Senate Education and Employment References Committee Inquiry into The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies

Submission by

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This submission is made in our capacity as academic experts on labour regulation, and the views expressed are ours alone.

Our focus is on the adequacy of the existing regulatory framework in dealing with the kind of issues exposed by the February 2018 report of the Fair Work Ombudsman (FWO) on the procurement of cleaners in Tasmanian supermarkets.[1] As the UTS Centre for Business and Social Innovation points out in its submission to this inquiry, the exploitation of cleaners is a problem not just in retail stores, but in other parts of the cleaning sector. We support the various recommendations in that submission, including greater government support for, and extension of, the Cleaning Accountability Framework. But we also believe that some of the business practices in the cleaning sector that contribute to so-called 'wage theft' and other forms of worker exploitation (including underpayment of leave, termination and superannuation entitlements) are merely examples of a broader challenge to the labour regulation framework. Our objective in this submission is to suggest one way in which that challenge might be met, for the benefit of both cleaners, as well as vulnerable workers in other business networks in the public and private sector.[2]

Australia has, by international standards, an exceptionally strong 'safety net' of rights and protections for employees. But the very strength of that safety net creates incentives for businesses to find ways of minimising or avoiding the costs associated with complying with the employment standards framework.

One form of avoidance involves the practice of 'sham contracting', or misclassifying workers as independent contractors. Previous reports suggest that this is a problem in the cleaning

[1] Fair Work Ombudsman, *Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets*, February 2018.

[2] See eg Fair Work Ombudsman, *Inquiry into the Procurement of Security Services by Local Governments*, June 2018; Fair Work Ombudsman, *Inquiry into Trolley Collection Services Procurement by Woolworths Limited*, June 2016; Fair Work Ombudsman, *Inquiry into Procurement of Housekeepers by Four or Five-Star Hotel Groups*, May 2016.

sector, as well as in other industries.[3] In this regard, we support implementation of the Productivity Commission's recommendation to strengthen the provisions of the *Fair Work Act 2009* (FW Act) that seek to prohibit such arrangements.[4]

For present purposes, however, we are interested in another form of avoidance. This involves the fragmentation of corporate structures and working arrangements into loosely connected networks that blur responsibility for ensuring workplace compliance. A key feature in such arrangements, whether they involve subcontracting, labour hire, franchising, the use of corporate groups or other types of 'supply chain', is the creation of legal distance between a worker and a 'lead business' that ultimately benefits from their labour.[5] Even if the worker is employed, and can identify underpayments or other breaches of labour standards by their employer, all too often that employer no longer exists, or otherwise does not have the assets to meet any judgment against them.

Section 550 of the FW Act does extend liability for breaches of the statute to a person 'involved in' someone else's contravention. The provision applies to a person who has aided or abetted the contravention, procured or induced it, conspired with others to bring it about, or been in any way 'knowingly concerned'. It is routinely used to attach liability to directors or senior managers of a company. But the need to establish *actual knowledge* of the contravention makes it very hard to pursue lead businesses, regardless of the extent to which their business practices may have contributed to the relevant breaches.[6]

It was precisely this limitation that led the Turnbull Government to propose, and the Parliament to authorise, the enactment of Division 4A of Part 4-1 of the FW Act, as part of the changes made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

Under s 558B of the FW Act, a holding company may now be held responsible for a breach by one of its subsidiaries of the National Employment Standards (NES), an industrial instrument (such as an award or enterprise agreement), the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting. The same applies to a franchisor, in relation to a breach by one of its franchisees, but only if the franchisor has 'a significant degree of influence or control' over the franchisee's affairs. In each case, the franchisor or holding company, or one of their officers, must have known about the contravention, or should reasonably have known it, or could reasonably have expected that a similar contravention would be likely to occur. Liability can be escaped if reasonable steps have been taken, on the part of the holding company or franchisor, to prevent such contraventions.

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[3] See eg Fair Work Ombudsman, *Sham Contracting and the Misclassification of Workers in the Cleaning Services, Hair and Beauty and Call Centre Industries*, November 2011; Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report*, November 2011. See also *Fair Work Ombudsman v Quest South Perth* (2015) 256 CLR 137.

[4] See Productivity Commission, *Workplace Relations Framework*, Inquiry Report No 76, 2015, pp 813–5.

[5] For just some examples from what now is a substantial body of academic literature on this trend, see Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, 2014.

[6] See eg Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016.

The adoption of this new form of secondary liability has significantly strengthened the regime for ensuring compliance with the employment standards established by the FW Act – but only for two particular types of business model. In our view, the arguments for holding companies and franchisors to be held responsible for certain contraventions affecting workers who they do not directly employ apply with equal force to other business models, whether involving labour hire, subcontracting, the use of affiliated companies that are not technically subsidiaries, or more elaborate supply chains.[7]

Our proposal incorporates some of the essential concepts in s 558B, but expresses them in terms that are sufficiently general to apply to any form of corporate or commercial arrangement, while retaining the safeguards in that provision to prevent regulatory overreach.

Specifically, we propose that a person (whether an individual or a corporate entity) should be liable for an employer's contravention of the NES, an industrial instrument, the rules concerning the payment of wages or the keeping of records, or the prohibitions on sham contracting, where the person:

(a) has a significant degree of influence or control over the employer's affairs, or over the wages or employment conditions of the relevant employee(s);

(b) knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and

(c) cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.

Whether a person has significant influence or control over wages or employment conditions should be determined by reference to the substance and practical operation of arrangements for the performance of the relevant work.

A person should be deemed to have significant influence or control if it sets or accepts a price for goods or services, or for the use of property, at a level that practically constrains the capacity of the relevant employer to comply with its obligations.

In our opinion, the adoption of such a form of secondary liability, to complement the existing provision in s 550 for knowing involvement in another person's contravention, would be an appropriate response to the type of practices in the cleaning sector being investigated by the Committee. It would not only address similar issues in other industries, but would also minimise regulatory avoidance strategies.

Importantly, it would only apply to a lead business which has influence or control over the employer or the relevant employees' wages or working conditions, *and* has reason to believe that contraventions are likely to occur. This effectively sets the same threshold for

[7] For an elaboration of the justifications for making lead businesses liable, see Tess Hardy, 'Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform*, 2017, p 71.

secondary liability as that currently applied to franchisors and holding companies. The main change we recommend, in broadening its application to other types of arrangement, is the deeming provision. A business at the top of a lengthy supply chain may set a price or demand an economic return from a party with whom it is directly dealing that is so low that contraventions of employment standards further down the supply chain become inevitable. So long as that should be reasonably apparent to the lead business, it should not be able to hide behind its lack of direct influence or control over the actual employer or the working conditions of those performing the relevant work.