

Workers Compensation (Cross Border Workers) Approved Protocol 2012 (No 1)

Notifiable instrument NI2012–362

made under the

Workers' Compensation Regulation 2002, reg 101 (Approved protocols for Insurers)

1 Name of instrument

This instrument is the *Workers Compensation (Cross Border Workers) Approved Protocol 2012 (No 1)*.

2 Commencement

This instrument commences on the day following notification.

3 Approval

I approve the attached Protocol for Cross Border Workers.

Dr Chris Bourke
Minister for Industrial Relations
17 July 2012

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ACT WORKERS' COMPENSATION SCHEME

PROTOCOL FOR CROSS BORDER WORKERS

1 LAW AND POLICY

1.1 The *Workers Compensation Act 1951* (the WC Act) establishes a statutory workers' compensation scheme for the Territory's private sector (the ACT Scheme), which obliges employers to compensate workers who suffer a personal injury that arises 'out of, or in the course of' their employment with that employer.

1.2 Where a worker undertakes work across more than one State or Territory (i.e. where they are a cross-border worker) the 'State of Connection' provisions determine the jurisdiction in which an employer is required to obtain (and maintain) workers' compensation insurance for that worker.

1.3 In the ACT, the test for determining workers' compensation coverage for cross-border workers is set out in Part 4.2A of the WC Act. Under s 36B(1) of the WC Act compensation is only payable where a worker's employment is connected with the ACT – this is referred to as the 'State of Connection'.

1.4 Section 147 of the WC Act sets out the circumstances in which an employer may be found to have committed an offence if they do not hold a compulsory insurance policy issued by an approved insurer for their workers, including any cross-border workers that they engage.

1.5 The purpose of this protocol is to outline the tests that apply to determine whether, for workers' compensation purposes, an individual's employment is connected with the ACT.

2 WHAT IS THE TEST AND HOW DOES IT OPERATE?

2.1 The State of Connection test is made up of five steps which need to be considered in order. It is important that you always start with step 1. After that, it is only necessary to consider the next step if the previous step does not decide a worker's State of Connection.

Step 1	Where does the worker usually work?
Step 2	Where is the worker usually based?
Step 3	Is there a State or Territory in which the employer's principal place of business in Australia is located?
Step 4	What if steps 1, 2 and 3 do not decide the State of connection and the worker works on a ship?
Step 5	What if steps 1, 2, 3 and 4 do not decide the State of connection and the worker is injured?

2.2 It is important to note that these steps apply to a particular contract or term of employment for a worker. If employment circumstances change, the test should be revisited.



3 STEP 1 – WHERE DOES THE WORKER USUALLY WORK?

3.1 This step focuses on the State/Territory in which an individual “usually” works. For these purposes, “usually” means the State/Territory in which the worker works in his or her employment with their employer.

3.2 The word “usually” means *habitual or customary or in a regular manner*.^{*} This does not involve an assessment of the proportion of time that a worker spends in each State/Territory, the test is **not time based**.

If...	then...
the worker usually works within a single State or Territory	that State or Territory is the worker’s State of Connection because the worker usually works in that State or Territory.
step 1 does not decide the State of connection	you need to consider step 2.

3.3 Consider the following factors and examples in deciding where a worker usually works:

- the worker’s work history with the employer over the previous 12 months;
- the worker’s proposed future working arrangements;
- the intentions of the worker and employer;
- the terms of any contract of employment between the employer and the worker;
- Any period during which the worker in a Territory or Stat (a relevant place) or was in a relevant place for the purposes of employment, whether or not the worker is regarded as working or employed in the relevant place under the workers compensation law of the relevant place; and
- Where the worker actually performs the work rather than where the work is required to be performed.

3.4 In determining where a worker usually works, s 36B(6)(b) provides that consideration should not given to any temporary working arrangement of six months or less that may arise under the contract between the employer and the worker.

^{*} *Michael Hanns v Greyhound Pioneer Australia Ltd* [2006] ACTSC 5 (8 February 2006).



Example 1: Worker usually works in a single State/Territory

Emma is employed as an Electrical Trade’s Assistant with NSW based employer ‘B’. Emma performs all of her employment duties on worksites in the ACT, taking her own vehicle to work and providing her own tools and equipment. She does not attend her employer’s premises in NSW in the course of her day-to-day duties and receives all of her instructions from the relevant project manager on sites in the ACT.

In this case, Emma performs work for her employer in the ACT and under step 1 her State of Connection is the ACT.

Example 2: Worker usually works in more than one State/Territory[†]

An employer carries on business as an interstate bus operator from premises in Canberra, ACT. Ray is engaged by the employer as a bus driver, mainly driving buses between Canberra and Sydney but also on the Canberra/Melbourne and Canberra/Thredbo routes. Occasionally Ray drives charter buses entirely within the ACT for the employer.

In this example Ray usually works in ACT, NSW and VIC. Therefore, step 1 does not decide the State of Connection and step 2 must be considered.

4 STEP 2 – WHERE IS THE WORKER USUALLY BASED?

4.1 This should only be considered if Step 1 does not identify a single State or Territory in which the worker usually works.

4.2 The focus of Step 2 is on the subjective employee circumstances rather than the employer’s business activities.[‡]

If.....	then.....
<p>Step 2.1</p> <p>the worker usually works for the employer in more than one State or Territory but is provided with a place which s/he is expected to operate from,</p>	<p>the worker is usually based at that place and the State or Territory in which the base is located is the State of Connection.</p>
<p>Step 2.2</p> <p>step 2.1 does not decide the State of Connection, but there is a place from which your worker routinely receives day to day work instructions or directions,</p>	<p>the worker is usually based at that place and the State or Territory in which is located is the State of Connection.</p>

^{† †} *Michael Hanns v Greyhound Pioneer Australia Ltd* [2006] ACTSC 5 (8 February 2006)

[‡] *Avon Products Pty Ltd v Magnt Falls* [2010] ACTA 21



Step 2.3 If step 2.2 does not decide the State of Connection, but there is a place the worker attends to collect materials for the purposes of their employment,	the worker is usually based at that place and the State or Territory in which it is located is the State of Connection.
Step 2.4 step 2.3 does not decide the State of Connection, but there is a place where the worker reports for administrative, human resources and other non-specific related employment issues,	the worker is usually based at that place and the State or Territory in which it is located is the State of Connection.
Step 2.5 If Steps 2.1 to 2.4 do not decide the State of Connection,	Step 3 must be considered.

Example 3: The worker is usually based in a single State/Territory

Jenny is a sales representative for XYZ. Each morning Jenny is required to attend a warehouse in NSW to collect her employer's products, which she is then required to distribute at various retail outlets in NSW and ACT. Jenny uses a vehicle supplied by her employer, which she garages at her home in NSW. At the end of each day Jenny is required to return any unsold merchandise to the warehouse in NSW.

Jenny works without day-to-day supervision. Her immediate manager is located in XYZ's ACT office and is the person to whom she is required to send reports and time sheets and to whom she reports verbally by telephone from time to time.

Jenny sends all written correspondence to her manager via a facsimile located at her home in NSW. All invoice books which Jenny needs to carry out her duties are mailed to her home in NSW from where she prepares all documentation related to her employment.

In this example it is likely that Jenny is usually based in NSW for the purposes of her employment with XYZ. The employer's NSW warehouse is a place provided by XYZ that Jenny is expected to operate from.



Example 4: The worker has no single State/Territory from which they are usually based

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

Paul transports goods between NSW, QLD and WA. His contract of employment specifies that he is employed to undertake transporting services across each of these States.

Paul routinely receives instructions from each of the depots he stops at in NSW, QLD and WA, receiving ad hoc instructions via radio while in transit.

In this example, it is unlikely that Paul’s employment would be usually based in any single State or Territory. Step 3 would need to be considered.

5 STEP 3 – IS THERE A STATE OR TERRITORY IN WHICH THE EMPLOYER’S PRINCIPAL PLACE OF BUSINESS IN AUSTRALIA IS LOCATED?

5.1 You only need to consider Step 3 if Steps 1 and 2 fail to identify a single State/Territory.

If.....	then.....
neither step 1 nor step 2 decides the State of Connection and there is a State or Territory in which the employer’s principal place of business in Australia is located,	that State or Territory is the worker’s State of Connection.
step 3 does not decide the State of Connection,	Step 4 must be considered if the worker works on a ship or step 5 for all other types of workers

5.2 The location of an employer’s principal place of business in Australia is the most important or main place where the employer conducts the main part or majority of its business in Australia.

5.3 The following factors should be considered in deciding the employer’s principal place of business in Australia:

- The address registered on the Australian Business Register in connection with the employer’s Australian Business Number (ABN).
- If the employer is not registered for an ABN, the State registered on the Australian Securities and Investments Commission’s National Names Index, as being the jurisdiction in which the employer’s business or trade is carried out.
- The employer is not registered for an ABN or on the National Names Index, it’s business mailing address.



Example 5

An employer operates an interstate transport business. The three trucks required for the conduct of the business are registered in Queensland and serviced at the employer's depot in Brisbane Queensland. When not in use, all of the vehicles are parked at the depot.

Two of the trucks operated by the business are involved almost exclusively in delivery work within Queensland on a daily basis. The third vehicle is used to transport loads between Brisbane and Port Kembla, New South Wales.

The employer also maintains an office at Kiama, NSW. All administrative activities for the business are carried out at this office including the payment of wages.

In this example, the employer's principal place of business in Australia is located in Queensland.

6 STEP 4 – WHAT IF STEPS 1, 2 AND 3 DON'T DECIDE THE STATE OF CONNECTION AND THE WORKER WORKS ON A SHIP?

6.1 Step 4, need only be considered if the worker's State of Connection is not decided by Steps 1, 2 or 3 and s/he works on a ship.

If....	Then....
the worker's State of Connection is not decided by steps 1, 2 or 3 and the worker works on a ship,	the worker's State of Connection, while working on a ship, is the State or Territory in which the ship is, or most recently became registered.
the worker's State of Connection is not decided by steps 1, 2, 3 or 4,	Step 5 must be considered.

6.2 For these purposes "ship" means any kind of vessel used in navigation by water, however propelled or moved, and includes all of the following if used wholly or primarily in navigation by water:

- a barge, lighter or other floating vessel; and
- an air-cushioned vehicle, or other similar craft.



7 STEP 5 – WHAT IF STEPS 1, 2, 3 AND 4 DON'T DECIDE THE STATE OF CONNECTION AND A WORKER IS INJURED?

7.1 Step 5 applies if a worker's State of Connection is not decided by Steps 1, 2, 3 or 4 and the worker is injured in the course of their employment.

If.....	Then....
Steps 1 to 4 do not decide the State of Connection and the worker has suffered a workplace injury or illness in a State or Territory	unless the worker is entitled to compensation for the same injury under the laws of a place outside Australia, then the State of Connection is the State or Territory in which the injury or illness was suffered.

7.2 However, compensation is not payable under the Act in relation to a worker's injury to the extent that compensation (**external compensation**) under the workers compensation law of an external Territory or a place outside Australia has been received in relation to the same injury.

7.3 If a person receives compensation under the Act from an employer in relation to a worker's injury and later receives external compensation in relation to the same injury, the employer is entitled to recover from the person the 'recoverable amount'.

7.4 Under the Act, the lesser of the following amounts is the recoverable amount:

- the amount of ACT compensation;
- the amount of external compensation.

7.5 If an amount of ACT compensation is paid in relation to a lump sum claim, the amount of ACT compensation applies as if the reference to the amount of ACT compensation paid by the employer included a reference to any legal costs as between party and party that the employer is liable to pay in relation to the claim.



8 WHERE CAN I GET FURTHER INFORMATION?

8.1 An employer or injured worker should also obtain independent legal advice as to the application of the *Workers Compensation Act 1951* and this protocol to individual circumstances or claims.

State/Territory	Contact details	Legislation
WorkSafe ACT	www.worksafety.act.gov.au 1300 302 502	Section 36B of the <i>Workers Compensation Act 1951</i>
WorkCover New South Wales	www.workcover.nsw.gov.au WorkCover Assistance Service 13 10 50	Section 9AA of the <i>Workers Compensation Act 1987</i>
WorkSafe Northern Territory	www.nt.gov.au 1800 250 713	Section 53AA of the <i>Work Health Act</i>
WorkCover Queensland	www.workcover.qld.gov.au 1300 362 128	Section 113 of the <i>Workers' Compensation and Rehabilitation Act 2003</i>
WorkCover South Australia	www.workcover.com 13 18 55	Section 6 of the <i>Workers Rehabilitation and Compensation Act 1986</i>
WorkCover Tasmania	www.tas.gov.au 1300 776 572	Section 31A of the <i>Workers Rehabilitation and Compensation Act 1988</i>
WorkSafe Victoria	www.worksafe.vic.gov.au WorkSafe Advisory Service 1800 136 089	Section 80 of the <i>Accident Compensation Act 1985</i>
WorkCover Western Australia	www.wa.gov.au 1300 794 744	Section 20 of the <i>Workers Compensation and Injury Management Act 1981</i>