30 June 2017

The Standing Committee on Education,
Employment and Youth Affairs
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Canberra ACT 2601
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Via Email: committees@parliament.act.gov.au

Dear Committee

Submission from Master Builders ACT - Inquiry into the extent, nature and consequences of insecure work arrangements and employment practices in the ACT

Thank you for inviting the Master Builders Association of the ACT (MBA ACT) to make this submission to the committee.

Introduction

MBA ACT was formed in 1925 and represents the interests of around 1,200 commercial builders, residential builders, civil contractors, suppliers, subcontractors and professionals.

Master Builders ACT is the largest membership association in the ACT and also operates Canberra's leading Registered Training Organisation and Group Training Organisation.

The building and construction industry is a significant contributor to the ACT economy, employing around 14,000 people *(ABS, August 2016)* and made a $1.7 Billion contribution towards Gross State Product (by Industry Value Added) in 2015-16 *(ACT Government, Economic Indicators for the ACT)*.

Is employment in the Building and Construction Industry insecure?

Budget Paper No. 3 of the ACT Budget 2017-18 (page 1) provides a useful context for employment in the ACT. The budget paper states:

> *The ACT economy is now on a strong growth footing. Gross State Product is expected to grow by 3¼ per cent in 2016-17, consistent with the 3.4 per cent recorded in 2015-16.*
>
> *Above trend growth is also forecast to continue into 2017-18 at 2¾ per cent, with growth then returning to its long-term trend rate of 2½ per cent.*
>
> *Construction, service exports, government consumption and household consumption are all contributing to the positive economic outlook.*

Importantly, this growth is supporting new jobs. Around 3,000 jobs are expected to be created on average each year over the forward estimates across a wide range of industries – further evidence of the diversification of the Territory's economy.

The ACT's population also continues to grow, with around 6,000 more people living in Canberra each year. By 2020-21, the Territory's population is expected to reach over 428,000.

Wages growth is expected to continue to be moderate over the short term before returning to trend in the medium term, due to the impact of Australian Public Service wage bargaining outcomes. Importantly, however, private sector wages growth in the ACT has recently shown signs of gathering pace.

This strong growth story is positive news for the Territory's construction industry. In short, a strong ACT economy means a strong construction industry.

The industry's confidence in the ACT economy is supported by a four year infrastructure investment program of $2.8 billion, including unprecedented investment in major projects such as light rail stage 1.

In this context, the MBA ACT sees no evidence that employment in the building and construction industry in the ACT is insecure. In fact, the industry is currently experiencing shortages of labour, in particular shortages of skilled workers. MBA ACT expects this strong demand for labour in the construction industry will continue.

The strong demand for labour translates into high wages. The majority of employees in the construction industry receive well above Award wages, regardless to whether or not they are on an Enterprise Bargaining Agreement (EBA) or if they paid "off the Award". The employment market is such that employers cannot realistically offer less.

These conditions lead to our opinion that employment in the building and construction industry is more secure than many other industries in the ACT, for example, fast food, retail, hospitality, tertiary education, and childcare to name a few.

The Law as it currently stands is effective

Industrial relations laws are vast in scope and effective in practice. This area of law is comprehensively covered by Commonwealth legislation and the ability for a State or Territory to effectively legislate is constrained; in general by the almost universal application of the Fair Work Act 2009 and in the building and construction industry in particular by the automatic operation of the Building and Construction General On-site Award 2010 (the Award).

As noted in the discussion paper at 3.i, regard must be had to the real limits of the ACT Government to effectively legislate in this area. As noted on page 7 of the discussion paper – the vast majority of the relevant legislation is Federal, and as such the Commonwealth effectively covers the field.

The Discussion Paper seems to envisage this problem and raises the question at 3.ii about the *extent to which tendering and procurement arrangements are and could be used to encourage best practice in industries where insecure work arrangements have become common*.

Using tendering and procurement rules to provide a bulwark against unsubstantiated cases of alleged insecure employment is not a suitable vehicle for enforcing such changes. Such a measure seems specifically aimed at the building and construction industry. In the absence of solid evidence that there are extant issues of insecure employment in the building and construction industry in the ACT, such a measure is simply not warranted.

As per the definition of insecure work at 2.7 of the discussion paper, casual work is regarded as an insecure form of employment but such simplistic assumptions can sometimes be misleading, as is noted at 2.10 of the discussion paper. A good example of this that an employee employed as a casual can after a period of regular and systematic employment avail themselves of protections under both the Fair Work Act 2009 and the Award regardless of the fact that they are employed and paid as a casual. For example, if a casual employee has been employed on a regular and systematic basis for the requisite period of time, they can be (and often are) deemed to be a protected employee for the Unfair Dismissal provisions under the Fair Work Act. An employer's protest to the Commission that they were employed and paid as a casual will not matter. In daily practice this is not a high bar to meet. This is an example of where the current Industrial Relations law has already adequately recognised and dealt with an issue of security of employment.

Mandatory casual conversion clauses are very common in industrial relations law and it should also be noted that the Building and Construction General on-site Award 2010 contains such a mandatory casual conversion clause (clause 14.8).

The Award represents the base for pay and conditions for onsite workers in the building and construction industry, and employers simply cannot pay (or offer conditions) below the Award. Breaches of the Award are actionable in both the Federal Courts and the Fair Work Commission. Complaints can also be made to the Fair Work Ombudsman. The ongoing experience of the Master Builders Association however, is that very many employees of our members greatly prefer to be employed on a casual basis and remain employed as a casual despite attempts by employers to place them in more *secure* employment.

Over and above the Award, the majority of the employees in the industry are covered by Enterprise Bargaining Agreements (EBAs) under which the Fair Work Commission has ascertained that the workers are "better off overall", as opposed to the Award. Simply put, if an employer wishes to simplify their industrial relations arrangements so as to be "Award free" they usually enter into an Enterprise Bargaining Agreement with their employees and such an EBA must have pay and conditions under which employees are better off overall than they are under the Award. These EBAs are voted on by the employees and are only made if a majority of the employees approve them. They are then subject to the scrutiny of the Fair Work Commission. Any employee can choose to be represented by an employee association in the process of making an EBA, and many employee associations embrace the making of EBAs.

As discussed briefly above, a good example of the provision of employment security provided by Commonwealth legislation is the unfair dismissal regime under the Fair Work Act 2009. Any eligible applicant can, for a small fee and minimal effort, call their employer to account if they believe their dismissal was harsh, unjust or unreasonable.

MBA ACT provides regular advice and assistance in this process and the existence of the unfair dismissal laws help ensure that the majority of employers take a reasonable and sensible approach

to questions around employment. In addition to this, the Fair Work Ombudsman is a free, effective and accessible resource in relation to workplace disputes and complaints. The free mediation service offered by the Fair Work Ombudsman is also a highly effective workplace dispute resolution procedure.

MBA ACT is unaware of any evidence to realistically suggest that the law as it currently stands is not sufficient to ensure secure employment. Simply put – the law is already adequate – all that is required is more education about, and enforcement of, the existing employee rights.

MBA ACT suggests that what is required is adherence to, and enforcement of, the law as it currently stands, not adding a further layer of complexity and bureaucratic compliance on local businesses. The greatest guarantee of job security is a thriving marketplace where the demand for workers is high. The greatest assistance that government can provide to ensure secure employment is create a strong economy.

Apprentices and Group Training Organisations

It is important to note that employed Apprentices enjoy a high level of employment protection in the building and construction industry. They are covered by the Award and the Fair Work Act 2009. A 17 year old Apprentice in the building and construction industry arguably has a much higher level of employment regulation and protection than a similar aged employee working in a large fast food chain, a retailer, or a day-care.

In addition to the protections provided by their approved training contract, all apprentices engaged in building and construction in the ACT receive entitlements under the National Employment Standards (NES), the Training and Tertiary Education Act 2003 (ACT), the Long Service Leave (Portable Schemes) Act 2009 (ACT), the Work Health and Safety Act 2011 (ACT), the Workers Compensation Act 1951 (ACT) in addition to Commonwealth and Territory anti-discrimination legislation.

The Building and Construction General On-Site Award 2010 directly ensures that, aside from a small number of exceptions, the terms of the Award will apply just as they do to any other covered employee. Whilst the base rates for an apprentice are lower under this Award than for a non-apprentice employee, this facilitates their entry into the industry and recognises that the employer will provide direction and training.

Apprentices receive a number of additional entitlements which are not available to ordinary employees under the Award. Apprentices are legally entitled under the Award to paid absence from work, without loss of continuity of employment to attend off-site training. In addition to receiving the ordinary loading when overtime work is required, an apprentice employed under the Award cannot work overtime without supervision. If they are under 18 years, an employer is not permitted to require an Award-covered apprentice to work overtime unless the employee wants to. Payment by results is expressly prohibited. Despite the lower pay rate, the Award ensures that the employer reimburses an Award-covered apprentice for the cost of any fees charged by the RTO, including the cost of prescribed textbooks.

The Award has been amended to provide apprentices with larger scope for flexibility in their training. The Building and Construction General On-Site Award 2010 provides for competency based

progression, providing an apprentice with the capacity to progress at a faster rate through the pay scales if they wish to finish the apprenticeship early.

Although the Building and Construction General On-Site Award 2010 does not apply to all covered apprentices, those whose employment conditions are not set by this safety net will be covered by either an individual flexibility arrangement or an enterprise agreement. In either case, the Employer has to ensure that an employee will be better off overall than they would otherwise have been had the Award applied.

MBA ACT Employed Apprentices
MBA ACT currently employees 73 apprentices, 19 school based apprentices, and a further 29 students under the Kids Assist program.

In addition to the protections under law described above, apprentices employed by MBA Group Training are provided with additional employment protections, safety protections and work security.

A MBA ACT apprentice receives the following benefits:

- Ongoing full time employment
- Paid annual leave
- Paid personal leave
- Full NES and Award entitlements
- Paid downtime for inclement weather and stand down (contra other apprenticeships – you don't work, you don't get paid).
- Personal Protective Equipment provided at no cost
- Hearing tests for apprentices
- Regulatory protection from ACT Department of Employment and the National Standards for GTOs
- Supervision by 2 full time apprentice field officers
- Dedicated WHS officer
- Enrolled in a Certificate III trade qualification (Carpentry, Plumbing or Plant Operations)
- Pre-placement short course training (manual handling, first aid, bullying and harassment, power tool awareness)
- Variety of exposure to a range of projects.

We believe no further regulation or control is required of Group Training Organisations in the ACT to provide more employment security.

Labour Hire
Labour hire companies provide a critical temporary work force to meet fluctuations in workload which are evident in the construction industry. Because the industry is contract based, and as such the industry has an *overriding need for flexibility*, a business in our industry may need 15 employees on a job on Monday, 45 on Tuesday and Wednesday, 30 on Thursday and 2 on Friday. If a tender falls through, they may have no need of a large number of employees for weeks or months. It is usually not possible in the building and construction industry to ascertain ongoing workforce requirements

There is therefore a vital role for Labour Hire in the building and construction industry.

While some Labour Hire firms may suffer a bad reputation, there appears to be a lack of real evidence to justify why Labour Hire is somehow supposedly more prone to abuse than any other form of employment. It is fundamentally important to note that the law still applies equally. An employee in a labour hire company is free to join a union, call the Fair Work Ombudsman, and otherwise avail themselves of all of the many protections that the law affords.

Again, the answer does not lie in more regulations, but in enforcing the workplace rights that already exist.

Sham contracting

MBA ACT rejects any suggestion that there is either a growing problem with the use of sham contracting or that the current law is insufficient to deal with whatever problem exists.

Sham contract arrangement arises when an employer deliberately treats an employee as an independent contractor or coerces employees into signing contracts that represent them as being contractors rather than employees. This is currently proscribed in s357 to s359 of the Fair Work Act 2009.

MBA ACT stresses that this behaviour is a deliberate act by those who choose to act illegitimately. It is a practice we unequivocally condemn.

Sham contracting should not, however, be confused with misclassifying an employee as a contractor, a mistake that may often be made because of the dense and confusing law that governs this distinction. Attempts to paint sham contracting as something different to the deliberate manipulation of the law promotes an assumption that sham contracting is an endemic problem in the building and construction industry or other industries. This is not the case.

There have been in the past dramatic and spurious reports claiming that Sham Contracting is resulting in tax losses nationally in the order of $2.5 billion a year and more. Such claims are inaccurate and falsely damning of the industry. Estimates of tens of thousands of workers in the building industry being potentially on a sham contract may indicate possible misclassification problems, but they do not represent a proper indication of sham arrangements – sham contracting being by definition a deliberate misuse of the law.

MBA ACT suggests that Sham Contracting is an area in which greater education is required both for industry and other participants.

Conclusion

The MBA ACT welcomes the opportunity to contribute to the committee's inquiry. In summary, we would like to highlight the following key points.

The ACT has a strong and vibrant economy which is expected to keep growing, this more than any other factor will ensure the ongoing security of employment in the ACT. There is a high demand for skilled building and construction workers and this demand is by far the greatest guarantee of

security of employment.

Consequent to the high demand for skilled workers, workers in the building and construction industry are generally paid well above award rates, and further conditions such as rostered days off are enviable.

The law as it currently stands is more than adequate to protect the security of employment. Industrial relations law has a long and proud history in Australia. It is right and proper that this law is now predominately a matter for the Commonwealth, so that all Australian workers enjoy to a large and growing degree the same protections regardless of where it is that they work.

Both Group Training Organisations and Apprentices receive strong protection under the current legal arrangements. As displayed above MBA apprentices receive even more. Apprentices are the future of our industry. To unnecessarily burden employers who are looking to take on apprentices risks damaging the future of the industry. To place such burdens when there is no need for it as the area is already covered by various laws and regulations is regressive.

As discussed above, the cyclical and contract based nature of the building and construction industry necessitates the flexibility of labour hire arrangements. Importantly, all the legal protections that apply for a worker in the industry also apply to those working under labour hire arrangements. MBA ACT notes that labour hire exists without comment in other industries, such as “temping” in clerical industries. In short there is a need for labour hire, and no need for extra protections aimed at specific industries.

Sham contracting is proscribed by the Fair Work Act 2009 and unequivocally condemned by MBA ACT. MBA ACT believes that more education across industry, government and other stakeholders would assist in combating sham contracting. As it is already clearly illegal under Commonwealth law, it is difficult to see what more could be usefully be done by a State or Territory government.

We would welcome the opportunity to discuss any aspect of our submission in further detail, and request the opportunity to present to the committee at the public hearings.

Yours sincerely

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