SECOND READING SPEECH

<u>Construction Industry (Long Service) Amendment Bill 2012</u>

Mr Speaker, I move that the Bill be now read the second time.

This Bill makes amendments to the *Construction Industry (Long Service) Act 1997*. The Act establishes a portable long service scheme for employees engaged in the construction industry. The scheme is administered by TasBuild Limited – a private trustee company.

The effect of this scheme is that employees gain long service entitlements as a result of their time engaged in the construction industry, rather than by continuous employment with one employer. They are able to access long service entitlements upon completing 10 years of relevant employment, which can be achieved through a number of different periods of employment with different employers.

This is different to other legislation relating to long service leave in Tasmania, where employees only become entitled to long service

leave upon completing a period of continuous employment (generally 10 years) with the same employer.

Before I go into detail about the proposed amendments to the Act, I would like to briefly mention the background to this legislation.

Mr Speaker, all states and territories have portable long service schemes for workers in the construction industry. These schemes were introduced in recognition that much of the work in the construction industry was transient and based on short term projects with different employers. Few workers would ever have made it to the qualifying period for long service leave under the general legislative requirements.

Mr Speaker, Tasmania was one of the first states to enact legislation establishing such a scheme in 1971. At that time, the scheme was administered by Government with very little industry involvement.

In 1997, the current Act was passed to give effect to the Rundle Government's commitment to transfer control of the Construction

Industry Long Service Fund to a private company – TasBuild. TasBuild's Board is made up of representatives of employers and workers involved in the construction industry. In effect, this means that the industry itself has control over its long service scheme. All other states and territories had previously moved to this type of arrangement.

Since the Act commenced on 22 March 1998, TasBuild has administered the scheme through its Trust Deed and Rules.

Briefly, the way the scheme works is that TasBuild sets a payment rate that employers must pay in relation to each of their workers who work in relevant employment. When a worker accumulates 10 years of relevant employment, he or she has a long service entitlement that is payable by TasBuild at the worker's current rate of pay. The entitlement is either paid out to the worker as a lump sum, or taken as leave.

Mr Speaker, the proposed amendments to the Act are intended to do the following:

- firstly, to clarify who is and is not covered by the scheme, and I will elaborate on this in a moment;
- secondly, to add to and amend existing definitions in the Act to make the legislation easier to interpret and apply; and
- thirdly, to make other amendments that are necessary to improve the operation and application of the legislation.

One of the key features of the proposed amendments is to clarify coverage under the scheme. In saying this, I would like to make it clear that the amendments are not intended to change the scope of coverage under the Act – to either bring more workers into the scheme or to cut workers out.

In its current form, coverage under the Act depends on involvement or engagement in the "construction industry". The Act defines the construction industry as any industry involved in any construction described in Division C (Manufacturing) or Division E (Construction) of the Australian and New Zealand Standard Industrial Classification

of 1993. This Classification is commonly referred to as the ANZSIC Code.

Under the amendments, the concept of "construction work" will be an important determinant of coverage, rather than engagement in the construction industry.

Reference to the relevant construction and manufacturing industry sectors will still play an important role in the application of the Act. Under the amended provisions, the definition of construction work will refer to relevant industry activities, which are listed in a new schedule - Schedule 1.

The activities listed in Schedule 1 are aligned with the updated 2006 edition of the ANZSIC Code. Describing these activities in Schedule 1 will mean that users of the legislation will not have to go beyond the Act to another document to determine who is or is not covered by the Act.

The new schedule will operate in conjunction with three other new provisions that have come from TasBuild's Rules, and which describe the concepts of "relevant employment", "construction work" and "who is an employer and employee".

The first step in determining whether a person falls within the scope of the Act and the scheme will be to determine if the person is employed or engaged in relevant employment. The definition of "relevant employment" appears in the proposed new section 3A. Under that provision, the following persons are in relevant employment:

- firstly, employees (other than manufacturing employees) who are employed or engaged wholly or predominantly to carry out construction work;
- secondly, manufacturing employees where the employer is wholly or predominantly involved in construction work during that period of employment; and

- thirdly, persons engaged under a contractual relationship (including labour hire workers) if the person is engaged wholly or predominantly for the duration of the contract, for the carrying out of construction work.

Wherever the word "predominantly" is used, it has a specific meaning described in the Bill. It means 90% or more, or another percentage as prescribed.

As I mentioned earlier, the proposed amendments are not intended to alter the scheme's coverage – to increase or decrease it.

The "wholly or predominantly" requirements in the definition of relevant employment may appear to limit the scope of the scheme. However, they do not represent a change in approach. These requirements have their origin in the TasBuild Rules.

The Bill does provide TasBuild with some discretion to determine that someone is or is not in relevant employment notwithstanding whether they strictly meet the other criteria. This would only tend

to be exercised in line ball cases (for example, where an employee is close to the 90% threshold), or in cases where there are exceptional circumstances, and/or where both the employer and employee agree on an outcome.

Employees who are employed or engaged wholly or predominantly for administrative, clerical and/or managerial purposes are not considered to be in relevant employment and therefore do not come under the TasBuild scheme.

This is consistent with the current situation, and harks back to the philosophy underpinning the scheme ever since its inception. The portable long service scheme was established to benefit employees who are "on the tools" because it was generally those employees who had difficulty accruing long periods of service with a single employer. Also excluded from the definition of relevant employment are employees who perform maintenance work for an employer whose primary commercial function does not involve construction work, for example someone employed by a hospital to carry out maintenance work.

Mr Speaker, the determination of whether someone is in relevant employment depends upon whether they are carrying out construction work.

The proposed new section 3B defines the term "construction work" as 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 a Schedule 1 activity. It also includes transportation of materials to and from site and manufacture of a product used as part of an activity mentioned above if the transporter or manufacturer, or someone else employed or engaged by the same employer, is also involved in carrying out the construction activity on site.

The next step, in relation to coverage, is to determine whether there is an employer/employee relationship.

The proposed new section 3C sets out who is an employee and an employer. Under section 3C, the first requirement to be an

employee for the purposes of the Act is that the person must be employed or engaged in relevant employment, as I mentioned earlier.

The other requirements depend upon the manner in which the person is employed or engaged. There are three situations included in the Bill.

In the first, a person, called a "relevant person" in the Bill, will be an employee for the purposes of the Act if:

- firstly the relevant person is employed or engaged in relevant employment under a contract with another person; **and**
- secondly, the other person has a statutory obligation to make superannuation contributions in respect of the relevant person.

In such a situation the other person is the employer.

The concept of aligning the Act's coverage with superannuation laws is not new. Under the current Trust Deed Rules, TasBuild has been applying the criteria from superannuation legislation 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.

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

The second situation covered by section 3C relates to persons engaged or employed under labour hire arrangements to carry out relevant employment. The section specifies a number of requirements that must be met for the labour hire worker to be considered an employee.

Importantly, the worker must be wholly or principally remunerated for his or her personal labour and skills. Another criterion is that he or she must be paid a specified minimum amount for this work - $450 gross per calendar month, or an amount as prescribed for a period. The concept of a minimum amount is another requirement that is based on superannuation provisions.

The third situation described under section 3C applies to workers engaged or employed in relevant employment under an apprenticeship or contract of training. Such workers must be engaged for at least 7.6 hours per calendar month, to be considered employees. A non-monetary threshold is used, because, due to their low rates of remuneration, some apprentices or trainees, who work part-time, could be disadvantaged if exclusion was to be based on the minimum amount threshold.

The new section 3C also makes it clear that owner builders do not have to make payments to the scheme. This reflects TasBuild's current practices.

Mr Speaker, although it is not intended to change the coverage and scope of the TasBuild scheme, it is possible that the clarifications may result in some people, who are currently being covered by the scheme, no longer meeting the requirements of relevant employment. In recognition of this, the Bill includes some transitional arrangements. The transitional arrangements will apply to a person whose employer was making contributions to TasBuild

for them immediately before the amendments commence but who will no longer fall within the new definition of "employee" under the Act. Notwithstanding that such workers don't come within the new meaning of "employee", they will continue to be covered by the scheme unless:

- they leave their employment with the employer; or
- both the employer and the employee agree to opt out of the transitional arrangement; or
- within three months of reaching the next long service entitlement point (for example – at 10, 15 or 20 years) one of the parties (either the employer or employee) decides to opt out.

Mr Speaker, another key feature of the amendments, which I would like to highlight, is a new deeming provision. Under the current system, when an employee moves off the tools to another type of job – for example, a promotion to a management position – the employee is no longer in relevant employment and therefore no

longer under the scheme. This may create difficulties, particularly where the employee has been working for the same employer for a number of years. The employee can fall in a gap between the TasBuild scheme and the *Long Service Leave Act 1976,* which applies to most private sector employee, and therefore not qualify for long service entitlements under either.

This scenario is best illustrated with an example. Suppose 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 Long Service Leave Act, as the time spent in relevant employment does not count for the purposes of that 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.

Both employers and workers have approached TasBuild seeking rectification of such situations. The TasBuild Board came up with a deeming arrangement, which has been adopted and included in the Bill. The proposed new section 21A will allow an employer and a worker to jointly apply to TasBuild to have employment, which is not relevant employment, recognised for the purposes of the scheme so that the worker continues to be covered. There are tight restrictions on when this can occur.

Firstly, the worker must have previously been employed in relevant employment for a minimum of 5 years.

Secondly, for at least the last two years of that period of relevant employment, the worker must have been continuously employed by their current employer.

And thirdly, the worker must have ceased to be in relevant employment, but continued, without interruption, to be employed by the same employer for a purpose other than relevant employment.

Where these requirements are met, and an agreement has been submitted to and approved by TasBuild, the worker continues to be covered by the TasBuild scheme unless:

- the worker leaves their employment with the employer; or
- one of the parties (either the employer or worker) opts out.

The opting out option can only be initiated within 3 months of a worker reaching a long service entitlement point – at 10, 15, 20 years and so on.

Mr Speaker, this arrangement is a voluntary one that can continue on indefinitely if both the employer and worker so wish. Obviously, given that TasBuild is obliged to pay entitlements based on the worker's wages at the time of taking the entitlement, the entitlement payments could become very expensive if the worker is promoted into high paying positions. To address this, the Bill enables TasBuild to cap any entitlement payment made to the worker or the amount

of ordinary pay to be used to calculate contributions paid by the employer. The formula for calculating the cap is to be set out in the Trust Deed.

Mr Speaker, the issues I have mentioned above are the key or major features of the Bill. Other amendments are aimed at making the Act and scheme easier to administer and apply. Ever since the commencement of the Act in 1998, TasBuild has encountered difficulties in enforcing employer obligations. Identifying and addressing these difficulties has been an ongoing process. Many issues have only come to light during the course of legal proceedings. Enforcement is an important part of administering the scheme – ensuring that there are adequate funds in the scheme to meet workers' long service entitlements and that this cost is spread across all employers who employ or engage workers in construction work.

In 2003, amendments were made to the Act to assist with enforcement, including strengthening the obligations on employers to keep and provide access to records and information. Despite those amendments, TasBuild has continued to experience issues from time

to time with pursuing employers for payments to the scheme. The Bill addresses these issues.

Mr Speaker, one of the problems TasBuild has faced in enforcement is in getting access to records and information from employers they suspect should be contributing to the scheme. Some employers have argued that they are not employers as defined by the Act, and therefore have no obligation to provide the information to TasBuild. The proposed amendments address this by allowing TasBuild to seek information and records from a person it believes on reasonable grounds to be an employer for the purposes of the Act. In addition, the amendments give TasBuild a power that enables it to determine whether there are reasonable grounds to believe a person is an employer. TasBuild can require the person to supply information, records and returns. If not supplied within 30 days, TasBuild can presume that there are reasonable grounds for the belief that the person is an employer.

Another issue that has been problematic, is the time limit on taking proceedings. Currently, the Act provides that proceedings to

recover a payment due to TasBuild must be commenced within 6 months after the company becomes, or ought reasonably to have become, aware that the payment was due. The difficulty with this time limit is that it can be easily frustrated if an employer delays providing information to TasBuild. Arguably, the 6 month 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, such as employee records, to enable it to calculate the exact amount due and owing. To address these issues, the amendments extend the time limit to 12 months. This is to run either from when TasBuild becomes aware that the payment was due; or, if records, returns and information have been requested to calculate the payment, from when TasBuild receives the records, returns or information.

The final feature of the Bill that I'll explain is the clarification of which long service Act applies when an employee is eligible to be covered,

or would, but for this Act, be eligible for coverage, by one of three other Acts.

Most private sector employees in Tasmania are covered by the Long Service Leave Act. Proposed new section 3D makes it clear that the Long Service Leave Act does not apply to persons employed or engaged in relevant employment under the Construction Industry (Long Service) Act.

In the two remaining cases, section 3D specifically excludes application of this Act. Excluded employees are those who are eligible to accrue long service under:

- part 7 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*; and
- the *Long Service Leave (State Employees) Act 1994.*

Part 3 of the Bill makes a consequential amendment to the Long Service Leave (State Employees) Act, providing for that Act to apply to an employee who would be entitled to long service under the

Construction Industry (Long Service) Act if he or she were not employed by a State authority.

Mr Speaker, I won't talk about the remaining amendments proposed by the Bill. They are less significant than the ones I have already mentioned, and generally relate to clarifications, minor adjustments or administrative changes.

I would like to take a moment to outline the development and consultation process relating to this Bill. The Bill has been the culmination of extensive work and cooperation over a long period by TasBuild, the Office of Parliamentary Counsel and WorkSafe Tasmania, formerly known as Workplace Standards. I would like to thank Chris Atkins, the Chief Executive Officer of TasBuild, Kate Woodward at the Office of Parliamentary Counsel and the staff of WorkSafe Tasmania for their efforts in developing this legislation.

The consultation on this Bill has been significant. An exposure draft of the Bill was released for public comment with advertisements placed in the three Tasmanian daily newspapers and the Government

Gazette. The Bill and explanatory information about the proposed amendments was made available on the Workplace Standards website.

Key stakeholders, including the Tasmanian Chamber of Commerce and Industry, Unions Tasmania, the Master Builders Association, the Housing Industry Association, other relevant industry bodies and unions, and other chambers of commerce around the State, were contacted in writing and invited to provide comments and feedback on the Bill. In addition, a briefing on the legislation was provided to the members of the TasBuild Board and offered to the OHS Committee of the TCCI.

Mr Speaker, the comments received in relation to the Bill have been supportive – both of the legislation and of the TasBuild scheme. Indeed, far from complaining about their obligations under the TasBuild scheme, some of the feedback received from employers is that they would like the scope of the scheme to be extended further to include their administrative staff as well as their workers who are on the tools.

There were some concerns raised by the HIA, mainly relating to labour-only contractors, and I thank the HIA for their contribution. In response, further consultation occurred and some improvements were made to the Bill. I note that views varied about how best to make it easy for employers to determine who is covered by the scheme while, at the same time, ensuring that the application of the scheme does not significantly change. The Bill strikes a balance to achieve this outcome.

Mr Speaker, the changes to the Act and the scheme, which are set out in this Bill, are important. They clarify who is and is not covered by the scheme and improve its administration and enforcement.

I commend the Bill to the House.