ii)

This clause provides for the word 'licensed' to be inserted before the word 'self-insurer'.

Clause 70 Section 168A (2) (a)

This clause provides for the words 'approved insurers and self-insurers' to be replaced with the words 'licensed insurers and licensed self-insurers'.

Clause 71 Section 168A (2) (b)

This clause provides for the words 'an insurer or self-insurer's' to be replaced with the words 'a licensed insurer's or licensed self-insurer's'.

Clause 72 Section 168A (3) (a)

This clause provides for the words 'an approved' to be replaced with the words 'a licensed'.

Clause 73 Section 168A (3) (b)

This clause provides for the word 'self-insurer' to be replaced with the word 'licensed' before the first mention in this section.

Clause 74 Section 168A (4)

This clause provides for the words 'approved insurer and self-insurer' to be replaced with the words 'licensed insurer and licensed self-insurer'.

Clause 75 Section 168A (4), note

This clause provides for the words ‘An insurer’ to be replaced with the words ‘A licensed insurer’.

Clause 76 Section 168A (5)

This clause provides for the words ‘approved insurer or self-insurer’ to be replaced with the words ‘licensed insurer or licensed self-insurer’.

Clause 77 Section 168A (7)

This clause provides for the first mention of the words ‘insurer or self-insurer’ to be replaced with the words ‘licensed insurer or licensed self-insurer’.

Clause 78 Section 168A (8)

This clause provides for the words ‘an approved insurer or self-insurer’ to be replaced with the words ‘a licensed insurer or licensed self-insurer’.

Clause 79 Section 168AA heading

This clause provides for the substitution of section 168AA Supplementary contributions to DI fund by licensed insurers and self-insurers.

Clause 80 Section 168AA (2)

This clause provides for the words ‘approved insurers and self-insurers’ to be replaced with the words ‘licensed insurers and licensed self-insurers’.

Clause 81 Division 8.2.5 heading

This clause provides for the substitution of Division 8.2.5 DI fund’s relationship with liquidators of licensed insurers.

Clause 82 Displacement of liquidator’s Corporations Act obligation Section 169 (2)

This clause provides for the words ‘an approved insurer may exercise his or her powers’ to be replaced with the words ‘a licensed insurer may exercise the liquidator’s powers’.

Clause 83 Claim for payment if final judgment etc and self-insurer unable to cover liability Section 170HB (1) (b)

This clause provides for the word 'self-insurer' to be replaced with the words 'licensed self-insurer'.

Clause 84 Section 171E heading

This clause provides for the substitution of section 171E DI fund paying claims for payment against licensed insurers and licensed self-insurers if settlement approved.

Clause 85 Premiums—maximum rates Section 176 (1)

This clause provides for the words 'an insurer' to be replaced with the words 'a licensed insurer'.

Clause 86 Definitions—pt 8.3 Section 179B, definition of *insurer*

This clause provides for the substitution in the definitions of insurer to mean a licensed insurer or licensed self-insurer.

Clause 87 Inspectors Section 188 (1), note 1

This clause omits section 188 (1), note 1 relating to Inspectors.

Clause 88 Apportioning cost of administering workers compensation and safety legislation Section 210 (1)

This clause provides for the words 'approved insurers or self-insurers' to be replaced with the words 'licensed insurers or licensed self-insurers'.

Clause 89 Section 210 (2) (b)

This clause provides for the words 'insurer and self-insurer' to be replaced with the words 'licensed insurer and licensed self-insurer'.

Clause 90 Section 210 (3)

This clause provides for the words 'insurer and self-insurer's' to be replaced with the words 'licensed insurer and licensed self-insurer's'.

Clause 91 Section 210 (3) (b)

This clause provides for the words ‘insurer and self-insurer’ to be replaced with the words ‘licensed insurer and licensed self-insurer’.

Clause 92 Section 210 (5), except note

This clause provides for the substitution of 210 (5) and is consequential on moving to a licensing framework.

Clause 93 New Chapter 21

This clause provides for the transition of part 3 of the Bill (*Workers Compensation Act 1951*).

Section 269 defines commencement day for the purposes of the transition arrangements for part 3 of the Bill.

Section 270 provides that if an insurer was an approved insurer under the Act before commencement day, the insurer is taken to be a licensed insurer until the end of the period for which the insurer was approved.

Section 271 provides that if an employer was a licensed self-insurer under the Act before commencement day, the insurer is taken to be a licensed self-insurer until the end of the period for which the employer was exempted under section 151 as a self-insurer.

Section 272 enables the Executive to make regulations dealing with transitional matters.

Section 272 (1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act’s purpose.

Section 272 (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify chapter 21 of the Act, and only if the Executive is of the opinion that the chapter does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 272 (3) gives a regulation under section 278 (2) full effect according to its terms. A provision of chapter 21 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section

is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Also, any modification by regulation of chapter 21 of the Act has no ongoing effect after the expiry of that chapter.

Section 273 provides that Chapter 21 expires 2 years after the day it commences.

Clause 94 Dictionary, definition of *approved insurer*

This clause provides for the omission of the dictionary definition of the words 'approved insurer'.

Clause 95 Dictionary, definition of *gross written premiums*

This clause provides for the substitution of the definition in the Act of the words 'gross written premiums' to mean the total amount of premiums, less GST, for all insurance policies written by the licensed insurer for a policy period.

Clause 96 Dictionary, new definitions

This clause provides for new definitions of:

- insurer licence;
- insurance service;
- licence (for division 8.1.5 (Regulatory action));
- licensed insurer;
- licensed self-insurer;
- licensee (for division 8.1.5 (Regulatory action));
- regulator;
- regulatory action (for division 8.1.5 (Regulatory action)); and
- regulator condition.

Clause 97 Dictionary, definition of *self-insurer*

This clause provides for the omission of the dictionary definition of the word 'self-insurer'.

Clause 98 Dictionary, new definition of *self-insurer licence*

This clause provides for a new definition of the words 'self-insurer licence'.

Clause 99 Further amendments, mentions of *an approved*

This clause provides for the words ‘an approved’ to be replaced with the words ‘a licensed’ in the relevant sections of the Act.

Clause 100 Further amendments, mentions of *approved*

This clause provides for the word ‘approved’ to be replaced with the word ‘licensed’ in the relevant sections of the Act.

Clause 101 Further amendments, mentions of *director-general*

This clause provides for the word ‘director-general’ to be replaced with the word ‘regulator’ in the relevant sections of the Act.

Clause 102 Further amendments, mentions of *an insurer*

This clause provides for the words ‘an insurer’ to be replaced with the words ‘a licensed insurer’ in the relevant sections of the Act.

Clause 103 Further amendments, mentions of *insurer*

This clause provides for the insertion of the word ‘licensed’ before the word ‘insurer’ in the relevant sections of the Act.

Clause 104 Further amendments, mentions of *insurers*

This clause provides for the insertion of the word ‘licensed’ before the word ‘insurers’ in the relevant sections of the Act.

Clause 105 Further amendments, mentions of *self-insurer*

This clause provides for the insertion of the word ‘licensed’ before the word ‘self-insurer’ in the relevant sections of the Act.

Part 5 Work Health and Safety Act 2011

Clause 106 Rights that may be exercised while at workplace New Section 188 (1) (da)

This clause provides for the insertion of a new section 118 (1) (da) to take photographs, films or audio, video or other recordings relevant to the suspected contravention under the WHS Act.

Clause 107 Section 118 (2)

This clause substitutes and amends section 118(2) to deal with the new right of entry power created under section 118(1)(da) consistent with the way in which the WHS Act currently deals with the existing right of entry power to inspect and make copies of a document while at a workplace.

Specifically, photographs, films, or audio, video or other recording are not able to be taken if to do so would contravene a law of the Commonwealth or a law of a State. This subsection does not create an offence under the WHS Act in addition to the relevant Commonwealth or State law.

Clause 108 New section 118 (5)

This clause inserts a new subsection (5) in section 118 of the WHS Act to allow WHS entry permit-holders to exercise their rights under section 118 (1) in relation to any other contravention reasonably suspected to have occurred while exercising a right of entry at a workplace.

Clause 109 Section 118A

This clause inserts a new section 118A that will apply to the exercise of the new right of entry power created under section 118 (1)(da) and its further use under the new section 118 (5). This section will require that a WHS entry permit-holder notify, as soon as reasonably practicable after entry, the person conducting a business or undertaking (PCBU) that the permit-holder intends to use the new audio/visual recording power under section 118 (1)(da) while at the workplace in relation to a suspected contravention or intends to use, or has used it in relation to another contravention observed while at the workplace under section 118 (5).

Clause 110 New division 10.2A

This Division provides for a regulator to issue prohibited asbestos notices. It ensures a regulator has powers in relation to prohibited asbestos in circumstances where an inspector may not otherwise be able to issue an improvement notice or prohibition notice.

Clause 197A includes key definitions for Division 2A Part 10 including 'asbestos,' 'asbestos containing material (ACM),' 'prohibited asbestos' and 'relevant person in relation to a workplace.'

The definition of 'relevant person in relation to a workplace' provides discretion for a regulator to determine who a relevant person is when issuing the notice, taking into account that there may be various persons with responsibility for asbestos at a workplace because of different workplace arrangements and the complexity of modern supply chains. For example, the PCBU at the workplace at the time the prohibited asbestos is discovered may not have caused it to be fixed or installed, or be most able to comply with the notice and carry out measures in relation to the prohibited asbestos.

Clause 197B requires a regulator to issue a prohibited asbestos notice if they reasonably believe that prohibited asbestos is present in the workplace. A regulator must issue a prohibited asbestos if they form the necessary belief.

A regulator may be able to form the necessary belief for issuing a prohibited asbestos notice even where the regulator does not know the precise location of prohibited asbestos at the particular workplace. For example, a regulator may be able to form the necessary belief based on intelligence from other cases where the same products are used.

Clause 197C sets out the required contents of a prohibited asbestos notice. A prohibited asbestos notice must state:

- the basis for a regulator's belief that prohibited asbestos is present in the workplace,
- details of the prohibited asbestos, including the location, type and condition,
- specific measures the relevant person is required to take in relation to the prohibited asbestos, including in relation to the management, and
- the day by which compliance is required by the relevant person.

The day specifying compliance with the prohibited asbestos notice must be reasonable. When considering whether the day is reasonable, all of the circumstances relating to the notice must be considered.

Clause 197D provides that it is an offence for a relevant person not to comply with a prohibited asbestos notice. The penalties reflect the consequences for failing to remedy the serious risks to health and safety posed by prohibited asbestos.

Clause 197E provides that a regulator may extend the compliance period for a prohibited asbestos notice. The compliance period can only be extended if the period has not ended.

Clause 111 Application—div 10.4 Section 202

This clause is consequential on the addition of division 10.2A and amends section 202 of the WHS Act to include a reference to 'prohibited asbestos notice' within the meaning of 'notice' for the purposes of Division 10.4.

Clause 112 Directions in notices Section 204

This clause is consequential on the addition of division 10.2A. It includes a reference to a 'prohibited asbestos notice' where there is a reference to 'improvement notice' and 'prohibition notice' to clarify that directions and recommendations can also be included in a prohibited asbestos notice.

Clause 113 Section 204 (b)

This clause is consequential on the addition of division 10.2A. The insertion of the words 'measures to take' in relation to remedying a contravention provides that a direction included in a notice may offer the person to whom it is issued a choice of measures to take, or ways in which to remedy the contravention.

Clause 114 Recommendations in notice Section 205 (1)

This clause is consequential on the addition of division 10.2A. It includes a reference to a 'prohibited asbestos notice' where there is a reference to 'improvement notice' and 'prohibition notice' to clarify that directions and recommendations can also be included in a prohibited asbestos notice.

Clause 115 Section 206

This clause is consequential on the addition of division 10.2A. This amendment replaces the current section 206 in the WHS ACT and separates the changes that can be made to a notice by an inspector and the regulator. It will allow an inspector to make minor changes to all notices (except prohibited asbestos notices) and extend the compliance period for improvement notices only. The regulator may make minor changes to and extend the compliance period for prohibited asbestos notices.

Clause 116 Regulator may vary or cancel notice New section 207 (2)

This clause is consequential on the addition of division 10.2A. This amendment clarifies that a prohibited asbestos notice issued by the regulator may only be varied or cancelled by the regulator.

Clause 117 When regulator may carry out action Section 211

This clause is consequential on the addition of division 10.2A. The changes allow the regulator to carry out remedial action in relation to prohibited asbestos at a workplace, similar to the existing framework for prohibitions notices, if the relevant person to whom a prohibited asbestos notice is issued fails to comply with the notice.

Where a notice was issued and was not complied with, the regulator may carry out the measures that were specified in the prohibited asbestos notice or any other measures the regulator believes reasonable to make the workplace or situation safe.

Clause 118 Power of the regulator to take other remedial action Section 212 (1)(a)

This clause is consequential on the addition of division 10.2A. The changes allow the regulator to carry out remedial action in relation to prohibited asbestos at a workplace.

If no notice was issued, the regulator may take any action necessary to make the workplace safe.

Clause 119 Section 212 (1)(b)

This clause is consequential on the addition of division 10.2A. The changes allow the regulator to carry out remedial action in relation to prohibited asbestos at a workplace, similar to the existing framework for prohibitions notices, if the regulator cannot find a relevant person to issue a prohibited asbestos notice to.

If no notice was issued, the regulator may take any action necessary to make the workplace safe.

Clause 120 Costs of remedial or other action Section 213 (b)

This clause is consequential on the addition of division 10.2A. This amendment allows the regulator to recover the reasonable costs of carrying out the remedial measures.

Clause 121 Application—div 10.6 Section 214

This clause is consequential on the addition of division 10.2A. This amendment includes prohibited asbestos notices within the meaning of 'notice' for the purpose of Division 10.6 in relation to injunctions.

Clause 122 Which decisions are reviewable Table 223, new items 9A and 9B

This clause is consequential on the addition of division 10.2A.

Clause 123 Dictionary New definitions

This clause is consequential on the addition of division 10.2A.

Schedule 1 Consequential amendments

Part 1.1 Dangerous Goods (Road Transport) Regulation 2010

Clause 1.1 Section 175 (1), note 1

Clause 1.1 is consequential on the amendments in Part 2 of this Bill.

Part 1.2 Lifetime Care and Support (Catastrophic Injuries) Act 2014

Clauses 1.2-1.11

Clauses 1.2-1.11 are consequential on the amendments in Part 4 of this Bill.

Part 1.3 Workers Compensation Regulation 2002

Clause 1.12

Clause 1.12 is consequential on the amendments in Part 4 of this Bill.

Part 1.4 Work Health and Safety Regulation 2011

Clauses 1.13-1.15

Clauses 1.13-1.15 are consequential on the amendments in sections 110-123 of this Bill.