WORKPLACE HEALTH AND SAFETY AND ANOTHER ACT AMENDMENT BILL 2002

EXPLANATORY NOTES

FOR

AMENDMENTS TO BE MOVED IN COMMITTEE BY THE HONOURABLE GORDON NUTTALL MP

Title of the Bill

Workplace Health and Safety and Another Act Amendment Bill 2002

Objectives of the Amendments

The objective of the amendments to the *Workplace Health and Safety and Another Act Amendment Bill 2002* (the Bill) is to make minor amendments to the Bill to ensure its policy objectives are met.

The objective of the amendments to the *WorkCover Queensland Act 1996* is to provide certainty of coverage and premium payment obligations across all industries, and in particular the building and construction industry.

The 1998 *Review of Industrial Relations Legislation in Queensland* found that Queensland has a lower proportion of its total workforce classified as employees and a higher proportion as self-employed, that is contractors of various sorts, than for Australia as a whole. This is in addition to:

- a decline in standard-time employment, that is, less employees working a five day, 35 to 40 hour week in standard daylight hours over a normal working year;

- an increase in non-standard or atypical employment, including contractors, the self-employed, part-time, and casual employment; and
- an increase in insecurity or precariousness of employment, that is, irregular employment contracts, changing work, shifting jobs and redundancies.

It is evident among the self-employed generally that there is an increase in the number of 'dependent' contractors, that is, self-employed workers who have a small number of clients, compared to independent contractors. This suggests that among the self-employed, there are increasing numbers who work in arrangements that more closely resemble those of employees rather than independent contractors.

As an example, in the Queensland building and construction industry the relationship between those providing their labour and entities engaging labour is characterised by a variety of contractual relationships which reflect the different way that work is done or organised. In particular:

- work is increasingly project based and highly specialised, and persons engaged regularly move between projects and engaging entities;
- persons regularly change status between employee and contractor; and
- there is a long-term trend to self-employment through contracting, with increasing numbers of the labour force working as contractors.

The *WorkCover Queensland – Leading Australia* policy committed the Government to implement "fairer and more accessible workers' compensation arrangements for all workers in the building and construction industry". The continuing growth in contracting arrangements calls into question the applicability of workers' compensation, pay-roll tax and federal taxation requirements.

The Commonwealth has responded to this trend in contracting by introducing tests as part of the *New Business Tax System (Alienation of Personal Services Income) Act 2000* (Cwlth) to determine whether an individual is in fact in business for him or herself or is merely seeking to receive a reward for providing his or her labour, personal efforts or skills.

For Queensland's workers' compensation scheme, the trend towards contracting has resulted in a level of uncertainty as to whether (and when)

persons are covered or have premium payment obligations under the workers' compensation scheme. This particularly affects self-employed contractors and subcontractors and entities engaging labour.

For insurers, there is greater complexity in determining the employment status of persons and the employer status or otherwise of engaging entities for the purposes of determining entitlements to compensation and premium payment obligations.

Under the *WorkCover Queensland Act 1996* (the Act) a "worker" is a person who works under a contract of service (section 12). Schedule 2 of the Act also deems certain persons as "workers". The current legislative framework does not provide certainty when applied to the multitude of employment and contractual arrangements that now exist in the building and construction and other industries. This has also been compounded by differences in the definition of "worker" or "employee" in other State and Commonwealth legislation that Queensland employers are required to comply with.

To fulfil the *WorkCover Queensland – Leading Australia* policy, and in keeping with the beneficial nature of workers' compensation legislation, it is proposed to amend the definition of "worker" to provide greater certainty and consistency by applying a "results test" in addition to the other legislative criteria regarding who is a "worker". Under the results test, a person will be considered to be a "worker" unless it can be shown that the person meets all elements of the results test. The elements of the test are:

(1) The person is paid to achieve a specified result or outcome.

(2) The person has to supply the plant and equipment or tools of trade needed to perform the work.

(3) The person is, or would be, liable for the cost of rectifying any defect in the work performed.

The results test closely aligns with a similar test in the *Income Tax Assessment Act 1997* (Cwlth) for the purposes of determining a personal services business under the Alienation of Personal Services Income measures introduced in 2000.

Accordingly, the amendment to the definition of "worker" will exclude from coverage those persons who have obtained a personal services business determination from the Commissioner of Taxation. This approach ensures consistency in determinations made by the Australian Taxation Office and WorkCover Queensland as to who is and who is not a worker.

The proposed amendments do not seek to replace or expound upon the common law meaning of "contract of service" found in s.12(1) of the Act: see also High Court of Australia in *Stevens v. Brodribb Sawmilling Co. Pty Ltd* (1986) 160 CLR 16 and *Hollis v. Vabu Pty Ltd* (2001) HCA 44.

The importance of the proposed amendments is that they require the satisfaction of the three tests irrespective of whether or not a contract of service exists or can on the evidence be found. The essential character of the proposed amendments is not that they go to the existence or otherwise of a "contract of service" for the purposes of s.12(1) of the Act but rather that the proposed amendments provide an alternative way of determining whether or not someone is a "worker" or an "employer".

Schedule 2 Part 2 of the *WorkCover Queensland Act 1996* specifies certain persons who are deemed *not* to be workers, including directors of corporations, trustees of trusts, and partners in a partnership. These current exclusions from coverage will remain in the Act.

Achievement of the Objectives

In relation to the amendments to the *Workplace Health and Safety Act 1995*, the policy objectives of the Bill are supported by the minor amendments. In brief, the amendments:

(a) modify the Bill's definitions of "dangerous event" and "work injury"; and

(b) insert an additional provision in the Bill to require an employer or principal contractor to keep, for a period of 5 years, the workplace assessment record a workplace health and safety officer is required to make in accordance with the Bill; and

(c) make minor technical amendments to the *Workplace Health and Safety Act 1995*.

In relation to the amendments to the *WorkCover Queensland Act 1996*, the amendments in Committee have been prepared to amend section 32, schedule 2 and schedule 2A, and to insert a new chapter 17 into the *WorkCover Queensland Act 1996*. The amendments will clarify the original intent of the legislation and provide certainty for employers by ensuring that a person who works for another person under a contract is presumed to do so as a "worker", unless it can be shown that the person is doing so under a genuine business arrangement.

The amendments achieve this objective by introducing a "results test" to be used in addition to the definition of a "worker" in section 12 to provide certainty for employers regarding who is and who is not a "worker" under the Act.

Administrative Cost

There are no additional costs incurred by Government as a result of these amendments to the Bill.

The WorkCover Queensland Board held an amnesty campaign for uninsured and under declared employers in the building and construction industry from 1 to 28 February 2003. Due to the success of the campaign, the amnesty was extended until 14 March 2003.

As at 14 March 2003, $25M in additional wages had been declared to WorkCover, which equates to additional premium of $1.06M.

Consistency with Fundamental Legislative Principles

The Bill is consistent with fundamental legislative principles.

Consultation

In relation to the amendments to the *Workplace Health and Safety Act 1995*, the Department of the Premier and Cabinet was consulted in February 2003. The Office of the Queensland Parliamentary Counsel identified the necessary technical amendments to the *Workplace Health and Safety Act 1995* after the Bill had been introduced to Parliament.

Broader consultation was not undertaken as the amendments are of a minor or technical nature and do not alter the policy objectives of the Bill. Extensive consultation with government departments, major industry bodies, unions, employers, employees and consumers on the policy objectives of the Bill had already been undertaken prior to the Bill's introduction to Parliament in December 2002.

In relation to the amendments to the *WorkCover Queensland Act 1996*, consultation has occurred with the Queensland Master Builders Association, the Housing Industry Association, the Australian Industry Group, Commerce Queensland, CPA Australia, the Queensland Trucking Association, the Queensland Security Industry Reference Committee, the

Building Service Contractors Association of Australia, the Queensland Workers' Compensation Self Insurers' Association, the Local Government Association of Queensland, the Queensland Law Society, the Australian Plaintiff Lawyers Association, the National Electrical and Communications Association, the Construction, Forestry, Mining and Energy Union (Construction and General Division), the Queensland Council of Unions, the Australian Workers' Union (Queensland Branch), the Department of the Premier and Cabinet, Treasury Department, WorkCover Queensland, the Department of Public Works, the Queensland Building Services Authority, the Department of State Development (Business Regulation Reform Unit), the Office of Fair Trading, the Department of Justice and Attorney-General and the Department of Transport.

NOTES ON CLAUSES

Amendment No. 1 at clause 1 amends the title of the Bill to acknowledge the further Act to be amended.

Amendment No. 2 at clause 2 specifies that the amendments to the *WorkCover Queensland Act 1996* are to commence on 1 July 2003. The amendments to the *Workplace Health and Safety Act 1995* will commence on a day to be fixed by proclamation.

Amendment No. 3 inserts a new clause 19A after clause 19 to amend section 79 (Employer to display identity of workplace health and safety representatives). This is a technical amendment to clarify the operation of the provision and reflect modern drafting style.

Amendment No. 4 inserts a new clause 21A after clause 21 to amend section 95 (Employer and principal contractor to display identity of workplace health and safety officer). This is a technical amendment to clarify the operation of the provision and reflect modern drafting style.

Amendment No. 5 at clause 24 amends the Bill to require an employer or principal contractor to keep the records the workplace health and safety officer (WHSO) is required to make under clause 23 of the Bill for a period of 5 years.

Under new requirements in clause 23 of the Bill, a WHSO is required to record the results of a workplace health and safety assessment carried out at the workplace.

This requirement will enable inspectors to check that assessments have been carried out and whether employers have taken action to rectify problems identified by the WHSO.

Amendment No. 6 at clause 34 amends a reference to the title of the Bill to acknowledge the further Act to be amended.

Amendment No. 7 at clause 36 amends the definition of dangerous event in the *Workplace Health and Safety Act 1995*. The Bill specifies that a "dangerous event" means an event caused by specified high risk plant, or an event at a workplace caused by a workplace activity, if the event involves or could have involved exposure to persons to risk to their health and safety because of:

> "(f) escape, spillage or leakage of any substance, including any hazardous material or dangerous goods."

The Department of Industrial Relations received feedback from external sources that "substance" is too broad in this context and should be amended to focus on the "escape, spillage or leakage of hazardous material or dangerous goods".

Amendment No. 8 at clause 36 amends the definition of "work injury" to include serious bodily injuries. Currently, "work injury" means:

(a) an injury to a person that requires first aid or medical treatment if the injury was caused by work, a workplace, a workplace activity or specified high risk plant; or

(b) the recurrence, aggravation, acceleration, exacerbation or deterioration of an existing injury in a person if—

  (i) first aid or medical treatment is required for the injury; and

  (ii) work, a workplace, a workplace activity or specified high risk plant caused the recurrence, aggravation, acceleration, exacerbation or deterioration.

The death of a person should be recognised as a "work injury". The definition of work injury should also cover a situation whereby a person is absent from work for 4 days, because of a work injury, but who may not require first aid or medical treatment needs.

PART 2A—AMENDMENT OF WORKCOVER QUEENSLAND ACT 1996

Amendment No. 9 inserts a new part 2A after clause 36 to amend the *WorkCover Queensland Act 1996*.

Clause 36A provides that the inserted part 2A amends the *WorkCover Queensland Act 1996*.

Clause 36B amends section 32 of the *WorkCover Queensland Act 1996* (Who is an "employer") to provide that a person mentioned in schedule 2A, part 2 is not an "employer".

Clause 36C inserts a new chapter 17 to specify that the provisions of the *WorkCover Queensland Act 1996* as in force immediately before 1 July 2003 continue to apply in relation to an injury sustained by a worker before 1 July 2003, as if the *Workplace Health and Safety and Other Acts Amendment Act 2003*, part 2A had not been enacted.

Clause 36D amends schedule 2 of the *WorkCover Queensland Act 1996* (Who is a worker) to insert a new section 1A in part 1 (Persons who are workers).

Schedule 2 specifies certain persons or categories of persons who are workers and those who are not workers. The Bill amends schedule 2 to specify that any person who works for another person under a contract (regardless of whether the contract is a contract of service) is a "worker" unless all three elements of a results test can be satisfied in relation to the person, or it can be shown that a personal services business determination under the *Income Tax Assessment Act 1997* (Cwlth) is in effect for the person.

Schedule 2 Part 2 of the *WorkCover Queensland Act 1996* specifies certain persons who are deemed *not* to be workers, including directors of corporations, trustees of trusts, and partners in a partnership. These current exclusions from coverage will remain in the Act.

A person who works for another person under a contract would ordinarily be a person who works for labour only or substantially for labour only, or a person who seeks to receive a reward mainly for his or her personal efforts or skills. However, for the purposes of the test in clause 36D, it does not matter whether the contract is a contract of service, a contract for services, or any other type of contract.

For example, a contract which is substantially for supplying or selling goods, granting a right to use property, or providing the use of an asset may involve some degree of labour which is incidental or ancillary to the main purpose of the contract. The provision of labour would not be the substantial intent of the contract and section 1A would not apply because the contract does not substantially concern one person working for another person. In determining the main purpose of the contract, it may be necessary to look past the contract to the true nature of the agreement between the two parties.

In order to prove that an individual is not a "worker", all three elements of the results test must be met:

1. The person performing the work is paid to achieve a specified result or outcome.

In order to satisfy this test:

- a person's contract or quote would require him or her to complete a set task; and
- payment would need to be for an agreed price, based on completing the set task.

The contract or quote should specify the result or outcome which is required. Generally, payment would not be made until the work is completed, although progress payments may be paid at agreed intervals. For example:

> *A builder has engaged an owner-driver of a truck to move 100 cubic metres of fill to another site. The owner-driver would be considered to be contracted to complete a set task.*
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> *Furthermore, if the builder and the owner-driver negotiated a price for the delivery of the fill and this is to be paid for on completion of the work, the owner-driver would be considered to be receiving payment for an agreed contract price, based on completing the set task.*

In this situation the owner-driver would be working for a specified result and part 1 of the results test would be satisfied. A failure to meet this test means that for the purposes of this clause the person is a "worker".

2. The person performing the work has to supply the plant and equipment or tools of trade needed to perform the work.

To satisfy this test the person would be required to provide the tools of trade, or plant and equipment actually needed for the person to carry out

the work under the contract, taking into account the particular circumstances of the work situation involved. However, a failure to meet this test means that for the purposes of this clause the person is a "worker". As examples:

> *A cleaner contracted to clean a child care centre may supply his or her own mops, buckets, wipes, vacuum cleaner, etc., but may be required to use the cleaning chemicals provided by the child care centre, for example, if the child care centre must use certain chemicals either required under a statute or which enable the centre to achieve a standard required by a statute. In this case the cleaner would still be supplying the tools and equipment needed to perform the work and part 2 of the results test would be satisfied.*
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> *A painter contracted to paint the outside of a newly constructed building is required under a contract to complete the work, including provision of all necessary tools, plant and equipment (eg. brushes, paint, trestles, etc.). In some instances the painter may also have to supply scaffolding if the work is to be performed above a certain height. However, if the scaffolding is already set up or is still in place from previous construction activity (as is often the case), then the painter does not actually need to supply the scaffolding. Provided the painter supplies all the other equipment actually required to perform the work, part 2 of the results test would be satisfied.*

3. The person is, or would be, liable for the cost of rectifying any defect in the work performed.

To satisfy this test the person would, under a contract, be liable for the cost of repairing any defects in their work and/or the cost of any damages that might result from the need to rectify any of the work. A failure to meet this test means that for the purposes of this clause the person is a "worker". As an example:

> *A homeowner contracts a builder to renovate the homeowner's bathroom. The builder may subcontract a labourer on an hourly rate to strip the current fittings, tiles and lining from the bathroom. The labourer is paid to achieve a specific result but is not required to supply the tools necessary to perform the work (eg. hammers, crowbars, wheelbarrow) and is not liable for the cost of rectifying any defect in the work performed. If the labourer is ordered to rectify any defect, he or she is paid to do so. The labourer is therefore a worker of the builder.*

While stripping the bathroom, the labourer causes structural damage to one of the walls. Although the labourer is not liable for the cost of repairing the damage, the builder, as the worker's employer, would be vicariously liable for the damage caused by the worker.

In the event of an application for compensation being lodged, all of the information available at the time of the claim may be considered. This is in keeping with the current common law as enunciated by the High Court of Australia in *Stevens v. Brodribb Sawmilling Co. Pty Ltd* (1986) 160 CLR 16 and *Hollis v. Vabu Pty Ltd* (2001) HCA 44 that there is no single objective test for deciding who is an employee and that all of the circumstances of a case must be considered, on an individual case by case basis.

Despite the results test, a person is not a worker if he or she has a personal services business determination under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60. This section specifies the matters about which the Commissioner of Taxation must be satisfied in order to make a determination that a person is performing work and receiving income as a personal services business.

Clause 36E amends schedule 2A of the *WorkCover Queensland Act 1996* (Persons who are employers) by inserting a new part 2, replacing the title of the schedule and renaming the existing schedule as part 1.

Schedule 2A specifies certain persons or categories of persons who are employers. The Bill amends schedule 2A to insert a new part 2 (Persons who are not employers) which specifies that a person is not the employer of a person who works for the person under a contract (regardless of whether the contract is a contract of service) if all three elements of the results test can be satisfied in relation to the person, or it can be shown that a personal services business determination under the *Income Tax Assessment Act 1997* (Cwlth) is in effect for the person.

As for clause 36D, a person who works for another person under a contract would ordinarily be a person who works for labour only or substantially for labour only, or a person who seeks to receive a reward mainly for his or her personal efforts or skills. However, for the purposes of the test in clause 36E, it does not matter whether the contract is a contract of service, a contract for services, or any other type of contract.