THE LEGISLATIVE ASSEMBLY

FOR THE

AUSTRALIAN CAPITAL TERRITORY

EXPLANATORY STATEMENT

Amendments to the *Workers Compensation Act 1951*

Circulated by authority of
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Contents

1. Name of Act

This clause establishes the name of the Act as the Workers Compensation Amendment Act 2003 (No 2).

2. Commencement

This is a formal provision specifying when the Act commences operation. The provisions of the Act will commence on a date fixed by the Minister in writing.

3. Act amended

This is a formal provision specifying the name of the Act that is amended. In addition to the *Workers Compensation Act 1951*, this Act also amends the *Limitation Act 1985* (clause 33), the *Workers Compensation Supplementation Fund Act 1980* (clause 34) and the *Workers Compensation Regulations 2002* (schedule 2.2).

4. Who is a worker? Section 8(3) (a) to (d)

This clause substitutes the existing paragraphs to make consequential amendments to cross references to the following provisions that are amended by this Bill:

- paragraphs 156(6)(a) and (b) (Information for insurers on application for issue or renewal of policies);
- paragraphs 160(1)(a) and (b) (Six monthly information for insurers); and
- paragraph 190(1)(b) (Provision of information to inspectors).

5. Trainees new section 14(3A)

This clause inserts a new subsection in section 14 (trainees). New subsection 14(3A) exempts adults with a disability who participate in an on-the-job work experience program (in relation to work that is for a trade or business) from the meaning of worker for the purposes of the Act.

The exemption means that a host employer offering work experience opportunities to adults with a disability will not be required to obtain workers compensation insurance for those trainees, provided that the work experience program is organised by a specialist employment service provider.

6. Section 14(4)

Clause 6 omits the existing introduction to subsection 14(4) and substitutes a new introduction to reflect renumbering within section 14.

7. Section 14(4), new definitions

This clause inserts new definitions for the terms an ***adult with a disability*** and a ***specialist employment service provider*** that are used in new subsection 14(3A).

An ***adult with a disability*** is a person who is aged 16 years or older and has a physical, intellectual or psychiatric disability and is likely to suffer from that disability permanently or for an extended period. This definition is modelled on a similar definition in the *Social Security Act 1991* (Cth).

A ***specialist disability employment service provider*** is a corporation or an unincorporated organisation that provides employment services to people with a disability, and is not carried on for the financial benefit of the organisation's executive officers or members (for instance, not-for-profit organisations).

8. Section 14

This is a formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

9. New section 17A

This clause inserts a new section that is intended to clarify which volunteers are workers within the meaning of the Act.

As a general principle, a person who performs work for someone else and receives no payment apart from reimbursement of expenses, is not a worker within the meaning of the Act. However, in some limited circumstances a volunteer is a worker under the Act.

Those circumstances in which a volunteer will be a worker are set out in section 14 (trainees), section 17 (religious workers), section 18 (commercial voluntary workers) and section 19 (public interest workers).

10. Commercial voluntary workers Section 18 (1)

Section 18 provides that, as a general principle, commercial volunteers are workers for the purposes of the Act. The employer of a commercial volunteer must therefore obtain a workers' compensation policy covering the volunteer, unless the employer is exempted from the application of section 18 under a certificate issued by the Minister.

Clause 10 substitutes existing subsection 18(1) to clarify who is a commercial volunteer. Commercial volunteers are people who perform work without payment (other than reimbursement of expenses) for an organisation whose objective is the creation of a personal or private financial benefit for the owners or members of the organisation.

Generally, the section will therefore apply to 'for-profit' organisations that engage volunteers. However, it should be noted that it is not necessary for the organisation to actually make a profit to be covered by the section. Also, the purpose of the enterprise, trade or business needs to be considered as a whole. For instance, if a not-for-profit organisation has a subsidiary profit-making arm, the organisation as a whole is not conducted to create personal or private financial benefit, so section 18 would not apply.

Clause 10 also inserts detailed examples in notes to further explain the intended operation of section 18.

11. Public interest voluntary workers Section 19 (1)

As a general principle, volunteers who work for public interest (typically not-for-profit) organisations are not workers for the purposes of the Act. However the Minister may declare, under section 19, categories of public interest voluntary work. In these circumstances, people performing this public interest voluntary work are workers for the purposes of the Act.

Clause 11 substitutes a new subsection 19(1), which clarifies the operation of section 19.

Since the commencement of section 19, some charitable organisations have written to the Government, informing that they have been advised that they need to seek Ministerial declarations under section 19 to exempt them from obtaining workers compensation coverage for volunteers. This is not how the section operates or was designed to operate.

New subsection 19(1) clarifies that the Minister may declare work performed by volunteers for 'stated public interest entities' to be public interest voluntary work. Volunteers performing this type of work for an entity stated in the Minister's declaration are workers for the purposes of the Act. The stated entity would therefore need to obtain workers compensation coverage for these volunteers. In other circumstances, public interest and not-for-profit organisations do not require workers compensation coverage for voluntary workers.

Clause 11 also inserts a note to provide a detailed example of how section 19 is intended to operate. The note describes a fictional annual event titled the "Big Splash" hosted by a not-for-profit organisation. As the example states, the event is potentially dangerous for the volunteer marshals. In this case, the Minister decides that it is in the public interest for the volunteer marshals working for "Big Splash" to be declared as public interest voluntary workers, so that the "Big Splash" organiser must take out workers compensation insurance for the volunteer marshals.

12. Section 96

This clause deletes the existing section and substitutes a new section 96 (Obligation of insurer on being notified of injury).

Under the existing section 96, insurers are required to make contact with the injured worker, the injured worker's employer and the injured worker's nominated treating doctor (three point contact) for all reported injuries, regardless of the seriousness of the injury. There are some injuries where this may not be necessary, such as a minor paper cut.

New subsection 96(1) provides that within three days of an insurer receiving an injury notice (from an employer), they must take action under the insurer's injury management program. Failure by an insurer to take action under the injury management program is an offence that attracts a maximum penalty of 10 penalty units.

New subsection 96(2) provides that if the insurer reasonably believes that the injury is not a significant injury, then they are relieved of their obligation to make three-point contact. The term 'significant injury' is defined in subsection 96(5) as an injury that results in the worker being off work for more than seven days. Failure by an insurer to make three-point contact in the case of a significant injury attracts a maximum penalty of 30 penalty units.

Subsection 96(3) provides that if an insurer had formed a reasonable belief under subsection 96(2) that the injury was not a significant injury, but subsequently becomes aware that the injury is, in fact, a significant injury, then the obligation on the insurer to initiate three-point contact is reinstated consistent with new subsection 96(1). Failure by an insurer to make three-point contact in these circumstances attracts a maximum penalty of 30 penalty units.

New subsection 96(4) specifies than an offence against section 96 is a strict liability offence. There is no requirement for a mental fault element for these offences eg for the insurer to intentionally or deliberately fail to make three-point contact or to take action under the injury management program: conduct alone is sufficient to make an insurer liable to prosecution. However, a mistake of fact defence is available to all strict liability offences under the Criminal Code.

Subsection 96(5) provides definitions for the terms ***continuous period*** and ***significant injury*** that are used within section 96.

13. Medical certificates and claims for compensation Section 118 (2)

This clause substitutes a new subsection 118(2) (Medical certificates and claims for compensation).

Currently, a medical certificate accompanying a claim for weekly compensation must comply with medical assessments prescribed under the regulations, and include either a statement of the doctor's assessment of whether the worker's condition is consistent with the worker's employment being a substantial contributing factor to the injury or the doctor's assessment of the likelihood of the worker's employment being a substantial contributing factor to the injury.

Representatives of general practitioners have advised that many doctors are not in a position to make an assessment of the likelihood of the worker's employment being a substantial contributing factor to the injury, particularly in the case of diseases.

New subsection 118 (2) deletes the requirement for the medical certificate to include the doctor's assessment of the likelihood of the worker's employment being a substantial contributing factor to the injury, but retains the requirement for the medical certificate to include the doctor's assessment of whether the worker's condition is consistent with the worker's employment being a substantial contributing factor to the injury.

14. Time for taking proceedings generally Section 120

Clause 14 omits the existing introduction to section 120 (Time for taking proceedings generally) and substitutes a new introduction to enable renumbering within section 120.

15. New section 120(2)

Clause 15 inserts a new subsection 120(2). The new subsection provides that a time limit for taking proceedings for the recovery of compensation for an injury may be extended if:

- the Magistrates Court allows the proceeding to be maintained under the provisions of new section 120A (Proceedings on late claims); or
- the Magistrates Court or an arbitrator finds in the proceeding for the claim that section 124 (No notice or defective or inaccurate notice) applies.

16. Section 120, notes 1 and 2

This clause deletes the existing note 2 leaving the existing note 1 as the only remaining note to this section.

17. New section 120A

Section 120 of the *Workers Compensation Act 1951* limits the time for taking proceedings to recover compensation:

- to three years after an injury; or
- if the worker was unaware of the injury, within three years after the worker became aware of the injury; or
- if the worker dies, within three years after the claimant becomes aware of the death.

Clause 17 inserts a new section 120A that enables the Magistrates Court to allow out of time proceedings for the recovery of compensation under this Act under certain circumstances.

The new section will allow an extension of these time limits by the Magistrates Court in exceptional circumstances if the court considers that it would be just and reasonable to allow the proceeding to be maintained. The court may also hear from anyone likely to be affected by the proceeding.

Before the Magistrates Court allows an application, it must have regard to the length of and reasons for the delay in making the claim, any prejudice to the employer, the conduct of the employer and the employer's insurer with respect to the claimant, the duration of any disability of the worker arising at the time of or after the injury giving rise to the claim, whether the claimant acted promptly and reasonably once becoming aware of the injury or death leading to the claim, and any steps taken by the claimant to obtain medical, legal or expert advice and the nature of any advice received.

These provisions are based on section 36 of the *Limitations Act 1985,* which gives the Magistrates Court discretion to extend the limitation period for personal injury claims.

18. New section 126A

This clause inserts a new section 126A – Lump sum claims – notice by insurers about double compensation etc into part 6.1 of the Act.

New section 126A provides that if insurers are given notice by an employer of a lump sum claim and the insurer is liable to indemnify the employer for the claim, then the insurer must give the claimant prescribed information.

The prescribed information includes the requirement to repay the employer any lump sum compensation already received as well the employer's legal costs as between party and party if the claimant later decides to bring a common law action regarding their injury. The sections that require repayment of lump sum compensation and legal costs are:

- section 36F (No ACT compensation if external compensation received),
- section 183 (Remedies against employer and stranger),
- section 184 (No compensation if damages received), and
- section 185 Dependants recovering damages and not claiming compensation).

This provision is designed to reduce overall costs to the workers compensation scheme, by limiting the possibility that employers (and insurers) would be required to pay for two sets of legal costs for the one injury. Lawyers are subject to a similar requirement to inform clients about repayment requirements (section 182F).

If there is an approved form containing the information that must be given by an insurer, then that form must be used.

Subsection 126A(3) provides that an offence against this section is a strict liability offence. This is consistent with the Criminal Code provisions.

19. Sections 156 to 162

This clause deletes the existing sections 156 to 162 and substitutes them with new sections.

The aim of these provisions is to assist in the identification of under-declaration of wages. New sections 156 to 162 simplify the reporting requirements on employers, while maintaining a strong accountability mechanism to ensure employers are not under-reporting wages and employee numbers.

New section 156 provides that when an employer applies to an insurer for the issue or renewal of a compulsory insurance policy, the employer must supply the ***employer's estimates*** with the application.

Employer's estimates (this term is defined in new subsection 156(6)) includes the employer's estimate of:

- the number of Territory workers in each determined category to be employed in the period,
- the total wages to be paid to those workers in that period,
- the number of paid and unpaid workers who will be working for the employer in that period, and
- the approximate amount of time each of those workers will work in that period.

Given the importance of accurate wage and salary reporting to the workers compensation scheme, two offences are provided for under section 156: a fault-based offence and a strict liability offence.

Subsection 156(2) provides that if an application to the insurer does not include a statutory declaration containing the ***employer's estimates*** for the proposed insurance period, the employer commits an offence. An employer will breach subsection 156(2) if the employer intentionally fails to provide the auditor's certificate to their insurer – see section 22 of the Criminal Code. This offence, which requires mental fault, is subject to a maximum penalty of 250 penalty units, imprisonment for two years, or both.

Subsection 156(3) establishes an accompanying strict liability offence for an employer who fails to give a statutory declaration containing the ***employer's estimates*** for the proposed insurance period to the insurer. This offence does not require intention, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (3) is subject to a lower maximum penalty.

Subsection 156(4) specifies that an offence against subsection (3) is a strict liability offence.

Subsection 156(5) provides that section 156 does not apply to a non-business employer (for example, a householder employing a nanny).

New section 157 applies to employers who are renewing their workers compensation insurance policy.

Given the importance of accurate wage and salary reporting to the workers compensation scheme, two offences are provided for under section 157: a fault-based offence and a strict liability offence.

Subsection 157(2) provides that, within 30 days of the renewal of the workers compensation policy, the employer must provide to their insurer a certificate from a recognised auditor stating the actual total wages paid by the employer during the previous insurance period. An employer will breach subsection 157(2) if they intentionally fail to provide the auditor's certificate to their insurer – see section 22 of the Criminal Code. This offence, which requires mental fault, is subject to a maximum penalty of 250 penalty units, imprisonment for two years, or both.

Subsection 157(3) establishes an accompanying strict liability offence for an employer who fails to provide the auditor's certificate. This offence does not require intention, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (3) is subject to a lower maximum penalty of 50 penalty units.

Subsection 157(4) specifies that an offence against subsection (3) is a strict liability offence.

Subsection 157(5) provides that section 157 does not apply to a non-business employer (for example, a householder employing a nanny).

New section 158 applies to employers when their workers compensation insurance policy expires, is cancelled, or is not renewed.

Subsection 158(2) provides that, within 30 days of expiration, cancellation or non-renewal, the employer must provide to their former insurer a certificate from a recognised auditor stating the actual total wages paid by the employer during the previous insurance period.

Subsection 158(3) provides that an offence against this section is a strict liability offence. The offence does not require intention, or other mental fault elements, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (2) is subject to a maximum penalty of 50 penalty units.

Subsection 158 (4) provides that this section does not apply to non-business employers.

New section 159 applies to employers who change to a new insurer immediately after the expiry of their previous workers compensation policy.

Subsection 159(2) provides that, within 30 days after the new policy is issued by the new insurer, employers must give to their new insurer the information that they would have been required to provide to their former insurer under section 158, had they stayed with that insurer. An employer will breach subsection 159(2) if they intentionally fail to provide the auditor's certificate to their insurer – see section 22 of the Criminal Code. This offence, which requires mental fault, is subject to a maximum penalty of 250 penalty units, imprisonment for two years, or both.

Subsection 159(3) establishes an accompanying strict liability offence for an employer who fails to provide the auditor's certificate. This offence does not require intention, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (3) is subject to a lower maximum penalty of 50 penalty units.

Subsection 159(4) specifies that an offence against subsection (3) is a strict liability offence.

Subsection 159(5) provides that section 159 does not apply to a non-business employer (for example, a householder employing a nanny).

New section 160 is intended to minimise the under reporting of wages and workers by employers to their insurers. The section requires that employers provide their insurers with information about their actual expenditure in relation to their ***employer's estimates*** that they are required to provide to their insurer under section 156. The information provided to insurers must be provided in the form of a statutory declaration.

The statutory declaration must be provided within 30 days after the end of each reporting period.

Subsection 160(2) provides that an offence against this section is a strict liability offence. The offence does not require intention, or other mental fault elements, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (2) is subject to a maximum penalty of 50 penalty units.

Subsection 160(3) provides that this section does not apply to non-business employers.

Subsection 160 (4) defines ***reporting period*** for the purposes of this section. As a general rule, employers are required to report the prescribed information to their insurers once every six months.

New section 161 provides that persons who make relevant statutory declarations required under subsections 156(2) and 160(1) commit offences if they contain false or misleading statements or omit information that causes the statement to be misleading.

Subsection 161(1) provides that a person who knowingly makes a false or misleading statement or omission in a statement commits an offence. This offence, which requires intention as the fault element, is subject to a maximum penalty of 1,250 penalty units. Higher maximum penalties, including up to 10 years' imprisonment, are prescribed for second and subsequent offences, as is the case under the existing section 161.

Subsection 161(2) provides that a person who recklessly makes a false or misleading statement or omission in a statement commits an offence. This offence, which requires recklessness as the fault element, is subject to a maximum penalty of 50 penalty units, 6 months imprisonment or both.

Subsections 161(3) and (4) provide that if the false or misleading statements or omissions do not affect a material particular in the statutory declaration, then the provisions of this section do not apply.

Subsection 161(5) defines a ***relevant statutory declaration*** for the purposes of the section.

New section 162 has been amended to update references to the following sections that are amended by this Act:

- section 147 (Compulsory insurance – employers)
- section 156 (Information for insurers on application for issue or renewal of policies)
- section 157 (Information for insurers after renewal of policies)
- section 158 (Information for insurers after end or cancellation of policies)
- section 159 (Information for new insurers after change of insurers)
- section 160 (Six-monthly information for insurers)
- section 214 (Criminal liability of executive officers).

20. New Section 182F

This clause creates a new section 182F - Lump sum claim- notice by lawyers to clients about repayment requirements.

New section 182F provides that if a person/claimant proposes to engage a lawyer to act for the person in relation to a common law claim for an injury for which a workers compensation claim has been made or may be made, then the lawyer must give the claimant prescribed information.

The prescribed information includes the requirement under the Act to repay the employer any lump sum compensation already received as well the employer's legal costs as between party and party if the claimant later decides to bring a common law action regarding their injury. The sections that require repayment of lump sum compensation and legal costs are:

- section 36F (No ACT compensation if external compensation received),
- section 183 (Remedies against employer and stranger),
- section 184 (No compensation if damages received), and
- section 185 (Dependants recovering damages and not claiming compensation).

This provision is designed to reduce overall costs to the workers compensation scheme, by limiting the possibility that employers (and insurers) would be required to pay for two sets of legal costs for the one injury. Insurers are subject to a similar requirement to inform clients about repayment requirements (section 126A).

If there is an approved form containing the information that must be given by an insurer, then that form must be used.

Subsection 182F(4) provides that an offence against this section is a strict liability offence. This is consistent with the ACT Criminal Code provisions.

21. Section 183 heading

This clause deletes the former section heading and substitutes it with the new heading Remedies against employer and stranger.

22. Section 183

Clause 22 substitutes a new introduction to enable renumbering within section 183.

23. New section 183 (2)

This clause inserts a new subsection 183(2).

The new subsection provides that amounts of lump sum compensation paid under subsection 183(1) also includes the employer's legal costs as between party and party.

24. Section 184

This clause deletes the existing section 184 and substitutes it with a new section 184 - No compensation if damages received.

The new section prevents the payment of compensation under the *Workers Compensation Act 1951* for a worker's injury if a damages settlement or award has been obtained for the same injury independently of the Act.

Subsections 184(2), (3) and (4) provide that if ACT compensation is paid first and a person later receives independent damages, then the worker's employer is entitled to recover the lesser of the two amounts (including legal costs as between party and party) that the employer is liable to pay.

Subsection 184(5) provides that the employer cannot recover an amount under this section if the employer has already recovered an amount for the same injury under section 36F.

25. Dependents recovering damages and not claiming compensation Section 185 (2) (b)

This clause deletes the existing paragraph 185(2)(b) and substitutes a new paragraph.

The new paragraph specifies that the amount that a non-claiming dependent may be liable to repay to an employer under this section is the total amount of compensation paid to the dependents of the worker in relation to the worker's injury.

26. Section 185 (3), definition of C

This clause substitutes a new definition of **C** to be used in the formula to calculate the damages each non-claiming dependent may be liable to repay to the employer. **C** now means the total amount of compensation paid to the dependents of the worker in relation to the worker's injury.

27. New section 185 (5)

This clause inserts a new subsection 185(5).

The new subsection provides that the total amount of lump sum compensation that may be required to be repaid to the employer under subsections 185 (2) and (3) include legal costs as between party and party that the employer is liable to pay in relation to the claim.

28. Provision of information to inspectors Section 190 (1)(b)

This clause deletes the existing paragraph 190(1)(b) and substitutes it with a new paragraph.

The clause makes a consequential amendment relating to amendments made by clause 19 of this Act.

29. Time for beginning prosecutions Section 212 (1)

This clause deletes the existing subsection 212(1) and substitutes it with a new subsection.

The clause makes consequential amendments to references to the following sections that are amended by this Bill:

- section 147 (Compulsory insurance – employers)

- section 156 (Information for insurers on application for issue or renewal of policies)
- section 157 (Information for insurers after renewal of policies)
- section 158 (Information for insurers after end or cancellation of policies)
- section 159 (Information for new insurers after change of insurers)
- section 160 (Six-monthly information for insurers)
- section 214 (Criminal liability of executive officers).

New subsection 212(1) also provides that prosecutions for those offences may be begun within five years after the day, or last day the offence is committed.

New subsection 212(1A) further provides that new subsection 212(1) only applies to an offence against section 214 if the offence relates to the contravention by a corporation of another section mentioned in subsection 212(1).

30. Section 212

This is a formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

31. Dictionary, new definition of *lump sum claim*

This clause inserts a new definition of ***lump sum claim*** into the Dictionary for the Act.

Lump sum claim means a claim for compensation in relation to a loss under part 4.4 (Compensation for permanent injuries) or part 4.6 (Compensation for death).

32. Dictionary, definition of *recognised auditor,* paragraph (c)

This clause deletes the existing paragraph (c) of the definition and substitutes it with a new paragraph (c) to correct a reference to CPA Australia within the definition of ***recognised auditor***.

33. Limitation Act 1985, section 35

This clause inserts a reference to section 16A in section 35 of the *Limitation Act 1985*, to clarify that the Magistrates Court can hear out of time applications in certain circumstances for common law claims for work-related injuries.

34. Workers Compensation Supplementation Fund Act 1980, section 7 (3)

This clause omits the existing expiry date in subsection 7(3) and substitutes it with a new expiry date of 1 October 2006.

This is a consequential amendment relating to changes to the *Workers Compensation Act 1951* made by the *Workers Compensation Amendment Act 2003*.

Schedule 1 Cross-Border amendments

1.1 Section 30 (4)(a)

This clause deletes the existing paragraph 30(4)(a) and substitutes it with a new paragraph. The amendment makes a change to a cross-reference consequential on other amendments made by this schedule.

1.2 Section 33

This clause omits the existing section 33, which contains existing cross-border provisions. These provisions are replaced by new provisions set out in this schedule.

1.3 New part 4.2A

This clause inserts a new Part 4.2A Employment Connection with ACT or State.

Part 4.2A implements new, nationally agreed arrangements for cross-border workers compensation coverage. The intention of the new arrangements are that an employer should only need one workers compensation policy for each worker that they employ, regardless of whether that workers is required to work in different workers compensation jurisdictions during the course of their employment.

The new provisions will provide greater certainty for employers regarding their obligations to take out a workers compensation policy when operating across States and Territories, and provide greater certainty for injured workers as to where they should make a workers compensation claim.

The new arrangements do not mean that employers can now take out a workers compensation policy in one jurisdiction only. An employer with workers in different jurisdictions must still maintain coverage in each jurisdiction where the employer has workers.

The clause introduces new sections 36A, 36B, 36C, 36D, 36D, 36E and 36F.

New section 36A contains a definition of the term ***Territory or State of connection*** that is used in new part 4.2A. The defined terms will have the same meaning under the *Workers Compensation Act 1951* as they do in complementary legislation in Australian States and the Northern Territory.

New subsection 36B(1) provides that workers compensation is only payable under the *Workers Compensation Act 1951* if the ACT is the ***Territory or State of connection***. Subsection (2) specifies that a worker does not have to be injured within the limits of the ACT in order for the ACT to be the ***Territory or State of connection***.

New subsection 36B(3) establishes three tests for working out a worker's ***Territory or State of connection***. This 'employment connection test' is the central test for the new cross-border provisions, and will be used to determine which State or Territory workers compensation laws apply to an injured worker making a claim for compensation.

The employment connection test is a three-part test that examines the history of and intentions of the parties to the employment relationship. The test is progressive, in that, if a ***Territory or State of connection*** is not ascertained from the first limb of the test, the second limb of the test is examined. If the second limb of the test does not identify a single ***Territory or State of connection***, then the third limb of the test is examined.

Three examples of how the test would be applied are set out below:

A. Worker attending a conference in another jurisdiction

A worker employed by a Canberra employer usually works in Canberra, but is required to attend a conference over a period of three days in Melbourne. It is possible to determine the worker's ***Territory or State of connection*** through the application of the first test in paragraph 36B(2)(a): the worker usually works in the ACT, and is only visiting Victoria temporarily for work purposes.

If the worker was injured while at the conference in Melbourne, the worker would be covered by the employer's ACT workers compensation policy and is only entitled to compensation under the ACT workers compensation scheme.

In this example, the first part of the test in paragraph 36B(3)(a) determines the ***Territory or State of connection***, paragraphs (b) and (c) do not need to be considered.

B. Courier drivers working in both Canberra and New South Wales

A courier service has its head office in Canberra, and provides courier services to businesses in Canberra, Queanbeyan, Yass and Braidwood. Workers (who live in both the ACT and New South Wales) report to the office in Canberra to collect the courier vans and initial deliveries. Directions are received via radio throughout the day. The workers cross the border regularly and cannot be said to 'usually work' in either ACT or NSW.

In this example, it is not possible to determine the ***Territory or State of connection*** using the first part of the test in paragraph 36B(3)(a), as the workers do not 'usually work' in either the ACT or New South Wales. The second part of the test in paragraph 36B(3)(b) is then considered.

The workers in this example are 'usually based' in the ACT for the purposes of their employment, as they are required to report to the courier service's head office in Canberra to collect their delivery vans and initial orders each morning. Therefore, the ***Territory or State of connection*** for these workers is the ACT, and the courier service

would need to obtain an ACT workers' compensation policy for the courier drivers. If the workers were injured while making deliveries in New South Wales, they could only make compensation claims under the ACT workers compensation scheme.

In this example, the first part of the test in paragraph 36B(3)(a) did not determine the ***Territory or State of connection***, so the second part of the test in paragraph 36B(3)(b) was considered. The second part of the test determined the ***Territory or State of connection***, so it was not necessary to consider the third part of the test in paragraph (c).

C. Information technology consultants working across several States

An IT consulting company has its head office in the ACT. It operates computer data warehousing facilities in the ACT, Queensland, New South Wales and South Australia.

Trouble-shooters are employed full time by the company and are flown between different sites where they remain for periods ranging from a few weeks to a few months, until the issue is resolved. They are then directed and flown to the next location following a short break, over which time they return to their homes. The workers use equipment and materials at the company's various sites.

The first part of the test in paragraph 36B(3)(a) would not determine these workers' ***Territory or State of connection***, as they do not usually work in any one State or Territory, but are routinely required to work in different workers compensation jurisdictions.

The second part of the test in paragraph 36B(3)(b) similarly does not determine these workers' ***Territory or State of connection***, as the workers do not usually report to any particular location or 'base' to collect equipment or materials, so cannot be said to be 'usually based' in a particular jurisdiction.

Under the third limb of the test, in paragraph 36B(3)(c), the ACT would be the ***Territory or State of connection*** as this is where the workers' employer has its principal place of business.

There may be some limited cases where the three-limbed test established under subsection 36B(3) will still not determine a single Territory or State of connection – further provision is made for these situations in subsections 36B(4) – (6).

Subsection 36B(4) deals with workers on ships who have no ***Territory or State of connection*** determined under subsection (3). In the case of these workers, the ***Territory or State of connection*** is the jurisdiction in which the ship is or most recently became registered.

Subsection 36B(5) provides that in a situation where no ***Territory or State of connection*** can be determined under subsection (3), no compensation is payable to the injured worker

under the law of another country or an external territory and the worker was injured in the ACT, then the ***Territory or State of connection*** will be the ACT.

Subsection (6) provides some guidance as to when a worker can be said to 'usually work' in a jurisdiction for the purposes of applying the first limb of the test in paragraph 36B(3)(a). In deciding whether a worker 'usually works' in a Territory or State, regard must be had to:

- the workers' employment history with the employer over the preceding 12 months;
- the worker's proposed future working arrangements;
- the intentions of the worker;
- the intentions of the employer;
- any period during which the worker worked in another Territory or State for the employment (however, arrangements where the worker is working in another jurisdictions in a temporary capacity for less than six months must not be considered).

Therefore, if a worker who usually works in the ACT is temporarily placed by their employer in another jurisdiction for a period of less than six months, this will generally be disregarded in working out where the worker 'usually works' under paragraph 36B(3)(a). However, if the worker is sent to work in another jurisdiction temporarily for more than six months out of a twelve-month period, it is likely that they will be considered to usually work in that other jurisdiction, as it is necessary for the purposes of the test to examine the workers employment history over a period of 12 months.

Subsection 36B(7) excludes a worker within the meaning of the *Seafarers Rehabilitation and Compensation Act 1992 (Cth)* from coverage under the ACT workers compensation scheme.

Subsection 36B(8) defines the term ***ship*** for the purposes of section 36B and clarifies the meaning of the term ***Territory or State*** with regard to geographical boundaries.

New section 36C provides that if a question as to a worker's ***Territory or State of connection*** arises in a matter before an ACT court, the court must apply the test in section 36B to determine if the ACT is the ***Territory or State of connection***. However, if a court of another jurisdiction has already made a determination in relation to the matter and that decision is recognised under new section 36E, then the ACT court is not to make the determination itself, but is to rely on the other court's decision.

New section 36D provides that if a claim for compensation has been made and a party to that claim for compensation applies to the ACT Magistrates Court for a determination of the ***Territory or State of connection***, the ACT Magistrates Court must determine the ***Territory or State of connection***. In determining the ***Territory or State of connection***, the ACT Magistrates Court must apply the tests in section 36B.

New section 36D also provides that an application for a determination may not be made or heard if a court of another jurisdiction has already made a determination in relation to the matter and that decision in relation to the ***Territory or State of connection*** is recognised under new section 36E.

New section 36E provides that if a determination as to the ***Territory or State of connection*** has been made by an ACT court, or a court or tribunal of another Territory or State under a corresponding law, that determination is to be recognised for the purposes of the *Workers Compensation Act 1951* as the ***Territory or State of connection***.

The new section does not prevent a party to the claim from making an appeal that relates to a determination of a court as to the ***Territory or State of connection***. If, as the result of an appeal, the determination as to the Territory or State of connection is changed, then the determination as changed on appeal is to be recognised for the purposes of the *Workers Compensation Act 1951* as the Territory or State of connection.

New section 36F is designed to prevent 'double-dipping' by injured workers, by making it clear that compensation is not payable under the *Workers Compensation Act 1951* in relation to a worker's injury if compensation has been received for the same injury under the laws of an external Territory or a jurisdiction outside of Australia.

If a worker receives compensation under the *Workers Compensation Act 1951*, and then subsequently makes a claim that results in the worker receiving external compensation for the same injury, then the employer is entitled to recover compensation from the worker. The employer is entitled to recover from the worker the lesser of the two amounts of compensation, including any legal costs as between party and party that are associated with that amount of compensation.

1.4 Section 144 (2)

This clause makes a consequential amendment to a reference to a provision that is amended by this Act.

1.5 Section 147

This clause substitutes a new section 147.

Under this section, employers are required to maintain a current workers compensation policy, with an approved insurer, for workers that they employ. The section is amended so that it is consistent with the new cross-border arrangements and the Criminal Code.

Subsection 147(1) requires employers to maintain a workers compensation policy. An employer will breach subsection 147(1) if they intentionally fail to take out a workers compensation policy – see section 22 of the Criminal Code. This offence, which requires mental fault, is subject to a maximum penalty of 250 penalty units, imprisonment for two

years, or both. Subsection 147(2) specifies that subsection 147(1) does not apply to a non-business employer (for example, a householder employing a nanny).

Subsection 147(3) establishes an accompanying strict liability offence for an employer who fails to take out a workers compensation policy. This offence does not require intention, the unintentional conduct described by the provision is sufficient to make the employer liable to prosecution. The strict liability offence in subsection (3) is subject to a lower maximum penalty of 50 penalty units and applies to non-business employers.

Subsection 147(4) specifies that an offence against subsection (3) is a strict liability offence.

New subsection 147(5) provides that the requirement to have a workers compensation policy with an approved insurer under section 147 does not apply to employers who are themselves approved as self-insurers. The section does also not apply in the circumstances where joint insurance policies are obtained. For example, two companies may enter into a joint venture to complete a project. As a part of the joint venture agreement, one of the companies party to the venture takes out a workers compensation policy that covers all of the workers on the project. In this situation, the other company could employ some of the workers, but because the policy taken out by the first company covers those workers, the other company without the policy would not breach section 147.

New subsection 147(6) contains a specific defence to the offences set out in subsections 147(1) and (3) associated with the new cross-border arrangements. If an employer believes on reasonable grounds that another State or the Northern Territory is the Territory of State of connection for a worker under new Part 4.2A, and the employer takes out workers compensation insurance for the worker in that other jurisdiction, as required by the laws of that other jurisdiction, then this is a defence to prosecution under section 147 for failure to take out a workers compensation policy in the ACT.

New subsection 147(7) provides that a cover note issued by an approved insurer to an employer is only a valid policy if it is replaced with a compulsory policy within thirty days of the cover note being issued.

1.6 Section 150

Clause 22 substitutes a new introduction to section 150 to enable renumbering within the section.

1.7 New section 150 (2)

This clause inserts new subsection 150(2). Under section 150, if an employer fails to maintain a compulsory workers compensation insurance policy, the Nominal Insurer may recover an amount equal to triple the premium that the employer would normally have had to pay as a debt.

New subsection 150(2) contains a specific defence to an employer's liability under section 150 associated with the new cross-border arrangements. If an employer believes on reasonable grounds that another State or the Northern Territory is the ***Territory of State of connectio***n for a worker under new Part 4.2A, and the employer takes out workers compensation insurance for the worker in that other jurisdiction, as required by the laws of that other jurisdiction, then this is a defence to liability under section 150.

1.8 Chapter 9 heading

This clause substitutes a new heading for Chapter 9, Common law damages, and creates a new part 9.1, Interpretation and application.

1.9 New part 9.2 etc

This clause inserts a new part 9.2 Choice of law after section 182 of the Act, and a new heading, Part 9.3 Compensation and common law damages, before section 183.

New part 9.2 incorporates the second major component of the new cross-border arrangements, regarding choice of laws. The choice of laws provisions support the determination of the ***Territory or State of connection*** test, as under this part the law applied to the injured worker is that of the Territory or State determined under the tests set out in new section 36B.

The intention of the new part is to reverse the effect of the High Court of Australia's decision in *John Pfeiffer Pty Limited v Rogerson* [2000] HCA 36 (21 June 2000), by making the ***Territory or State of connection*** the jurisdiction in which a mater is heard, rather than the jurisdiction in which the actual injury occurred.

For example, if a worker was injured in the ACT, but a court determined in accordance with section 36B that South Australia was the ***Territory or State of connection*** for that worker, then South Australian law will govern the ability of the worker to take an action against their employer.

Clause 1.9 inserts new sections 182A, 182B, 182C, 182D and 182E.

New subsection 182A(1) inserts definitions of the terms ***damages claim***, ***employer***, ***substantive law***, and ***worker*** that are used in Part 9.2.

New subsection 182A(2) defines the term ***work-related injury*** for the purposes of Part 9.2. A work-related injury is defines as an injury to a worker for which compensation is payable under a workers compensation law of a Territory or State, whether or not compensation has actually been paid to the worker.

New subsection 182A(3) further clarifies the definition of a ***work-related injury*** by specifying that an injury is work-related even if the law of a particular jurisdiction

excludes the worker from making a claim because the injury is attributable to the worker's own conduct or failure, or the worker did not make the claim (or an election associated with the claim) properly.

New section 182B defines the term ***substantive law*** that is used in Part 9.2. ***Substantive law*** includes laws that:

- establish, modify or extinguish a cause of action or a defence to a cause of action;
- impose time limits on when an action may be brought;
- limit the kinds of injury, loss or damage for which an action may be brought,
- prevent the recovery of damages or compensation;
- are expressed as presumptions, or rules of evidence, that affect substantive rights;
- a provision of Chapter 9.2 of the Workers Compensation Act 1951; and
- provisions of the laws of other States and Territories that are prescribed under the regulations.

However, subsection 182B(2) provides that ***substantive law*** does not include a law that prescribes choice of law rules.

New section 182C defines the term ***damages claim***, used in Part 9.2, as a claim for damages that is related to a work-related injury, where that injury was caused by or claimed to be caused by either the negligence or some other tort by the employer (or an agent of the employer where the employer could be vicariously liable for the agent's acts).

The term also includes a claim for damages in relation to a work-related injury caused by a breach of contract by the employer. A claim for damages includes a claim for an injury caused or alleged to be caused through the negligence of the employer, even if the damages are claimed in an action for breach of contract.

New subsection 182D provides that it is the substantive law of the Territory or State of connection that governs whether or not the injured worker can bring a common law action for damages in relation to their injury. The substantive law of that jurisdiction of connection will also determine the nature and quantum of damages.

For example, if a worker who was injured while in the ACT was actually connected with South Australia as determined by the tests contained in new section 36B, that worker could not make a claim for damages in the ACT. The worker would also be prevented from making a claim for damages in South Australia, as South Australian law specifically prohibits a worker from making a claim for damages against their employer. However, if the same worker were connected with Tasmania under the section 36B test, then the worker would be able to make a claim for damages in Tasmania, subject to meeting the qualifying tests set out in Tasmanian workers compensation legislation.

New section 182E limits the application of the choice of law provisions in Part 9.2. The provisions only apply to a damages claim against an employer, a person who is

vicariously liable for the acts of the employer, or a person for whose acts the employer is vicariously liable.

1.10 Chapter 16 heading

This clause substitutes the existing Chapter 16 heading with a new heading, Transitional-Workers Compensation Amendment Act 2001.

1.11 New chapter 17

This clause inserts a new Chapter 17 Transitional – Workers Compensation Amendment Act 2003 (No 2).

Chapter 17 contains the transitional provisions associated with the introduction of the new cross-border arrangements. The transitional provisions will expire two years after commencement.

New section 247 contains definitions for two terms used in Chapter 17: ***cross-border scheme commencement day*** and ***cross-border scheme provisions***.

The ***cross-border scheme commencement day*** is the day the cross-border amendments in new part 4.2A, new Part 9.2 and new schedule 2 to the *Workers Compensation Act 1951* are inserted by the *Workers Compensation Amendment Act 2003 (No 2)*. The commencement of these provisions will be on a day determined by the Minister in writing, timed to coincide with the commencement of complementary provisions in New South Wales.

Section 248 provides that the new cross-border provisions do not apply to an injury received before the ***cross-border scheme commencement day***, and preserve the operation of the former provisions of the Act in relation to these injuries, as if the new cross-border provisions had not been made.

If the death of the worker or a period of incapacity results from more than one injury, one before and one after the ***cross-border scheme commencement day***, then under new subsections 248(3) and (4), the worker's death or period of incapacity is deemed to have occurred as a result of the later injury.

Subsection 248(6) specifies that compulsory insurance policies that are in force on the commencement day will cover employers for their liability under this Act, as amended by the cross-border scheme provisions, until the policy expires.

Section 249 provides that the transitional arrangements for the cross border scheme provisions will expire two years after the commencement day.

1.12 New schedule 2

This provision inserts a new schedule into the *Workers Compensation Act 1951*, Schedule 2 Adjacent areas.

The provisions of Schedule 2 are technical in nature, and are required for the purposes of establishing workers' ***Territory or State of connection*** under new section 36B, particularly regarding maritime workers. The schedule relates to continental shelf and territorial sea areas designated under Commonwealth legislation for New South Wales, Victoria, South Australia, Tasmania, Queensland, Western Australia and the Northern Territory.

1.13 Dictionary, new definition of *damages* and *damages claim*.

This clause inserts new definitions for the terms ***damages*** and ***damages claim*** into the Dictionary. These new definitions reflect the new cross-border arrangements.

1.14 Dictionary, definition of *employer*, paragraph (b)

This clause inserts new paragraphs into the definition of employer in the Dictionary. The new paragraphs make reference to specific definitions of employer contained in the new cross-border provisions.

1.15 Dictionary, new definition

This clause inserts a new definition of the term ***employment*** into the Dictionary. The term is used for the purposes of new section 36A.

1.16 Dictionary, definition of *injury*, new note

This clause inserts a new note after the existing definition of ***injury***. The new note directs the reader to the extended meaning of injury in chapter 9, at section 180.

1.17 Dictionary, definition of Territory worker

This clause inserts new definitions of ***substantive law***, ***Territory or State of connection*** and ***Territory worker*** in the Dictionary. These new definitions reflect the new cross-border arrangements.

1.18 Dictionary, definition of *worker*

This clause inserts new definitions of the terms ***worker***, ***workers compensation law*** and ***work-related injury*** into the dictionary. These new definitions reflect the new cross-border arrangements.

Schedule 2 Criminal Code harmonisation

Part 2.1 Workers Compensation Act 1951

2.1 New section 3A

This clause inserts a new subsection 3A into the Act. New subsection 3A applies the ACT Criminal Code to offences in the *Workers Compensation Act 1951*.

The Criminal Code will apply to all ACT legislation from 1 January 2006, however, all amending legislation introduced after 1 January 2003 must be compliant with the Criminal Code. As the other amendments made by this Bill affected a substantial number of offences under the *Workers Compensation Act 1951*, it was decided to introduce amendments making all offences under the *Workers Compensation Act 1951* compliant with the Criminal Code, to avoid confusion for users of the legislation.

Where offence provisions are amended in other respects, the necessary 'criminal code' changes have been built into the new amended provisions in the other Parts and schedules of this Act.

Where offence provisions are being amended solely to make them consistent with the Criminal Code, those amendments are included in this schedule.

The ACT Criminal Code reforms the ACT's criminal laws by adopting general principles of criminal responsibility, and standard provisions regarding burdens of proof and defences. It also defines fault elements for offences, including conduct, intention, knowledge, recklessness and strict liability. More information about the Criminal Code is available in the Explanatory Statement to the *Criminal Code 2002*.

The Criminal Code harmonisation schedule amends the following offence provisions in the *Workers Compensation Act 1951*:

- Section 90 (Insurer's obligation of prompt payment)
- Section 91 (Employer's obligations for injury management programs)
- Section 92 (Register of injuries)
- Section 100 (Employer's personal injury plan obligations)
- Section 105 (Employer must provide suitable work for full time, part time and casual workers)
- Section 106 (Employer must provide suitable work for contract workers)
- Section 109 (Workplace rehabilitation)
- Section 114 (Unreasonableness in stopping payment)
- Section 126 (Action by employer in relation to claims)
- Section 139 (Meaning of *approved rehabilitation provider* etc)
- Section 142 (Vocational rehabilitation)
- Section 153 (Compulsory insurance – insurers)

- Section 154 (Cancellation)
- Section 155 (Cover notes)
- Section 163 (Provision of information to Minister)
- Section 169 (Power of Supreme Court to set aside certain agreements)
- Section 170 (Intervention by nominal insurer)
- Section 174 (Information and assistance by employer to nominal insurer)
- Section 176 (Premiums – maximum rates)
- Section 178 (Workers' rights to information)
- Section 189 (Identity cards)
- Section 190 (Provision of information to inspectors)
- Section 191 (Entry and inspection of premises)
- Section 194 (Obstruction etc of inspector)
- Section 210 (Confidentiality)
- Section 213 (False information etc)
- Section 214 (Criminal liability of executive officers)

The schedule also amends Regulation 99 (Court approved termination) of the Workers Compensation Regulations 2002.

It should be noted that the Criminal Code provides that all strict liability offences have a specific defence of mistake of fact, in addition to any specific defences set out in other legislation.

Several provisions of the *Workers Compensation Act 1951* previously established 'reasonable excuse' defences to offences:

- Section 114 (Unreasonableness in stopping payment)
- Section 126 (Action by employer in relation to claims)
- Section 190 (Provision of information to inspectors)
- Section 191 (Entry and inspection of premises)

These defences have been removed by these amendments, as the general defence of mistake of fact is available under the Criminal Code.

2.2 Section 90

This clause substitutes the existing section 90 with a new section 90 that is consistent with the Criminal Code.

Under subsection 90(1), insurers commit an offence if they fail to pay service providers within 30 days after a service has been provided, unless the insurer reasonably believes that the service has not been provided or improperly provided and has told the service provider in writing the reason for not paying for the service.

Subsection 90(3) specifies that this is a strict liability offence: there is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.3 Section 91

This clause omits the introduction of the existing section 91 and substitutes a new introduction to enable renumbering within the section.

2.4 New section 91 (2) and (3)

This clause inserts new subsections 91(2) and 91(3).

New subsection 91(2) clarifies that section 91 (Employer's obligations for injury management programs) does not apply to a non-business employer.

New subsection 91(3) specifies that an offence against this section is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.5 Section 92 (4)

This clause omits the words 'without lawful authority or excuse' in the existing subsection 92(4). These words are not required, given the application of the standard defences in the Criminal Code to the offence, and are not consistent with the Criminal Code.

2.6 New section 92 (7) and (8)

This clause inserts new subsections 92(7) and (8).

New subsection 92(7) specifies that the offences contained in subsections 92(3) and (4) are strict liability offences. These are strict liability offences as there is no fault element for the physical elements of the offences and the conduct described in the provisions alone is sufficient to make a person liable to prosecution.

New subsection 92 (8) provides a defence to a person who alters the injuries register to correct an error of fact. For instance, if a worker made an honest and reasonable mistake and entered the wrong date as the date of injury (eg at the beginning of a new calendar year, it is not uncommon to write the previous year) then the employer could correct the register in that circumstance.

2.7 New section 100 (4)

This clause inserts a new subsection 100(4) to specify that the offences in subsections 100(1) and (2) are strict liability offences. These are strict liability offences as there is no fault element for the physical elements of the offences and the conduct described in the provisions alone is sufficient to make an employer liable to prosecution.

2.8 Section 105 (1) to (3)

Clause 2.8 substitutes existing subsections 105(1) – (3), which relate to employers' requirements to provide suitable work for injured full time and casual workers.

The new subsections have been restructured to make them consistent with the Criminal Code.

New subsection (3) specifies that an offence under new subsection (2) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.9 Section 106 (1) to (3)

Clause 2.9 substitutes existing subsections 106 (1) – (3), which relate to employers' requirements to provide suitable work for injured contract workers.

The new subsections have been restructured to make them consistent with the Criminal Code

New subsection (3) specifies that an offence under new subsection (2) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.10 New section 106 (5)

This clause inserts a new subsection 106 (5) to provide two definitions for ***contract period*** and ***defined period*** that are used in the section.

2.11 Section 109

This clause substitutes the existing section 109 (Workplace rehabilitation) with a new section 109 that has been restructured so as to be consistent with the Criminal Code.

Employers must establish, maintain and display return to work programs that contain policies and procedures for the rehabilitation of the employers' injured workers. The former section 109 provided that there was just one offence that employers could commit against this section.

New subsection 109(1) provides that an employer must establish and maintain a return to work program that contains policies and procedures for the rehabilitation of the employers' injured workers

New subsection 109(2) provides that an employer must display or notify a return to work program at each place of work of the workers to whom the program relates.

New subsection 109(3) provides that the return to work program must provide polices and procedures for the rehabilitation the employer's injured workers. The employer's return to work program must also be consistent with the employer's insurer's injury management program. The employer's return to work program must also be established in accordance with any guidelines issued by the Minister under section 110. The employer's return to work program must also be developed in consultation with the employer's workers, the workers' union representatives and a rehabilitation provider.

New subsection 109(4) provides an exemption to the requirement that an employer must establish an individual return to work program if the employer is part of a group of employers sharing a jointly-established return to work program, they have written authorisation to do this from the Minister, and the jointly established return to work program complies with subsection 109(3).

New subsection 109(5) provides that this section does not apply to a non-business employer.

New subsection 109(6) provides that an offence under section 109 is a strict liability offence. These are strict liability offences as there is no fault element for the physical elements of the offences and the conduct described in the provisions alone is sufficient to make an employer liable to prosecution.

2.12 Section 114 (4)

This clause substitutes existing subsection 114(4) with a new subsection and inserts a new subsection 114(5) into section 114 (Unreasonableness in stopping payment).

New subsection 114(4) has been restructured so as to be consistent with the Criminal Code.

New subsection 114(5) provides that an offence against this section is a strict liability offence. This is a strict liability offence as there is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.13 Section 126 (1) and (2)

This clause substitutes the existing subsections 126(1) and (2) with new subsections, which have been slightly amended to clarify obligations under the provisions.

2.14 Section 126 (5)

This clause substitutes the existing subsection 126 (5) with a new subsection.

New subsection 126 (5) provides that an offence under subsections 126 (1), (2) or (3) is a strict liability offence. These are strict liability offences as there is no fault element for the physical elements of the offences and the conduct described in the provisions alone is sufficient to make the employer liable to prosecution.

2.15 Section 139 (1)

This clause omits the word 'chapter' from subsection 139(1) and substitutes it with the word 'Act'. This corrects a minor error.

2.16 New section 142 (5)

This clause inserts a new subsection 142(5) into section 142 (Vocational rehabilitation).

New subsection 142(5) provides that an offence under subsection 142(1) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.17 Section 148

This clause omits the existing section 148. New section 214 (see clause 2.42 below) now establishes the offence and penalty provisions previously provided for in section 148.

2.18 Section 153 (3)

This clause substitutes the existing subsection 153(3) with a new subsection and inserts a new subsection 153(4).

New subsection 153(3) has been amended so as to be consistent with the Criminal Code. It establishes two situations where the offence in subsection 153(1) does not apply to an insurer refusing to issue a compulsory insurance policy to an employer:

- where the employer has not paid for the policy; or
- where the employer has not provided information reasonably requested by the insurer in relation to the policy.

New subsection 153(4) specifies that an offence against this section is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.19 Section 154

This clause substitutes the existing section 154 (Cancellation).

Section 154 has been restructured so as to be consistent with the Criminal Code.

New subsection 154(2) specifies that an offence under new subsection 154(1) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.20 New section 155 (1A)

This clause inserts a new subsection 155(1A).

New subsection 155 (1A) provides that an offence against subsection 155(1) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.21 Section 155

This is formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

2.22 Section 163 (1) (c)

This clause substitutes existing paragraph 163(1)(c) with a new paragraph, containing an amendment consequential to amendments made to section 214 (see clause 2.42 below).

Section 163 (3)

This clause substitutes existing subsection 163 (3) with a new subsection. New subsection 163(3) makes an amendment consequential to restructuring of other subsections in section 163.

2.24 Section 163 (5)

This clause omits the words ‘an offence against subsection (6)’ from the existing subsection 163 (5) and substitutes the words ‘an applicable offence’. This is a consequential amendment.

2.25 Section 163 (6)

This clause substitutes existing subsection 163(6) with a new subsection and inserts new subsections 163(7) and (8).

New subsection 163(6) has been restructured so as to be consistent with the Criminal Code.

New subsection 163(7) specifies that an offence under section 163 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make a person liable to prosecution.

New subsection 163(8) provides a definition of the term ***applicable offence***, used in the section.

2.26 New section 169 (8A)

This clause inserts a new subsection 169(8A), which specifies that an offence under subsection 169(8) is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the plaintiff liable to prosecution.

2.27 Section 169

This clause is a formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

2.28 Section 170 (3)

This clause substitutes the existing subsection 170(3) with a new subsection and inserts new subsections 170(3A) and (3B) into section 170 (Intervention by nominal insurer).

New subsection 170(3) has been restructured so as to be consistent with the Criminal Code.

New subsection 170(3A) provides a specific defence to an offence against this section.

New subsection 170(3B) provides that an offence against section 170 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the alleged employer liable to prosecution.

2.29 Section 170

This clause is a formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

2.30 Section 174 (2), penalty

Clause 2.30 substitutes the existing words 'Maximum penalty (subsection (2)): 50 penalty units' in subsection 174(2) with the words 'Maximum penalty: 50 penalty units'.

This clause clarifies that the penalty applies to the entire section 174 (Information and assistance by employer to nominal insurer).

2.31 New section 174 (3)

This clause inserts a new subsection 174(3).

New subsection 174 (3) specifies that an offence against section 174 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.32 Section 176

This clause omits the introduction of the existing section 176 and substitutes a new introduction to enable renumbering within the section.

2.33 New section 176 (2)

This clause inserts a new subsection 176(2) into section 176 (premiums –maximum rates).

New subsection 176 (2) specifies that an offence against section 176 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.34 New section 178 (5)

This clause inserts a new subsection 178(5) into section 178 (Workers' rights to information).

New subsection 178 (5) specifies that an offence against section 178 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.35 Section 189 (2), penalty

Clause 2.35 substitutes the existing words 'Maximum penalty (subsection (2)): 1 penalty units' in subsection 189(2) with the words 'Maximum penalty: 1 penalty units'.

This clause clarifies that the penalty applies to the entire section 189 (Identity cards).

2.36 New section 189 (3)

This clause inserts a new subsection 189(3).

New subsection 189(3) specifies that an offence against section 189 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the person liable to prosecution.

2.37 Section 190 (3) and (4)

This clause substitutes existing subsections 190(3) and (4) with new subsections.

New subsection 190(3) provides that an employer must comply with a notice given to the employer by an inspector under subsections 190(1) and 190(2). This provision (previously subsection 190(4)) has also been restructured so as to be consistent with the Criminal Code.

New subsection 190(4) specifies that an offence against section 190 a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the employer liable to prosecution.

2.38 Section 191 (5)

This clause substitutes existing subsection 191(5) with a new subsection and inserts a new subsection 191(5A) into section 191 (Entry and inspection of premises).

New subsection 191(5) has been restructured so as to be consistent with the Criminal Code.

New subsection 191(5A) specifies that an offence against section 191 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the person liable to prosecution.

2.39 Section 191

This is a formal provision requiring the renumbering of subsections when the Act is next republished under the Legislation Act.

2.40 Section 194

This clause substitutes existing section 194 with a new section. New section 194 has been restructured so as to be consistent with the Criminal Code.

2.41 Section 210

This clause substitutes the existing section 201 with a new section.

New subsection 210(1) has been restructured so as to be consistent with the Criminal Code.

New subsection 210(2) provides a specific defence for disclosure of information required under the Act or by law. For instance an approved insurer is required to provide information relating to claims to the Minister. Thus the insurer would not commit an offence against this section in that circumstance.

New subsection 210(3) specifies that an offence under section 210 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the person liable to prosecution.

2.42 Sections 213 and 214

This clause substitutes the existing sections 213 and 214 with new section 213 (False information etc) and section 214 (Criminal liability of executive officers).

New subsection 213(1) provides that section 213 applies to the following statements, described as ***relevant statements***:

- a statement in a notice
- a statement in a certificate made by a recognised auditor
- a statement in a claim for compensation
- a statement in a medical certificate or other document relating to a claim
- a statement giving information to someone about a claim.

New subsection 213(2) provides that the section applies to relevant statements verified by a statutory declaration.

New subsection 213(3) provides that the requirements of the section do not apply to statements or other information given in a court proceeding or a statement or information made by a person not knowing that the information was in relation to a claim for compensation.

New subsection 213(4) provides that a person commits an offence if they make a relevant statement knowing it to be false, misleading or omitting information that makes the statement misleading. The maximum penalty for this offence is 100 penalty units, imprisonment for one year or both.

New subsection 213(5) provides that a person commits an offence if they make a relevant statement and are reckless as to whether the statement is false, misleading or omitting information that makes the statement misleading. The maximum penalty for this offence is 50 penalty units, imprisonment for six months or both.

New subsection 213(6) establishes a defence to these offences: subparagraphs 213(4)(b)(i) and (5)(b)(i) do not apply if the statement is not false or misleading in a material particular.

New subsection 213 (7) establishes a defence to these offences: subparagraphs 213(4)(b)(ii) and (5)(b)(ii) do not apply if the omission does not make the statement misleading in a material particular.

New section 214 relates to the criminal liability of executive offices of corporations.

New subsection 214(1) provides that an executive officer of a corporation also commits an offence if:

- the corporation contravenes a defined provision in the Act;
- the contravention is a relevant offence against the Act;
- the officer was reckless as to the contravention occurring;
- the officer was in a position to influence the conduct of the corporation; and
- that officer failed to take all reasonable steps to prevent the contravention.

New subsection 214(2) provides that the provisions of this section still apply even if the corporation is not prosecuted for, or convicted of the relevant offence.

New subsection 214 (3) provides that a court must, in deciding whether the executive officer took or failed to take reasonable steps to prevent the commission of the offence have regard to the following:

- any action the officer took to ensure that the corporation arranged regular professional assessments of the corporation's compliance with the defined provision;

- any action the officer took to ensure that the corporation implemented appropriate recommendations arising from that assessment;

- any action the officer took to ensure that other employees, agents and contractors have a reasonable knowledge and understanding of the requirement to comply with the defined provision; and

- any action the officer took when they became aware that the contravention was, or might be, or about to happen.

New subsection 214(5) provides that if a corporation has a defence to a prosecution for the relevant offence, then section 214 does not apply.

New subsection 214 (6) sets out which provisions of the Act are ***defined provisions*** for the purposes of section 214:

- Section 92(3) (Register of injuries);
- Section 126 (Action by employer in relation to claims);
- Section 142(1) (Vocational rehabilitation);
- Section 147 (Compulsory insurance- employers);
- Section 153 (Compulsory insurance – insurers);
- Section 156 (Information for insurers on application for issue or renewal of policies);
- Section 157 (Information for insurers after renewal of policies);
- Section 158(2) (Information for insurers after end or cancellation of policies);
- Section 159 (Information for new insurers after change of insurers);
- Section 160(1) (Six-monthly information to insurers);
- Section 161 (Statutory declarations – false information etc);
- Section 162(3) (Employment after 2nd offence);
- Section 163(6) (Provision of information to Ministers);
- Section 176(1) (Premiums – maximum rates);
- Section 190(3) (Provision of information to inspectors);
- Section 191(5) (Entry and inspection of premises);
- Section 194(1) (Obstruction or hindrance of inspectors);
- Section 210 (Confidentiality);
- Section 213 (False information etc).

2.43 Dictionary, definition of *approved rehabilitation provider*

This provision substitutes the former definition and reflects a consequential amendment to a cross-reference to new subsection 139(1).

Part 2.2 Workers Compensation Regulations 2002

2.44 New regulation 2

This clause inserts a preamble to the regulations to explain how the application of the Criminal Code affects offences under the regulations. It is similar to the preamble in part 2.1 of this schedule.

2.45 Regulation 99 (3A)

This clause inserts a new subregulation 99(3A) into regulation 99 (Court approved termination).

New subregulation 99(3A) specifies that that an offence against regulation 99 is a strict liability offence. There is no fault element for the physical elements of the offence and the conduct described in the provision alone is sufficient to make the insurer liable to prosecution.

2.45 Regulation 99

This is a formal requirement requiring the renumbering of subregulations when the regulations are next republished under the Legislation Act.