

Introduction

The Construction Forestry Mining and Energy Union (**CFMEU**) welcomes the opportunity to make submissions to the review of the *Apprenticeship and Traineeship Act 2001 (The Act)*. In addition to these submissions we also support the submissions compiled by Unions NSW.

The CFMEU represents members in the building and construction industry. A large proportion of them are skilled tradespersons who have gained their qualifications and start in the industry under an Apprenticeship scheme; and many of those have gone on to work with or mentor apprentices of their own.

For as long as the CFMEU has existed, it has been working hard to assist our members throughout their apprenticeships. We see first-hand the consequences of breakdowns in the working relationship between employers and apprentices, the weakening of these bonds by labour hire firms and the issues faced by workers when firms collapse. Through its experience the CFMEU has come to appreciate the complexity of the system and the necessity for rigorous protection of apprentices, who are particularly vulnerable to exploitation and abuse.

These submissions will argue that the over-riding principle of the apprenticeship system must be the protection and support of the apprentice.

Flexibility in Training Arrangements

The discussion paper raises a number of questions about whether the current system provides sufficient flexibility to affected industries to offer apprenticeships. CFMEU would be concerned if additional flexibilities were to dilute the mix of education, practical skills and a living wage currently provided by an apprenticeship against the interests of apprentices; and particularly that, as has occurred in other industries, the implicit guarantee of skill and competence signalled to employers by the completion of an apprenticeship could be dramatically undermined.

The Vocational Training Order regime performs an important “gatekeeper” function – in their absence, it’s not clear what could prevent the Apprenticeship designation being applied to a wide range of informal training arrangements, enterprise-specific arrangements and certifications that would not normally be considered appropriate for consideration as an “apprenticeship”. The requirements in VTOs for certain numbers of hours help maintain a high standard of quality for NSW Apprentices, and maintains the confidence of the industry in the training delivered.

We are primarily concerned that any deregulation of what an apprenticeship “is” may have significant effects on the market perception of the value of a completed apprenticeship; with deleterious results not only for new apprentices, but also those who have completed one and rely on the trade gained for their employment.

Alternative Models for apprenticeships and traineeships

CFMEU is supportive of pre-apprenticeships as an introduction to the industry; but we strongly oppose moves to require institutional learning before the commencement of the apprenticeships; or internships in any form. The current system allows for appropriate recognition of prior learning; and supports on and off the job training– but in a way which avoids displacing the on-the-job experience which is the integral difference between apprenticeships and other forms of qualification.

The full-time study internship model mentioned would entirely undermine the apprenticeship model in trades.

Internships and fully institutional training forces all the costs of training onto the apprentice/trainee and would lead to the types of exploitation that we are seeing with the recent scandal of the Commonwealth's fee help arrangement. Under existing arrangements for apprenticeships in the building and construction industry the employer pays for the TAFE/RTO fees and in return has the benefit of employing an apprentice on a reduced wage whilst they are learning on the job. For the apprentice, they trade off a reduced wage for genuine productive work, the apprentice is paid for their time spent on off the job training.

CFMEU remains supportive of competency-based apprenticeships.

Establishing Apprenticeships and Traineeships

Paid work, on and off the job training and qualification is integral to apprenticeship program.

The proposals raised regarding casual apprentices and independent contractor apprentices are of particular concern.

The nature of casual work is that the workers do not have an on-going relationship with their employer; but are employed only for an engagement with no guarantee of ongoing work. If an employer cannot guarantee ongoing work for any period, then they should not be guaranteeing to provide significant on and off the job training to an apprentice under a training contract. A related issue is that the duties owed by the apprentice to the employer under a training contract would continue despite the potentially frequent cessation of the employment relationship, and may prevent the individual seeking more stable alternative work. . For employers who cannot guarantee ongoing employment other options are already available, primarily Group Training Organisations.

Independent contractor apprentices seem equally problematic. A key test for independent contractor/employee determinations is the level of control and independence the contractor can demonstrate. In an apprenticeship relationship that is close to zero. If the department is aware of any such arrangements currently in existence, CFMEU recommends their immediate referral to the FWO for prosecution under the sham contracting provisions of s357 of the Fair Work Act.

If Junior is reduced to 18 in this act, it would appear to reduce the usefulness of s26 of the Act by excluding workers aged between 18 and 20. CFMEU's position is that there is no reason to exclude any apprentice from this mechanism, and we suggest that s26 be modified to replace the word "junior" with "person".

Training Contracts are binding

CFMEU has a significant concern about the possibility of training contracts ceasing with employment or ceasing to bind once the employment relationship ceases as suggested.

In the building industry, the experience of trainee apprentices is significant – the immediate cessation of the training contract upon ceasing employment produces a real difficulty in transferring apprentices between jobs, as well as enforcing their workplace entitlements in the jurisdiction of the Chief Industrial Magistrate. Cancellation of training contracts by the VTRP, particularly when retrospective, can produce similar problems and reduce the effective value of genuine pay claims lodged under the Industrial Relations Act 1996.

We are concerned that a general rule that the contract ceases when employment ceases has real potential to disempower, disadvantage and remove a forum for dispute resolution from apprentices who require it.

Further, it remains CFMEU's view that apprenticeship without employment is not an apprenticeship. It is in the nature of apprenticeship that productive work is completed by the employee, under the direction of the employer, and as a general principle, no productive work should be extracted from a worker without compensation.

Roles and Responsibilities

Generally speaking, the roles and responsibilities set out in the current Act are appropriate; the main concern we hear is of inadequate enforcement of these roles, rather than any issues with prescriptiveness.

The distinction between GTOs and other employers is appropriate – the bar should be higher for companies that specialise in this training, because the temptation to cut corners is greater at scale; and they can bear more administrative cost without it becoming prohibitive to offer. There have been frequent complaints that some GTOs already registered are failing to provide adequate training and monitoring for their apprentices; reducing the requirements for these operators would only remove any ability for apprentices to seek redress. Actual employers should receive greater assistance and leeway, since they're primarily conducting another business.

However, the Host Employer provisions were written with well-operated and regulated GTOs in mind, and it is increasingly apparent in the building industry that labour hire companies and less reputable GTOs are employing apprentices and placing them with contractors with little regard for their responsibilities to monitor the host employer. Once the contract with the host employer ceases, some labour hire, and labour-hire-like GTOs companies are making their apprentices redundant and seeking to terminate the training contract to avoid any further responsibilities to the workers involved. In some cases, labour hire firms have deregistered or disappeared, leaving affected apprentices and other workers in limbo. We believe it may be appropriate to prohibit labour hire companies from putting on apprentices or making use of the Host Employer provisions without registering as a GTO.

The Development of a Training Plan

Competency-based training makes the training plan far more vital to Apprenticeships than in the past; and we support the focus of the Regulations on establishing them. CFMEU doesn't believe they currently create barriers of impediments, rather that they are too generic - almost always set by the RTO, with little or no involvement by the employer or apprentice, and unhelpfully vague.

Mandating a more central role for the apprentice (or guardian) and the employer in the development of the plan is absolutely necessary for training plans to function as intended. A much more specific explanation of the roles, responsibilities and obligations for all parties in Part 1 of the template plan would be of assistance here, and a greater focus on Part 3, which

is quite specific and often poorly completed. Most training plans contain little useful information about the requirements for appropriate training and available facilities, without which the plan is reduced to a box-ticking exercise.

Cancellation of Apprenticeships and Traineeships

CFMEU has significant concerns about the proposals to allow cancellation of a contract without consent or knowledge of either of the parties to that contract. We agree that the existence of a significant number of contracts in the system with defunct or uncontactable parties attached creates an administrative issue for the department; but the cancellation (particularly retrospective cancellation) of these contracts has the potential to disadvantage apprentices regarding their workplace entitlements, and should be treated with great caution.

We propose that contracts of this kind should be rendered “inactive” in some fashion without affecting the liabilities of the parties to each other – particularly in regards to workplace entitlements. If cancellation is the preferred mechanism, particularly where the employer is at fault, such as when they become a prohibited employer or where a training contract is established using false or misleading information, the legislation may need to be modified to allow apprentices to explicitly make a claim for compensation against that employer for damages arising from the cancellation of the contract.

Certification

As a general rule apprentices should only be issued with a trade certificate (i.e. certificate of proficiency) on completion of the apprenticeship. CFMEU supports a requirement that all building and construction trades be licensed, and we contend that this position would significantly increase completion rates for apprenticeships. If an apprentice does not complete all of the requirements for the trade certificate they should be issued with a Statement of Attainment that identifies all of the competency standards that they have achieved (in addition to any craft certificate) – which would be valuable for future recognition of prior learning applications.

Registration of Group Training Organisations

The Act should continue to provide for the registration of group training organisations. However, the requirements for registration need to be tightened; with GTOs required to provide training and be simultaneously registered as a Registered Training Organisation. GTOs that operate like labour hire firms should be deregistered immediately, and where found to have failed in their duties to apprentices, named as prohibited employers.

CFMEU believes that the host arrangements in the legislation should be restricted to registered GTOs and employers partnered with registered GTOs. CFMEU argues that a key reason for the falling completion rate amongst apprentices is the increasing number of poor operators in the sector which provide little in the way of training support. To address it, it's necessary to ensure that all apprentices are engaged on a quality apprenticeship.

Dealing with Disputes, complaints and Appeals

CFMEU believes that the VTRP is a highly valuable forum for dealing with disputes under a training contract. Where a dispute emerges, the position of apprentices in relation to their employers is often one of significant vulnerability, and as such conciliation and resolution of problems should be cheap, rapid and highly expert. VTRP is a low-cost jurisdiction, and has specific expertise, stemming from the involvement of industry participants, that could not be easily replaced by NCAT. We support the submission of Unions NSW that decisions be appealable to the NSW IRC.

In addition, the vast majority of apprentices now have employment arrangements governed by the Fair Work Act and the Modern Awards. It would be appropriate for the VTRP to have access to a mechanism to refer wages and entitlement matters to the FWC for arbitration. As an example, clause 15.9(b) of the Building and Construction General On-site Award 2010 provides a dispute mechanism where a dispute over competency-based progression arises.

Allowing greater scope for complaints against particular 3rd parties would be very valuable in general. Host employers in particular, should be considered a party to the contract for the duration of the hosting arrangement, and afterwards in regards to issues that emerged during the hosting arrangement – which might begin to address some of the issues with labour hire companies. In addition, although we recognize that 3rd parties should not in general be bound, where many companies are present on a job site and responsibility for work decisions is not entirely with the employer, some dispute resolution measures should be available to apprentices against 3rd parties unreasonably frustrating the terms of their training contract.

Sanctions

The key concern that CFMEU has with the current regime of sanctions isn't legislative, but to do with resourcing. The number of industry training officers has dramatically decreased over the past decade and a half, and there are ongoing concerns about the capacity of the department to monitor the field adequately and enforce the Act effectively. Without significantly greater resourcing of these positions, no changes to the sanctions regime will be effective. CFMEU strongly supports the submission of Unions NSW on Industry Training Officers.

In addition, the ability for employee representative organisations to commence prosecutions under the Act should be expanded, in line with the processes under the Work Health and Safety Act 2011.

Given that only 14 prohibited employer orders made, the current system of sanctions appears to be failing apprentices. We suggest that the Act mandate a hierarchy of sanctions against breaching employers – firstly prosecution, then cancellation of the apprenticeship, and employer prohibition for any repeat offences, including by individually naming directors of companies. We support the submission of Unions NSW in substantially increasing the penalty units available to offences under the regulation, and publishing a list of all “prohibited employers”.

Trade Recognition

CFMEU believes that the recognition of trade skills sections of the Act are functioning as intended, and do not require any change at this point in time.

The Regulation

Generally speaking, we believe the balance between Act and Regulation is roughly correct; however, the Regulation accompanying the Act should be restricted to matters that are expected to be influenced by technological or industry changes over the next 5 years.