SENATE INQUIRY ON THE EXPLOITATION OF GENERAL AND SPECIALIST CLEANERS WORKING IN RETAIL CHAINS FOR CONTRACTING OR SUBCONTRACTING CLEANING COMPANIES.

Submission by United Voice

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United Voice is a union of workers organising to win better jobs, stronger communities, a fairer society and a sustainable future. Members of United Voice work in a diverse range of industries including cleaning, security, aged care, early childhood education and care, hospitality, healthcare, emergency services and manufacturing. United Voice is the cleaners' union.

A quarter of our members work in contracted industries such as cleaning and security, and an increasing number of them are employed in workplaces characterised by high levels of pyramid contracting and sham contracting. For this reason, United Voice is uniquely placed to offer insights on exploitation of cleaners working in retail.

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INTRODUCTION

Australia has some of the world's strongest workplace protections in the OECD, yet the exploitation of retail cleaners this country is endemic.

Wage theft, wage stagnation, insecurity and poor working conditions are entrenched features of the industry.

This submission explains why the current industrial relations (IR) framework is failing to protect these workers from harm, and what can be done to fix it.

We argue that, fundamentally, the exploitation of retail cleaners has been caused by the interaction of two dynamics:

1. The practice of outsourcing, which requires cleaning companies to tender for contracts with major retailers on the basis of very low wage costs, and applies powerful economic disincentives to employers to offer fair wage rises or decent work conditions; and

2. An IR system that is narrowly focussed on the regulation of the relationship between employees and their technical employers, rather than between employees and the entities (in this case, major retail companies) who have the power to determine their wages and conditions of work.

As a consequence of these two dynamics, the fundamental principle that has historically characterised Australian industrial relations – the idea that employees (acting collectively) and employers should be involved in both the making, and enforcement of regulations - cannot be said to operate in relation to retail cleaning today.

Through a mixture of industry practice and inadequate regulation, large retailers with the power to control the conditions of cleaners work have been able to place legal distance between themselves and those employees, and substantially circumvent and diffuse the industrial and regulatory pressures that might otherwise hold them to account.

Major retailers hold all of the power over cleaners' wages and conditions, with virtually none of the responsibility.

For almost a decade, various policy, legal and campaigning initiatives have been undertaken by a range of actors to ameliorate this situation.

These endeavours will be surveyed in this submission, but what characterises them all is their ambition to merely mitigate levels of exploitation, without addressing the underlying misalignment in the system that interrupts the link of responsibility between retailers and cleaners.

It is our strong contention that the policy and legislative interventions introduced in the nine years since Work Choices to reduce the exploitation of cleaners, all of which have been welcome as palliative measures, have nevertheless been inadequate to overcome the basic cause of cleaner exploitation: the lack of accountability between major retail chains and the cleaners who clean their shops.

This link can only be credibly restored through the redesign of our industrial relations system to make it fit for purpose, and able to adequately regulate the employment relationship under conditions of 'fissured' as well as direct, employment.[1]

Our recommendations are for legislative change to that end: to enable multi-employer bargaining and industrial action, and open out the range of matters that can be included in an agreement, through a process overseen by a more active and legally empowered arbitral body.

The collapse in standards of compliance in contract retail cleaning is, we contend, a vivid illustration of a wider dynamic that is at play in many supply chains throughout the Australian economy.

The recommendations that we make will not only strengthen compliance with labour law in retail cleaning, but across Australian society more generally.

1 David Weil 2014, *The Fissured Workplace: why work became so bad for so many and what can be done to improve it,* Harvard University Press.

A) FRAMEWORKS AT BOTH COMMONWEALTH AND INDUSTRY LEVEL TO PROTECT WORKERS FROM HARM, INCLUDING EXPLOITATION, WAGE THEFT, UNDERPAYMENT, WAGE STAGNATION AND WORKPLACE INJURY

1. UNION MEMBERSHIP

One of the most basic protections offered to retail cleaners is the right to join a union.

This is a protection so basic that it is often overlooked, but it remains the case that workers in workplaces with high union membership density are almost never exploited.

Workers in such workplaces are aware of their rights, actively involved in bargaining with their employers over their conditions of work, and empowered to hold their employers to account over any breaches, although it is often the case that their capacity to so act means that such breaches are less likely to occur in the first place.

Workplace unionism creates a 'virtuous circle' of legal compliance, worker engagement and mutual striving for high standards. Such cultures of compliance are decentralised and self-sustaining; they do not require external surveillance by state agencies or complaints-based detection strategies.

While retail cleaners in Australia may have the right to join a union *de jure*, in practice, a very small number do.

The fact of low union density in the retail cleaning is both a cause and a consequence of worker exploitation, and the collapse in standards and expectations in this industry that the rule of law in relation to wages and conditions will be complied with.

The causes of low union density in retail cleaning are multiple and mutually reinforcing.

There are factors associated with the industry (the fact that many employers are small in size, that workplaces are isolated and that there are high levels of worker turnover and casual employment), the attitudes of particular employers (some of whom intimidate workers into not joining a union), additional worker vulnerabilities that exist because of the high proportion of temporary migrant workers in the industry, and disincentives to unionism created by the IR framework itself, which restricts union access and enables non-union members to 'free ride' the benefits of union services without joining.
An example of the level of intimidation

that can be applied to retail cleaners may be found in the experience of one Queensland cleaner who was told by his company manager that if he or his colleagues were spoken to by the union, they were to not *"tell anyone anything, say you work for Quad and that you are on duty and you can't talk, we are here to support you and here to help. Tell us who complained to the union and we will pay you $150 cash... we are going to kick his arse, I'm going to call my cousin in Sydney to come up here and shoot whoever made the complaint about us to the union."*

The union has faced restrictions on the right of entry to workplaces since 2004. There is no right in the Fair Work Act (FWA) for workers to meet and consult with their union in the workplace, free from limitation.

There is no guaranteed right to the time and resources that are essential for collective bargaining to be meaningful, nor can unions freely attend their workplace in response to potential breaches of the law.

2. THE AWARD SYSTEM AND THE NATIONAL EMPLOYMENT STANDARDS (NES)

In theory, the Award system and the NES provide a suite of minimum protections that are designed to ensure that no Australian worker is exploited.

In practice, these minimum protections are routinely breached in retail cleaning (for examples, see the section below). The FWO's recent audit of supermarkets in Tasmania found non-compliance with the Cleaning Services Award at 90% of Woolworths' sites.[2]

The nature of contract cleaners as a highly dispersed and 'hidden workforce' means that the true extent of exploitation cannot be determined with precision.

In our experience, contraventions of the Cleaning Award in retail cleaning are extremely common, with the frequency of breaches becoming exponentially higher once a second-tier or more of sub-contracting is introduced.

Most cleaners working in supply chains are not receiving payslips, are paid a flat cash rate for all hours worked (and so are not paid minimum wages, part-time allowances, night shift, weekend or public holiday penalty rates), do not receive overtime, do not receive superannuation, and are often unable to provide a clear indication of the business which has employed them.

A primary reason for the pervasive non-compliance with the law in retail cleaning is the cutthroat nature of the competitive contracting system.

This limits employers' legal obligations, or ability to pay above the Award, and increasingly encourages behaviour to tender below the Award.

There is an expectation on the part of retailers, who bear minimal formal legal obligations to cleaners employed by contractors, that contracting companies will be able to provide cleaning of 'champagne quality' specifications at 'flat beer prices.'

The money allocated to cleaning contracts is often fixed: large retailers such as Westfield have enormous market power the sector and offer cleaning contracts to cleaning businesses on a 'take it or leave it basis', with an overwhelming focus on price rather quality or capacity to deliver.

The going tender price tends to remain static, and is often unresponsive to rises in labour costs, public liability insurance expenses, and even CPI.

Increasingly this bears little resemblance to the legal requirements set by the Award.

2 Fair Work Ombudsman (2018) *An inquiry into the procurement of cleaners in Tasmanian supermarkets*, February 2018.

Any cleaning contractor who wishes to survive in such an environment must conform with the de facto norms of the industry, which involve ruthless cost-cutting, promises to perform the work at or below cost, and doing and saying 'whatever it takes' to win contracts in the short term.

Contract cleaning executives talk about the industry *"devouring itself from within through nonsensical pricing – often implemented by illegal sub-contracting."*[3]

"On the one side you've got contractors cutting each other's throats to get work and on the other side you've got property owners taking the lowest price for each job."[4]

Despite cleaning companies' claims to superior levels of 'innovation' and 'efficiency', it remains the case that many contracts are for sums that are so low that they cannot possibly be adequate to enable the contractor to deliver quality cleaning of the areas involved without either paying unlawfully low wages, intensifying work and/or cutting costs on equipment or chemicals.

Contractors know, however, that bidding for and accepting such contracts is the price of doing business.

Under such industry conditions – where adhering to the law is likely to send you out of business, and the chance of being punished for non-compliance with labour laws is low – worker exploitation becomes a rational business decision.

Contractors know that it is unlikely that the cleaners they employ will be unionised, or that they will know and be prepared to exercise their rights. Many employ international students to do the work, who have an added layer of vulnerability due to their fear of being deported in the event that they work more than 40 hours a fortnight during their course.

Many of these students feel a high degree of loyalty to their cultural community, and fear losing their job if they speak out against their employer or join their union.

Recent research shows that employers currently think that underpaying workers is a low-risk business decision, with 21% of surveyed employers from the hospitality industry and the hair and beauty industry thinking it is either unlikely or highly unlikely that a business underpaying workers will get caught.[5]

In our experience, the proportion of retail contract cleaners with this sense of impunity would is substantially higher.

3 Inclean Australasia Magazine (2005) 'Industry takes first steps towards establishing a "council"', 18(4).
4 Quote from an employer in the industry, Iain Campbell & Manu Peeters (2007) *'Low pay and working time: the case of contract cleaners'*, Working Paper, The Centre for Applied Social Research, RMIT University, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.587.9697&rep=rep1&type=pdf
5 Howe, J. and T. Hardy (2017) *Business responses to Fair Work Ombudsman Compliance Activities,* Centre for Employment and Labour Relations Law, Melbourne Law School, p. 18, accessible at: http://law.unimelb.edu.au/__data/assets/pdf_file/0011/2237582/Howe-and-Hardy-Business-Response-Survey-Report-Jan-2017.pdf?utm_source=TractionNext&utm_medium=Email&utm_campaign=Insider-Subscribe-310517

"Contractors are engaged in insane price cutting in order to get work so it's increasingly harder for honest contractors to make a profit. Margins offered in retail are so tight now that owners are actively encouraging the use of illegal practices. Plenty of really good contractors are just refusing to sign some of these contracts because they're so over-stretched. Others just don't bother to tender for retail contracts anymore."

- John Laws, President, Australian Contract Cleaners Alliance[6]

WAGE THEFT IN RETAIL CLEANING CAN OCCUR IN THE FOLLOWING WAYS:

- Below-award ordinary hourly rates of pay as low as half the legal minimum
- No penalty rates for weekend and public holiday work
- Unpaid overtime
- Non-payment or underpayment of superannuation
- Denial of sick leave, with workers having to make up any hours they miss due to illness
- Non-payment of entitlements upon change of contract
- Cash-back scams, where workers may be paid the correct rate into their bank account, but have to withdraw cash and return it to their employer, and
- Sham contracting, often at below-Award rates made even lower once the absence of entitlements (e.g. paid leave and superannuation).

6 Cited in United Voice (2012) *A Clean Start for Australia's Shopping Centres,* www.pc.gov.au/inquiries/completed/retail-industry/submissions/subdr221-attachment1.pdf

Retail contract cleaners also have an additional layer of vulnerability that occurs at the time of change of contract, as they have no certainty that they will be able to get work with the new contractor, making their employment incredibly precarious:

> *"Each time the contract goes up for tender we worry about our jobs. Each time the contract changes, I have watched the new contractor expect us to do the same work in less hours. That means even if they raise our wages the pay packet is cut because we've got less hours on the job."*

- Cleaner, South Australian shopping centre

It is common for contracting companies that are in the last phases of a cleaning contract which they know will not be renewed to act with even greater impunity in their unfair treatment of the cleaners they employ.

This occurs because, from the moment that a contractor learns that their contract will not be renewed, all of their commercial decision-making is made against a backdrop of short-termism: they know that there are unlikely to bear any commercial consequences from lower-quality cleaning (because they have already suffered the major consequence of such an event, a lost contract) and they also know that many of their workers are likely to be leaving employment in any event, making the probability of them taking costly legal action for non-compliance even more diminished than it usually is.

For that reason, the usual practices of hours-cutting, work intensification and non-payment of wages and entitlements tend to be even more acute in the 'end-of-contract' phase.

In the case of one major cleaning contractor, Spotless, the avoidance of redundancy payments to employees in instances where a contract was lost was, until recently, elevated to company policy.

For many cleaners employed by smaller contractors in non-unionised workplaces, regular contract changes invariably mean a loss of entitlements.

These workers then face six month probationary periods with the incumbent contractor even if they are hired to work in the same place, doing the same work they have been doing often for decades.

CASE STUDY IN REFUSAL TO PAY VALID REDUNDANCY PROVISIONS AFTER THE LOSS OF CONTRACT: SUNSHINE COAST PLAZA SHOPPING CENTRE, QUEENSLAND

In 2014, the Spotless subsidiary Berkeley Challenge sacked 21 cleaning and security workers, each of whom had been employed by the centre for between 4 and 21 years, without redundancy pay.

The company attempted to argue redundancy was not payable under the Fair Work Act due to "ordinary and customary turnover of labour". One worker was denied $14,000 in redundancy pay.

Spotless had adopted the exemption generally for all of its businesses, and put the view that the loss and gain of contracts was inherent to the 'fiercely competitive' contract services industry.

After a four-year legal battle between Spotless and United Voice, the Federal Court held the company's application of the Fair Work Act was improper due to the length of the contract and its employees' services, and required the company to repay $209,000 in redundancy entitlements.

Spotless has been before the courts in half a dozen redundancy cases similar to this case.

In United Voice's submission, Spotless Group and other major contractors regularly flout the law when contracts are changed, resulting in wage theft of workers' entitlements they have legitimately earned.

United Voice's submission to the 2017 Senate Inquiry into Corporate Avoidance of the Fair Work Act provides further detail in the ways in which members in contracting industries are vulnerable to losing conditions and entitlements upon change of contract.[7]

7 United Voice (2017) *Submission to the Inquiry into corporate avoidance of the Fair Work Act,* February 2017, pp. 18-19.

3. OCCUPATIONAL WORK AND SAFETY PROTECTIONS

Retail cleaners suffer some of the highest rates of occupational injury in Australia, eclipsing even those of construction and mining workers.[8]

Despite high and uniform levels of formal legal protection, contractors simply do not adhere to legal requirements because they are driven by the cut-throat competitive tendering model to cut corners in order to win and retain contracts.

Cost savings can be achieved by not replacing damaged or broken equipment, using cheap or discount chemicals, including the corrosive "Class 8 Dangerous Good" bleach.

Cleaners are forced to work more intensely, as hours are cut and workers taken off the job. 53% of cleaners we surveyed reported that they "only sometimes" have enough time to complete their work and 20% "never" have enough time to complete their work.

The present system offers cleaners no ability to apply industrial pressure to employers to rectify health and safety issues.

There is nothing inevitable about the present lack of capacity of retail cleaners to exercise industrial power.

In 1947, David Jones cleaners were successfully able to resist their employers' attempts to intensify their work through lawful industrial action which led to the resolution of the matter.[9]

8 Patty, A. (2017) 'Cleaning can be more dangerous than construction work', *The Sydney Morning Herald,* 25 August 2017, www.smh.com.au/business/workplace/cleaning-can-be-more-dangerous-than-construction-work-20170822-gy1f1o.html
9 Sheil, C. (1988) *The Invisible Giant: a history of the Federated Miscellaneous Workers' Union of Australia,* 1915-1985, PhD thesis, University of Wollongong, p. 260.

4. STANDARD ENTERPRISE BARGAINING

The Award system and the NES, even when they are enforced, are no cures for wage stagnation. Substantive wages rises, which keep pace with the cost of living and the value of the work performed, can only be achieved through a meaningful bargaining process.

The contract cleaning companies who formally employ retail cleaners and are the entity with whom cleaners have bargaining rights have virtually no power over their terms and conditions, which are simply dictated to them by the retailers who award the contracts.

Workers are strictly forbidden from taking any industrial action against these entities, by virtue of the prohibition on secondary boycotts which has existed under civil law in Australia since the mid-1970s, and the provisions of the Competition and Consumer Act 2010.

Australian laws on this matter put Australia at odds with both international labour law standards (which permit sympathy strikes as long as the original strike is lawful) and the industrial law frameworks of most OECD countries.

Despite these strictures, United Voice nevertheless attempted to enter into negotiations with retail companies over cleaners' conditions through the 'Clean Start' retail campaign in the early 2010s.

Clean Start sought to introduce a framework that would stop the race to the bottom in contracting, and instead entrench new standards that would secure respect and fair treatment at work for cleaners, as well as job security, fair and safe workloads, adequate and safe equipment and fair pay.

Without any legal capacity to exert industrial pressure on retailers, however, the campaign foundered, as retailers resisted the union's attempts to persuade them that higher conditions and wages would be beneficial to both workers and the quality of cleaning performed in centres.

Absent any legal obligation to exercise any responsibility for cleaners' welfare, a number of major retailers simply ignored the unions' appeals to improve contracts, despite a concerted and resource-intensive campaign that lasted over 18 months.

5. 'LOW WAGE' BARGAINING AND MULTI-EMPLOYER BARGAINING

The provisions in the Fair Work Act (FWA) that were designed to 'catch' workers for whom the enterprise bargaining system was a poor fit have failed.

Processes for multi-employer bargaining are extremely weak and do not enable any employer to be compelled to participate in the process.

Nor do they permit industrial action in support of bargaining.

Similarly, the low-paid bargaining stream was designed in an extremely narrow and unworkable fashion, and effectively excludes any retail cleaner that may have had access to a collective bargaining agreement in the past, even if that EBA contains conditions that are only minimally better than the Award.

6. CIVIL PENALTY LITIGATION: ACCESSORIAL LIABILITY AND SHAM CONTRACTING PROVISIONS

For those retail cleaners who, against the odds, do come forward to report on alleged breaches of their lawful entitlements, access to justice through the legal system is extremely difficult.

The Fair Work Commission does not have the power to arbitrate or make orders, forcing unions to take employers to court which is complex, time consuming and costly.

Prosecuting underpayments in the Federal Circuit Court is complicated and slow. Despite the reverse onus of proof, a lack of detailed records to prove the extent of the wage theft can be a significant obstacle to pursuing a claim.

Workers must be prepared for delays of two years or more, a fact which makes the likelihood of international students prosecuting claims extremely low.[10] According to Allan Fels, "the court system works quite badly for systematic underpayment of thousands of people."[11]

For the rare worker who is able to overcome these barriers, section 550 of the FW Act provides for the attribution of liability for breaches of the Act to persons 'involved in' contraventions of the Act, whether or not they are the direct employer of the worker whose rights have been breached.

This mechanism means that lead contractors and/or retailers may potentially be held responsible for breaches down the supply chain.

These provisions impose a high threshold of evidence to show that the person involved in the contravention has 'aided abetted, counselled or procured the contravention' or 'has induced the contravention, whether by threats or promises or otherwise' or 'has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention'.

It is an extremely high bar to establish that the host employer or the lead contractor is "knowingly concerned" in contraventions by a third party. The actual knowledge requirement of section 550 arguably rewards corporations who remain purposely ignorant about the conduct of their labour suppliers.[12] There have been only a handful of cases where s550 has been used by the FWO against a separate corporation.[13]

United Voice is currently seeking to establish Spotless's accessorial liability in relation to the underpayment of 58 cleaners engaged by a subcontractor, INCI Corp, in a case that has been costly and time-consuming.

10 Hemingway, C. / WEst Justice (2016) *Improved laws and process to stop wage theft*, accessible at: www.westjustice.org.au/cms_uploads/docs/westjustice-not-just-work-report-part-2-(1).pdf
11 Patty, A. (2017) '7-Eleven compensation bill climbs over $110 million', *The Sydney Morning Herald*, 13 June 2017, accessible at: www.smh.com.au/business/workplace-relations/7eleven-compensation-bill-climbs-over-110-million-20170612-gwpdfx.html
12 WEstjustice (2017) *Submission to the Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, p. 18.
13 Berg, L. and B. Farbenblum (2018) 'Remedies for migrant worker exploitation in Australia: Lessons from the 7-Eleven wage repayment program', *Melbourne University Law Review*, 41:3, p. 1075.

CASE STUDY IN ACCESSORIAL LIABILITY FOR SHAM CONTRACTING: SPOTLESS AND INCI CORP

One of Australia's largest listed companies, Spotless, is implicated in underpayments of some of the lowest-paid workers in Australia, United Voice claims in ongoing Federal Court proceedings.

The case argues that Spotless was an accessory with a third-party contractor in a scheme primarily designed to defraud 58 Myer cleaners of wages and entitlements.

Cleaners working in Myer in Melbourne had their wages, penalty rates, leave entitlements and superannuation stolen from them in a bold-faced scheme to pay workers a flat rate of $20 an hour – well below award rates of pay and conditions.

Spotless held the cleaning contract with Myer. But Spotless sub-contracted some of its Myer cleaning through a smaller contractor, INCI Corp. In turn, INCI Corp underpaid its workforce, and engaged cleaners on sham ABN contracts.

The case demonstrates that rather than a "few bad apples" scenario, the culture of wage theft extends to boardrooms that actively participate in schemes to rip off workers.

The case shows that responsibility for systemic wage theft goes right to the top.

Given the strength of the case, United Voice is confident it will successfully argue for a significant range of penalties to be payable by Spotless.

Workers were asked to sign documents at the flat hourly rate showing they were "subcontractors" of INCI Corp.

While cleaning the stores, the cleaners wore Spotless uniforms with Spotless insignia and used equipment and cleaning products supplied by INCI Corp.

In response to what it sees as unfettered corporate greed, United Voice has launched landmark legal action in the Federal Court that alleges "accessorial liability" on the part of Spotless.

The Union is confident that the case will reveal the lengths major listed companies go to in avoiding meeting their legal requirements to pay fair wages to workers.

6. CIVIL PENALTY LITIGATION: ACCESSORIAL LIABILITY AND SHAM CONTRACTING PROVISIONS (CONTINUED)

The FWA contains provisions prohibiting sham contracting, to provide redress where companies have sought to convert employees into independent contractors and/or transfer them to labour hire companies in order to avoid statutory workplace relations protections. These provisions against sham contracting would be considerably strengthened if they were accompanied by a statutory presumption in favour of an employment relationship, and a statutory definition of the employee/contracting relationship.[14] The incidence of sham contracting would be reduced further though restricting ABN eligibility for international students in cleaning.[15]

Of relevance too are the Franchisor responsibility provisions introduced in the *Protecting Vulnerable Workers Fair Work Amendment 2017*, which makes franchisor and holding companies liable for contraventions by franchisees or subsidiaries. These additions to the Act are welcome, but are not sufficient to address exploitation in retail cleaning, where franchising is not the dominant form of 'fissuring'. Far more useful would have been an extension of these provisions to supply chains and labour hire companies, as recommended by the Labor senators on the Committee.[16]

It should also be noted that none of these penalty provisions provide for organisations at the top of supply chains to be required to rectify unpaid wages, they merely introduce a new civil remedy provisions for failing to prevent a contravention.

Effectively, a worker who experiences underpayment by a franchisee will not be able to pursue the franchisor for the amount underpaid; this worker can only seek that the head office pay a (higher) penalty for failing to prevent it.

This legislative amendment furthermore does not extend responsibility for unpaid super to the franchisor. As academics have noted, franchisors and holding companies may also escape liability if they are able to show that they took 'reasonable steps to prevent a contravention by the franchisee entity or subsidiary' (s.558(b)(3)).[17]

Nor does the Australian FWA impose any restrictions per se on the number of layers in labour supply chains allowed in high-risk industries such as cleaning, in contrast to other jurisdictions.[18]

14 United Voice (2017) Submission to the Corporate Avoidance of the Fair Work Act Inquiry
15 United Voice (2016) Submission to the Review of the Working Holiday Maker visa programme
16 The Senate – Education and Employment Legislation Committee (2017) *Report on the Fair Work Amendment (Protecting Vulnerable Workers) Bill [Provisions]*, p. 46, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/VulnerableWorkers/Report
17 Clibborn, S. and C. Wright (2018) 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', The Economic and Labour Relations Review, 29:2, p. 218.
18 The 'Oslo Model', see FLEX (2017) *Risky Business: Tackling Exploitation in the UK Labour Market*, p. 32, accessible at: www.labourexploitation.org/sites/default/files/publications/Risky%20Business_Tackling%20Exploitation%20in%20the%20UK%20Labour%20Market.pdf

CASE STUDY IN DOWN-SOURCING RISK IN SUPERMARKET CLEANING: WOOLWORTHS

In February 2018, the FWO released a report on an audit it completed on supermarket cleaning in Tasmania in 2015.[19]

Cleaning contractors at 90% of Woolworth's supermarkets in Tasmania were found to be non-compliant with the law.

Contraventions included systematic underpayment with flat hourly cash rates ranging from $14 to $21 and as low as $7 an hour during a training period. Underpayments detected totalled $64,162.54.

Woolworths and the contractors in its cleaning supply chain were found to have "abysmal" record-keeping.

Many of the workers were in Tasmania on temporary work visas from Korea, India, Nepal and Pakistan, and were reluctant to come forward. The report made the following key findings:

DIRECT EMPLOYMENT MINIMISES THE EXPLOITATION OF CLEANERS

In contrast to Coles and IGA, who directly employ most of their cleaners, the complex outsourcing model adopted by Woolworths, involving seven different contractors, who in turn contract out the work further, was a major cause of exploitation.[20] The Woolworths' model has resulted in four layers separating Woolworths from its cleaners, with cleaners typically required to labour late at night or in the early hours outside of opening hours.

By contrast, Coles' (directly employed) cleaners work within store opening hours and are identifiable as Coles staff, and IGA supermarkets are cleaned by employees as part of their everyday duties. Neither of these companies showed any evidence of cleaner exploitation.

WOOLWORTHS' PROCUREMENT POLICY MEANT THAT IT WAS RESPONSIBLE FOR EXPLOITATION IN ITS SUPPLY CHAIN

Woolworths' procurement policy directly contributed to the rampant exploitation of cleaners at the retailer's sites.

19 www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets
20 Occasional specialist cleaning (strip and polish) is outsourced at Coles; at IGA sites, cleaning is primarily done by direct employees

CASE STUDY IN DOWN-SOURCING RISK IN SUPERMARKET CLEANING: WOOLWORTHS (CONT.)

The FWO found that the oncost factored in by Woolworths was very low.

Woolworths did not renew contracts to lead contractors who submitted bids high enough to comply with WH&S requirements, modern award rates including penalties and allowances, long service leave requirements, and the enhanced cleaning standards contained in the tender.

Instead, Woolworths gave compliant contractors' work to other contractors who submitted lower bids and who went on to subcontract the work to a third party who the FWO found to be responsible for underpayments and other serious non-compliance.[21]

The retailer's compliance monitoring was found to be deeply flawed.

There was no independent auditing system in place that allowed for the abuse of cleaners' workplace rights to be checked in a timely fashion and for their rights to be upheld. Nor did Woolworths monitor contractors' compliance with its subcontracting policy, which stated that only one level of subcontracting was allowed, with all subcontractors "required" to be approved by Woolworths. Policies such as Woolworths' are ineffectual unless they are monitored and enforced.

THE CURRENT LAWS DO NOT ENABLE WOOLWORTHS TO BE FOUND LEGALLY LIABLE FOR THE EXPLOITATION OF ITS CLEANERS

The FWO considered there to be insufficient evidence to bring an accessorial liability claim against Woolworths, and is seeking a proactive compliance deed from the company.

The fact that the statutory body is now seeking a voluntary measure from the company, despite the fact that only one third of the total $64,162.54 in underpayments has been repaid, speaks volumes about the inadequacies of the laws in place.

While the exploited cleaners of Woolworths' supermarkets may or may not eventually be reimbursed for their stolen wages, the FWO's compliance activities are not a sustainable solution.

Substantive changes to our employment laws are required in order to ensure quality cleaning and working conditions

21 www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets p. 18-19.

7. VOLUNTARY COMPLIANCE SCHEMES

The Cleaning Accountability Framework (CAF) is an independent, multi-stakeholder initiative that seeks to improve labour and cleaning standards in Australia. CAF is run by a Steering Committee that includes cleaning contractors (and the BSCAA), facility managers, building owners, the Fair Work Ombudsman, United Voice, and researchers from the University of Technology Sydney. CAF is also supported by a wider advisory group that includes participants from across the property sector.

At the heart of CAF's approach is a certification scheme. Under this scheme building owners or key tenants will be able to nominate a building for review by CAF. CAF then works with the owner, facility manager, and cleaning contractor to verify that agreed standards are being provided for those cleaners.

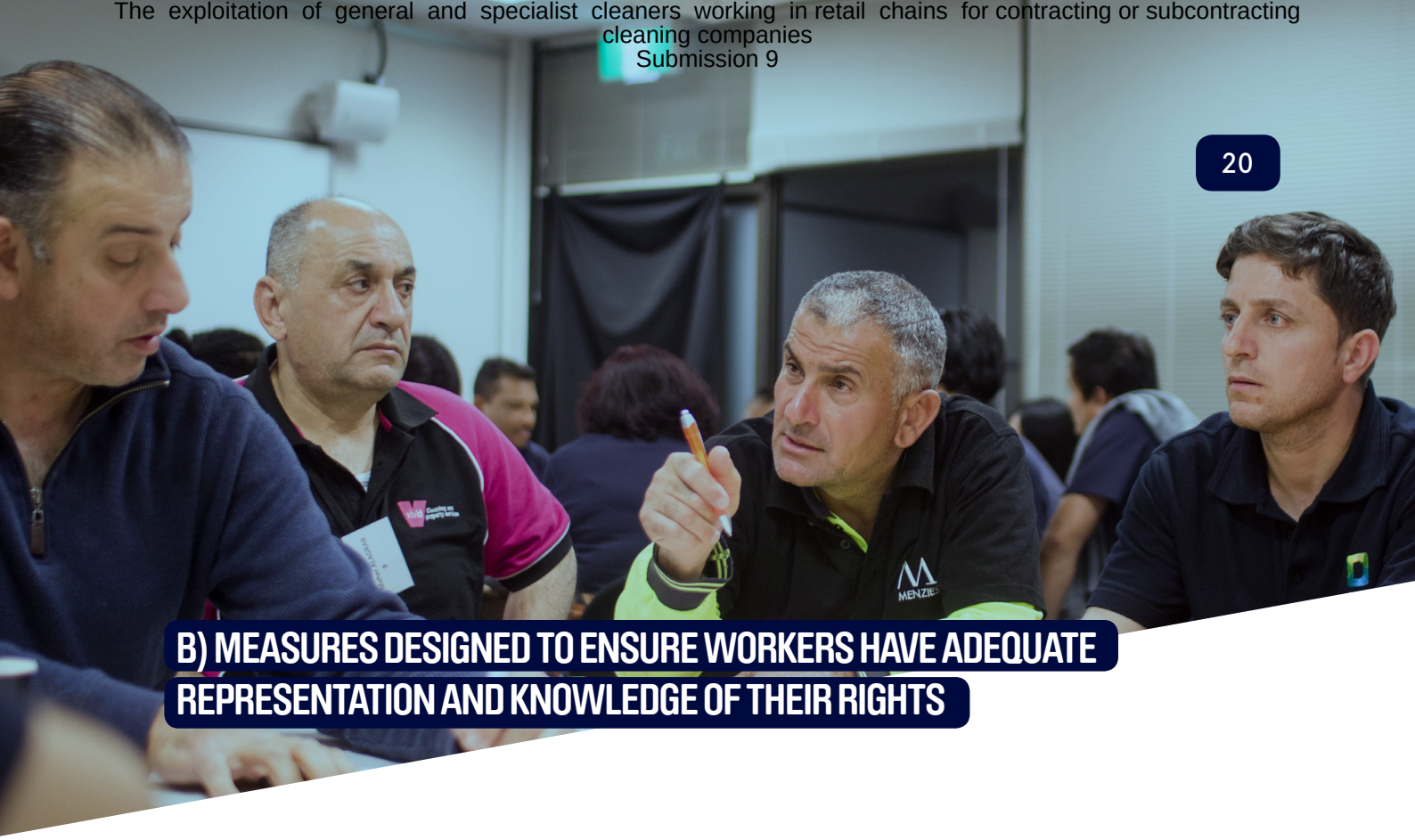
This review process involves engagement with the cleaners themselves (through workplace meetings and the nomination of CAF site representatives from among the cleaning workforce) and the involvement of an independent auditor appointed by CAF.

Where the evidence is provided that the required standard is being met, CAF will award a star rating for that particular building.

While United Voice strongly supports the CAF initiative as a measure to assist in improving cleaners' rights and increasing the transparency of cleaning supply chains and responsible contracting practices under the current IR laws, the scheme is inherently limited by the fact that it is voluntary.

Certifications and 'star ratings', while they can potentially enhance negotiation processes, can never be an adequate substitute for a framework that enables employees to meaningfully exercise collective industrial power.

What is needed is a framework that requires the entity with power over wages and conditions to negotiate with workers and be responsible for their protection under law. CAF should therefore be not used as an excuse to fail to adapt the IR system to the conditions of the modern Australian economy.



B) MEASURES DESIGNED TO ENSURE WORKERS HAVE ADEQUATE REPRESENTATION AND KNOWLEDGE OF THEIR RIGHTS

As mentioned on page 4 of this submission, unions are key to protecting workers from exploitation.

Unions are also the primary representative of workers and the key mechanism to ensure workers know their rights.

Unions create a culture of compliance, where workers themselves are responsible for ensuring their workplace complies with the law, rather than relying on the surveillance of FWO, which can never reach the majority of workplaces.

Workers in unionised workplaces are aware of their rights, are actively involved in bargaining with their employers over their conditions of work, and are empowered to hold their employers to account over any breaches.

While there have been a range of education campaigns implemented recently by the Young Workers Centre,[22] the Migrant Workers Centre[23] and the FWO, recent research suggests that simply knowing about workplace rights does not suffice to empower vulnerable workers to enforce those rights.

The largest survey of temporary migrant workers in Australia to date found that, contrary to popular assumptions, three quarters of international students and working holiday makers are fully aware they are being underpaid.[24]

The Woolworths cleaners the FWO encountered in its audit of supermarket cleaning knew they were being underpaid but were reluctant to speak with the government agency due to fear of losing their job.

The problem is not so much a lack of workers' education about rights, but rather their lack of power to command decent pay and conditions.

22 www.youngworkers.org.au/
23 www.migrantworkers.org.au/about
24 Berg, L. and B. Farbenblum (2017) *Wage theft in Australia: Findings of the National Temporary Migrant Work Survey*, p. 5-6. https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5a11ff31ec212df525ad231d/1511128887089/Wage+theft+in+Australia+Report_final_web.pdf

C) THE EXTENT OF COMPLIANCE WITH RELEVANT WORKPLACE AND TAXATION LAWS, INCLUDING THE EFFECTIVENESS AND ADEQUACY OF AGENCIES SUCH AS THE FAIR WORK OMBUDSMAN AND THE AUSTRALIAN TAXATION OFFICE;

The state of compliance with workplace and tax laws in industries such as cleaning is unacceptably low.

There are an estimated 1.6 million businesses paying their workers cash in hand in the black economy.[25]

44% of temporary migrant workers report having been paid cash in hand in their lowest paid job in Australia, and 50% of them report never or rarely receiving pay slips.[26]

30% of workers (2.4 million workers) are not being paid part or all of their super entitlements, which amounts to $5.6 billion worth of super being stolen from workers each year.[27]

As for the most marginalised section of the workforce – those in the black economy – CBUS and peak body Industry Super Australia estimate that 277,000 workers are missing out on an estimated $800 million in superannuation payments annually.[28]

The cleaning industry is one of the main drivers of the black economy in Australia at present.[29]

In addition to generally being paid below-Award rates, cleaners employed off the books or engaged in sham contracting arrangements are not covered by WorkCover if they experience a workplace injury.

25 Khadem, N. (2016) 'Illegal "cash-in-hand: payments in Australia's black economy on the rise', *The Sydney Morning Herald,* 14 November 2016, accessible at: www.smh.com.au/business/workplace-relations/illegal-cashinhand-payments-in-australias-black-economy-on-the-rise-20161111-gsnaue.html

26 Berg, L. and B. Farbenblum (2017) *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey,* November 2017, UNSW and UTS, accessible at: https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/5a11ff31ec212df525ad231d/1511128887089/Wage+theft+in+Australia+Report_final_web.pdf

27 ISA/CBUS (2016) *Overdue: time for action on unpaid super,* Industry Super Australia and CBUS, accessible at: www.industrysuperaustralia.com/assets/Reports/Final-Unpaid-Super-January-2017.pdf It is a conservative estimate because it does not include workers whose salary sacrifice additional contributions are being kept by their employer due to an existing loophole. If stolen salary sacrificed super was included, the proportion of workers affected would rise to 33%, and would add $1 billion to the unpaid super bill, according to the ISA/CBUS report, pp. 6-7.

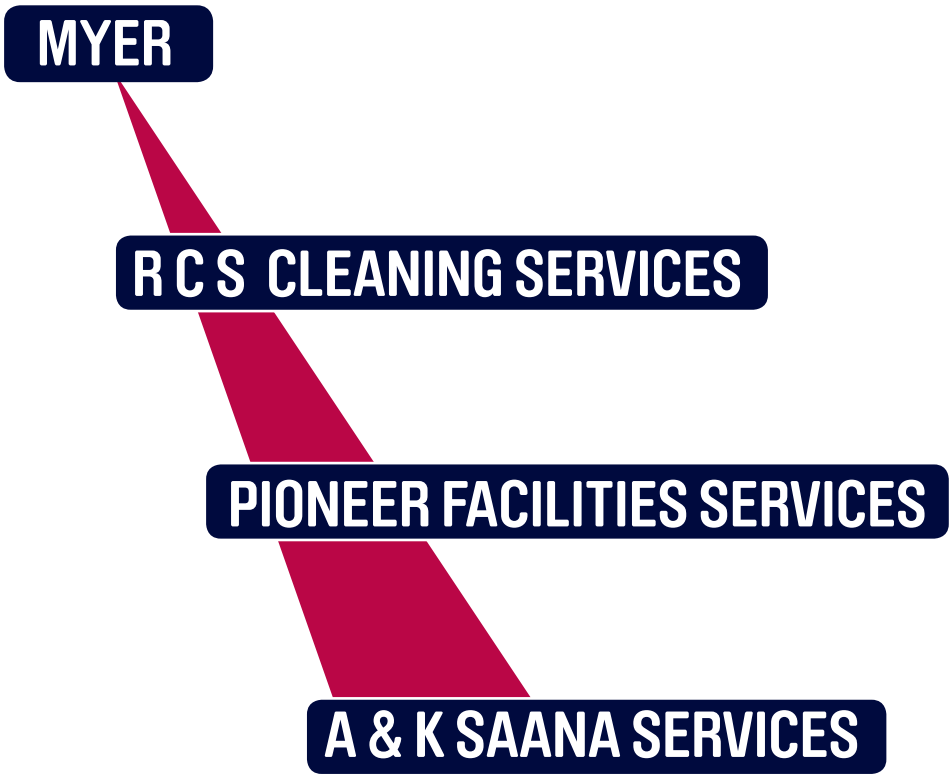
28 Industry Super Australia and CBUS (2016) *Overdue: Time for action on unpaid super,* p. 4, www.cbussuper.com.au/content/dam/cbus/files/news/media-releases/Unpaid-Super-Report-Dec-2016.pdf

29 *Black Economy Taskforce – Final Report,* October 2017. treasury.gov.au/review/black-economy-taskforce/final-report/

CASE STUDY IN WAGE THEFT IN SUPPLY CHAINS: MYER, MELBOURNE

In May 2015, an audit found that, in an arrangement that was separate to the 'INCI Corp' case profiled above, nine cleaners at several Melbourne Myer sites were underpaid a total of $6,300 in just one month.

Flat rates of $17/hour for both employees and independent (sham) contractors were paid, as part of a tiered-contracting scheme that involved an agreement between Myer and RCS Cleaning Services, who subcontracted to Pioneer Facilities Services, who in turn subcontracted to A&K Saana Services.



The FWO has made a welcome contribution to reducing levels of worker exploitation in Australia in its monitoring, investigative and enforcement initiatives.

Its use of supply chain litigation, enforceable undertakings and proactive compliance deeds have had an important impact in attempting to disrupt the culture of impunity that exists in many pockets of the contract cleaning industry.

However, the FWO can only ever augment the role of unions as an agent of enforcement and regulation. Unions create a culture of compliance, where workers themselves are responsible for ensuring their workplace complies with the law, rather than relying on the surveillance of FWO, which can never reach the majority of workplaces.

The FWO has just 250 inspectors for over 2 million workplaces.[30] This means each inspector is responsible for 36,600 workers, whereas the ILO recommends a target of one inspector for every 10,000 workers.[31]

The FWO also has a low success rate in holding employers to account. In 2016-17, the FWO reported only 34 enforceable undertakings, 50 litigations, and 4 Compliance Partnerships relating to underpayment.

1 in 5 businesses that were audited by the FWO in 2015-16 had breached record keeping laws, but only one of these cases led to litigation.[32]

Business owners do not consider the FWO's activities a deterrent: a 2017 audit of ACT businesses that had previously been found to be non-compliant with workplace laws revealed that four in ten were still in breach the second time around.[33]

The FWO's enforcement can only ever be symbolic, not systematic.

The ATO does little to detect unpaid super, and does not conduct any random audits of employers to identify when they are paying workers below-Award cash off-the-books and failing to remit superannuation.[34]

30 Clibborn, S. and C. Wright (2018) 'Employer theft of temporary migrant workers' wages in Australia: Why has the state failed to act?', *The Economic and Labour Relations Review,* 29:2, p. 214.
31 Weil, D. (2008) 'A strategic approach to labour inspection', *International Labour Review,* 147:4, p. 372.
32 James, N. (2017) *Fair Work Ombudsman Natalie James' speech to the Australian Industry Group's PIR Conference,* Canberra, 1 May 2017.
33 FWO (2017) '40 per cent of ACT businesses fail second chance', Media Release 19 December 2017, www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/december-2017/20171219-act-compliance-monitoring-campaign-mr#twitter
34 Hutchens, G. (2017) 'Unpaid superannuation: tax office should better police employers – Senate report', *The Guardian,* 3 May 2017, accessible at: www.theguardian.com/australia-news/2017/may/03/unpaid-superannuation-tax-office-should-better-police-employers-senate-report

The ATO is the only entity able to pursue unpaid super, and yet their record of doing so is poor.

The Black Economy Taskforce made a number of recommendations that, if actioned by the Government, will go some way to boosting the effectiveness of the ATO's monitoring and enforcement of wage theft and tax fraud by cleaning contractors operating in the black economy.[35]

A further significant reform would be to grant unions and superannuation funds the ability to initiate legal action in response to unpaid super on behalf of members.

The Australian Securities and Investments Commission could do much more to protect retail cleaners and scores of other workers labouring in industries plagued by wage theft, tax fraud, phoenixing, and pyramid subcontracting.

This includes getting a handle on the labyrinthine corporate structures used by cleaning contractors to obscure the labour supply chain.

At present, a corporation can be registered with ASIC without any of its directors having provided legal evidence of their real names.

The government should establish a Director Identification Number (DIN) system without further delay to ensure transparency of beneficial ownership of entities and director identification, and take substantive action to prevent phoenix activity.

35 *Black Economy Taskforce – Final Report,* October 2017. treasury.gov.au/review/black-economy-taskforce/final-report/

D) PRACTICES INCLUDING 'PHOENIXING' AND PYRAMID SUBCONTRACTING

In many industries, the use of labour hire and subcontracting results in a much higher incidence of exploitation and unlawful behaviour than arises from direct employment relationships.

In 2015, United Voice Victoria found that a worker engaged as an independent contractor through a pyramid subcontracting scheme had been underpaid $26,000.00 in an eighteen month period (see the Werribee Plaza case study below).

In a second subcontractor case, a worker was found to have been underpaid about $10,000.00 in only three months.

The devolution of legal and moral responsibility within these chains results in significant challenges for enforcement and compliance.

Some workers who are at the bottom of supply chains are persistent and financially secure enough to successfully pursue their legal entitlements, however the time consuming and expensive work involve in unpicking these arrangements means the vast majority of workers have difficulty enforcing their basic legal rights.

The layers of contractual obfuscation often mean it is very difficult to ascertain the nature of the employment relationship, the actual entitlements being provided to a worker, and even who the employee is engaged by.

CASE STUDY OF SHAM CONTRACTING USING THE FRANCHISE MODEL: HARRIS SCARFE RUNDLE MALL AND ADELAIDE AIRPORT

A United Voice member was engaged as a franchisee by the cleaning contractor Academy Services between 2010 and 2014 to clean Harris Scarfe Rundle Mall and Adelaide Airport. During that time, he was underpaid a total of $168,203.

As a "franchisee", our member was paid a flat rate of $27.76 per hour, out of which he had to pay 25% as a "franchisee royalty" and 7.5% as "Work Cover Levy".

In reality, he was an employee and should have been employed under the Cleaning Services Award or the Clean Start collective agreement as applicable.

Academy Services has a long history of non-compliance and questionable practices, evidenced by numerous interventions by United Voice's South Australian branch.

The company's business model involves both the direct employment of employees, and the engagement of entities it regards as "franchisees".

The franchisees sign contracts identifying them as franchisees with a series of formal terms consistent with a franchise arrangement.

Despite the pretence that the cleaning work is being performed by an independent contractor, the hours of work, and their work duties, are dictated by Academy Services. Franchisees are required to perform work exclusively for Academy Services. Academy Services provides all the equipment and materials required for the work. Payments are made periodically in a similar pattern as wages and not on invoices submitted per job.

The success of Academy Services' business model is that it has its own employees working during non-penalty periods, and the franchisees work during penalty periods.

The flat fee it pays franchisees is above the base rate that should apply but well below the more significant penalty rates at which the work should be paid.

Phoenix activity is a practice that disproportionately affects workers in the cleaning industry, where small contractors illegally liquidate their business routinely to avoid paying their employees' wages and entitlements, along with their obligations to the ATO.

Research by PWC for the FWO has named the security and cleaning industries as having the highest risk profile of any industry – higher than building and construction.[36] For high risk industries such as cleaning and security, up to 10% of employees in those industries are considered to be affected by phoenixing.[37] According to the latest figures available, phoenix activity cost workers up to $298 million each year in unpaid entitlements.[38]

The ease with which phoenix activity occurs means that even when workers and their representatives are able to supply hard evidence of exploitation, legal action can be stymied by the relative ease with which company directors can liquidate their businesses and re-emerge under different legal entities, circumventing their obligations to their workers and the tax office along the way.

The current regulatory and enforcement environment does not adequately prevent phoenixing from occurring.

A Productivity Commission report (2015) recommended the Government establish a Director Identification Number (DIN) system.[39] This policy proposal has received sustained backing from stakeholders across the spectrum from the Australian Institute of Company Directors, to the Tax Justice Network, the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, and experts from Melbourne Law School and Monash Business School.[40]

Academics from Melbourne and Monash have published a comprehensive strategy to detect, disrupt and enforce phoenix activity.[41]

United Voice urges the Government to consider the recommendations of this report. In particular, we recommend the implementation of a DIN system without further delay. This will enable government, unions and procuring businesses to exclude phoenix operators from high risk contracting supply chain industries such as cleaning.

36 PWC / FWO (2012) *Phoenix activity: Sizing the problem and matching solutions,* June 2012, p. 16.
37 PWC / FWO (2012) June 2012, p. 18
38 PWC modelling using ATO data, PWC (2018) *The Economic Impacts of Potential Illegal Phoenix Activity*, report for the ATO, FWO, and ASIC, p. 3.
39 Productivity Commission (2015) *Business Set-up, Transfer and Closure,* No. 75, 30 September 2015.
40 'Who supports Labor's plan for a Director Identification Number, to crack down on phoenix companies?', Labor media release, 6 June 2017.
41 Anderson, H., I. Ramsay, M. Welsh, and J. Hedges (2017) *Phoenix Activity: Recommendations on detection, disruption and enforcement,* February 2017, Melbourne Law School and Monash Business School.

RECOMMENDATIONS

For United Voice, the chief mechanism for abolishing the systematic exploitation of cleaners is stronger collective bargaining and union rights to establish an enforceable industry standard that cleaners, collectively, have a voice and a hand in shaping.

The recommendations below address this principle, and also propose a number of amendments to complementary legislation, affecting sham contracting and migrant worker rights.

1. INDUSTRY BARGAINING

Our members, whose experiences of exploitation in the cleaning industry we have outlined in this submission, have been abused by the current system.

These stories demonstrate the extent to which the current industrial relations system has failed workers in the cleaning industry. They are symptomatic of what is happening in the broader economy.

It is important to note that the costs of low pay, underemployment, unemployment and exploitation extend beyond a workplace or an industry. They extend into the home and the family.

They have a corrosive impact on social inclusion, on trust, participation, attitudes and overall well-being and happiness.

Awards, once a safety net, now cover large swathes of the workforce, placing an effective cap on workers' wages and conditions.

A key tenet of the enterprise bargaining system was that parties would be able to bargain and expected to do so in good faith. That trust in enterprise bargaining was misplaced and ultimately very damaging to many workers.[42]

Enterprise bargaining, moreover, is not a feasible form of collective bargaining for the bulk of small and medium enterprises, or for contracting sectors like cleaning, where enterprise agreements are easily undercut.

Further unions do not have the means to deal with large numbers of enterprises singly, and most small and medium employers do not have the means, interest or experience to engage in the bargaining process.[43]

42 Schofield, J. (2018) 'The inequality crisis, industry bargaining and the future of the union movement', *Evatt Journal,* Vol.17, No. 2, June 2018. evatt.org.au/papers/inequality-crisis-industry-bargaining-and-future-union-movement.html
43 Isaac, J. (2018) 'Why are Australian Wages Lagging and What Can Be Done About It?', *Australian Economic Review,* vol. 51, no. 2, p. 182.

RECOMMENDATIONS

This has driven United Voice to call for reform of our collective bargaining system to facilitate industry-based collective bargaining based on the following simple principles:

- It must be universal: it must meet the needs of workers who have fallen through the gaps in the current system.
- It must be accessible: All workers must be able to benefit from a system designed to be a tide that lifts all boats.
- It must give workers a real voice and restore their power to determine their living standards.[44]

Industry based collective bargaining is not a radical proposition: it is widely used in many European countries, and is law in two-thirds of OECD and accession countries.

It is used in those jurisdictions to promote equality and economic growth.

It was common in many industries in Australia prior to 1973, and has been shown to promote productivity: it establishes greater fairness and uniformity in pay, and sets a common standard for all employers involved; it takes wages out of competition and forces less efficient firms to operate at a greater efficiency in order to survive, rather than being subsidised by lower wages, thus raising productivity.

Where employment is scattered with small numbers of employees in each enterprise, such as is the case in contract cleaning, industry bargaining is particularly appropriate.

The right to strike in an industry or across multiple employers should be allowed, as part of the revival of collective bargaining.

Joe Isaac argues this would promote a better balance of industrial power, as well as being more consistent with ILO conventions.

He further recommends that pattern bargaining should be allowed, with the FWC controlling and limiting it to certain situations in its discretion.[45]

2. RESTORE UNION RIGHTS

Restoring freedom of association for all workers in Australia is integral to eliminating worker exploitation. To be clear, exploitation occurs because of workers' voice has been diminished and their rights to organise and advocate through their union for improvements to living standards and workplace rights have been under persistent attack.

44 Schofield (2018)
45 Isaac (2018), p. 185-6.

RECOMMENDATIONS

Components of genuine union rights include:

- Positive organising rights
- Prohibitions on intimidation and harassment of union members
- Union information to new workers
- Recognition and protection of union delegate training
- Bargaining in good faith requirements, and
- Extending freedom of association rights to contractors.

3. PREVENT SHAM CONTRACTING

- The Independent Contractors Act 2006 (Cth) should be amended to a statutory presumption in favour of an employment relationship, and a statutory definition of the employee/contracting relationship.

- Restrict ABN eligibility for international students and working holiday makers in the cleaning industry.

4. PROTECT TEMPORARY MIGRANT WORKERS

The Government should enact a protective rather than a punitive approach to regulating migrant labour.

This should include the fundamental principle and expectation that exploitation should not result in deportation.

In suspected cases of exploitation, a rights-based approach should be taken by government – one that recognises the vulnerabilities of migrant workers to exploitation and puts in place mechanisms for protection against and rectification of exploitation.

A protective framework requires the following policies:

- Workers on temporary work visas should be granted the right to remain and work in Australia pending the resolution of their claims for underpayment and/or other instances of exploitation regardless of a visa condition breach having occurred in the context of the exploitation alleged to have occurred;

RECOMMENDATIONS

- A communication firewall should be enacted in such a way that the Fair Work Ombudsman is not required to report visa breaches to the Department of Home Affairs that could result in the unduly precipitated departure of a worker on a temporary visa;

- Temporary migrant workers should be eligible for all the same worker protections as residents and citizens when an employer defaults on their obligations, namely access to the Fair Entitlements Guarantee (FEG) scheme.

5. COMBAT PHOENIX ACTIVITY

- The government should establish a Director Identification (DIN) system without further delay to ensure transparency of beneficial ownership of entities and director identification, and take substantive action to prevent phoenix activity.

6. ENACT A NATIONAL LABOUR HIRE LICENSING SCHEME

- The Government should create a national licensing scheme covering labour hire and subcontracting operators. Such a scheme should include the capacity to undertake audits regarding compliance with employment standards, taxation and superannuation payments; and to investigate allegations of breaches and impose penalties. It should also include a 'fit and proper' persons test for all operators and directors. It should also include a 'fit and proper' persons test for all operators and directors.