SECOND READING SPEECH

Workers Rehabilitation & Compensation Amendment Bill 2012

Mr Speaker

I move that this Bill now be read for a second time.

Mr Speaker, the purpose of this Bill is to amend the *Workers Rehabilitation and Compensation Act 1988* to clarify the definition of worker.

As its title suggests, the Workers Rehabilitation and Compensation Act is about the treatment, rehabilitation and compensation of workers who suffer workplace injuries or diseases. The definition of the term 'worker' is obviously a fundamental aspect of the Act as it determines whether someone is entitled to workers compensation or not.

Traditionally, the term 'worker' has been understood to refer to a person who works under a contract of employment or a contract of service. A worker is expected to personally perform tasks allocated by their employer and is subject to their control and direction. This can be distinguished from an independent contractor who performs an agreed task for an agreed price and has control over how the work is performed.

Mr Speaker, the fundamental difference between a worker and an independent contractor is that a worker serves his employer in the employer's business, whereas an independent contractor carries on a business of his own. On the face of it that seems to be a fairly clear distinction and it is reflected in the current definition of 'worker' in the Act. However, over time the distinction has become blurred. Many workers, particularly the highly skilled, work with little supervision or control from their employers. Conversely, there have been a growing number of persons engaged as contractors under

arrangements that are very similar in reality to worker/employer relationships.

Mr Speaker, as I indicated earlier, this Bill is intended to clarify who is covered by the Act – that is, who is a worker. The impetus for these amendments came from a recent and tragic case where a young man (who I will refer to as the contractor) was very seriously injured whilst working for a brick manufacturing company (who I'll refer to as the host employer).

The contractor had been working at the host employer's workplace for a period of two years but he was not directly employed by the host employer. He had been engaged via a third party labour hire company under a type of contractual arrangement known as the 'Odco contracting system'. The contract specified that he was an independent contractor and not a worker of either the labour hire company or of the host employer.

Mr Speaker, notwithstanding the terms of this contract, the contractor lodged a workers compensation claim in respect of his injuries on the basis that he was a worker for the purposes of the Act. The legal basis for his claim was that despite the written contract purporting to make him an independent contractor, the true nature of his working arrangements was that of a worker working under a contract of service. His claim became the subject of extended litigation that was not finalised until July of this year. The Workers Rehabilitation and Compensation Tribunal found that he was a worker employed by the labour hire company. This determination was subsequently overturned on appeal with the both Supreme Court, and then later the Full Court of the Supreme Court, determining that the contractor was not a worker for the purposes of the Act. Unfortunately for the contractor, this leaves him with no entitlement to workers compensation. However, he may have a legal right to sue for damages through the common law system.

From a legislative perspective, this case was particularly significant as it was the first Tasmanian case that tested the status of a person engaged under the Odco contracting system.

Mr Speaker, I understand that the Odco contracting system has been used by a number of businesses in Tasmania as a means of engaging labour and I would like to briefly talk about this form of contracting.

The term 'Odco contracting system' arises out a Federal Court case in 1991. In that case, a labour hire company owned by Odco supplied workers to the building industry. The Full Court of the Federal Court found that these workers were not employed by the labour hire company because, under the terms of the contract, the labour hire company had little control over their work. Since that time, the Courts (including the High Court) have been divided on the status of persons engaged under this type of contracting system.

Mr Speaker, the Odco contracting system has been marketed to businesses as a legitimate form of contracting upheld by the High Court. At the other end of the spectrum, some commentators have labelled it a form of disguised employment established solely for the purpose of avoiding employer obligations, a practice that has become known as 'sham contracting'. In his submission to a House of Representatives Standing Committee enquiry into independent contractors and labour hire arrangements, Professor Andrew Stewart of the School of Law at Flinders University said:

> *Odco style arrangements were originally conceived, and continue to be promoted, as a means of avoiding a finding of employment status. There is no legitimate reason for their use and they should accordingly be prohibited.*

Mr Speaker, if I could now return to the amendments before us. As a result of the case I mentioned above the WorkCover Tasmania Board was asked to assess the legal implications arising from that case and to determine whether the definition of worker should be amended.

The Board concluded that there should be greater certainty about who is covered by workers compensation and that, on its own, the traditional common law contract of service test no longer provided that certainty. The Board noted that in recent years most States and Territories have introduced new measures to clarify coverage and address concerns about 'sham contracting'.

Mr Speaker, the Government accepts that the current definition of worker does not provide adequate certainty about who is covered under the Act and does not cater for the change in employment arrangements that we have seen in recent years. This ultimately leads to disputation and litigation causing expense and stress for all concerned. It may also encourage some businesses to exploit this uncertainty in order to avoid the various obligations placed on an employer. Sham contracting deprives workers of the usual employment entitlements such as superannuation, leave and workers compensation coverage. The Government is concerned about cases like the one I earlier referred to, where contractual arrangements result in persons who would otherwise be workers, missing out on the entitlements and benefits provided by the Act.

This Bill does not attempt to outlaw sham contracting. The Commonwealth Fair Work Act already contains provisions prohibiting this practice. However, the Bill does attempt to provide greater certainty of coverage for workers engaged under these types of contractual arrangements.

Mr Speaker, the first thing to note is that the Bill does not remove or change the common law contract of service test. Despite the criticism directed at the common law test, it remains the cornerstone of workplace relations laws across Australia. The test has evolved over time and continues to apply to and cover most workers.

However, as I have already mentioned, there are classes of work where the common law test is difficult to apply or may produce uncertain results. Some examples are taxi drivers, jockeys and

commission salespersons. These classes of work are clarified through specific deeming provisions in the Act.

The Act also includes a deeming provision, section 4B, to provide for the coverage of contractors who engaged in work that is not related to a trade or business carried on by the contractor. I understand there was some uncertainty about the potential impact of this provision at the time it was being introduced into the Act and to ease employer concerns an 'opt-out' provision was inserted. This allowed a contractor to opt not to be covered by the Act in respect to a contract if they took out personal accident insurance. Unfortunately, experience suggests that this provision is not well understood and has failed to provide any additional clarity or certainty.

This Bill repeals section 4B and inserts new provisions intended to clarify the status of contractors who are in employment like relationships and contractors under labour hire arrangements.

Mr Speaker the scope of the term 'worker' or 'employee' is a common issue across a range of legislation that impose obligations on employers and businesses. There have been suggestions that these terms should have a common definition applied across all employment legislation. While there is merit in this idea it is unlikely to be achieved in the foreseeable future. However, there has been a recent trend toward adopting legal terms and provisions that are applied in other legislation (particularly Commonwealth legislation) rather than using new terms that may produce unexpected results.

This Bill follows that trend by applying tests used in the Commonwealth Superannuation Guarantee (Administration) Act to determine whether a contractor is to be regarded as a worker or an independent contractor. Under the proposed new section 4B, a contractor will be deemed to be a worker for the purposes of the Act if the party that engages them has a legal obligation to make superannuation contributions for them. Therefore, if you are or should be paying superannuation for someone you have engaged to do

work, then you must also have workers compensation insurance covering that person.

However, as the superannuation threshold requirements may exclude some workers, section 4B will also deem a contractor to be a worker where:

- the contract is wholly or principally for the persons labour or skills;
- the contractor is not engaged to achieve a specific result (for example, engaged on an hourly rate rather than for a specified result); and
- the contractor must personally perform the work and cannot delegate it to someone else.

These tests also have their origin in the superannuation arena as they are applied to determine whether a contractor is a worker for the purposes of that legislation.

The Bill also inserts a new section 4BA to make it clear that a contractor engaged under a labour hire arrangement is taken to be a worker employed by the labour- hirer. This provision will close a loophole that resulted in the contractor in the case I mentioned being denied workers compensation.

Finally, Mr Speaker, the Bill inserts a new provision to clarify the status of persons who provide services of a private or domestic nature. This is intended to address concerns that the proposed amendments may have the unintended consequence of extending coverage to a wider range of domestic services, such as babysitting or gardening, where the frequency of the service is less than 8 hours a week.

I commend the Bill to the House.