



Exploitation in the cleaning industry

Australian Council of Trade Unions submission to the Senate Standing Committee on Education and Employment Inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies

Introduction

The Australian Council of Trade Unions (ACTU) welcomes the opportunity to provide a submission to this inquiry. The ACTU is the peak body of the Australian union movement and the largest and most representative body of Australian workers.

We have long held concerns about the parlous state of worker's rights in the cleaning industry – an industry in which wage theft, wage stagnation, insecurity and poor working conditions are entrenched features. For many years the twin influences of outsourcing and the industrial relations systems' focus on technical employers rather than those who actually set wages and conditions have created powerful rationales within the cleaning industry for worker exploitation. Most workers in the industry are employed by an entity that has been forced to bid for work doled out by large corporations who have huge incentives to keep prices low. Many are attempting, within the current I.R framework, to bargain with an entity that, despite being their employer, has absolutely no control over the amount of money available for wages or the conditions they work under.

Large retailers, who essentially control the wages and conditions of cleaners through their contracting, have been able to establish the legal fiction that they are detached from the workplace entitlements of workers in the industry – leaving them with all of the power and none of the responsibility.

While attempts have been made over the years to ameliorate the impact of this inequality, no genuine has been made to address the direct cause. The ACTU believes that the only way to address the issues plaguing the cleaning sector is legislative change 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.

This submission will respond briefly to the terms of reference, for more detail on any of the points made, the ACTU commends to the Committee the submission from our affiliated union United Voice, which we support.

Terms of Reference 1: Frameworks at both Commonwealth and industry level to protect workers from harm, including exploitation, wage theft, underpayment, wage stagnation and workplace injury

Union membership

Workers in high-density union workforces are exploited far less regularly than those who work in low-density occupations. Workers in high-density occupations tend to be more aware of their rights and conditions, take active part in bargaining with their employers and are more able to hold their employers to account.

Unfortunately, while all cleaning workers have the right to join a union and enjoy these protections, many do not. The causes of this are multifarious - factors associated with the industry (small employers and fragmented and isolated workspaces, high levels of worker turnover and casual employment), employers (some of whom intimidate workers into not joining a union), difficulties of union access and disincentives to unionism created by the IR framework itself, which restricts union rights of access and enables non-union members to 'free ride' the benefits of union services without joining. Whatever the precise combination of causes, low levels of union membership in the cleaning industry is both a symptom and a cause of worker exploitation. Barriers to increasing union density should be removed.

Awards, the NES and OHS protections

While the award system theoretically provides a solid legal floor for wages and conditions for workers, the reality on the ground in the cleaning industry is that this is not the case. Unions have long reported that breaches of the award minima are incredibly common within the cleaning industry, particularly once multiple levels of sub-contracting arrangements are involved. Most cleaning workers in supply chains receive payments in cash at a flat rate and are not paid minimum wages, part-time allowances, night shift, weekend or public holiday penalty rates, overtime, superannuation, and are often unable to provide a clear indication of the business which has employed them.

The primary cause of this reality is a simple economic imperative. While the legal requirements may be clear, the competitive contracting system results in a market where the only way to survive is to pay below the minimum award and legislated rates.

Large retailers have near-monopsony levels of influence in the market and have shown a clear inclination to drive down prices year on year, drop suppliers at the first sign of cost increases and to ignore increases to the cost of doing business for suppliers such as CPI and increases public liability insurance expenses. This creates a situation in which cleaning contractors, in order to survive, are forced into constant ruthless cost-cutting due to intense competition from other suppliers and a strong tendency from buyers to select the lowest price offer regardless of quality.

In reality many contractors bid for contracts at prices they have no ability to meet and then attempt to deliver on those promises – usually through paying unlawfully low wages or intensifying work requirements. Low levels of capitalisation and business experience are required for entry into the contract cleaning market meaning that the market is flooded with small operators many of whom are prepared to ignore their workplace obligations to employees. Many contractors are also driven to spend less on equipment and chemicals, creating significant OHS risks – such as the continuing use of broken machinery and the purchasing of cheaper and more dangerous cleaning chemicals.

In these conditions, where obeying the law is a recipe for financial ruin, worker exploitation has become a rational business model. Contractors know their workforce is unlikely to be aware of their employment rights, with many using migrant labour such as international students who are particularly vulnerable to exploitation.

Enterprise bargaining

Meaningful bargaining for wages and conditions is not possible in the current system for a number of reasons.

1. Contract cleaning companies have limited power over wages and conditions. These are set, de facto, by the retailers who award the contracts - whom the workers are unable to bargain with or take action against (through laws against secondary boycotts and the provisions of the *Competition and Consumer Act 2010*).
2. Low wage bargaining under the Fair Work Act 2009 is extremely narrow and unworkable and excludes any retail cleaner that may have had access to a collective agreement in the past, even if that EBA is only marginally better than the Award.
3. Existing multi-employer bargaining processes are weak and employers cannot be compelled to participate in the process. Protected industrial action is not permitted in support of multi-employer bargaining.

Civil Penalty litigation: Accessorial Liability and Sham Contracting provisions

Legal avenues for cleaning workers to pursue underpaid wages are limited and problematic in a number of ways.

1. The Fair Work Commission does not have the power to arbitrate or make orders, which means unions are forced into the court system which is both costly and time-consuming. Despite reverse burden of proof provisions, workers often have great difficulty accessing or providing detailed records to demonstrate underpayments have occurred.
2. Section 550 of the FW Act provides for the potential 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, which is desirable. However, these provisions impose a high threshold and in practice have had limited application in these circumstances.
3. While the Fair Work Act also contains provisions against sham contracting, these would be strengthened if they included a statutory presumption in favour of an employment relationship, and rendered sham contracting per se as well as misrepresentations about sham contracting, unlawful. Moreover the exception in s 357(2) of the Act as to the employer's state of knowledge of the status of the arrangement has proved to be a significant loophole. The incidence of sham contracting would be reduced further though restricting ABN eligibility including for international students in commercial cleaning.
4. The Franchisor responsibility provisions introduced in the Protecting Vulnerable Workers Act, which make franchisor and holding companies liable for contraventions by franchisees or subsidiaries are welcome, but are not sufficient to address exploitation in retail cleaning. Far more useful would have been an extension of these provisions to supply chains and labour hire as franchising is not the dominant model in cleaning.

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.

The CAF is a valuable initiative which the ACTU supports. However, as a voluntary scheme, the CAF cannot possibly replace a legal framework that allows employees to meaningfully negotiate with the entity that determines their pay and which makes that entity legally responsible for their protection. The existence of the CAF should not be used as an excuse to not take further steps.

Terms of Reference 2: The extent of compliance with relevant workplace and taxation laws

According to the recent Black Economy Taskforce report, the cleaning industry is a key driver of shadow economy activity in Australia. As well as generally being paid below legal rates, cleaners are often employed 'off the books' or are engaged in sham contracts. The United Voice submission to this inquiry contains many case studies that illustrate this reality.

Terms of Reference 3: The effectiveness and adequacy of agencies such as the Fair Work Ombudsman and the Australian Taxation Office

The Fair Work Ombudsman has sought to address the issue of worker exploitation in the cleaning industry. Supply chain litigation, enforceable undertakings and proactive compliance deeds have been used to chip away at the impunity that many elements of the cleaning industry feel they can operate with in regard to breaking industrial law. However, the FWO is a reactive and complaint-driven regulator. This is particularly problematic in the cleaning industry as, as mentioned before, workers in that industry are often unaware of their workplace rights and are often greatly disincentivised to complain. Non-compliance with superannuation obligations is also a significant issue. The ATO has not made adequate inroads into the detection and recovery of unpaid superannuation or the exploitation of part-time and casual employees. Improving laws which facilitate worker access to union representation in workplaces, and proper access to employment records as well as allowing unions to initiate legal action for unpaid super would go some distance to addressing this issue.

Recommendations

In order to address the issues raised in both our submission and that of United Voice, we recommend the following measures. Greater detail can be found on these recommendations in the United Voice submission to this inquiry.

1. **Universal, accessible industry bargaining.** Industry bargaining is already widely used in many European countries, and is law in two-thirds of OECD and accession countries. In industries 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.
2. **Restore union rights.** Exploitation occurs because the workers' voice has been marginalised and their rights to organise and advocate through their union for improvements to living standards and workplace rights have been under persistent attack. Rights that must be restored (among others) are:
 - a. Positive organising rights
 - b. Prohibitions on intimidation and harassment of union members
 - c. Union information to new workers
 - d. Recognition and protection of union delegate training
 - e. Bargaining in good faith requirements, and
 - f. Extending freedom of association rights to contractors.
3. **Prevent sham contracting.** The statutory mechanisms dealing with the issue of sham contracting need to be strengthened including by the removal of the exception relating to the state of employer knowledge as set out in s 357(2) of the Fair Work Act 2009. ABN eligibility for international students and working holiday makers in the cleaning industry should be restricted.
4. **Protect temporary migrant workers.**
 - a. 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;

- b. 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 Phoenixing.** 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.** 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.

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