CLAUSE NOTES

Workers Rehabilitation and Compensation Amendment Bill 2012

Clause 1: Short Title

This clause provides that the short title of the amending legislation is the *Workers Rehabilitation and Compensation Amendment Act 2012*.

Clause 2: Commencement

Under this clause, the amendments are to commence on a date to be proclaimed. The intention is that they will commence on 1 July 2013. This will give insurers and self-insurers sufficient time to prepare for the changes.

Clause 3: Principal Act

This clause provides that the Principal Act referred to in the Bill is the *Workers Rehabilitation and Compensation Act 1988.* The Bill is making amendments to that Act.

Clause 4: Section 4 amended (Application of Act)

This clause amends section 4 of the Act by removing subsection (5)(c).

Section 4 sets out the application or scope of the Act. It specifies when the Act applies and who it applies to. In subsection (5), there are a number of categories of persons who are specifically excluded from the application of the Act (i.e., the Act does not apply to them). One of those categories is domestic servants who are excluded from coverage in circumstances where they are working for a private family and

have not completed 48 hours' employment with the same employer at the time of injury.

Under this proposed amendment, section 4(5)(c) is to be removed. The reason for doing this is that the provision is out-dated (it was carried over from the 1927 Workers Compensation Act) and would have limited application in the present day. The Bill includes a new provision to better address the coverage of persons who carry out work for or a private or domestic nature, e.g. house cleaning, gardening *(refer to clause 5 below)*.

Clause 5: Section 4AA inserted (Services of a private or domestic nature)

This clause inserts a new provision into the Act – section 4AA.

This new provision clarifies coverage under the Act in relation to persons who carry out work that is of a domestic or private nature. It is intended to cover the situation where a householder engages someone to carry out short periods of work relating to their home or family such as basic house cleaning, gardening or baby-sitting. These types of arrangements were never intended to be covered by the Act. Whilst it has never been tested, it is arguable that such arrangements are currently excluded by section 4B. Section 4B specifically deems out contractors where the value of the contract is less than $100. However, section 4B is to be amended under this Bill as there has been considerable uncertainty about how it applies. Under the proposed amendment it has been substantially redrafted to clarify coverage of labour hire workers and contractors who are engaged wholly or principally for labour (see clause note for clause 6 below).

The proposed amendments in relation to section 4B would potentially extend coverage under the Act to persons (contractors) engaged to carry out domestic services. This would mean that householders who engage them would be obliged by the Act to take out workers compensation insurance.

To prevent this situation, the proposed new section 4AB makes it clear that a person is not a worker for the purposes of the Act if he or she provides services that are of a domestic or personal nature for another person at a residence occupied by that person for less than 8 hours in any week. "Services of a domestic or personal nature" is defined to include:

- cleaning;
- cooking;
- gardening;
- providing care, supervision or education to a child (e.g., baby sitter, music teacher, tutor);
- assisting in the maintenance, care or enhancement of a person's body; and
- providing companionship.

It should be noted that this exclusion only applies to contractors who would otherwise be deemed to be workers under the proposed new sections 4B and 4BA. Workers who are employed under a contract of service to provide domestic or personal services will still be covered by the Act, e.g. carers who are employed by an incapacitated person to help with showering and dressing etc, nannies.

Clause 6: Section 4B substituted

This clause removes the existing section 4B and replaces it with two new provisions – a new section 4B and section 4BA.

The existing section 4B deems contractors, who meet certain criteria, to be workers for the purposes of the Act. The criteria are:

- the work to be carried out must exceed $100 in value;
- the work must not be incidental to a trade or business regularly carried on by the contractor in the contractor's own name or under a business or firm name; and
- the contractor must not sublet the contract or employ any worker.

Section 4B provides an exception where the contractor takes out his or her own personal accident insurance. In such a case, the contractor is not taken to be a worker, and hence does not come under the Act, for the period of the insurance cover.

Section 4B was introduced into the Act by amendments which commenced in 2001. It was intended to clarify which contractors are workers for the purposes of the Act. Unfortunately, there has been some confusion about the operation of section 4B. In addition, there has, in recent years, been an increase in the use of contracting arrangements as an alternative to direct employment. These factors have led to uncertainty about coverage under the Act.

The proposed new provisions are aimed at clarifying the law and providing greater certainty.

Proposed new section 4B – Employment-like relationships

Under the proposed amendments, the existing section 4B is to be removed and replaced with a new provision.

The proposed new section 4B deems a contractor to be a worker where there is an obligation on the person engaging the contractor to make superannuation contributions in respect of that contractor (subsection (1)).

This is aimed at providing consistency with requirements under superannuation legislation. If there is an obligation to make superannuation contributions in respect of a person engaged to do work, then there will also be an obligation to take out workers compensation cover for that person.

It should be noted that the emphasis is on *having a legal obligation* to pay superannuation rather than the actual payment of superannuation contributions. The fact that a person isn't paying superannuation contributions does not necessarily mean that they don't have a legal obligation to pay them.

It is hoped that consistency with superannuation obligations will make it easier for employers to comply with the legislation rather than having different tests for different types of employment obligations. It will also make it clear that a worker for the purposes of the superannuation legislation is a worker for the purposes of the workers compensation legislation.

The new provision also (subsection (2)) deems a contractor to be a worker where the contractor:

- is wholly or principally remunerated for his or her personal labour or skills;
- is not engaged to achieve a specific result; and
- must personally perform the work and cannot delegate it to another person.

This is intended to capture contractors where the relationship is very similar to an employee/employer relationship despite the fact that there is a contract for services rather than a contract of service.

All three factors must be present for a contractor to be deemed to be a worker under this provision. For example, if a contractor is wholly or principally remunerated for his

personal labour or skills and cannot delegate the work, but is engaged to achieve a specific result, then he will not be a worker for the purposes of the Act.

Another important point to note is that it is the nature of the relationship itself that is crucial for determining whether these criteria are met rather than just the terms of the contract. This is the way in which courts have viewed these types of matters in the past in determining whether there is an employer/employee relationship.

As with subsection (1), there is a connection with superannuation. The *Superannuation Guarantee (Administration) Act 1992 (Cth)* (section 12) extends the definition of employee to a person who works under a contract that is wholly or principally for the labour of the person. The Australian Taxation Office has interpreted the term "contract that is wholly or principally for the labour of the person" by reference to the three factors listed above (Superannuation Guarantee Ruling 2005/1). These three factors were derived from the relevant case law in Australia.

SGR 2005/1 provides an explanation of each of the three criteria as follows:

(1) Wholly or principally remunerated for labour

Labour includes mental and artistic work as well as physical labour. "Wholly or principally for labour" means that where a contract is partly for labour and partly for something else (such as goods, materials, equipment hire etc), the contract will only meet this criteria if it is principally for labour. SGR 2005/1 construes "principally" as meaning chiefly or mainly.

(2) Not engaged to achieve a specific result

SGR 2005/1 refers to the concept of being engaged to achieve a specific result as meaning that the contractor is free to use their own means (by third party labour, plant and equipment etc) to achieve the contractual outcome. Payment is often a specified contract price payable on satisfactory completion of the services, as opposed to payment by an hourly rate. However, the contract price could also be payment by reference to the volume of something delivered or the contract price could be based on an estimate of the time and labour cost that is necessary to complete the task.

(3) Must personally perform the work

SGR 2005/1 suggests that the power to delegate or subcontract is a significant factor in determining whether someone is an employee or independent contractor. It is an indication that the person is a worker if they are contractually required to personally perform the work. If the person has unlimited power to delegate the work to others, with or without the approval of the other party to the original contract, then this is a strong indication that the person is an independent contractor. The power of delegation referred to is not just a case of a worker arranging to swap shifts or delegating some tasks to another worker. In the case of an independent contractor delegating work, the contractor will be responsible for paying the party the work has been delegated to.

Subsection (3) of the proposed new section 4B makes it clear that the fact a contractor has an Australian Business Number (ABN) is not determinative of whether or not they are a worker.

Subsection (4) prevents section 4(5)(a) from applying to contractors who fall within the scope of section 4B. Section 4(5)(a) is an existing provision which excludes casual workers

employed otherwise than for the purposes of the employer's trade or business.

Proposed new section 4BA – Contractors under labour hire arrangements

The proposed new section 4BA is aimed at providing greater clarity about the application of the Act in relation to labour hire arrangements.

In recent years, there has been an increase in the use of labour hire arrangements in lieu of traditional employer/employee relationships. Under these types of arrangements, a person (the contractor) is engaged by a labour hire agency to provide services for the benefit of a third party or parties. Although the contractor is performing work for the third party (host employer), there is no direct contractual relationship between the contractor and the host employer. The host employer has entered into a contract with and pays the labour hire agency for the services. The labour hire agency pays the contractor for their labour.

These types of arrangements have led to difficulties where contractors have been injured and sought workers compensation. There have been cases where despite the actual nature of the contractor's day to day work being no different to that of a person employed under a contract of service (employer/employee relationship), the contractor has missed out on workers compensation because it was determined that the contractor was not employed by either the labour hire agency or the host employer.

The new provision is intended to resolve this issue. It specifically deems a contractor engaged under a labour hire arrangement to be a worker employed by the labour hire agency if the following criteria apply:

- the contractor has been engaged under a contract for services by the labour hire agency;
- under the contract, the contractor is to perform work for a someone other than the labour hire agency (a third party);
- there is no contract to perform the work between the contractor and the third party; and
- the contractor does all or part of the work personally.

Where the labour hire agency is a corporation and the contractor is an officer of that corporation (in accordance with the definition in section 9 of the *Corporations Act 2001* (Cth)), then the provision will not apply. It should be noted that the contractor who is an officer of the corporation may still be a worker for the purposes of the Act under other provisions.

Subsection (2) of the proposed new section 4BA makes it clear that the fact a contractor has an Australian Business Number (ABN) is not determinative of whether or not they are a worker.

Subsection (3) prevents section 4(5)(a) from applying to contractors who fall within the scope of section 4BA. Section 4(5)(a) is an existing provision which excludes casual workers employed otherwise than for the purposes of the employer's trade or business.

Clause 7: Repeal

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