Submission in Response to the Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies.

July 2018

Maurice Blackburn Lawyers submission to the inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies

Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 31 permanent offices and 29 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

Maurice Blackburn understands that the Committee has been tasked with investigating the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies, with particular reference to:

a) frameworks at both Commonwealth and industry level to protect workers from harm, including exploitation, wage theft, underpayment, wage stagnation and workplace injury;
b) measures designed to ensure workers have adequate representation and knowledge of their rights;
c) 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;
d) practices including 'phoenixing' and pyramid subcontracting; and
e) any related matters.

We are grateful for the opportunity to contribute to this important discussion. We have based our responses around our observations as to the main factors leading to the exploitation of those who work in the cleaning industry, who are some of our most vulnerable workers and citizens.

We submit that there are two main contributors to this exploitation:

i. The inability of the current industrial relations system to adequately regulate the growth of sham contracting through labour hire and precarious employment arrangements, and

ii. The effects of accentuated power imbalances in tendered and outsourced work arrangements.

We present information on these two factors in the following pages, for the Committee's consideration.

The inability of the current industrial relations system to adequately regulate the growth of sham contracting through labour hire and precarious employment arrangements.

The circumstances through which cleaning services are procured are, by nature, prone to exploit workers.

Large retailers and corporations are able to outsource their cleaning requirements through a competitive tender process. Through this, they are able to dictate pay rates – by selecting the successful tenderer on the basis of cost – without having the direct responsibility to the cleaners for their employment terms and conditions.

The emergence of this middle party – the employer of the cleaners – has led to a disconnect between the development of purchasing policies by retailers/corporations, and the impacts those policies have on the ones who actually provide the service.

These middle parties – the business operators who win the tender to provide services must figure out how to provide the services, and derive their own profit, in a highly competitive marketplace where the success of the tender is determined primarily by the lowest bid. One obvious way they can look to cut costs is in employees' pay rates.

A 2016 audit by the Fair Work Ombudsman (FWO) found that 33% of cleaning businesses were paying their staff incorrectly.[1] United Voice has found that the likelihood of breaches of the Award increases exponentially once a second tier or more of sub-contracting is introduced.

In many ways, from the employees' perspective, it's a race to the bottom.

Over the past two decades, many business operators have found legal ways to avoid their responsibilities under Fair Work legislation and other legal and regulatory structures.

By insisting, for example, that people who work for them be self-employed, independent contractors, business operators avoid having to take responsibility for the provision of safety nets that Australians have come to expect: awards-based wages, superannuation, and to be covered by workers' compensation.

These business operators have managed to move the public discourse away from their responsibility for providing adequate employee entitlements, to a focus on 'who employs whom'.

Many business operators adopt 'sham contracting' arrangements between themselves and their contracted staff. This is especially prevalent in low-paid sectors where those doing the work have little market power such as cleaners – and also construction workers, beauticians, call centre workers and drivers.

In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for many workers engaged in such arrangements:

> "*There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description*."[2]

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[1] *https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser*

[2] *www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2.*

These new work arrangements are typically positioned in the context of entrepreneurship, self-determination and workplace flexibility, but Maurice Blackburn believes that they are merely another way in which employers are abrogating their responsibilities to their workers.

Labour Hire and particularly the rogue, 'invisible' labour hire operators, often operate outside employment frameworks and routinely exploit workers. While a number of states are implementing Labour Hire Licensing schemes,[3] there is still the outstanding issue of how federal laws intersect with these schemes, while other states continue to be without a framework at all.

Precarious work and particularly the prevalence of sham contracting, the abuse of labour hire arrangements, freelance/contingency work and gig economy work outside of regulatory frameworks are increasing year by year.

It is important that industry regulators are appropriately resourced to proactively and reactively respond to issues arising from these multi-level employment arrangements. This involves ensuring that a regime of regular audits of employers sits alongside a capacity to investigate complaints efficiently and in a timely manner.

One other structural issue which leads to exploitation of workers in multi-level employment arrangements is the inability of workers to take industrial actions against the retailer. The existence of secondary boycott rules means that workers may only take industrial action, in certain circumstances, against their direct employer.

As multi-level and multi-party employment arrangements increase, effort will be needed to ensure workplace laws evolve to reflect these new realities. Maurice Blackburn encourages the Committee to feature the need to correct this source of exploitation in its recommendations.

The effects of accentuated power imbalances in tendered and outsourced work arrangements.

Those who tender for and win cleaning contracts often operate businesses which attract and employ the most vulnerable workers. These may include workers from culturally and linguistically diverse backgrounds, those returning to the workforce following family responsibilities, early school leavers and students.

According to a recent FWO census[4], almost two-thirds of cleaners are female and almost 40 percent of employees were born overseas. Many are international students.

This vulnerability often places them at a distinct status disadvantage in negotiating appropriate employment conditions. This is typified by:

- Employee non-engagement with unions or forms of workforce organisation,
- Employees not questioning inappropriate behaviours of employers through fear of retribution, or not being able to find alternative work, and
- Employees not seeking external information on entitlements.

[3] *See, for example, https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland; https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry; https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence*
[4] *https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser*

In our experience, migrant populations are often the victims of sham contracting arrangements. There are approximately 650,000 temporary migrants in Australia, a large majority of whom are working.

Business operators claim that contracted employment arrangements offer young migrants an opportunity to join the workforce in a flexible and entrepreneurial way.

In our experience, the conditions of their visas are often used against them to claw back salaries or underpay them. They are led to believe that if they complain about working arrangements, or if they are paid too much, they will be deported.

In its well-researched submission to a recent Senate inquiry into the future of work,[5] the Centre for Multicultural Youth says, in relation to young immigrants:

> *'In the future, young people are likely to be navigating a much more flexible and variable workplace, with less support and where there may be increased risks of exploitation. As such, young people will also need to be equipped with knowledge about their rights and responsibilities in the workplace, as well as with supports to exercise those rights*.'

In short, the most marginalised workers are over-represented in poor working arrangements in the cleaning industry.

Maurice Blackburn submits that for any improvement to be seen in the incidence of such working arrangements depriving their workers of proper pay, a positive obligation must be placed on business owners to ensure its IR arrangements are upholding the legislative requirements of workplace law.

There are several limitations with the current negative obligation model when it comes to workplace issues within sub-contracting arrangements, including that:

- unlawful behaviour remains unaddressed if there is no complaint;
- the focus is on redressing harm not preventing harm;
- penalties against individuals do not motivate organisational change;
- there are no incentives for promoting proper behaviour; and
- focusing on individual complaints reinforces the characterisation of poor behaviour as an interpersonal phenomenon – or 'a few bad apples' - rather than a systemic or cultural issue.

Maurice Blackburn also submits that this positive obligation should also extend to ensuring that appropriate superannuation, leave entitlements and workers compensation coverage are addressed.

Maurice Blackburn believes that the proliferation of precarious work arrangements for cleaners continues to be a significant factor increasing insecurity among the workforce. This uncertainty would undoubtedly influence the behaviour of workers where they would otherwise pursue their industrial rights or access support and compensation if they believed they were being exploited.

One of the key ways through which cleaners can ensure adequate representation and knowledge of their rights is union membership.

[5] *https://www.aph.gov.au/DocumentStore.ashx?id=3cd33a44-816c-46dc-87ae-5d4709cb98bb&subId=563289.*

Worker exploitation and wage theft is always lowest in workplaces with the highest union membership. The reasons for this are self-evident:

- The union is a source of information for workers on their rights, conditions and entitlements,
- The union will involve workers in bargaining processes with the employer, and
- The union will take action if it finds that workers are being exploited, and hold the employer accountable.

There are, however, several issues associated with the nature of cleaners' work which make connections with unions difficult. These include:

- The high turnover of staff,
- A highly casualised workforce,
- The off-site and single-worker nature of much of the work,
- Antipathy from some employers about the role of unions, and
- Fear amongst some cultural and minority groups of potential negative consequences of joining a union, in the eyes of the employer.

Maurice Blackburn encourages the Committee to recommend that government work with and through unions as a primary means of information distribution to the workforce, for information pertaining to minimum employee entitlements and recourse available in the event of employer misconduct.

Maurice Blackburn is also concerned that businesses which engage workers but abrogate their legal responsibilities for proper pay and conditions are being given an unfair commercial advantage over businesses which play by the conventional rules. We recommend that the Committee give consideration to how 'the level playing field' should be retained.