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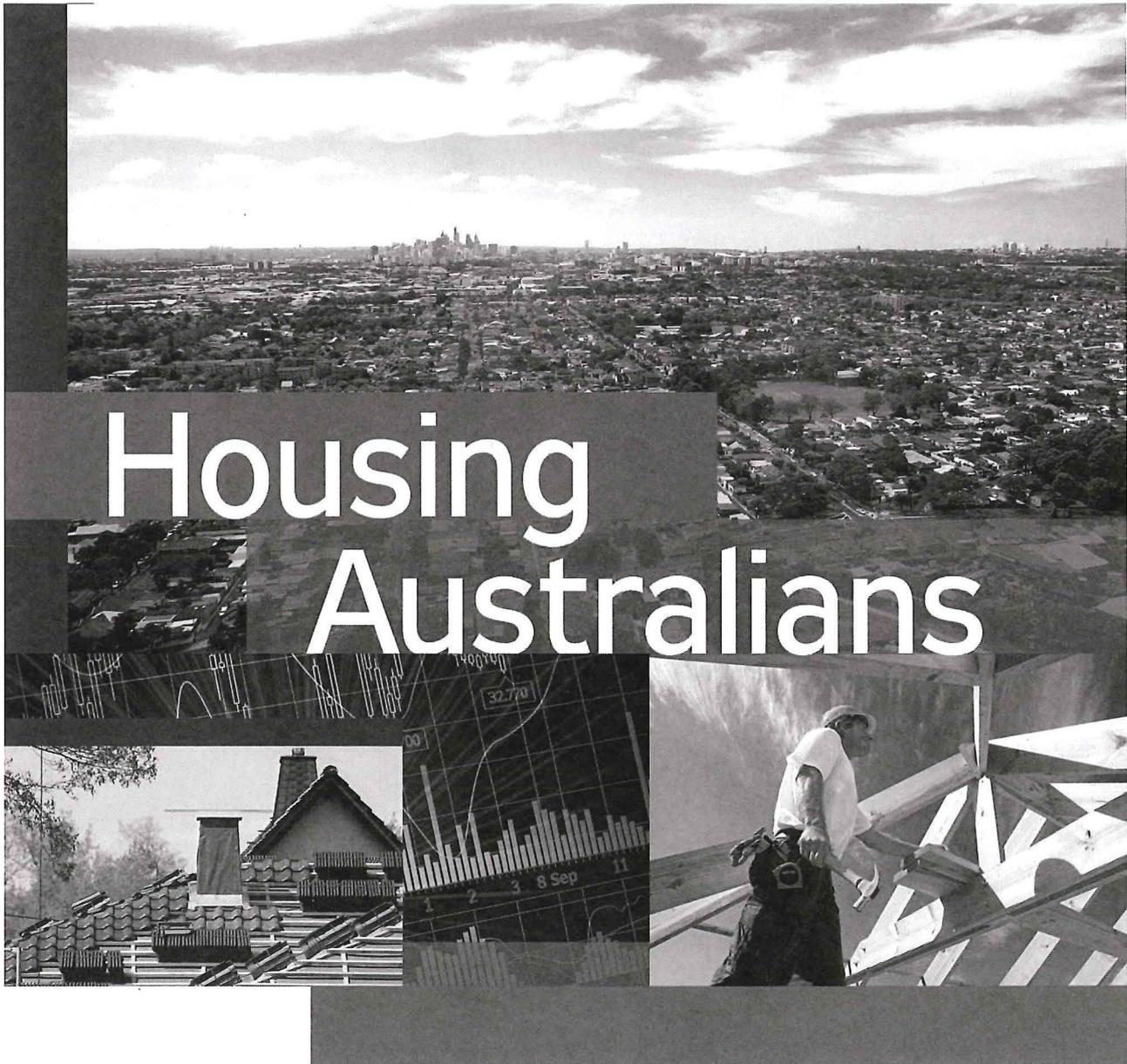
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HOUSING INDUSTRY ASSOCIATION



# Housing Australians

Submission to the ACT Legislative Assembly Standing Committee on Education, Employment and Youth Affairs

## Inquiry into Insecure Employment in the ACT

30 June 2017



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## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 30,000 member businesses throughout Australia, with over 1,200 members in the ACT and Southern NSW. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing. HIA members construct over 85% of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.



## 1. INTRODUCTION

HIA welcomes the opportunity to respond to the Standing Committee on Education, Employment and Youth Affairs Inquiry into Insecure Employment in the ACT and the accompanying discussion paper that was released in May 2017.

The terms of reference for the Inquiry refer to a range of matters relating to 'insecure' work arrangements in the ACT including the:

- legal rights and obligations of group training organisations, labour hire companies, host organisations and employees, along with any ambiguity that exists between these entities.
- effectiveness of existing industrial relations laws and instruments and their enforcement in the group training and labour hire industries, including occupational health and safety laws and workers' compensation laws.
- impact of poor practices, including workplace health and safety practices, in group training, labour hire and other insecure employment arrangements on competing businesses.
- impact on long-term workforce needs of replacing permanent employees, apprentices and trainees with casualised labour hire workers.

HIA's submission aims to respond to the terms of reference to highlight the benefits of independent contracting, labour hire and group training to the ACT residential building industry (and the economy more broadly), the use of visa arrangements and the adequacy of the existing safety nets of laws and regulations that protect employees.

It is HIA's view, at least from a residential building industry perspective, that all of the concerns about independent contracting, labour hire, visa holders and 'vulnerable workers' implied by the Committee's terms of reference are extensively addressed by both Commonwealth and Territory legislation.

Further, group apprenticeship schemes provide an essential source of workforce development for the industry. Under these arrangements Group Training Organisations (GTOs) employ the apprentices and place them with hosts who provide the necessary onsite training and work experience. HIA operates such a group apprenticeship scheme. It is a highly regulated sector and should not have been included in the terms of reference.

HIA is concerned about adding red tape onto small business in the ACT, the duplication of existing regulation, or the imposition of additional labour costs that are entirely divorced from improvements in productivity or competitiveness.

## 2. GENERAL COMMENTS

Both independent contracting and the labour hire industry are extremely important for businesses – big and small, employers, employees, the national and ACT economy.

Both are completely legitimate and lawful forms of arranging work.

The residential building industry, both in the ACT and elsewhere throughout Australia, has a long and established use of alternative modes of work engagement rather than directly employed full time workers. The majority of work undertaken on a detached housing dwelling is performed by independent (sub)contracting tradespersons. This subcontract system contributes strongly to efficiency, adaptability and cost-



competitiveness of the detached housing industry. Contactors in this market housing industry are essentially small businesses working for themselves.

As the Productivity Commission has observed, not everybody wants to work under the same conditions, and that these alternative forms of working partly satisfy the wide variety of preferences across the workforce.

Regretfully, however, this Inquiry is broadly premised on assumptions that independent contracting, labour hire and even group training arrangements are inferior and less legitimate than direct (full time) employment and hence warrant specific investigation.

In addition, the term 'insecure work' is neither a legal concept, nor and as suggested by the Discussion Paper, is it 'clearly defined'. Rather it is a pejorative label that creates a negative view of work arrangements that do not fit the ideal of the directly, permanently employed full time worker.

HIA rejects this label. Although paragraph 2.10 of the Discussion Paper, states that "*alternative forms of employment are not necessarily insecure...some individual prefer a form of employment that others would consider insecure, because it better suits their needs or provides benefits not available with traditional forms of employment*", this is a somewhat muted and conditional concession that focuses on the rights of workers but ignores the context in which that work is performed.

HIA is also concerned at the inclusion of the group training sector in the terms of reference of an Inquiry that also intends to look into the potential illegal use of labour hire workers, sham contractors or foreign workers.

Whilst there have been isolated recent media reports<sup>1</sup> claiming that issues exist with supervision of some school based apprentices, the ACT Government has historically supported the group training model through funding and other initiatives.

Group training and apprenticeship schemes are an important source of apprenticeship and skills development in the construction industry. Many small business employers in the industry wanting to be involved in training the industry's future workforce are unable to commit to the obligations associated with a full term, being a three or four-year indenture.

In this regard, while on the surface similar to labour hire, group training is quite distinct. The majority of apprentices are employed in a full time capacity by the GTO. Their employment is not 'insecure'. The GTO is bound by all the laws and regulations covering employers and GTOs cannot contractually transfer this liability to their host employers.

HIA encourages the Committee to continue to recognise the positive contribution by group training.

### **3. INSECURE WORK & SHAM CONTRACTING**

The terms of reference direct the Committee to consider 'sham contracting' in a number of contexts including its use in particular industries and allegations that sham contracting arrangements are being used to avoid workplace laws and other statutory obligations.

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<sup>1</sup> See <http://www.canberratimes.com.au/act-news/skills-canberra-tightens-processes-after-highprofile-apprentice-injuries-20170612-gwp8s8.html>



HIA does not support sham contracting and supports strong laws and penalties applying against businesses and individuals that evade their legal obligations. HIA is unaware of significant issues within the ACT residential construction industry insofar as 'sham contracting' is concerned.

### 3.1 USE OF INDEPENDENT CONTRACTORS IN THE HOUSING INDUSTRY

As is widely known, the detached residential building sector highly relies on the use of independent trade contractors, rather than directly employed workers, for onsite construction work.

In their publication *Understanding the patterns, characteristics and trends in the housing sector labour force in Australia*,<sup>2</sup> research body the Australian Housing and Urban Research Institute (AHURI) make reference to Australian Bureau of Statistics data to conclude:

- Small businesses form a very high proportion of all business in the residential building industry.
- The majority of those working in the industry in the 'working proprietor or partners of unincorporated businesses' worked in smaller businesses.
- Direct employees are distributed more broadly across businesses of all sizes other than the smallest category of businesses (\$100 000 – \$0.5 million).

AHURI further state:

*"The structure of the Australian house building industry is characterised by small businesses that contribute to the building of residential housing through extensive contracting arrangements".*

Contracting provides substantial benefits to subcontractors, head contractors/builders, consumers and the economy generally which are not available using employees alone. These benefits include:

- Higher levels of productivity.
- Guaranteed higher quality of work.
- Payment by results which leads to stable costs at greater rewards for productivity.
- Capacity to organise work to suit themselves.

Independent research has also shown that the (detached/cottage) housing industry is significantly more efficient than commercial construction.

The Productivity Commission first analysed the effects of restrictive work practices in the commercial sector in 1999, whilst in 2003 Econtech conducted a thorough analysis of the different cost structures applying in the housing and commercial construction sectors. Econtech found that the same tasks cost an average of 10% more in the commercial sector than in the residential sector. Labour costs were on average 19% higher in the commercial sector. This analysis understated the actual cost differential by excluding site allowances which are a considerable additional cost for commercial projects. Of specific relevance is that industry estimates

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<sup>2</sup> AHURI Positioning Paper No. 142, Australian Housing and Urban Research Institute Limited, Melbourne, <http://www.ahuri.edu.au/research/position-papers/142>



suggest that the impact of site allowances for large projects in Victoria is an additional 3 to 4% of total project costs. This data has been regularly updated, the latest being in 2013.

In addition, there are a number of reasons why work arrangements in the residential construction industry are more suited to contracting arrangements as opposed to permanent engagement.

### ***Volatile demand***

The Australian economy is not static – demand rises and falls over time, in sometimes very unpredictable ways. The residential construction industry particularly has a high degree of volatility in its output. Over the last ten years activity in home building, including renovations, has changed in real terms from \$71.9 billion in 2006 to over \$78.6 billion in 2010, then back down to \$72.1 billion in 2012 and then increased to more than \$89.4 billion in the last financial year.

In the ACT, the percentage of detached dwellings to multi-residential fell from 57% in 2007/08 to 20% in 2015/16. Detached homes are forecast to increase from 1,021 commencements in 2015/16 to 1,957 in 2020/21, to make up 43% of commencements in the year.

In this environment engaging permanent labour is a significant business risk, so using contractors makes good commercial sense. Contractors reflect a sensible business response to the environment within which the industry operates.

### ***Short term projects***

The overwhelming majority of residential construction projects are completed within six to twelve months. It is not practical given the already uncertain pipeline of future work to consider a permanent construction workforce, when work will be completed on a project-to-project basis.

### ***Small business***

Most businesses in the residential construction industry are in the ‘micro-business’ category. In HIA’s estimate, around two thirds of all residential construction businesses have no employees. For a small business with low turnover, labour hire and contracting are a rational response to managing risk.

### ***Specialisation in production***

The need for specialised skills is a key factor. The construction of a typical project home can involve 40 or more skills ranging from structural skills in carpentry, bricklaying and concreting through to niche skills like waterproofing, termite barrier installation, and finishing skills like landscaping, cabinetry and security systems.

The typical small business builder that contracts to undertake residential construction and renovation work simply does not generate sufficient work over the course of a year to carry these specialised skills as permanent employees, so labour hire and contracting is the appropriate business response.

## **3.2 WHAT IS SHAM CONTRACTING?**

The Discussion Paper asserts that ‘*Sham contracting is the practice of misclassifying employees as independent contractors*’. This statement is inaccurate and conflates a ‘sham arrangement’ for the purposes of the *Fair Work Act 2009 (Cth)*, with a common law misclassification of an employee as an independent contractor. Such a definition is not supported by the *Fair Work Act 2009 (Cth)*, and could be seen as contrary to the common law which supplements the Act.



The concept of sham contracting is found in the ‘sham arrangement’ provisions of the Act (ss.357-359), which is where an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

These provisions prohibit an employer from:

- Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (s.357(1)).
- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (s.358).
- Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (s.359).

Under subsection 357(2) a defence is available to an employer if at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship (i.e. whether contract was a contract of employment). Failure to comply with the sham arrangement provisions attracts potential penalties of up to \$51,000 per breach for corporate entities and up to \$10,200 per breach for involved individuals.

In 2006, the then Workplace Relations Minister described the purpose of these provisions, which are:

*‘aimed at preventing employers from entering into sham contracting arrangements ...where an employer seeks to avoid taking responsibility for the legal entitlements due to employees by seeking to disguise as an independent contracting relationship what is in reality an employment relationship.’*

Allegations of sham contracting and Odco style arrangements have been examined by the courts.

Recently, the regulator successfully appealed to the High Court in the matter of *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors*<sup>3</sup>, which scrutinised such arrangements. In that case the High Court found that the ‘triangular’ relationship between a business, a labour hire company and an individual breached the current sham contracting provisions.<sup>4</sup>

Relying upon the High Court’s findings, the Federal Court fined Quest \$33,000 for its ‘deliberate’ and ‘conscious’ misrepresentation of the contracting arrangement, and a further \$21,450 for threatening to dismiss a receptionist for refusing to enter into a similar arrangement.

### **3.3 EVIDENCE OF SHAM CONTRACTING**

Whilst there are widely divergent claims about the use of contractors in the building industry, in 2011, the then Australian Building and Construction (ABCC) Commissioner and now a Fair Work Commissioner, Leigh Johns, conducted an Inquiry into Sham Contracting into the building industry. The Report that resulted from

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<sup>3</sup> HCATrans 284 (4 November 2015)

<sup>4</sup> [2015] HCA 45



the Inquiry found that 'sham contracting' is not rife in the building industry or even 'widespread' (contrary to some claims) and also rejected proposals for radical action, such as changes to legislation.

HIA also notes that during the Fair Work Ombudsman's (FWO) 2014/15 National Building and Construction Industry Campaign, the regulator conducted a comprehensive audit of a number of businesses in the industry "given the historically high reliance on contracting arrangements and concerns of sham-contracting and misclassification within the industry". However, no prima-facie evidence of sham-contracting arrangements in the residential construction industry was found.<sup>5</sup>

The reality is that most contractors choose to work under contracting arrangements because they want to run their own businesses and accrue the potential financial benefits. Builders choose to engage contractors because it is the most cost effective way of doing much building work. In the main, contractors do not wish to be treated as employees as it would effectively limit their flexibility, and potential income.

#### 4. LABOUR HIRE AND GROUP TRAINING

The terms of reference refer to the nature and consequence of insecure work arrangements in the ACT including the:

- legal rights and obligations of group training organisations, labour hire companies, host organisations and employees, along with any ambiguity that exists between these entities.
- effectiveness of existing industrial relations laws and instruments and their enforcement in the group training and labour hire industries, including occupational health and safety laws and workers' compensation laws.
- impact of poor practices, including but not limited to workplace health and safety practices, in group training, labour hire and other insecure employment arrangements on competing businesses.
- impact on long-term workforce needs of replacing permanent employees, apprentices and trainees with casualised labour hire workers.

##### 4.1 LABOUR HIRE IN THE RESIDENTIAL CONSTRUCTION INDUSTRY

There are a number of differing models under which workers may be engaged under alternative employment arrangements in the construction industry including, labour hire employee service, contractor services under 'OdcO' arrangement, and via GTOs.

In HIA's experience, labour hire arrangements are not commonly used in the detached housing residential sector, although they can provide effective short-term labour for larger multi-residential building projects that require additional capacity, or specialised tasks and skills.

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<sup>5</sup> See National Building and Construction Industry Campaign 2014/15 - A report prepared by the Fair Work Ombudsman under the Fair Work Act 2009. Fair Work Ombudsman. July 2015 accessed at [www.fairwork.gov.au/ArticleDocuments/714/national-building-and-construction-campaign-report.docx.aspx](http://www.fairwork.gov.au/ArticleDocuments/714/national-building-and-construction-campaign-report.docx.aspx)



The essential quality of a labour hire arrangement is the splitting of contractual and control relationships. The 'standard' arrangement is:

- the worker at the site is under the direction or control of the host or client organisations in relation to the performance of work;
- the labour hire agency has responsibility for the wages and other on-costs of the worker and has a direct contractual relationship with them; and,
- the client or host pays the labour hire agency for providing the labour and thus has a contractual relationship with the labour hire agency.

They reflect a sensible business response to the environment within which the industry operates.

Workers engaged under labour hire arrangements are employees of the labour hire firm. They are not unregulated and unprotected. These employees are covered by the relevant modern awards and/or industrial instruments, the *Fair Work Act 2009 (Cth)* and other related acts. They have access to unfair dismissal, anti-discrimination and other rights. In turn, labour hire businesses, as the employer, are responsible for compliance with the relevant industrial law, instruments and the modern awards. They are responsible for ensuring employees receive their minimum employment entitlements at all times.

If a corporation, they are subject to the requirements of the *Corporations Act 2001 (Cth)*. There are Commonwealth agencies responsible for enforcement of these obligations. HIA does not consider additional regulation at a Territory level necessary or desirable. Host companies will have common law responsibilities and statutory workplace health and safety obligations with respect to workers under their control.

## 4.2 GROUP TRAINING ORGANISATIONS

Group apprenticeship schemes are an important source of apprenticeship and skills development in the housing industry. In fact, the concept of group training arose from a need expressed by small employers, in the building and similar industries who found it difficult to commit to fixed four year training contracts.

GTOs are able to play an effective role in assisting trainees and apprentices from commencement through to completion because they have in place pastoral care and support mechanisms that may not otherwise be in place for directly indentured apprentices. According to Buchanan and Evesson:

*'At their best they help promote decent, sustainable work-based learning situations by facilitating a fairer sharing of the risks associated with employment and skill formation. They are able to do this because policy from an earlier era nurtured a network of group training organisations built around a practical vocational ethic. This is an ethic that blends the best of commercial competence, a commitment to developing coherent occupational structures and an ethos of care and support at both the personal and local level.'*

Further, and by observation, the vast majority of apprentices in the building and construction industry are taken on by trade contractors. Often a single person working as a contractor will have one or two directly indentured apprentices.

### 4.3 LEGAL REQUIREMENTS FOR GTOS AND LABOUR HIRE IN THE ACT

GTO's, as the employer, are responsible for compliance with the relevant industrial law, instruments and the modern awards. They are subject to extensive rules and regulations under these laws.

In addition, there are many requirements imposed on GTOs through the Revised National Standards for Group Training Organisations (January 2017). It is important to note that these minimum standards do not apply to directly indentured employers. 'HIA Apprentices' is a registered GTO under these National Standards.

There are many benefits of using a GTO, including the requirement to satisfy the minimum standards as set out in the document to ensure compliance and accreditation as a GTO. These standards include three key elements:

- recruitment, employment and induction;
- monitoring and supporting apprentices and trainees to completion; and,
- maintaining a sustainable GTO which is well governed and administered.

It is also important to note that GTO's often adopt further measures to ensure compliance with relevant laws including:

- Prequalification checks for all new host employers to ensure compliance with their obligations under the *Work Health and Safety Act 2011 (ACT)*.
- Ensuring supervisors are suitably trained to attend sites to visit apprentices and to carry out safety check on those sites.
- Mentoring visits on site which can play a crucial role in the development of the host employer/apprentice relationship as well as providing guidance and support to both parties about their rights and obligations.

HIA supports continuation of the current system regulating GTOs in the ACT.

### 5. THE USE OF WORKING VISAS

Temporary work visas only represent a small number of total workers in the ACT residential building industry. HIA is not aware of the use of working visas in the residential construction industry or the engagement of workers on working visas, to avoid obligations that arise under the *Fair Work Act 2009 (Cth)*.

The Department of Immigration and Border Protection have reported that the total number of primary visa holders for the construction industry in Australia as at 31 December 2016 was 5,620 of which only 70 were reported in the ACT.<sup>6</sup>

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<sup>6</sup> Source: <https://www.border.gov.au/ReportsandPublications/Documents/statistics/457-quarterly-report-31122016.pdf>, p.15



## 6. REGULATORY POWERS

In formulating its recommendations, the Inquiry's terms of reference direct the Committee to consider a number of matters, including the limits on the ACT Government's legislative and regulatory powers and the potential impact of any regulatory regime on ACT businesses.

Firstly, it should be noted that legislative competence of the ACT parliament to regulate employment and contracting arrangements is significantly curtailed as a result of Section 122 of the Constitution of the Commonwealth. Unlike the state governments, there is no discretion to the ACT Government to 'refer' or not 'refer' its industrial relations powers to the Commonwealth. Nonetheless there are a range of both Commonwealth and territory laws and regulations that impact on employment matters - whether concerning vulnerable workers, labour or contracting in the building industry.

Quite contrary to the perception that there is a lack of entitlements for non-permanent forms of work, the current regulatory regime provides a range of entitlements. These laws include:

- *The Fair Work Act 2009 (Cth)*
  - Protection against underpayment of wages and other conditions of employment.
  - For contractors, apart from the sham contracting provisions, it provides protection to misclassified contractors including:
    - Underpayment orders and penalties for breaches of: the NES and modern awards.
    - Unfair dismissal laws.
    - A prohibition on coercion in relation to workplace rights (s.343).
    - A prohibition on misrepresentations in relation to workplace rights (s.345).
  - Unions are able to impose considerable restriction on the engagement of labour hire and other contractors through enterprise agreements and awards.
- *Independent Contractors Act 2006 (Cth)*
  - Gives contractors the right to challenge 'harsh' or 'unfair' contracts in the Federal Magistrates Court.
- *Corporations Act 2001 (Cth)*
  - Regulates the behaviour of companies and their directors.
- *Incomes Tax Assessment Act(s) and Tax Administration Act (Cth)*
  - Determines personal and business tax status of contractors and employees and superannuation guarantee status.
- *Migration Act 1958 (Cth)*
  - Provides for the rights of foreign works and provides for example, a 457 visa holder must be paid no less than that of any Australian employee who is performing the same role as the visa holder in the workplace and must not be required to reimburse the work sponsor for the costs relating to being the approved work sponsor, including recruitment and migration agent costs.
- *Payroll tax Act 2011 (ACT)*
  - Determines liability for payroll tax for employees and some classes of contractor.
- *Construction Occupations (Licensing) Act 2004 (ACT)*
  - Regulates the issue of builders licences in the ACT.



- *Training and employment Act 2003 (ACT)*
  - Regulates the employment of apprentices and trainees.
- *Workers Compensation Act 1951 (ACT)*
  - Ensures the payment of premiums and claims for employees.
- *Long Service Leave (Portable Schemes) Act 2009 (ACT)*
  - Provides a portable long service entitlement for workers in the construction industry.
- *Workplace Health and Safety Act 2011 (ACT)*
  - Imposes safety obligations on ACT builders, employers and workers in accordance with the model WHS legislation.

The multiple administrations that potentially oversee the conduct of businesses in labour hire and employment and contracting more generally, is a strong indication that the regulatory environment is capable of addressing the issues outlined in the Committee's terms of reference.

To the extent that the Committee's Inquiry finds deficiencies in the current regulations, HIA considers that they will be a result of compliance and enforcement issues rather than deficiencies in the regulations themselves. The last thing small business in the ACT need is additional red tape, duplication of existing regulation or the imposition of additional labour costs that are entirely divorced from improvements in productivity or competitiveness.

HIA also notes that the terms of reference refer to regulation in other jurisdictions. In this regard, HIA acknowledges that the Queensland Government has introduced the *Labour Hire Licensing Bill 2017* into state parliament and it is the subject of Committee Inquiry. This Bill seeks to impose a licensing regime on labour hire companies in Queensland, and to GTO's.

In HIA's view, the Bill is significantly flawed. It reflects a politically motivated response to poor behaviour and practices that were found in some industries, particularly in the mining and horticultural (seasonal fruit and vegetable) sectors. The proposed labour hire licensing regime will simply add cost and regulatory burden without effectively targeting rogue operators engaging in unlawful behaviour.

As the proposed licensing regime applies to GTOs, if implemented, the Bill will simply make it more expensive to employ an apprentice. This is of particular concern given the continual decline of apprenticeship commencements and completions. HIA does not consider there is any merit in the ACT Government contemplating a similar approach.

Further, whilst options for additional regulation of the labour hire industry or 'insecure work' may be pushed by some proponents or canvassed in reviews and inquiries being conducted by other Australian jurisdictions, it is important that the basis for any new form of regulation be supported by facts and evidence within the ACT.

Finally, HIA notes that the terms of reference direct the Committee to consider Australia's obligations under international law including International Labour Organisation (ILO) conventions. In relation to Australia's international obligations, only the Executive of the Commonwealth has the capacity to enter into treaties. Ultimately, these are matters for the Australian Government not the Territory Government or Assembly to consider or decide upon.

