Answers to questions on notice by United Voice and Maurice Blackburn Lawyers. Asked at a public hearing on Melbourne on 4 September 2018.

1. Comment on AiG submissions

What follows is a selective response to key arguments made in the AIG submission. It is not a comprehensive response to every point raised. We would be pleased to provide further evidence in response to select arguments on request.

(a) AIG claim: 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' and 'Legitimate subcontracting arrangements should not be interfered with' (p.3)

The high levels of worker exploitation in retail cleaning are testament to the fact that existing protections and processes are not adequate. In particular, there is a widely recognised nexus between cleaner exploitation and subcontracting. To quote the Fair Work Ombudsman, 'our experience is the most vulnerable workers end up in the most exploitative scenarios. And these cases usually involve some sort of 'fissuring' in the relationships between those doing the work and those benefiting from the labour.'[1] This pattern, whereby the risk of exploitation rising with legal distance from the lead firm, is echoed by our own experience.

Sub-contractors who do not meet their obligations under labour law, in practice, face a paucity of sanctions. First, the accessorial liability provisions of the Fair Work Act require proof of detailed knowledge of the contraventions and are easily avoided. Secondly, the current regime for the enforcement of the law rests on the assumption that vulnerable workers can, in practice, enforce their rights through the litigation process. Our experience and the evidence given to the Committee suggest that this is frequently not the case, for the reasons we outline in our submission. Litigation outcomes can take years, and do not provide the scope to address the underlying structural drivers of non-compliance. Those structural drivers are constituted by low union density and a legal structure that prevents workers in supply chains from being able to meaningfully bargain with the entity with true control over their conditions of work, and practicably hold them to account for their legal obligations.

We also observe that, in the context of school cleaning, it is common practice for State governments to either directly employ cleaners, or place strict limits on sub-contracting. These policy decisions reflect the practical reality that subcontracting in cleaning is associated with a high risk of non-compliance.

(b) AIG claim: 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. (p.9)

It is not the case that subcontracting will lead to increased productivity, efficiency and quality. In fact we are unaware of any evidence that suggests this. Reduced costs for lead

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[1] Natalie James, Address to AIRAANZ conference, 7 Feb 2018 https://www.fairwork.gov.au/ArticleDocuments/764/AIRAANZ%20Presentation.pdf.aspx

firms are not the same as productivity. A range of *inefficiencies* attend subcontracting arrangements, including the loss of skill and experience as a result of high workforce turnover, the loss of accrued entitlements on contract change and the practice of placing employees on a 'trainee' and probationary footing with the new contractor. These costs are overwhelming borne by workers.

Academic studies undertaken in the context of hospitals have found a negative relationship between outsourcing and subcontracting and the quality of cleaning. In the case of Oslo University Hospital, the decision to return cleaning services in-house resulted in lower costs, less sick leave taken, higher staff morale and increased productivity. (Bard, K. & Helle, K. (2013) 'How Insourcing Rather Than Outsourcing Gave Substantial Savings and Improvements', Ernst and Young, *Performance,* vol. 5(3): 20 – 23).

(c) AIG claim: Making major businesses in a supply chain responsible for the liabilities of their suppliers would: o Discourage multinational firms from investing in Australia and consequently reduce employment; o Reduce the responsibility upon suppliers for ensuring that they meet their own liabilities; and o 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 (p.10)

Workplace health and safety legislation imposes liability for non-compliance throughout a supply chain or like structure so that the entity at the top of the chain owes legal duties to the workers at the bottom of that chain. It is recognised that when work is fissured, that the risk of non-compliance escalates. The same approach should be taken with industrial and employment laws.

There is no evidence that requiring major businesses to assume responsibility for compliance with labour law for workers in circumstances where they exercise a high level of influence over those workers' terms and conditions of work would discourage investment in Australia or reduce employment. For most of Australian history, responsibility for compliance with labour law for cleaners has been borne by the firms that they clean. If a business cannot afford to be cleaned by cleaners who are paid in accordance with legal minimums, we contend, that business is not commercially viable. The notion implicit in AIG's submission that the cheapness of products and services is an *a priori* national good, that has primacy over the principle that all workers have the right to minimum legal protections, is contrary to the legal and institutional framework for labour regulation in Australia.

The amendments proposed by Professor Andrew Stewart and Dr Tess Hardy to the Fair Work Act in terms of lead firm responsibility constitute a modest and appropriate step that reflects the fact that the rights of corporations to subcontract are not absolute, but rather are exercised in the context of appropriate labour regulation. The *Fair Work Act* already fetters corporations' rights to strike contracts in a range of circumstances, eg. sham contracting or where the corporation is in a franchisor/franchisee relationship with an entity and thus exercises a high level of influence over the other party.

The choice to outsource and subcontract cleaning arrangements ultimately lies with lead firms, if they wish to avoid the costs of monitoring their supply chains for compliance it is always open to them to employ cleaners directly. Under present arrangements, where it is

open to lead firms to turn a blind eye to exploitation in the supply chain, it is the people with the least resources and power who are bearing the cost of non-auditing down the supply chain, namely the cleaners themselves.

2. Comment on the FWO/Woolworths Proactive Compliance Deed

In our view, the FWO/Woolworths Proactive Compliance Deed exhibits several significant limitations:

(a) Unnecessary limitation of repayment of entitlements

The Deed only directs Woolworths to ensure *"to the extent possible, that Employees who have been underpaid since 1 July 2014 are paid their full employee entitlements due to them"* and to *"require Contractors to ensure that their current and future Employees at each Woolworths Site receive the full entitlements due to them"*. This falls short in several ways. By imposing a limit of 1 July 2014, despite Woolworths' acknowledgment that there were compliance issues identified as early as 2010, they are excluding cleaners who were underpaid before that time.[1] We note that 7-Eleven's underpayment recovery scheme was not time-limited, as recommended by Professor Allan Fels, who was engaged to oversee it.[2]

(b) Unfair onus of responsibility for determining and claiming underpayments

The Woolworths deed puts the onus on workers to come forward and claim their entitlements, rather than on Woolworths to pro-actively determine repayments, notwithstanding the fact that the FWO's report acknowledged that most of the cleaners they encountered in the Tasmanian audit were "reluctant to provide specific information that would lead to their employer 'getting in trouble' with the FWO".[3] In addition to their fear of speaking to inspectors, the FWO found that Woolworths cleaners were often:

- unable to provide details as to the nature of their engagement
- unwilling to advise how much they were being paid
- not receiving payslips
- unable to provide a clear indication of the business which employed them
- from overseas or of a non-English speaking background.[4]

With only $21,332.37 worth of entitlements having been recovered for Woolworths' cleaners at the date of publication of the FWO's report in February 2018, it is clear that this is a deeply imperfect restitution process. There is little reason to believe these vulnerable workers will, as a result of this Deed, feel empowered to come forward to navigate a potentially complex process with no documentation.

(c) Inadequate processes to ensure responsible subcontracting

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[1] Woolworths Group Cleaning Services Proactive Compliance Deed (2018), p. 6.
[2] Transcript of Professor Allan Fels' appearance at the Senate Inquiry into the exploitation of cleaners in retail chains, 4 September 2018, p. 3.
[3] FWO (2018) *An inquiry into the procurement of cleaners in Tasmanian supermarkets*, p. 23.
[4] FWO (2018) *An inquiry into the procurement of cleaners in Tasmanian supermarkets*, p. 12.

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The Woolworths deed does not place substantive limits on sub-contracting, it merely requires Woolworths to direct their contractors to obey the law. In our view, this is manifestly inadequate. Contracting beyond a single-tier dramatically raises the risks of non-compliance and underpayment, and should only be permissible in highly limited circumstances (beyond the specialist cleaning context): where there are agreed pricing schedules established in collaboration with a range of stakeholders, independent monitoring processes, change of contract processes that preserve job security, worker engagement processes and maintenance of a register of subcontractors. Without these safeguards, the risk of non-compliance as a consequence of sub-contracting is, in our view, unacceptably high.

We also note that the Deed does not ensure that contract pricing is sufficient to maintain safe productivity levels. High workloads are a serious problem in the cleaning industry, leading to some of the highest rates of occupational injury. Woolworths should ensure that safe productivity levels are taken out of competition in the tender process, by working with the Cleaning Accountability Framework to devise a pricing schedule anchored in safe productivity levels. Contract prices should also be sufficient to cover non-wage costs such as public liability insurance, equipment, materials, and administration.

We view this Deed as a missed opportunity to re-set the relationship between Woolworths and the cleaning workforce, and put in place arrangements that ensure that cleaners are employed on fair and lawful terms in the future. Such an arrangement would involve:

- A commitment to direct employment of cleaners or, alternatively, a no-subcontracting clause with a range of entitlements and safeguards including independent monitoring processes, change of contract processes that preserve job security, worker engagement processes and contract pricing schedules that ensure safe levels of productivity;
- Clauses to ensure Woolworths repays underpayments to cleaners in full, dating to at least 2010, and has responsibility for taking reasonable measures itself for locating such cleaners and assessing the extent of the underpayment; and
- An approach to cleaners' wages and conditions, whether through employment or contracting, that meaningfully enables cleaners to bargain, rather than entrenches a bare minimum basis for remuneration.