Ai GROUP SUBMISSION

Senate Education and Employment References Committee

Inquiry into the Exploitation of General and Specialist Cleaners Working for Retail Chains for Contracting or Subcontracting Cleaning Companies

July 2018

Ai GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, construction, retail, contracting, food, transport, information technology, telecommunications, labour hire, defence, and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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INTRODUCTION

Ai Group welcomes the opportunity to provide a submission to the Senate Education and Employment References Committee's Inquiry into the Exploitation of General and Specialist Cleaners Working for Retail Chains for Contracting or Subcontracting Cleaning Companies.

Ai Group has amongst its membership a number of major retailers and major companies in the contract cleaning industry.

The Terms of Reference for the Inquiry focus upon issues which include:

- The adequacy of existing frameworks to protect workers from exploitation, underpayments, wage stagnation and workplace injury;
- Measures to ensure workers have adequate representation and knowledge of their rights;
- The effectiveness of agencies such as the Fair Work Ombudsman (**FWO**) and the Australian Taxation Office (**ATO**);
- "Phoenixing"; and
- Subcontracting arrangements.

This submission argues that:

- There are very comprehensive protections in place to protect workers from exploitation, underpayments and workplace injury and that changes are not needed to workplace relations or Work Health and Safety (**WHS**) laws to increase protection for workers;
- "Wage theft" is an overly emotive term widely used by unions to describe underpayments;
- The current low rate of wage growth is due to spare labour capacity, weak productivity growth and weak inflation, and not due to inadequate union power or worker rights;
- The FWO and the ATO are very well-resourced and effective regulators with all of the necessary powers;
- Strong laws are in place to address "phoenixing";
- Legitimate subcontracting arrangements should not be interfered with;
- The accessorial liability provisions in s.550 of the *Fair Work Act 2009* (**FW Act**) provide an effective and adequate means of holding persons responsible if they are knowingly involved in breaches of the FW Act or industrial instruments. The FWO very frequently pursues actions under s.550, most of which are successful.

- Making major businesses in a supply chain responsible for the liabilities of their suppliers would:
    - Discourage multinational firms from investing in Australia and consequently reduce employment;
    - Reduce the responsibility upon suppliers for ensuring that they meet their own liabilities; and
    - Impose very substantial auditing, training and other costs upon major businesses, with these costs leading to the businesses needing to charge higher prices for their products and services which would increase the cost of living for consumers.
- The very longstanding redundancy pay exclusion for "the ordinary and customary turnover of labour" is an important part of the redundancy pay scheme under the FW Act and needs to be maintained.

EXISTING FRAMEWORK TO PROTECT WORKERS

There are very comprehensive protections in place to protect workers from exploitation, underpayments and workplace injury.

These include:

- The National Employment Standards (**NES**) in the FW Act;
- The unfair dismissal and anti-bullying provisions in the FW Act;
- The general protections in the FW Act, including the sham contracting laws and adverse action provisions;
- The modern award system;
- Annual Wage Reviews;
- The enterprise bargaining system;
- Transfer of business laws;
- Transfer of employment laws;
- Union representation and entry rights;
- The *Independent Contractors Act 2006*;
- The *Migration Act 1958*;

- The Superannuation Guarantee Legislation;
- State WHS laws;
- State workers compensation laws;
- Federal and State anti-discrimination legislation;
- State laws dealing with long service leave, child labour and numerous other employment and contracting matters; and
- Access to the Fair Work Commission (**FWC**), the Federal Court, the Federal Circuit Court, the FWO, the ATO, the ABCC, and other relevant Courts, Tribunals and regulators.

Last year, the FW Act was amended to:

- Increase penalties for breaches of awards, enterprise agreements, the NES and other specified provisions of the FW Act by 10 times;
- Increase penalties for breaches of pay slip and employee record-keeping requirements of the FW Act by 20 times;
- Reverse the onus of proof in an underpayment case where the employer has failed to keep employee records and issue pay slips;
- Impose responsibilities upon franchisors and holding companies for breaches of workplace relations laws and instruments by franchisees and subsidiaries in many circumstances; and
- Give the FWO greater investigative and enforcement powers.

There are very comprehensive protections in place for workers and there is no need for the existing framework to be amended to increase protections.

"Wage theft"

"Wage theft" is an overly emotive term widely used by unions to describe underpayments.

Running businesses is risky, complex and tough. The populist race to the bottom with the unions describing wage underpayments by a tiny minority of businesses as "wage theft", effectively labels all employers, large and small, as potential "thieves". It is a divisive attempt by the unions to indulge in old fashioned class warfare.

The implication that such activity is rife and that existing penalties are small or rarely imposed does not bear any scrutiny.

Of course, underpaying workers is unacceptable behaviour and should not be excused. However, heavy penalties already exist to deter and punish those who break the law.

Under the FW Act, penalties of up to $630,000 are in place for underpaying workers or failing to maintain the correct pay records. These penalties were increased just last year by up to 20 times, as discussed above.

A very well-resourced, active and effective regulator, the FWO, is in place to investigate and prosecute underpayments. When legal action is taken over underpayments, the FWO typically takes action against directors and senior managers, as well as against the businesses, using s.550 (the accessorial liability provisions) of the FW Act. Where wrongdoing is established the penalties are severe and effective.

Three important points should be made about employee underpayments.

Firstly, where such underpayments deliberately occur the employers concerned should and do face harsh penalties.

Secondly, many underpayments are the result of genuine misunderstandings and payroll errors. There are 122 federal industry and occupational awards containing over 10,000 pages of award entitlements, and thousands of classifications and minimum rates of pay. This is on top of thousands of pages of workplace relations laws and regulations. It is not surprising that from time to time businesses, particularly small businesses without dedicated HR staff, are confused about their obligations. Even businesses that promote themselves on the basis of a social conscience agenda and/or with being closely aligned with unions, have been identified as making very large underpayments to employees, allegedly due to errors or misunderstandings of legal entitlements (e.g. Lush Cosmetics and Maurice Blackburn Lawyers).

Thirdly, wage underpayment is an area comprehensively dealt with under federal laws. Further regulation under State criminal laws is unnecessary and unwarranted. It was sensibly decided many years ago that workplaces should be regulated through national, not state legislation.

Australia's economic success, including employment and wages growth, depends upon the ongoing willingness of men and women to establish and build businesses. Often employers put their houses and life savings on the line. Labelling businesspeople as thieves and subjecting them to over-regulation, not only demonises them: it deters investment, job creation and growth.

Forms of employment

It is in the shared interests of businesses and workers for existing flexibility to be retained regarding casual employment, part-time employment and self-employment. This flexibility is a critical part of the current workplace relations framework.

In July 2018, Ai Group published the following three fact sheets which emphasise the shared interests of businesses and workers in ensuring that casual employment, part-time employment and self-employment arrangements remain widely available:

- *Working Together, The Facts* – Casual Employment

- *Working Together, The Facts* – Part-time Employment
- *Working Together, The Facts* – Self-Employment

Wage growth

The terms of reference for this inquiry make reference to workers being potentially harmed due to "wage stagnation" and question whether the existing framework is adequate to prevent this.

On 16 May 2018, Ai Group released an economic research paper on Australia's recent experience of slow wages growth and its causes. The paper draws together key data to highlight that in Australia the key causes of slow wages growth are:

- Weak productivity growth;
- Spare labour capacity; and
- Weak inflation.

Other alleged causes of slow wages growth (such as low levels of union membership, the extent of casual employment, Australia's bargaining laws, and migration) are not significant drivers of wages growth.

The paper highlights that real wages are best strengthened through improved productivity.

Union arguments that it is in the community's interests for the unions to be given more power to force employers to capitulate on union wage claims, conflicts with the economic data and are patently wrong.

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

The FW Act includes comprehensive representation rights for workers, including:

- The right to join a union;
- The right to be represented by a union in a wide range of different areas and proceedings;
- The right to participate in lawful activities organised or promoted by a union;
- The right to take protected industrial action;
- Protection against adverse action and discrimination due to union membership or activities; and
- Entry and inspection rights for union officials.

The FW Act also includes numerous provisions directed at ensuring that workers have knowledge of their rights, including:

- The Fair Work Information Statement, that must be distributed to new employees;
- The requirement that awards and enterprise agreements be published;
- Consultation requirements in the Act and awards;
- A prohibition on employers making a false or misleading representation about an employee's rights;
- The requirement that the terms of any proposed enterprise agreement be provided to and explained to employees (in an appropriate manner taking into account the circumstances and needs of employees) before the agreement is voted upon;
- The FWO, which distributes a large range of materials directed at ensuring that employees have knowledge of their rights;
- The FWC, which also distributes a large range of materials directed at ensuring that employees have knowledge of their rights.

Accordingly, effective measures are already in place to ensure that workers have adequate representation and knowledge of their rights.

EFFECTIVENESS OF REGULATORS.

The FWO is a very well-resourced, active and effective regulator. As discussed above, the investigation and enforcement powers of the FWO were significantly expanded last year and additional powers are not warranted. In its submission to this Inquiry, the FWO has not identified any need for additional powers or resources.

The FWO's Annual Performance Statement 2016-2017 reported that 'the average time taken to resolve requests for assistance has been reduced to 15 days, as compared with 19 days in 2015–16'. In the same period, the FWO resolved 25,332 disputes through its dispute resolution service, the majority of these within seven days. The FWO recovered $30.6 million for 17,000 employees in 2016-17, representing a significant increase on the FWO's recovery of $27.3 million for 11,158 workers in 2015-16.

Similarly, the ATO is a very effective and well-resourced regulator with all of the necessary powers.

"PHOENIXING"

Strong laws are already in place to address illegal phoenix activities. The *Corporations Act 2001* (Cth) imposes very onerous duties on directors of companies and very tough civil and criminal penalties for breaches of duties, including in circumstances of insolvency.

On 12 June 2018, The Commonwealth Treasury opened consultation on the exposure draft of the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018* (Cth) and its supporting explanatory memorandum. The draft Bill would amend the Corporations Act to expand the penalties and make it easier to prosecute the directors of failed companies who have entered into transactions with the intention of defeating the recovery of employee entitlements, including in circumstances of phoenix activities.

The Australian Security and Investments Commission is active in investigating and prosecuting illegal phoenix activities.

Given the strong laws that are already in place to deal with illegal phoenix activities, there is no need for any additional measures to be taken.

SUBCONTRACTING ARRANGEMENTS

Subcontracting arrangements often lead to increased productivity, efficiency, quality and customer service because the work is carried out by specialised businesses that are able to focus upon their particular area of specialty.

Subcontracting is prevalent in most industries and the contract cleaning industry is no different.

Legitimate subcontracting arrangements should not be interfered with. Contracting businesses are typically regulated through the *Corporations Act 2001* or the *Independent Contractors Act 2006*.

The employees of contracting businesses are entitled to the protections in the FW Act and modern awards. Tough sham contracting laws are included in the FW Act to address circumstances where an employer misrepresents an employment relationship as a subcontracting relationship.

Given the wide range of protections that are currently in place, there is no need for any legislative changes aimed at providing additional protections.

OUTSOURCING

Outsourcing work to specialised businesses is a very common way for businesses to improve efficiency and to remain competitive, including in respect of cleaning work.

Contract cleaning businesses are typically much better placed to carry out cleaning work than their client businesses are. For most businesses, it would not make economic sense for them to employ their own cleaners when cleaning work can be carried out far more efficiently by contract cleaning businesses.

The FW Act includes transfer of business laws and transfer of employment laws that often have application in outsourcing situations. These laws provide a great deal of protection to workers, and do not need to be strengthened.

OTHER ISSUES

1. Supply chain responsibility proposal of Professor Andrew Stewart and Dr Tess Hardy

In their submission to the Inquiry, Professor Andrew Stewart and Dr Tess Hardy have proposed that an individual or a corporate entity should be liable for an employer's contravention of industrial instruments or certain provisions of the FW Act, where the individual or entity:

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

(b) knew or could reasonably be expected to have known that the contravention would occur; and

(c) cannot show that they have taken reasonable steps to prevent a contravention.

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

Ai Group does not support the proposal.

The accessorial liability provisions in s.550 of the FW Act provide an effective and adequate means of holding persons responsible if they are knowingly involved in breaches of the FW Act or industrial instruments by others, including a supplier. The FWO very frequently pursues actions under s.550, most of which are successful.

Making major businesses in a supply chain responsible for the liabilities of their suppliers would:

- Discourage multinational firms from investing in Australia and consequently reduce employment;
- Reduce the responsibility upon suppliers for ensuring that they meet their own liabilities; and
- Impose very substantial auditing, training and other costs upon major businesses, with these costs leading to the businesses needing to charge higher prices for their products and services which would increase the cost of living for consumers.

2. Ordinary and customary turnover of labour

In its submission, United Voice criticises the very longstanding redundancy pay exclusion in respect of "the ordinary and customary turnover of labour".

The exclusion was implemented within the federal award system as an outcome of the Australian Industrial Relations Commission's 1984 *Termination, Change and Redundancy Case*. Nowadays, the exclusion is contained within s.119 (Redundancy Pay) of the FW Act.

The exclusion is an important part of the redundancy pay scheme under the FW Act and needs to be maintained. Companies that lawfully apply the exclusion, having regard to the nature of their business, should not be subject to criticism for simply accessing provisions of the FW Act. The exclusion would of course not have been included in the Act unless the Commonwealth Parliament intended that the exclusion be utilized in relevant circumstances.

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