



**Australian Government**

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**Department of Jobs and Small Business**

## **Submission to the Senate Education and Employment References Committee**

Inquiry into the exploitation of general and specialist cleaners  
working in retail chains for contracting or subcontracting  
cleaning companies

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## Introduction

The Department of Jobs and Small Business (the department) welcomes the opportunity to make a 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.

Australia's national workplace relations system is underpinned by a strong legislative framework that protects workers, including cleaners working in retail chains, from exploitation and underpayment. Recognising that there are unscrupulous employers and business operators who may seek to exploit vulnerable workers, the Australian Government has taken action to strengthen the integrity of the framework and protect these workers from harm. This submission provides an outline of these frameworks and recent Government action.

## Size and Profile of the Cleaning Workforce

The *Cleaners and Laundry Workers* occupation group classified by the Australian Bureau of Statistics (ABS) most closely corresponds to the 'generalist and specialist cleaners' mentioned in the Terms of Reference.<sup>1</sup> This group covers a range of sub-occupations including Commercial Cleaners, Domestic Cleaners, Laundry Workers, Housekeepers and Car Detailers. Analysis at a sub-occupation level is not possible due to data limitations.

The latest ABS *Labour Force Detailed* data shows that in May 2018 there were 282,400 people employed as Cleaners and Laundry Workers. Cleaners and Laundry Workers in the retail trade industry make up a small proportion (5 per cent) of the total Cleaning and Laundry Workers workforce in Australia.<sup>2</sup> It is therefore difficult to provide reliable statistical data about this particular subset of the cleaning industry; however, data suggests many in the industry are women, from non-English speaking backgrounds, with low education levels, and are employed on a part-time or casual basis.

## Workplace Protections for Cleaners

Australia's national workplace relations system is underpinned by a strong legislative framework that protects workers, including cleaners working in retail chains, from exploitation and underpayment.

### National Employment Standards, Minimum Wages and Modern Awards

The *Fair Work Act 2009* (Fair Work Act) provides all national system employees with 10 minimum entitlements called the National Employment Standards (NES). Modern awards, registered enterprise agreements and employment contracts cannot provide for conditions that are below the NES entitlements and these entitlements cannot be removed or traded for other conditions.

All national system employees must be paid no less than the appropriate minimum wage, as determined by the Fair Work Commission. This includes employees who are not covered by an award.

Australia's 122 modern awards set industry and occupation-specific minimum conditions, which must be no less than the relevant NES entitlement. Most award-covered cleaners in Australia are likely to be covered by the Cleaning Services Award 2010. However, some cleaners may be covered by other awards.

As at 1 July 2018, after a 3.5 per cent increase following the Annual Wage Review, the minimum (hourly) award wages for ordinary hours (exclusive of penalties and allowances) under the Cleaning Services Award are:

- \$20.21 for employees at the Level 1 classification;
- \$20.91 for employees at the Level 2 classification; and
- \$22.04 for employees at the Level 3 classification.

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<sup>1</sup> Australian and New Zealand Standard Classification of Occupations (ANZSCO) 81 – [Cleaners and Laundry Workers](#).

<sup>2</sup> ABS *Employee Earnings and Hours* publication. Data for employees (and owner managers of incorporated enterprises (OMIEs)), not all employed persons.

Casual employees are paid an additional loading of 25 per cent of the ordinary hourly rate for the classification under which they are employed.

### **Enterprise Bargaining**

The Fair Work Act also provides a framework for collective bargaining at the enterprise level, which allows employers and employees to agree on terms and conditions specific to their enterprise.

In approving an enterprise agreement, the Fair Work Commission must be satisfied that each employee and prospective employee would be better off under the agreement than if the relevant modern award applied. Employees to whom an agreement applies cannot receive less than the base rate of pay set out in the national minimum wage order or in the relevant award. Enterprise agreements must not exclude the NES.

The Fair Work Act also sets out several matters that *cannot* be included in an enterprise agreement, including discriminatory terms and objectionable terms.

The department estimates there are 43 current agreements that cover cleaners working in Australia – that is, agreements current as at 31 March 2018 that identify the Cleaning Services Award 2010 as the parent award.<sup>3</sup> These 43 agreements covered 5,606 employees at the time of lodgment of the agreements. It is not possible to determine how many of these employees work specifically in the *retail trade* cleaning industry.

For 29 of these agreements, wage increases are tied to factors such as the financial performance of the company, state of the labour market, the Consumer Price Index or Fair Work Commission Annual Wage Review. For the remaining 14 agreements, the Average Annualised Wage Increase was 2.5 per cent.

### **General Protections and Independent Contracting**

The Fair Work Act protects employees from adverse action by employers where the employee exercises a workplace right or engage in lawful industrial activity, or because of their race, disability, sex, sexual orientation, carer's responsibilities or age, among other things. By way of example, this means that employees are protected from action such as dismissal or loss of shifts because they inquire or complain about their employment conditions to the Fair Work Ombudsman (FWO) or a union.

These provisions also prohibit coercion (for example, forcing a person not to exercise their right to become a member of an industrial association) and the deliberate misrepresentation of employment entitlements.

The Fair Work Act also prohibits employers from deliberately or recklessly misrepresenting an employment relationship as an independent contracting arrangement. The current maximum civil penalty is \$12,600 for an individual and \$63,000 for a body corporate. As part of its response to the *Black Economy Taskforce Final Report*, the Government has given in-principle agreement to amend the Fair Work Act to increase penalties for breaches of the sham contracting provisions.

### **Right of Entry**

The Fair Work Act confers rights on union officials to enter premises and exercise certain powers while on those premises. These provisions seek to balance the rights of organisations to represent their members, hold discussions and investigate suspected contraventions, and the rights of employers to go about their business without undue interference or interruption. A union official who holds a valid entry permit may enter a workplace during working hours for the purposes of:

- investigating a suspected contravention of the Fair Work Act, a modern award, an enterprise agreement, a workplace determination, or a Fair Work Commission Order where the suspected contravention relates to a member of the official's union; or
- holding discussions during mealtimes and other breaks with employees whose industrial interests the union official is entitled to represent.

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<sup>3</sup> The department manages the Workplace Agreement Database (WAD) that contains wages, conditions, and demographic information on about 150,000 enterprise agreements approved since 1991.<sup>3</sup> Analysis in this section relies on data sourced from the WAD.

When a union official is seeking to enter premises to investigate a suspected contravention of state or territory Work Health and Safety legislation, the individual must hold a valid entry permit from the Fair Work Commission but is not required to provide notice of entry under the Fair Work Act.

### **Fair Work Ombudsman Activities**

The FWO is the national workplace relations regulator and undertakes a range of activities to promote compliance across all Australian workplaces. This includes:

- responding to requests for assistance;
- campaigns to help monitor, improve and maintain compliance with workplace laws in a targeted way;
- compliance partnerships that help build collaborative relationships and show a public commitment to creating compliant and productive workplaces; and
- using the enforcement tools available under the Fair Work Act, including commencing litigation where there has been a suspected contravention of workplace laws.

The FWO is a strong and effective regulator. In 2016-17, the FWO's website ([www.fairwork.gov.au](http://www.fairwork.gov.au)) had over 16 million visits and FWO officials responded to over 450 000 enquiries. In the last five years, the FWO has recovered over \$130 million for workers who were not being paid correctly, including \$1.7 million for employees in the cleaning industry.

The FWO has commenced litigation in over 200 matters in the last five years and currently has just under 90 cases before the courts. Through litigation, the FWO has achieved record penalties in recent times. In one case, \$660,000 in penalties was ordered against individuals and the company.<sup>4</sup>

The FWO has also undertaken significant compliance work in the cleaning industry, including filing 15 litigations between July 2013 and June 2018 resulting in ordering of \$1,470,380 in penalties.

The FWO also plays an important role in educating people about their workplace rights and obligations. It has published a range of resources to assist businesses to manage compliance within labour supply chains, which may be a particular concern in the retail cleaning industry.

The FWO is also working with the cleaning industry to increase compliance and accountability in cleaning supply chains through the Cleaning Accountability Framework (CAF). The CAF is an independent, industry-led entity comprised of representatives from across the cleaning supply chain, including cleaning companies, property owners, employee representatives and industry associations. This approach recognises that all involved in the cleaning supply chain have to work together on improving industry standards.

The objectives of the CAF are to:

- identify best-practice tendering and compliance approaches that support quality-focused cleaning services, fair wages and labour standards; and
- recognise stakeholders who have implemented best-practice standards.

### **Recent Government Action to Protect Vulnerable Workers**

While there are strong frameworks in place to protect workers from harm, the Government recognises there are unscrupulous employers and business operators who may seek to exploit vulnerable workers. In response to evidence of shortcomings in the framework, the Government took action in 2017 to enhance protections for vulnerable workers.

### **Additional Funding for the Fair Work Ombudsman**

The Government provided the FWO with an additional \$20.1 million over four years dedicated to enhancing the FWO's assistance for vulnerable workers, including migrant workers. This funding will allow the FWO to build upon its capabilities and workforce so it can deal more effectively with employers who intentionally exploit vulnerable workers.

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<sup>4</sup> [Fair Work Ombudsman v Mhoney Pty Ltd & Anor \[2017\] FCCA 811.](#)

### ***Fair Work Amendment (Protecting Vulnerable Workers) Act 2017***

On 5 September 2017, the Parliament passed the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* that delivered on the Government's commitment to strengthen protections in the Fair Work Act.

To more effectively deter unscrupulous employers who deliberately exploit vulnerable workers, the Government introduced a higher scale of penalties (up to 10 times the previous amounts) for 'serious contraventions' of prescribed workplace laws – to 600 penalty units (currently \$126,000) for individuals and 3,000 penalty units (currently \$630,000) for bodies corporate.

Recognising that inaccurate or incomplete records make it very difficult to prove that workers have been underpaid, the Government doubled the maximum penalties for failures to keep proper employee records and pay slips - to 60 penalty units (currently \$12,600) for individuals and 300 penalty units (currently \$63,000) for a corporation. The Act also reversed the onus of proof in wage claims made in court in cases where an employer has failed to meet record-keeping or pay slip obligations and cannot give a reasonable excuse. In these cases, the employer will need to prove that they did pay the employee correctly or gave them the right entitlements.

To address instances where an employer seeks to undercut the minimum wage by requiring employees to pay back a proportion of their wages to the employer or a third party, the Fair Work Act amendments expressly prohibit employers from unreasonably requiring employees to pay back part of their wage.

To improve the identification, investigation and prosecution of employers who exploit their workers, the Government strengthened the evidence gathering powers of the FWO and introduced new penalties for people who deliberately hinder or obstruct the activities of the regulator.

In response to well-publicised cases of exploitation in some franchise networks, the Government introduced stronger provisions to make franchisors and holding companies responsible for breaches of the Fair Work Act in certain circumstances.

These were significant reforms to the Fair Work Act and must be given time to demonstrate results. The FWO has commented publicly that it will take a while for matters subject to the new provisions and higher penalties to progress through to the courts.

### **Migrant Workers' Taskforce**

The Government established a Migrant Workers' Taskforce (the Taskforce) to work across government and provide advice on ways to improve protections for migrant workers. The Taskforce includes representatives from ten Commonwealth government agencies and is chaired by Professor Allan Fels AO. Dr David Cousins AM is Deputy Chair.

The Taskforce is considering a number of policy issues and has already announced several initiatives, including:

- a new joint research project to test the most effective way of communicating with visa holders to ensure messaging on workplace entitlements is simple, clear and useful;
- an anonymous online reporting channel translated into key languages;
- better government sharing through a cross-agency data and analytics working group; and
- a new reporting protocol to encourage migrant workers to come forward with workplace complaints.

### **Fair Entitlements Guarantee Scheme**

The Fair Entitlements Guarantee (FEG) Scheme also helps to protect cleaners and other workers' entitlements in cases where employees are retrenched due to liquidation or bankruptcy of the employer. The FEG Scheme is a last resort financial assistance scheme that is only available where there is no other source of funds to pay employment entitlements.

To help deter corporate misuse of the FEG Scheme, the Government made the FEG Recovery Program an ongoing measure from 1 January 2017. The FEG Recovery Program provides funding for liquidators to pursue employers whose companies go into insolvency without paying employees' entitlements, including in circumstances of phoenixing. Based on experience from the FEG Recovery Program, the Government will introduce legislation to address corporate misuse of the FEG Scheme and to improve recovery of payments.

## **Illegal Phoenix Activity**

Illegal phoenix activity occurs throughout Australia and has significant impacts on much of the community, including private businesses, employees, contractors, and state, territory and federal government. Significant activity is underway across Government to combat illegal phoenix activity. The Phoenix Taskforce, established in 2014, brings together key government agencies to take a whole-of-government approach to reducing the impact of illegal phoenix activity and protecting businesses, employee entitlements and public revenue. The Phoenix Taskforce has developed a suite of targeted reforms to the corporations and tax laws to increase the ability of regulators to combat illegal phoenix activity. These reforms were announced in the 2018-19 Budget.

The department contributes to Government efforts to combat illegal phoenix activity by sharing data and experience on the use of the FEG scheme.

## **Other Protections**

### **Commonwealth Work Health and Safety Framework**

The *Work Health and Safety Act 2011* (Cth), which implements the model Work Health and Safety (WHS) laws in the Commonwealth jurisdiction, imposes the primary duty of care for work health and safety on individuals, businesses or organisations that are conducting a business (a person conducting a business or undertaking, or PCBU).<sup>5</sup> PCBUs must ensure the health and safety of workers and protect the public from workplace hazards from work carried out as part of the business or undertaking so far as is reasonably practicable.

This primary duty is not confined to the traditional employer/employee relationships but extends to a wide variety of work arrangements and relationships (for example, contractors, subcontractors, employees of a labour hire company, trainees etc.). PCBU work health and safety duties extend to cleaners working in retail chains for contracting or subcontracting cleaning companies.

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<sup>5</sup> The Commonwealth Act is part of a system of nationally harmonised work health and safety laws. The Commonwealth Act is based on model laws developed by Safe Work Australia, the tripartite national policy making body. The Commonwealth, New South Wales, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory have implemented the model laws. Victoria has similar laws in place and Western Australia is consulting stakeholders with a view to aligning its laws with the model laws.

## Appendix: Snapshot of the cleaning workforce

### Number and characteristics of workers

As noted above, Cleaners and Laundry Workers in the retail trade industry make up a small proportion (5 per cent) of the total Cleaning and Laundry Workers workforce in Australia.<sup>6</sup> It is therefore difficult to provide reliable statistical data about this particular subset of the cleaning industry.

The number of Cleaners and Laundry Workers has increased by 3 per cent over the past year and 11.5 per cent over the past 10 years. This is higher than the growth in total employed persons over the past year (2.5 per cent) but lower than over the past 10 years (17.6 per cent).

Most Cleaners and Laundry Workers are working part-time (68 per cent) and are female (61 per cent). Almost a quarter of Cleaners and Laundry Workers are in the 55-64 year age group (24.6 per cent), and around two thirds (66.1 per cent) of these workers are aged between 35 and 64 years of age.

There are slightly more Cleaners and Laundry Workers engaged on a permanent basis (51 per cent) compared with those who are casual (49 per cent).

### Pay setting and wages

In 2016, 53 per cent of Cleaners and Laundry Workers had their pay set by an award, 32.3 per cent by a collective agreement, and 14.4 per cent by an individual arrangement. Only 0.3 per cent were owner managers of incorporated enterprises (OMIEs).<sup>7</sup>

In 2016, the average hourly total cash earnings for Cleaners and Laundry Workers was \$25.25, compared with \$37.00 for all non-managerial employees.

Average hourly total cash earnings for Cleaners and Laundry Workers grew by 6.3 per cent between 2014 and 2016, and by 43.9 per cent over the 10 years to 2016. For all non-managerial employees, earnings increased by 5.8 per cent between 2014 and 2016, and 41.0 per cent over the ten years to 2016.

On average, hourly rates of Cleaners and Laundry Workers whose pay was set by a collective agreement was the highest (\$26.52), followed by individual agreement (\$25.66) and award (\$24.37).

### Work Health and Safety Data - Workers' Compensation Claims

Based on the most recent data from Safe Work Australia,<sup>8</sup> over the five years from 2011-12 to 2015-16, there were on average 1,805 serious workers compensation claims made each year by Commercial Cleaners.<sup>9</sup>

There were 7.9 serious claims for Commercial Cleaners per million hours worked in 2015-16. While the rate of serious claims has trended downwards over the last 10 years – more than halving from 18.7 serious claims per million hours worked in 2006-07 – the rate remains above the all industry average of 5.6 serious claims per million hours worked.

The most common type of injury or illness amongst Commercial Cleaners that led to a serious workers' compensation claim between 2011-12 and 2015-16 were traumatic joint/ligament and muscle/tendon injuries (52 per cent).

The most common causes of injuries or illness amongst Commercial Cleaners that led to a serious workers' compensation claim between 2011-12 and 2015-16 were *muscular stress while handling objects* (25 per cent), *falls on the same Level* (20 per cent), and *muscular stress while lifting, carrying, or putting down objects* (15 per cent).

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<sup>6</sup> ABS *Employee Earnings and Hours* publication. Data for employees (and OMIEs), not all employed persons.

<sup>7</sup> ABS *Employee Earnings and Hours* publication. Data for employees (and OMIEs), not all employed persons.

<sup>8</sup> Sourced from Safe Work Australia's *National Data Set for Compensation-based Statistics, 2015-16*. Note – data for 2015-16 is preliminary and is subject to upwards revision in subsequent years as further claims are finalised.

<sup>9</sup> For Safe Work Australia's purposes, the definition "Commercial Cleaners" relies on Australian and New Zealand Standard Classification of Occupations (ANZSCO) 8112 – [Commercial Cleaners](#). This data only relates to Commercial Cleaners eligible for workers' compensation, which generally captures employees but not independent contractors.