

INDUSTRIAL LEGISLATION AMENDMENT BILL 2011

Second Reading

Resumed from 21 September.

HON JON FORD (Mining and Pastoral) [8.23 pm]: The opposition supports and, indeed, welcomes the introduction of the Industrial Legislation Amendment Bill 2011 as it makes some quite significant reforms, particularly in regard to bringing in people who have been excluded from portable paid long service leave. The Industrial Legislation Amendment Bill 2011 principally amends the Construction Industry Portable Paid Long Service Leave Act 1985. I will be paying some attention to my notes because there are some very long-winded acronyms in this bill.

Hon Simon O'Brien: Detailed acronyms, if you don't mind!

Hon JON FORD: Detailed? Quite right!

The explanatory memorandum says that it establishes a statutory portable long service leave scheme for employees in the Western Australian construction industry, and it clarifies the act's application to certain employers; in particular, labour hire agencies are included in the definition of "employer". The bill also introduces a time frame for employers to submit a written statement for contribution. Employees will now no longer have to register with the Construction Industry Portable Paid Long Service Leave Board, as this should occur automatically. This is very significant because we are reacting to major change, particularly with the advent of the fly in, fly out workforce. When I say fly in, fly out, I mean a very portable workforce. We have people coming in and out of the industry, working for labour hire companies. Even though they might have worked for the same company for 10 or 15 years, because they work for a labour hire company they are not currently entitled to long service leave or to be part of the scheme in the construction industry, so this legislation rectifies that; it has largely been welcomed by everybody.

I have a couple of questions I would like the minister to answer in his response to the second reading debate. What provisions are there for auditing and/or compliance checks with employers? Could an employee who suspects or worries that they are not registered raise the matter with the CIPPLSLB, or is there a specific agency an individual can talk to if they think they have missed out?

Hon Simon O'Brien: To ensure that they are registered?

Hon JON FORD: Registered, yes.

The explanatory memorandum also says that the bill will replace most offence provisions with civil penalties, and the minister said in his second reading speech that proceedings would be brought by an officer of the board. The next question I want to ask is: can an individual employee bring proceedings to the Industrial Magistrates Court? Can an employee use a third party, such as a union or a lawyer, or can somebody else bring a proceeding before the Industrial Magistrates Court with regard to these matters, acting on behalf of an individual, either directly or indirectly? The bill will also clean up some technical matters in a number of acts: the Industrial Relations Act 1979 and substantive amendments. I have already gone through that. It provides recognition that the Construction Industry Portable Paid Long Service Leave Act offence provisions are to be replaced with civil penalties within the Industrial Relations Act; it amends references to reflect current federal industrial laws and agreements and amends publication requirements relating to area and scope award provisions in industrial agreements, and ensures clarity as to the validity of the appointments of the registrar and deputies of the Western Australian Industrial Relations Commission, and the clerk of the Western Australian Industrial Appeals Court. It also amends the minimum conditions of the Employment Act 1993 to recognise special public holidays proclaimed under the Public and Bank Holidays Act 1972, and in particular entitles full or part-time employees to pay, if they are not required to work on a day solely because it is a public holiday. Again, that is a significant change for people and is welcomed. It also amends the Employment Dispute Resolution Act 2008 and references in the EDR act to reflect current federal industrial laws and agreements consequential to those; the Litter Act 1979 and the Occupational Safety and Health Act 1984. I had a bit of a laugh about that, because it amends it to reflect the change of name of the Trades and Labor Council to UnionsWA! I did not actually look at why there would be some involvement in the Litter Act; I am not asking that question.

I have a couple of other questions. The explanatory memorandum states —

Clause 2 ... provides for sections 1 and 2 of the Amendment Act to commence on Royal Assent, and the rest of the Act on a day or days fixed by proclamation.

I found that to be a little unusual. Clause 2 of the Industrial Legislation Amendment Bill 2011, "Commencement", states —

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

Can the minister explain what this actually means—it seems to me to be unusual, but it might not be—and what is the intent? Normally, we find that legislation just provides that an act comes into operation on the day on which the act receives royal assent, so there are a couple of interesting extra provisions. I just wondered why that will apply in this case.

I have some questions about clause 6, but I will wait until the committee stage to ask them. I have a couple of amendments to move to clause 6. The second amendment is consequential on the first, so if the first amendment fails, the second one will fall away.

I thank the Minister for Commerce for the departmental briefings with a whole bunch of people. I have not found a stakeholder who has indicated any significant problem with the bill; they were all generally supportive of it. The opposition supports and welcomes the bill and congratulates the government on bringing it to this house. We hope it passes quickly.

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [8.31 pm] — in reply: I would like to thank Hon Jon Ford for his indication of support for the Industrial Legislation Amendment Bill 2011 on behalf of Her Majesty's loyal opposition and for the spirit in which he made his contribution to the second reading debate. Before I get too carried away, may I seek the leave of the house to continue my closing remarks at a later stage of this day's sitting? The explicit reason for doing so is that Hon Alison Xamon was detained on urgent parliamentary business and I think she wants to make a contribution to the second reading debate. If leave is granted, that will allow her to quickly do that.

[Leave granted for the member's speech to be continued at a later stage of the sitting.]

[Continued below.]

HON ALISON XAMON (East Metropolitan) [8.32 pm]: I thank the Minister for Commerce for giving me that opportunity. I will not speak for very long on the legislation. I rise on behalf of the Greens (WA) to support the Industrial Legislation Amendment Bill 2011. I understand that many of the provisions in the legislation have been floating around for some time, that parts of the legislation have been subject to considerable discussion by many stakeholders, and that quite a lot of it also reflects case law that has emerged over the years. Obviously, I support the changes to make reference to the Fair Work Act and UnionsWA. It is an important technical tidy-up and is long overdue. It is important that that be done. I also note that there is some important clarification about the appointment of industrial inspectors.

Of particular interest to me, and obviously the main substantive changes to the legislation, are the proposed amendments to the construction industry's portable long service leave scheme. It is a very important scheme. It has, in the main, functioned well. It recognises that the nature of the construction industry is such that workers rarely stay with one employer long enough to accrue long service leave in the way that other workers ordinarily do. Long service leave is particularly important to this industry, because construction work is arduous work. It is quite important that people are able to take this time out, because the work is also particularly hard on the body. I understand that the changes are largely designed to reflect the changing nature of the workforce and include provisions around labour hire companies; that is obviously important. A definition of "offshore" construction has been included, as well as the additional areas now classified as construction work—again, as I understand, to reflect case law—such as swimming pools and spas.

As Hon Jon Ford mentioned, there are changes to the membership of the board. I indicate that the Greens are happy to support Hon Jon Ford's amendment and share his concerns about ministerial involvement, which has increased to a level that has not been the case in legislation to date. In the nature of the make-up of the board, ideally all relevant and significant stakeholders would receive representation, and the amendment proposed by Hon Jon Ford goes a good way towards achieving that balance.

I also note that the legislation extends the definition of employers who are required to register for the purposes of contribution, which is a positive step. I understand that this also reflects case law. It is an important amendment, and it is important that we are tidying up these provisions. It is good to see that, effectively, it will be easier to recover moneys that are owed. I also note that the bill will update the provisions pertaining to enforcement.

Overall, this is a fairly straightforward bill. When I met with the ministerial briefers, I noted that a lot of the changes seemed overdue. I asked why it had taken so long for some of these changes to come about. Some of these changes represent a good tidy-up. However, there will be more discussion, particularly about the make-up of the long service leave board and how that board is appointed. It has been a very important board because it deals with such an important provision, particularly for construction workers. It is important that we get that right. I appreciate the opportunity to speak. The Greens will be supporting this bill.

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [8.37 pm] — in reply: I thank members again for their contribution. It appears that there is support from all sides of the house for this bill and for the suite of amendments that are contained therein. I thank members for that support and the spirit with which they have approached this debate. One of the pleasing things in this process is that we have employed briefings and there have been opportunities for discussion behind the Chair and elsewhere to make sure that when members from all sides come into this house, they are across the bill and prepared to deal with it. That is why we have these processes; it is to make sure that the important time of the house in plenary session is not consumed unnecessarily on matters of detail that can be attended to outside. I thank members for their contributions and the manner in which they have made them.

Hon Jon Ford raised several quite different questions, which I would now like to address in turn. I think I have answers that should satisfy him. In the case of the second question there might be a dichotomy of views amongst some in the community about the principle and justification for the answer I will give. Nonetheless, I have a firm answer for the member. The first question he asked was generally about what provision there is for employees to confirm that they are registered. I think it is a requirement under the legislation—it is not being impacted upon by anything we are doing tonight—that when registration occurs, a certificate is issued by the board to both the employer and the employee. If a certificate does not arrive or the employee is concerned about it, they can simply make an inquiry, because a certificate is required to be issued. A simple inquiry can give rise to other courses of action if registration has not taken place. I am fairly confident about those processes and I hope the member is too because the reason behind the way the legislation has been set up is specifically to make sure that employees in the related industries are captured as they move around in a mobile, if not itinerant, way. That is the spirit of the program, and has been since day one.

The second question Hon Jon Ford posed was whether it was available to an individual or a third party—such as a union, an individual or whoever it might be—to bring proceedings under the act. The proposed amendment we are considering is to change most of the offence provisions to civil penalty provisions under the Construction Industry Portable Paid Long Service Leave Act and to provide the Construction Industry Long Service Leave Payments Board with the ability to enforce civil penalties in the Industrial Magistrates Court. The question the honourable member posed, and the spirit behind it, was reflective of a view, or at least raised the possible view, that individual employees or unions perhaps ought to have standing under section 83E of the Industrial Relations Act 1979 to seek a civil penalty for a breach of the act. The reason that we have not gone down that path is that under the Construction Industry Portable Paid Long Service Leave Act, employer contributions are payable on behalf of employees to the board, not to individual employees. The employer contributions are effectively a debt owing to the board; hence the board has exclusive standing to take enforcement proceedings. In addition, employees will not be disadvantaged if their employer fails to make the contributions. Employees will continue to receive payment from the board for an accrued long service leave entitlement. We consider these proceedings to be properly the province of this board and its program rather than intruding into the province of the industrial relations arena, and the legislation before us is drafted accordingly. Although some might prefer to do it another way, they are the reasons that it is drafted this way. I submit to the member, with respect, that although acknowledging there may be a contrary point of view, what is being delivered in this bill does all that is required to be done, and we can have confidence that it will do so. Employees will have access to their entitlements and a board will be available to carry out the function of being responsible for chasing up recalcitrant employers. All of that stands to protect individual employees. The purpose of setting up the board and the scheme in the first place was to have someone able to stand up for those employees, and that is what we will continue to deliver.

Thirdly, Hon Jon Ford asked a question about the commencement provisions contained in clause 2. Although sections 1 and 2 would come into operation on the day on which the act receives royal assent, the rest of the act would come into operation on a day fixed by proclamation, together with the option for different days to be fixed for different provisions. He asked why that is so. There is no particular reason for that except it is a fairly standard convention in detailed bills. As the member would know from his experience, there may be all sorts of reasons why a bill delivers the mechanics of a whole system. It may be convenient for certain provisions to come in ahead of others to ensure an orderly transition. There is no particular reason for it at all. It is a fairly common provision—a fairly common construction.

I thank Hon Alison Xamon for her supportive comments. I get the idea that she has a pretty good understanding of and previous exposure to some of these matters. I thank her for lending the benefit of that experience to these proceedings.

Finally, there is a supplementary notice paper so I imagine we will be going into committee in just a moment. There are some amendments to be tested. There are some reasons why the government is not inclined to go along with those amendments. I think that is a matter that can be quite cordially discussed and worked through briefly, I hope, during the committee stage. I again thank members for their broad support for the bill. Also through that support for the second reading, I extend some thanks to the board and the board's secretariat. There is a good

team at the board. The chair is Linda Gibbs. She has a team around her who were recently reappointed on my submission to cabinet. The same people were reappointed. John Youens is the CEO there. They are all very good people.

Just as an aside, I also indicate that the other jurisdictions came to Western Australia just last Wednesday for the national conference of like schemes, which was down in Mandurah. I had the privilege to open the conference last Wednesday evening. It is a vibrant and dedicated area of activity and one in which Western Australia is showing not only some disciplined expertise but also some leadership. On that basis, I also thank members for their support of this further legislative provision.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chairman of Committees (Hon Michael Mischin) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

Clauses 1 to 5 put and passed.

Clause 6: Section 6 amended —

Hon JON FORD: In response to a couple of questions I asked, the minister commented on how great the board is and how well it is functioning; indeed, the minister said he has accepted the recommendation to reappoint the current board. While this issue is not a showstopper, members on this side of the house are a bit mystified about why a minister of the Crown would want to be involved in appointing two members to the board. After all, it is members' money, and as the minister rightly said, it is between the board, the employees and the employer. In fact, the only involvement the government has—in our view should have—is arm's length involvement because the minister is the custodian of the act. Before I move my amendment, I would like to give the minister an opportunity to say why a minister would want to be involved in appointing members to the board other than those already on the board.

Hon SIMON O'BRIEN: I thank the member for his question, which is a legitimate one, and the proposed amendment. I do not think it has been moved yet; I think the member has just asked to discuss the question. Whether the member goes ahead and moves it is a matter for him. It raises some interesting questions.

Yes, I do support the board. I think it is unique. I go along on the odd occasion when I have the opportunity to join the board, because I like to have a working relationship so that I can do things such as assist them in their membership, because I have to take forward nominations, and make sure they have the legislative tools at their disposal. So, there has been a bit of contact and we have done that. But the member is right; apart from that, I do not have any particular interest. I just have some limited, but important, role in making sure that we have a group that works together. The composition of the board is important, and it is interesting. I will mention a few names now, because they are all well known. On this board we have the likes of Kevin Reynolds from the Construction, Forestry, Mining and Energy Union sitting down with Mike McLean from the Master Builders Association; they are long-term members, and I know them both. We have others such as Steve McCartney, and the member and I have been having some dealings and discussions with Steve, no doubt, about the local content issue lately. Ray Sputore from Decmil, for example, is another member. It seems curious, yet everyone seems to work very well together. It is a remarkable construction.

The proposed changes are very modest. At the moment, the act provides for a seven-member board appointed by the minister—that is, by the minister in cabinet, which is the normal practice. The minister appoints one person to be the chairman, so that is a ministerial prerogative, and three persons will be selected from a list of six names, which in turn comprises three names from the Master Builders Association and three names from the Chamber of Commerce and Industry. So, the MBA and the CCI, between them, put up a list—three each—of six names, and I then pick three from that.

For the other three it is a similar arrangement, whereby the minister of the day selects three people from a panel of six names—again, appointed in two groups of three—three each from the body currently known under this legislation as the Trades and Labour Council, and three names submitted by the Building Trades Association of Unions of Western Australia, a peak body of some construction unions. That is what it is currently. I do not know that that necessarily gives the flexibility we need. I think that part of the motivation for the member raising this matter is in response to representations made by other organisations in the broader industry sector. I am aware of a few, such as the National Electrical and Communications Association and the Housing Industry Association, for example, that wonder why they are not included on these panels.

There are a couple of ways we could go about this. One is the way that the member is proposing on the supplementary notice paper, which is to increase the size of the pool so that I select four people twice—four people out of a panel of eight—to represent the unions and the industry respectively. That is one way of doing it. That would have the effect, obviously, of increasing the size of the board by two. However, what is proposed in clause 6 is that we amend section 6 to keep the same numbers—that is, a total of seven—and that in each half I appoint two people from a panel of four comprising the nominees of the Master Builders Association and the Chamber of Commerce and Industry, and another two people from a panel of four comprising the nominees of UnionsWA and the Building Trades Association of Unions. It is then proposed that the minister appoint one person who in the opinion of the minister represents the interests of employers in the construction industry, and one person who in the opinion of the minister represents the interests of employees in the construction industry. That will mean that there will still be representation from all the current players. It is not a complete revolution. They will still have their representation. But I might add that it will be a more equal representation. We have also provided some freedom in this clause for the minister of the day to nominate a person from some other body that is representative of either side of the sector. I think that will provide the flexibility that we will need to meet the requests that have been made by some of these organisations, while still preserving the basic structure, which seems to work quite well.

The other thing that this clause will do is avoid the need to increase the size of the board from seven to nine members. All my advice is that the current size of the board works pretty well in terms of the dynamics and the quorum requirements. I do not see any point in enlarging the size of the board unless there is very good reason to do that. I might add that it is not government money or taxpayers' money that funds this board. It is entirely industry funded. I have recently approved, on recommendation from the relevant source, a substantial rise in the remuneration for board members' meeting fees. The remuneration is now about \$14 000 per annum for an ordinary member. It would, therefore, cost an extra \$28 000 to appoint another couple of members. I do not think that is a particularly huge show-stopping amount of money. But, nonetheless, it is other people's money. Therefore, unless there is some compelling reason to do that, I choose not to do that.

That is quite a long and detailed explanation that I have just given, so thank you, Mr Deputy Chairman, for your patience. I hope that explains, in a non-confrontational way, why we prefer the option that we are going with; and if the member could support that, that would be good, although the member has the option of moving the amendment if he wishes.

Hon JON FORD: My understanding currently is that the act provides for the minister to nominate members to the board, with a limit on that discretion to those people who have been nominated from those stakeholder groups that have been identified. Is that correct?

Hon Simon O'Brien: Yes, that is correct.

Hon JON FORD: So the substantive difference in what is being proposed in this amendment is that all of a sudden the minister will have absolute discretion for two members. Is that correct?

Hon Simon O'Brien: Yes, in addition to the current discretion about the chair.

Hon JON FORD: The people I have spoken to are concerned that the minister of the day could inadvertently, or purposely, change the balance in favour of one group or the other. So an employer group might be worried that one flavour of government might bias the board towards employees, and an employee group might be worried that another flavour of government might bias the board towards employer groups. So I get that from both sides of the chamber. But, as the minister has said, it is not a show stopper.

Another issue that is brought up currently is by people on both sides—the minister is right—who say that one of the thorns is they believe they should be on the board. They do not understand why they do not get on the board, so they think politics are at play in the nomination process and that they will never be on the board.

Hon Simon O'Brien: I don't get involved in politics myself!

Hon JON FORD: Precisely! Why would the minister want to get involved in this?

Hon Simon O'Brien: Certainly not this one!

Hon JON FORD: On that basis, minister, it seems to me that the best solution would have been not to change the construction board, given its long history of working. Given that we are now being asked to change the board, I would like to propose the following amendment. As the minister said, it is a different way of looking at it. In this amendment the minister does not get involved in any way or form other than in the way or form that is currently available; that is, the minister of the day has limited discretion unless those groups actually fail to nominate somebody, and that is up to them. I imagine they could do that. If they were at loggerheads internally in their preselections, they might just say that they will give it to the minister.

On that basis I will move the amendment and test it in the chamber. I move —

Page 7, lines 4 to 26 — To delete the lines and substitute —

- (b) 4 persons appointed from among persons whose names on a panel of 8 names comprised of —
 - (i) 4 names submitted by the Master Builders' Association of Western Australia; and
 - (ii) 4 names submitted by the Chamber of Commerce and Industry of Western Australia (Inc);
- (c) 4 persons appointed from among persons whose names are on a panel of 8 names comprised of —
 - (i) 4 names submitted by Unions WA; and
 - (ii) 4 names submitted by The Building Trades Association of Unions of Western Australia (Association of Workers).

Hon SIMON O'BRIEN: I will not trouble the committee with the full explanation that I have already given by way of discussion. I will simply note that the effect of this amendment is basically to keep the status quo but to expand the pool of six nominated by the employer and employee representative groups to a quantity of eight in roughly the same formula. That is all it really is: to expand the size of the board from a total of seven to a total of nine. In so doing, if it would be the will of the chamber to go down this path, I think we would then intrude on the amendment contained in the bill because we would delete the lines. In so doing, we remove the initiative of freeing up a bit of discretion for the minister of the day to weigh a proper balance of representatives in the manner that I have already outlined. Again, I do not think it is a show stopper from either point of view, and I respect the member's motives, but we are trying to get a better system. We have been developing this for some time. I hope I have been able to articulate a good case for what is already drafted in the bill. If not, I will simply have to throw myself at the member's mercy and ask the chamber not to support this amendment.

Hon ALISON XAMON: As I indicated during my second reading contribution I generally support Hon Jon Ford's proposed amendment. I thought I should clarify my position. I am not actually enamoured with the idea of widening the number of people on the board. I am confident that seven people is probably a manageable number. I agree that that sort of number has also contributed to the stability of the board, which, as has been pointed out, is one of its positive functions. Ideally, we want to ensure that the board remains apolitical in effect, as much as is practicably possible when talking about the sorts of organisations involved. I am prepared to support the proposed amendment because I particularly share the concerns raised by Hon Jon Ford about the provisions at proposed section 6(1)(d) and (e) in that it is a shift to the minister making the decision to appoint people. One of the strengths of the board to date has been that it has very much had ownership from industry and also from representatives of workers in that industry. I would hate to see a move away from that. Although the minister has made it very clear that it would certainly not be his intention to politicise this board, of course we are talking about legislative provisions that will potentially be around for quite some time. The interpretations that may be exercised by existing ministers may not be the same as that for future ministers. That is something that we need to be mindful of. I would have preferred a similar make-up of three and three, but I have not moved the amendment; therefore, I basically either take the point in the amendment that is presented or not.

I would like to reiterate my concerns that no minister, either existing or future, should exercise the provisions that have now been included within this legislation, effectively, to politicise the board and perhaps to impose on the board people who are not supported by either the industry bodies that have put forward names or the employer representative groups that have put forward names.

Hon SIMON O'BRIEN: By way of a brief conclusion to this, if I can, I will just describe how this system would work. I have a pretty good feel for this because there are plenty of other boards and advisory committees and whatnot put together from time to time, and ministers have to consider what the make-up of those groups should be. I will tell members how I would go about it if I had to select, for argument's sake, the first three, being persons who in the minister's opinion represent the interests of employers in the construction industry, and I also had to find another three who in my view represent the interests of employees in the construction industry. I would go to the same groups and ask them to submit to me a nominee or two; that is exactly how I would do it and that is how we do it right now. It is as simple as that. This change proposed in the substantive clause preserves those stakeholders that are already explicitly mentioned; therefore, they are not just being thrown out the door. Even if we were going to the minister's discretion completely, I would still go through that process and I reckon that that is the process that most other ministers would follow as well, because that is the sensible way to do it. Anyway, it is up to members. I guess we have a two-part process here. If a member is of a mind to reject

Extract from *Hansard*

[COUNCIL — Wednesday, 19 October 2011]

p8310b-8316a

Hon Jon Ford; Hon Simon O'Brien; Hon Alison Xamon; Hon Simon O'Brien (

the notion of expanding the board by two, along the lines of the amendment, then they would vote against the amendment, but then we will come to the question of whether my clause stands as printed, and then if there are those who do not want to include the element of ministerial discretion for the third spot, then they would vote against that clause and then we are left with the existing section 6 of the act, which works very well. I advise that the government will be voting against the proposed amendment and in favour of the proposed clause.

Amendment put and negatived.

Clause put and passed.

Clauses 7 to 61 put and passed.

Title put and passed.

Bill reported, without amendment.

Leave granted to proceed forthwith through remaining stages.

Report

Report of committee adopted.

Third Reading

Bill read a third time, on motion by **Hon Simon O'Brien (Minister for Commerce)** and transmitted to the Assembly.