CLAUSE NOTES

Construction Industry (Long Service) Amendment Bill 2013

Part 1 – Preliminary

Clause 1 Short title

This clause provides that the short title of the amending legislation will be the *Construction Industry (Long Service) Amendment Act 2013*.

Clause 2 Commencement

Under this clause, the Bill is to commence on a day to be proclaimed. The intention is that the Bill will be proclaimed once TasBuild has had an opportunity to revise the Rules of the Fund to reflect the new provisions in the legislation and to make any necessary modifications to its administrative procedures.

Clause 3 Repeal of Act

This is a standard repeal provision to remove the empty shell of the Bill after all its provisions have been transferred and come into effect in the Principal Act.

Part 2 – *Construction Industry (Long Service) Act 1997* amended

Clause 4 Principal Act

This clause provides that the Principal Act referred to in Part 2 of the Bill is the *Construction Industry (Long Service) Act 1997*. This Part of the Bill is making amendments to that Act.

The Principal Act establishes a portable long service scheme for employees in the construction industry. The scheme is administered by TasBuild Limited, a private trustee company. TasBuild administers the scheme through its Trust Deed and Rules.

Under the construction industry portable long service scheme, employees accrue long service entitlements as a result of their time engaged in the construction industry, rather than as a consequence of continuous employment with one employer. They are able to access their entitlements on completing 10 years of relevant employment. This can be achieved through a number of different periods of employment with different employers.

Clause 5 Section 3 amended (Interpretation)

This clause amends various definitions in the Act and introduces a number of new definitions (some of which come from TasBuild's Rules).

"amending Act": This is a new definition. It has been included as there are various references to the Bill (or Act as it will be if passed) throughout the proposed amendments. Generally these references relate to timeframes, that is, a particular action is to occur within so many days or months of the commencement of the amending Act. Using the term "amending Act" prevents having to refer to the full name of the legislation each time.

"ANZSIC Code": This replaces the definition of "Standard Industrial Classification" which referred to the 1993 edition of the ANZSIC (the Australian and New Zealand Standard Industrial Classification) Code. This definition refers to the most recent edition (2006) of the ANZSIC Code. References from the ANZSIC Code are used in the proposed new Schedule 1 *(see clause 18 below)*. Schedule 1, in conjunction with the proposed new section 3B *(see clause 6 below)*, determines what falls within the scope of "construction work".

"construction industry": This definition is to be removed from the Act. This is because under the proposed amendments, coverage under the scheme is in most cases dependent upon the type of work the employee is doing rather than the industry the employer is involved in. The key terms under the proposed amendments are "relevant employment" and "construction work" *(see clause 6 below)*.

"construction work": This is a new definition which simply refers to a new provision (section 3B) where the definition of "construction work" is set out in full *(refer to clause 6 below)*.

"corresponding law": This replaces the existing definition of corresponding law. The proposed new definition removes paragraph (b) of the current definition, which states that the law is declared to be a corresponding law by the Minister by notice published in the Gazette. The provision which uses the term "corresponding law" is section 21 in relation to reciprocal arrangements with other States and Territories. The requirements imposed by paragraph (b) of the existing definition have been removed because they add an unnecessary additional layer to the process and may present difficulties where corresponding laws are amended.

"current fund": This is a new definition which has been added to distinguish the fund under the new scheme established by the Act from the fund which was established under the previous repealed legislation (the *Long Service Leave (Construction Industry) Act 1971*). This is important in relation to provisions dealing with refunds of payments etc *(see clause 7 below - proposed new section 6B)*.

"employed or engaged in relevant employment": This is a new definition which simply refers to a new provision (section 3A) that sets out in full what relevant employment is. Relevant employment is a key concept in the proposed amendments *(see clause 6 below)*.

"employee": This definition is being replaced with a new definition referring to the proposed new section 3C which provides a detailed definition of who is an employer or employee *(see clause 6 below)*.

"employer": This definition is being replaced with a new definition referring to the proposed new section 3C which provides a detailed definition of who is an employer or employee *(see clause 6 below)*.

"land": This is a new definition which is being included in the Act to clarify that where the term "land" is used (that is, in the proposed new section 3A(4) and section 3C(4) and (5)), it includes:

- an area of land whether or not it is built on or enclosed; and

- buildings, structures, plant and equipment on the area of the land.

"payment": This is a new definition. Its purpose is to distinguish payments into the Fund made by employers in respect of employees in relevant employment from contributions to the Fund that are made on a voluntary basis by self-employed workers. Self-employed workers are not required to make payments under the Act. However, the TasBuild Rules do allow them to make contributions to the Fund on their own behalf if they have previously had payments made for them. This is purely on a voluntary basis. This being the case, it is necessary to distinguish these contributions from the payments made by employers as there are obligations under the Act attaching to employer payments that do not apply in respect of the voluntary contributions made by self-employed workers.

"predominantly": This is a new definition. It will be used in the determination of whether an employee is employed or engaged in relevant employment *(see clause 6 below in relation to the proposed new section 3A)*. Under this definition "predominantly" means 90 percent or more. However, the definition allows for an alternative percentage to be prescribed in regulations.

"relevant employment": This is a new definition which simply refers to a new provision (section 3A) that sets out in full what relevant employment is. Relevant employment is a key concept in the proposed amendments *(see clause 6 below)*.

"Standard Industrial Classification": This definition is to be removed from the Act as a result of the new definition relating to "ANZSIC Code".

"Trust Deed": This is an amendment to an existing definition to clarify that the term Trust Deed includes any amendments made to the Trust Deed. The Rules of the Fund, which are a schedule to the Trust Deed, will need to be amended to reflect the changes made by this Bill.

Clause 6 Sections 3A, 3B, 3C, 3D and 3E inserted

This clause inserts five new provisions into the Act. The proposed new provisions are as follows:

Section 3A – What is relevant employment

This proposed new provision is a key element in determining coverage under the scheme.

Along with the following two proposed new sections (sections 3B and 3C), this section is central to coverage under the Act – that is, who is covered by the TasBuild scheme. All three provisions and Schedule 1 must be read together to determine whether a worker comes within the scope of the scheme. One of the factors in whether a person is an employee for the purposes of the Act is whether that person is employed or engaged in "relevant employment". The new section 3A establishes the circumstances in which relevant employment exists.

Subsections (1)(a) to (c) specify the following people as being in relevant employment (note that in each case "predominantly" means 90% or more, unless otherwise prescribed):

- a person engaged or employed in an activity, other than manufacturing, if they are employed or engaged wholly or predominantly to carry out construction work *(see notes in relation to section 3B below);*

- a person who is employed or engaged in manufacturing if:
  - while he or she is employed or engaged, the person who employs or engages him or her is wholly or predominantly involved in construction work. For example, an employee making kitchen cabinets in a joinery workshop would be considered to be in relevant employment if their employer is (wholly or predominantly) installing kitchens on site; OR
  - TasBuild has made a determination to the effect that the person is employed or engaged in relevant employment.

- a contractor if he or she is employed or engaged for the duration of the contractual relationship wholly or predominantly for the carrying out of construction work (*see notes in relation to section 3B below*). This category is intended to reinforce that the scheme applies in relation to labour only contractors and labour hire workers (subject to the provisions of section 3C – *see clause notes in relation to section 3C below).*

In addition to the categories above, section 3A(1)(d) allows TasBuild to make a determination that a person is in relevant employment. This is intended to provide TasBuild with some discretion where a case may not quite satisfy the requirements, for example:

- where the employee just falls short of meeting the wholly or predominantly test;

- where the employee is usually in relevant employment, but for some reason has been temporarily in a position that is not in relevant employment for a short time; or

- where there may be other valid reasons for finding that a person is in relevant employment.

Proposed new section 3A(2) specifies that the period of employment or engagement includes paid leave, and leave taken while paid workers compensation under the *Workers Rehabilitation and Compensation Act 1988* or while the person is employed our engaged in employment made available under section 143L of that Act.

For clarification, proposed new sections 3A(3) and (4) specifically exclude some circumstances or categories of employees from being engaged or employed in relevant employment, as follows:

- a person engaged or employed, wholly or predominantly for one, or a combination, of the following purposes:
  - administration;
  - clerical;
  - managerial; or
  - any other prescribed purpose;

- a person who is only performing construction work for the purpose of maintaining land owned or leased by their employer where the primary commercial function of the employer does not involve construction work (for example, someone employed by a hospital to carry out maintenance work at the hospital).

Section 3B – What is construction work

This is a new provision setting out the definition of "construction work". As referred to above, this will be one of the key provisions in relation to coverage under the TasBuild scheme. The basis for the definition of construction work comes from the TasBuild Rules.

Coverage under the Act currently depends on involvement or engagement in the "construction industry" (for both the employer and employee). The construction industry is defined as any industry involved in any construction described in Divisions C (Manufacturing) or E (Construction) of the ANZSIC Code of 1993 (currently referred to in the Act as the "Standard Industrial Classification – *see under Clause 5 above*).

Under the Bill, the concept of "construction work" will be an important determinant of coverage, rather than the "construction industry". This is to reflect that (with the exception of manufacturing) the emphasis in determining coverage is on what type of work the employee is engaged in rather than the industry the employer is involved in.

Industry sectors will still play an important role in relation to coverage under the scheme. The description of "construction work" will be supported by reference to the relevant construction and (construction related) manufacturing industry sectors, which are listed in a new schedule (Schedule 1).

The sectors listed in Schedule 1 are aligned with the ANZSIC Code as per the updated 2006 edition. Unless the contrary intention appears, an expression used in Schedule 1 has the same meaning as in the ANZSIC Code.

Under section 3B, construction work means an activity described in Schedule 1 that includes construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition, maintenance, preparation, storing or repairs performed on site as part of that activity (a construction work activity). Construction work also includes transportation of materials and manufacturing where:

- the transportation of materials or manufacturing occurs in connection with the abovementioned construction work activities; AND

- the person doing the transportation or manufacturing (or someone else employed or engaged by their employer) is also carrying out the construction work activity on site.

The circumstances in which transportation and manufacturing constitute "construction work" are illustrated by the following examples.

Example 1:

Employee A and Employee B are both employed by Employer X. Employee A drives a truck carrying timber to a construction site. Employee B erects framework on the construction site using the timber transported by Employee A. The transportation of the timber falls within the definition of "construction work". (Note – other provisions (sections 3A and 3C) will also need to be applied to determine whether Employee A and Employee B come under the scope of the scheme).

Example 2:

Employee C and Employee D are both employed by Employer Y. Employee C makes kitchen cabinets off site at Employer Y's joinery workshop. Employee D installs the kitchen cabinets on site. The manufacture of the kitchen cabinets by Employee C falls within the definition of construction work. (Note – other provisions (sections 3A and 3C) will also need to be applied to determine whether Employee C and Employee D come under the scope of the scheme).

Section 3C – Who is an employer or employee

Under the Act, the obligations apply to an employer with respect to an employee. Section 3C is a new provision which describes three types of employment or engagement, in each case defining who is an employer and an employee for the purposes of the Act.

Subject to the constraints and limitations described more fully further below, under section 3C(1), the term "employee" includes a person employed or engaged in relevant employment under:

a) a contract where the employer is required by law to pay superannuation contributions for the person;

b) a contract with a labour hire agency; and

c) a contract of apprenticeship or training.

Also under section 3C(1), a person will be an employer for the purposes of the Act (which means that the person will have to register with TasBuild and make payments in respect of their employees) if that person engages or employs someone who comes within one of the abovementioned categories of employees. More detail on each of these three categories is provided below.

Contract where the employer is required by law to pay superannuation – proposed new section 3C(1)(a))

A person (referred to in section 3C as the "relevant person") will be an employee for the purposes of the Act, if:

- the relevant person is employed or engaged in relevant employment under a contract with another person; and

- the other person (the employer) has a statutory obligation to make superannuation contributions in respect of the relevant person.

Relevant employment is defined in the proposed new section 3A (*see clause note in relation to section 3A above*).

Including the superannuation criterion in the Act provides clarity, simplifies matters for employers, and increases certainty.

The concept of aligning the Act's coverage with superannuation laws is not new. There is a body of case law and determinations made under the Commonwealth's superannuation laws; and, under the current Trust Deed Rules, TasBuild has been applying the criteria from these laws and rulings in order to determine whether a person is engaged under a contract wholly or

principally for labour, and is therefore eligible for inclusion as an "employee" under the Act.

Consideration was giving to importing the Commonwealth's tests, for coverage under the superannuation laws, into the Act.

Consultations with stakeholders on this issue disclosed differing opinions on how best to achieve alignment and provide greater certainty for employers. The final Bill takes the approach of simply referring to a statutory requirement to make superannuation contributions. This approach gains the benefits of aligning with superannuation laws while maintaining consistency with those laws.

Labour hire – proposed new section 3C(1)(b)

This provision is intended to provide greater clarity and certainty about coverage of workers engaged via labour hire arrangements. In recent years, there has been a considerable increase in the use of labour hire arrangements as a means of engaging labour in the construction industry.

Labour hire arrangements and contracts have been problematic or led to uncertainty in various aspects of employment law. In the context of the TasBuild scheme, there is a need to ensure there is no ambiguity about whether labour hire agencies are required by the Act to register or make payments. Whilst other amendments in this Bill clarify that the emphasis will be on whether the employee is engaged in relevant employment in construction work, rather than on the industry the employer is involved in, proposed new section 3C(1)(b) provides an added level of certainty with respect to labour hire. Labour hire agencies are employers under the Act when they employ or engage people to carry out relevant employment, and those workers are employees.

Under this provision, a person (the "relevant person") who is engaged or employed under a labour hire contract or arrangement is an employee for the purposes of the Act if:

- the relevant person is engaged in relevant employment – relevant employment is defined in the proposed new section 3A (*see clause note in relation to section 3A above*); and

- the relevant person is engaged under a contract with another person (the labour hire agency) to perform work for someone else (the third party); and

- has not entered into a contract with the third party in respect of that work; and

- is wholly or principally remunerated under the contract for his or her personal labour and skills; and

- is paid not less than the minimum amount (defined in section 3C(6) as $450 gross per calendar month or the amount prescribed for a period) for the component of the remuneration that is for personal labour and skills.

The relevant person will not be an employee for the purposes of the Act if the labour hire agency is a corporation and the relevant person is an officer of that corporation (in accordance with the definition in section 9 of the *Corporations Act 2001* of the Commonwealth).

The $450 per month threshold mentioned above is consistent with the Commonwealth superannuation legislation, whereby superannuation contributions are only payable if the employer pays the employee $450 or more (before tax) in a month.

Contract of apprenticeship or training – proposed new section 3C(1)(c)

A person (the "relevant person") who is engaged or employed under an apprenticeship or contract of training is an employee for the purposes of the Act if:

- the relevant person is engaged in relevant employment – relevant employment is defined in the proposed new section 3A (*see clause note in relation to section 3A above*); and

- the relevant person is engaged by the other party (the employer) for at least 7.6 hours per calendar month.

It is noted that the minimum amount ($450 per month) threshold that applies to labour hire workers under section 3C(1)(b) does not apply to apprentices and trainees. Instead, apprentices and

trainees have to meet the 7.6 hours per month threshold. This is because, due to their low rates of remuneration, some apprentices or trainees who work part-time could be unintentionally excluded if the minimum amount threshold was to be applied.

Subsection (2) of the proposed new section 3C makes it clear that the fact that a relevant person has an Australian Business Number (ABN) is not determinative of whether or not they are an employee for the purposes of the Act. Subsection (3) clarifies that the relevant person is only an employee, and the other person an employer, for the time during which the circumstances meet the requirements of subsection (1).

Sections 3C(4) and 3C(5) clarify that owner builders are not employers for the purposes of the Act in circumstances where they employ or engage someone to carry out work on their own land. A person is an owner builder in respect of land if:

- the person is the owner of the land; and

- the work is performed on the land at the time the person is the owner; and

- the person has not performed construction work on more than two buildings on land that they own in the previous five years.

These provisions reflect TasBuild's current practice that genuine owner builders are not required to make payments into the scheme.

Section 3C(6) contains definitions of two terms used in section 3C. The definition of labour hire agency describes what is meant by labour hire. The definition of minimum amount is included to align with the Commonwealth's superannuation provisions.

Section 3D – Non-application of Act

Section 3D is a new provision which has been included to clarify the scope and application of the different schemes and legislation relating to long service leave.

The effect of section 3D is that the Act (and TasBuild scheme) does not apply to an employee who is entitled to accrue long service leave under:

- Part 7 of the *Local Government (Building and Miscellaneous Provisions) Act 1993* – local government employees; or

- the *Long Service Leave (State Employees) Act 1994* (the State Employees Act) – State service employees. (Note – the Bill also includes consequential amendments to the State Employees Act to reflect that State service employees who would otherwise come under the Construction Industry (Long Service) Act, are covered by the State Employees Act – *see clause note in relation to clause 20 below.*)

Section 3D also clarifies that the *Long Service Leave Act 1976* (which applies to most private sector employees) does not apply in relation to a person who is engaged or employed in relevant employment.

Section 3E – New Scheme

This is a new provision intended to clarify the relationship between the Act and the operation of the scheme which is set out in TasBuild's Trust Deed (in the Rules).

Section 3E(1) lists a number of things that can be provided for by the scheme (ie in the Trust Deed and Rules), including:

- the registering of employers and employees under the Act;

- the long service entitlements of employees;

- payments by the company (TasBuild), including refunds;

- payments or contributions to TasBuild including the setting, estimation and collection of such payments or contributions;

- the calculation of time periods;

- in respect of self-employed workers:
  - the voluntary application of the scheme to self-employed workers; or

  - the non- application of the scheme;

- provision of information to TasBuild;

- the records required to be kept by employers;

- the determination on a case by case basis of:
  - whether work is or is not construction work within the meaning of the Act;
  - whether a person is or is not an employer within the meaning of the Act;
  - whether a person is wholly or predominantly involved in, or carrying out, construction work;
  - whether a person should be registered under the Act;
  - whether a person is or is not employed or engaged in relevant employment within the meaning of the Act;
  - a person's obligations or entitlements under the scheme;

- the process for objections to determinations made under the scheme;

- any matter necessary or expedient to give effect to the scheme, including the making of rules relating to the funds established under the Trust Deed;

- any other prescribed matter.

Any procedures or provisions relating to the matters on the list above are set out in TasBuild's Rules which can be accessed at its website.

Section 3E(2) confirms that the current scheme (that is, the scheme as it is prior to the commencement of the amendments) is deemed to comply with the new provisions.

Clause 7: Sections 5 and 6 substituted

This clause replaces sections 5 and 6, relating to registration and payment obligations, with new, updated provisions (sections 5, 6, 6A and 6B). This is in part due to the modifications to the key definitions, ie employer, employee, construction work etc.

Section 5 – Registration of employers:

The current section 5 sets out an employer's obligation to register with TasBuild and to make payments. It also provides that an employer is not obliged to make payments for any period that an employee has received long service leave benefits or entitlements under any Act, award or agreement and obliges TasBuild to refund any payment the employer has made in that circumstance.

The proposed new section 5 only relates to an employer's obligation to register with TasBuild. The other matters – payments and refunds – have been moved to other provisions (sections 6A and 6B – *refer to clause notes below*). This makes the layout of the Act more logical and user friendly - it is easier to locate those specific requirements and obligations rather than having them all in one provision.

Unlike the current section 5, the new provision does not include any requirement for the employer to be engaged in the construction industry. The obligation to register depends upon whether a person is an employer for the purposes of the Act which ultimately comes back to whether that person employs or engages someone in relevant employment in construction work *(see clause note relating to clause 6 above)*. Therefore, the emphasis is on what the employee is doing rather than the employer (there is an exception in relation to manufacturing *(refer to clause notes in relation to the proposed new section 3A in clause 6 above)*).

Under the existing provisions, there is no time limit within which an employer must register. This can cause difficulties in enforcing the obligation. The new provision addresses this issue by requiring a person to register within 90 days of:

- becoming an employer; or

- the commencement of the amendments (if already an employer at that time).

Section 6 – Registration of employees:

Section 6 of the Act requires employers to register each employee with TasBuild. As with section 5, the obligation under the current section 6 applies to an employer who is engaged in

the construction industry. This is removed in the proposed new section 6.

The new section 6 also introduces a time limit within which employees are to be registered – 30 days after a person becomes an employee of the employer (subsection (1)). Given that a person must be in relevant employment to be an employee under the proposed amendments to the Act, this requirement will apply to existing workers who transfer into a position in relevant employment with their employer as well as to new employees.

Section 6(2) allows TasBuild to register an employee, in the absence of any application to do so by the employer if it is satisfied it is appropriate to do so. This is not new as TasBuild currently has the power to register an employee when the employer fails to do so.

However, the new section 6 does introduce a number of additional elements or requirements largely aimed at improving the administration and enforcement of the Act. It:

- deems an employer to be a registered employer where TasBuild has, in the absence of any application, registered one of the employer's employees (subsection (3));

- provides that TasBuild can determine not to register a person as an employee if it is satisfied that it is not appropriate to do so (subsection (4));

- imposes a new obligation on an employer to notify TasBuild in writing within 30 days of an employee ceasing to be in relevant employment with that employer (subsection (5)). Note – this doesn't necessarily mean that the person has left employment with that employer – they may have been transferred to another position which is not in relevant employment. Likewise, a person could leave employment with that employer and go to another position in relevant employment with a new employer. It will then be up to the new employer to register the person as an employee; and

- introduces a new presumption that a person who is registered as an employee is employed or engaged in relevant employment (subsection (6)). This presumption is rebuttable

(subsection (7)), for example, by evidence (employment records, pay slips, position descriptions etc) that the person has been transferred into a position which is not in relevant employment.

Section 6A – Payments by certain persons:

The new section 6A carries over the existing obligation (in the current section 5) on an employer to make payments to TasBuild. The rate and timing of payments are determined by TasBuild in accordance with its rules. The payment rate is set as a percentage of the employee's ordinary weekly gross wage. It is currently set at 2% and is payable on a monthly or quarterly basis. Each month or quarter employers are required to lodge a return with TasBuild setting out the details of their employees, days worked, wages paid etc. There is a penalty of a fine of up to 100 penalty units (a penalty unit is currently $130) for non-compliance with this provision.

Section 6B – Refund of payments:

This is a new provision which amends an existing obligation (currently in section 5(3)) on TasBuild relating to the refund of payments to employers in certain circumstances.

Section 6B(1) clarifies the circumstances in which TasBuild is to refund payments and the effect of making a refund. TasBuild can make a refund if the employer proves that they have:

- provided the employee with long service leave; or
- made a period of long service leave available to the employee; or
- made a payment in lieu of long service leave; AND
- the employee has accepted what has been provided or made available.

Under section 6B(2), if TasBuild makes a refund:

- TasBuild's obligations in respect of that period of employment are discharged (that is, it has no further obligations in relation to that period of employment); and

- the refunded period is no longer relevant employment.

In effect, this means that if the employee continues or recommences to work in relevant employment, they will not be able to count the refunded period of employment towards their entitlement under the TasBuild scheme (no double dipping).

Section 6B(3) makes it clear that there is no obligation on an employer to make a payment for employment that occurred prior to the commencement of the amendments if the employer was not obliged to make the payment prior to the commencement of this Bill. The reason this clarification has been included is that there is a reversal in the process relating to payments and refunds. The current provision (section 5(2) and (3)) specifies that an employer is not obliged to make payments for any period that an employee has received long service leave benefits or entitlements under any Act, award or agreement and obliges TasBuild to refund any payment the employer has made in that circumstance.

Under the proposed new process, an employer will be obliged to make payments in respect of relevant employment but can get a refund of those payments in the circumstances set out in section 6B(1).

Clause 8: Section 7 amended (Levy)

This clause amends section 7 of the Act to reflect that the obligation on employers to make payments is being moved from section 5(1)(b) to the proposed new section 6A.

Clause 9: Section 8 amended (Records, returns and information)

This clause makes a number of amendments to section 8 of the Act. Section 8 specifies the records and returns that must be provided to TasBuild to enable TasBuild to administer the scheme. The proposed amendments are aimed at facilitating the administration of the scheme by giving TasBuild additional powers

to obtain the necessary information to identify employers and seek payments.

One of the problems TasBuild has faced in the past, in getting access to records and information from persons they suspect should be making payments to the scheme, is the argument that a person is not an employer for the purposes of the Act and therefore is not obliged to provide the records or information.

Under the proposed amendment to section 8(1), the obligation will no longer be limited to an "employer", or a person liable to pay a levy under section 7. It will additionally apply to a person TasBuild believes on reasonable grounds to be an employer. To determine whether it has reasonable grounds for the belief that a person is an employer, TasBuild can require the person to supply records, returns and information (for example, wage records, timesheets, employee records, position descriptions etc). If the records, returns and information are not supplied within 30 days, TasBuild is entitled to presume that there are reasonable grounds for the belief that person is an employer for the purposes of the Act and can proceed accordingly.

Therefore, under the proposed amendments, when it comes to TasBuild's attention that a person may be an employer under the Act, the process will be as follows:

- to establish whether there are reasonable grounds for believing that a person is an employer, amended section 8(2) provides that:
  - TasBuild can require (by notice) information, records etc;
  - if the records and information are not supplied within 30 days, TasBuild can presume there are reasonable grounds;

- once reasonable grounds have been established (including by presumption), new subsection (2A) allows TasBuild to require the employer to supply records or information (for example, to establish the amount of payments owing). The records or information must be provided within 30 days (subsection (2A)(a)). There is a fine of up to 10 penalty units for failure to comply. Note also that proposed new section 9(2)(c) allows a magistrate to make an order regarding supplying records, returns or information.

The proposed amendments also include a provision prohibiting a person from making or supplying a record, return or information that the person knows or ought reasonably to know is false or misleading or omitting any matter from the record etc resulting in it being false or misleading (section 8(4)).

A further amendment to section 8, in new subsection (2A)(b), is to increase the amount of the time that an employer must keep records of an employee's employment for from 7 years to 10 years. 10 years ties in with the time at which the employee may have access to long service entitlements under the scheme.

Clause 10: Section 9 substituted

This clause replaces the existing section 9 with a proposed new provision.

Section 9 - Enforcement:

One of the changes in the proposed new section 9, at subsection (1), is to clarify that TasBuild can take proceedings to recover levies as well as payments. Section 7 allows TasBuild to impose a levy instead of payments. "Levy" is not defined in the Act, but in legislation in other States relating to construction industry portable schemes, a levy is an amount payable based on a percentage of the value of a construction project. TasBuild has never adopted this method and has always applied payments based on wages instead. However, given that there is an ability to impose a levy, there also needs to be a means of recovering unpaid levies, which is why the proposed amendment is being made to section 9.

The other change made to section 9 is to more clearly specify the types of orders that a magistrate can make including:

- an order relating to the registration of an employer or employee;

- an order requiring the employer to pay TasBuild an amount not more than what the employer would have paid if they had complied with the Act (arrears of payments from the time of becoming an employer);

- an order requiring the supplying or records, returns or information to TasBuild;

- an order relating to the keeping of and access to records relating to an employee; and

- any other matter the magistrate considers necessary or desirable for the purposes of the Act.

Clause 11: Section 9B amended (Time of occurrence of offence)

This clause amends section 9B which sets out the time limits for taking proceedings.

Currently, the Act provides that proceedings to recover a payment due to TasBuild must be commenced within 6 months after TasBuild becomes aware, or ought reasonably to have become aware that the payment was due.

This time limit is short and can become easily frustrated if an employer delays providing information to TasBuild. It is arguable that the time limit runs from when TasBuild first becomes aware that the employer should be making contributions to the scheme. However, it is not possible to proceed against the employer if TasBuild does not have information or records to enable it to calculate the exact amount due and owing.

To address these issues, this clause extends the time limit to 12 months. This is to run from either:

- when TasBuild becomes aware that the payment was due; OR

- if TasBuild has requested records, returns and information to calculate the payment, from when it receives the records, returns or information.

There will no longer be any reference to the time limit running from when TasBuild ought reasonably to have become aware that the payment was due as this concept is ambiguous and has created uncertainty as to when the time limit has expired. However, under section 9B(4) the assertion of when TasBuild became aware that a payment was due can be rebutted if it can be proved that TasBuild had enough information at its disposal to become aware

earlier, for example, if TasBuild had received all of the relevant records 2 years earlier but had overlooked and/or not acted on them in a timely fashion.

Under section 9B(5), the meaning of payment includes both the payment of a levy imposed under the Act, and a payment required to be made under the Act.

Clause 12: Section 10 amended (Other long service leave provisions)

This clause makes minor amendments to section 10.

The purpose of section 10 is to prevent double dipping in terms of an employee accruing an entitlement for long service leave under another Act, award or agreement whilst being registered with TasBuild (and accruing long service entitlements under the scheme).

Section 10 currently states that any period that a person is registered with TasBuild (whilst engaged in the construction industry) does not count towards long service leave under any Act, award or agreement. This is anomalous as the reference to "under any Act" could technically be taken to include the Construction Industry (Long Service) Act itself. Obviously, this is not the intention of the provision, therefore the proposed amendment is aimed at resolving the anomaly by clarifying that any period in which a person is registered with TasBuild (whilst engaged in relevant employment) is not counted towards long service entitlements under any other Act, award or agreement.

In addition, the reference to construction industry (in existing section 10(2)) is to be changed to relevant employment to reflect that coverage depends upon the employee's engagement in relevant employment rather than in the construction industry.

Clause 13: Section 17A inserted

This clause inserts a new provision (section 17A) which sets out the transitional arrangements that are to apply in relation to the amendments.

Section 17A – Application of section 21A in certain circumstances:

The transitional arrangements were designed in recognition that the amendments may result in the exclusion of some employees who are currently covered by the scheme. For example, some manufacturing employees (such as in joinery workshops) who are currently covered by the scheme may not satisfy the "relevant employment" criteria, in particular the requirement that their employer is wholly or predominantly involved in construction work during their employment.

Under the proposed section 17A (subsection (1)), the transitional arrangements will apply to a person (a transitional employee):

- whose employer was making contributions for them immediately prior to the commencement date (of the amendments); and

- who is not an employee for the purposes of the Act immediately after the commencement of the amendments.

Subsection (7) defines a "transitional employer" as the person who made the abovementioned payments.

The effect of the transitional arrangements is that a transitional employee is taken to have an agreement under section 21(A)(6) (*see clause note in relation to clause 15 below*) and continues to be covered under the scheme (section 17A(3)).

Coverage continues unless:

- both the employer and employee agree to terminate the arrangement (sections 17A(5) and (6)); or

- after reaching the next long service entitlement point (eg 10 years, 15 years, 20 years), one of the parties opts out of the arrangement in accordance with sections 21C(1) to (4) (*see clause note in relation to clause 15 below*); or

- the employee ceases employment with the employer (section 21C(5)).

Under section 17A(2), the transitional arrangements do not apply in respect of payments that have been refunded before the commencement of the amendments. They also do not apply to payments for an entitlement that has been discharged, or the entitlement to have it discharged arose, prior to the commencement date. This covers the situation where an employee has been in relevant employment at some time prior to the commencement of the amendments, has accrued long service entitlements under the scheme but has not yet taken the entitlement and is no longer working in relevant employment at the time the amendments commence. In this scenario, the transitional arrangements are not applicable.

Section 21C(1) (which allows either party to opt out) only applies if the transitional employee accrues an entitlement since commencement of the amendments (section 17A(4)).

Clause 14: Section 21 amended (Reciprocal arrangements)

This clause makes minor amendments to section 21 to replace the term "construction industry" given that this term will no longer be used in determining coverage under the scheme.

In section 21(1), "construction industry" is to be replaced with "new scheme", which means the portable long service scheme administered by TasBuild.

In section 21(2), "construction industry" is to be replaced with "relevant employment" to reflect that an employee's entitlements under the scheme are dependent upon their periods of engagement in relevant employment – not their time in the construction industry.

Clause 15: Sections 21A, 21B and 21C inserted

This clause inserts three proposed new provisions into the Act (sections 21A, 21B and 21C) which are related to deemed relevant employment.

The new provisions are aimed at addressing the situation where employees fall in a gap between the Act and the *Long Service Leave Act 1976* (the 1976 Act) applying to most private sector employees. Such a situation can arise when an employee changes

his or her role while working while working for the same employer.

For example, an employee has worked for the same employee for 10 years. For the first 6 years, he or she worked in relevant employment. The employee was then promoted to a managerial role, which was not in relevant employment, and worked in that role for 4 years. The employee does not have an entitlement under the Act as he or she has not completed 10 years of relevant employment. The employee also does not have an entitlement under the 1976 Act as the time spent in relevant employment does not count for the purposes of the 1976 Act. The employer will have to work an additional 6 years of continuous employment with the same employer (all up this will be 16 years) to qualify for long service leave.

The new provisions establish a voluntary arrangement whereby, under limited specific circumstances, the employer and employer can make a joint application to TasBuild to continue under the scheme, notwithstanding that employee is no longer undertaking construction work.

Section 21A – Person taken to be in relevant employment in certain circumstances:

This proposed new provision allows for a person to be deemed to be in relevant employment in certain circumstances.

Section 21A will apply to a person (called the "relevant person"), specified in subsection (1), who:

- has been employed or engaged in relevant employment for a minimum period of 5 years; AND

- has been continuously employed in relevant employment for at least the last two years of that period by one person (the relevant employer); AND

- ceases to be employed or engaged in relevant employment but continues without interruption to be employed or engaged by the relevant employer.

New section 21A(8) specifies that continuously employed or engaged is to be interpreted in the same way as employment that is continuous within the meaning of the 1976 Act.

Section 21A does not apply to an employee who leaves relevant employment with their employer to go to a non-relevant employment job with another employer.

If the criteria are met, the relevant person and the employer may jointly apply to TasBuild for the relevant person to be taken to be employed or engaged in relevant employment for the purposes of the scheme (subsection (2)). As mentioned earlier, this is an entirely voluntary process. It is dependent upon the agreement of both the employer and employee. If one party does not agree, it cannot occur.

Section 21A(3) specifies that an application to TasBuild is:

- to be in an approved form (note – the employer and employee can make the application on separate forms, if, for example, they are in separate locations); and

- to include an acknowledgement that the employer and employee are aware of how any entitlement will be calculated (under the proposed new section 21B) and of any charges, costs or payments that may be payable in relation to the employee being deemed to be in relevant employment; and

- to be accompanied by the information TasBuild considers necessary to determine the application.

The timeframe for making an application (specified under section 21A(3)(d)) is:

- no later than 6 months after the employee ceased being in relevant employment and became engaged in other employment with the employer; or

- if the employee ceased relevant employment prior to the commencement of the amendments but continued to be employed by the employer – no later than 6 months after the commencement of the amendments.

Note – TasBuild can accept an application made outside of the timeframes (section 21A(4)).

If TasBuild approves an application made under section 21A, the effect is that the employee is taken to remain in relevant employment and continues to be covered by the scheme without any break (that is, the deemed relevant employment starts from where the actual relevant employment ceases). Section 21A(7) clarifies that the employer has 3 months from when an application is approved to make payments for the period between when the employee stopped being in relevant employment and the date that the application was approved by TasBuild.

Section 21B – Payments relating to relevant employment under section 21A:

The proposed new section 21B allows the Trust Deed to provide for how payments by the employer to the scheme and entitlement payments (payments by TasBuild to the employee) are to be calculated in relation to deemed relevant employment.

Section 21B provides for the Trust Deed to apply different formulas for calculating the ordinary pay of a person who is deemed to be in relevant employment by virtue of the proposed new section 21A to those applied to other employees. It also specifically allows TasBuild to cap (that is, place an upper limit) on entitlement payments and/or the ordinary pay amount used to calculate employer payments and entitlement payments.

The basis for allowing different formulas and/or a cap on payments is to provide an offset or trade-off for the benefits that employees receive in being able to remain in the scheme when they are no longer in relevant employment. Typically, such an employee will have been promoted from an "on the tools" job to a managerial role with a higher wage rate. Some managerial roles can be very highly paid. As long service entitlement payments are paid at the employee's ordinary wage rate at the time of taking the entitlement, this could potentially result in TasBuild having to make entitlement payments that far exceed the payments (and investment returns) made in respect of that employee over the ten year period. A cap will help to provide some control over this issue.

Section 21C – Termination of deemed relevant employment:

The proposed new section 21C provides for the termination of deemed relevant employment.

Once an application under section 21A has been approved by TasBuild, the employee is taken to remain in relevant employment (and the Act and scheme applies) until the arrangement is terminated in accordance with section 21C.

Under section 21C deemed relevant employment is terminated by:

- the employee ceasing to be employed or engaged by that employer (eg the employee leaves to go to a job with a different employer). In such a case, the deemed relevant employment is terminated on the date of cessation of employment (section 21C(5)); or

- one of the parties – either the employee or employer, opting out of the arrangement (sections 21C(1) to 21C(4)).

Where an employer or employee wishes to opt out of the deemed relevant employment arrangement, section 21C(3) provides that they must notify TasBuild in writing within 3 months of the employee reaching a long service entitlement point (ie 10 years, 15 years, 20 years etc). Notice can be given either up to 3 months before the employee reaches the entitlement point or up to 3 months after. Deemed relevant employment ceases on the day the entitlement to long service is accrued (the date of the entitlement point) (section 21C(4)).

If payments have been made since the last entitlement point (for example, if the employer notified TasBuild 3 months after the last entitlement point and continued to make payments up to that time), TasBuild is required to refund those payments (section 21C(7)).

Section 21C makes it clear that the termination of deemed relevant employment does not prevent a person accruing long service under the TasBuild scheme if that person subsequently returns to a position in relevant employment with either the same or a different employer (section 21C(6)).

Clause 16: Section 22 amended (Cessation of registration)

This clause makes a minor amendment to section 22 to replace the term "construction industry" given that this term will no longer be used in determining coverage under the scheme. In this provision, construction industry is replaced with "construction work".

Clause 17: Section 22A inserted

This clause inserts a new provision into the Act as follows.

Section 22A – Amendment of Schedule 1

The proposed new section 22A relates to the new schedule that is being included in the Act to incorporate the relevant industry categories from the ANZSIC Code (*see clause notes relating to clauses 5 and 6 above*).

Section 22A allows the Minister to amend the Schedule by order rather than having to do it through a formal amendment to the Act. This allows the Schedule to be updated more easily if there is a change in the ANSIC Code or there is a new category of construction work identified (note – an item does not necessarily have to be in the ANZSIC Code to be included in the Schedule).

To ensure that such an order receives Parliamentary scrutiny, subsection (3) applies certain sections of the *Acts Interpretation Act 1931* to an order, as if the order were regulations. This means that the process of making an order is similar to regulations, and includes:

- it must be published in the Gazette within 21 days of being made;
- it must be laid before each House of Parliament within the first 10 sitting days after publication.
- it can be disallowed by resolution of either House of Parliament (notice of which is given within the first 15 sitting days after the order is laid before the House).

By specifying that an order under this section is a statutory rule within the meaning of the Rules Publication Act 1953, subsection (4) ensures that the processes under that Act for the involvement of the Chief Parliamentary Counsel with the draft, and for numbering and printing, are applied.

Clause 18: Schedule 1 inserted

This clause introduces a new Schedule – Schedule 1- into the Act. Schedule 1 is a key part of the provisions relating to coverage. Its purpose is to describe the activities that are relevant to the definition of "construction work" in new section 3B, which refers to Schedule 1 in 3B(1)(a).

Schedule 1 is aligned with construction and relevant manufacturing industry sectors from the ANZSIC Code (see clause note in relation to clauses 5, 6 and 17 above). Listing these activities in a schedule in the Act makes the scheme easier to interpret and apply as there is no need to go outside the Act to another document to determine coverage under the scheme.

In summary, Schedule 1 activities relate to services including:

- residential building construction;
- non-residential building construction, eg commercial buildings, industrial buildings;
- road and bridge construction;
- site preparation services;
- bricklaying services;
- roofing services;
- structural erection services;
- plumbing services;
- electrical services
- air conditioning and heating services
- fire and security alarm installation services;
- plastering and ceiling services;
- carpentry or joinery work on construction projects
- tiling and carpeting services;
- painting and decorating services;
- glazing services;
- landscaping, paving and fence construction (except agricultural);
- awnings and blind installation and repair

- installation of radio or television broadcasting equipment of telephone, telegraph of telex equipment;
- construction or repair of distribution lines (electricity or communication);
- prefabricated building manufacture, when onsite installation is also done;
- structural component manufacture, when onsite installation is also done;
- other product manufacturing, when onsite installation is also done.

Categories in Schedule 1 are broken down further into specific activities.

Schedule 1 specifies that unless the contrary intention appears, an expression used in Schedule 1 has the same meaning as in the ANZSIC Code, which has more detail.

The ANZSIC Code also sets out specific exclusions from categories.

For clarity, Schedule 1 specifically states that where an activity in the schedule refers to a product made of a specific material, it also includes the same product made of other materials.

Part 3 – *Long Service Leave (State Employees) Act 1994* amended

Clause 19: Principal Act

This clause provides that the Principal Act referred to in Part 3 of the Bill is the *Long Service Leave (State Employees) Act 1994*. This Part of the Bill is making amendments to that Act.

Clause 20: Section 5 substituted

One of the purposes of this Bill is to specify coverage when a relevant employee, who undertakes "construction work" as described in the Construction Industry (Long Service) Act, is employed by a State authority.

Clause 20 replaces existing section 5 of the Long Service Leave (State Employees) Act.

The replacement section 5 specifies that the Long Service Leave (State Employees) Act applies to an employee of a State authority who would be entitled to be covered by the Construction Industry (Long Service) Act if he or she weren't in State employment.

This provision operates in conjunction with clause 6 which inserts new section 3D into the Construction Industry (Long Service) Act, which in section 3(D)(1)(b) specifies that it does not apply to persons eligible to accrue long service under the Long Service Leave (State Employees) Act.

Subsection 5(2) restates two existing exclusions to the application of the Long Service Leave (State Employees) Act.