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Senate Education and Employment References Committee
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ARA Response to *Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* July 2018

About the ARA:

The Australian Retailers Association (ARA) is the retail industry's peak representative body representing Australia's \$310 billion sector, which employs more than 1.2 million people. The ARA works to ensure retail success by informing, protecting, advocating, educating and saving money for its 7,500 independent and national retail members covering over 50,000 shopfronts. The ARA ensures the long-term viability and position of the retail sector as a leading contributor to the Australian economy.

Members of the ARA include Australia's most trusted retailers, from the country's largest department stores and supermarkets to specialty retail, electronics, food and convenience chains to mum-and-dad operators.

Executive Summary:

The Australian Retailers Association (ARA) welcomes the opportunity to advise the Senate Education and Employment References Committee with regard to the *Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (Inquiry).

This Inquiry comes at a time of ever-growing need for an agile and adaptable labour market. Closer analysis of current and emerging business practices when considering labour in Australia, and the consideration of recommendations and policies which would support these practices would be a welcome outcome of this Inquiry. This is notwithstanding the defined objective of the Inquiry to address

alleged and actual instances of 'exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies'.

It is clearly understood that the retail and services industries are undergoing a period of transition. Changes in work preferences and practices, customer expectations, operating hours and service delivery, as well as the growth of online and multi-channel engagement are all easily-identifiable markers. Available data indicates employment growth in both sectors, while neither remain centred on a traditional 9am-5pm, Monday-Friday model. This impacts on businesses, as what customers expect and how they interact with products and services has and continues to change. Policy responses have only recently begun to catch up to the consequences of these changes for the world of work.

It is incumbent upon Governments, regulators and professional bodies to continue to adapt their understanding of the needs, preferences and motivations of the people who work in businesses, and the businesses who want and need to employ workers. This includes modes of work which vary from the traditional permanent, full-time employment model, such as casual and fixed-term employment, labour hire, and independent contracting and subcontracting. Each plays a key role in supporting an agile, innovative and adaptable workforce, and great care should be exercised to ensure the legitimacy of these working arrangements is preserved.

It is no longer a valid assumption that the needs of the modern free-market economy will be met by employing only permanent, 9am-5pm, Monday-Friday workers. Nor is it valid to assume, nearly two decades into the 21st Century, that every individual *wants* to engage in this mode of work. Workers face continuously changing environments - personal, professional, social, and economic - as do businesses. It is unsustainable to move forward relying on outdated assumptions that alternative forms of work are inferior or suspect, or by seeking to regulate them so as to make them uneconomic and impractical.

1. Developments Prior to the Establishment of this Inquiry:

The ARA is a registered organisation under the *Fair Work (Registered Organisations) Act 2009 (Commonwealth)*. On the available evidence, it appears that this Inquiry has been called following the resultant outcomes of the Fair Work

Ombudsman's (FWO) *Inquiry into the procurement of cleaners in Tasmanian supermarkets*.

We wish to make it clear that the ARA and all our members, large and small, condemn any and all practices of underpayment or non-payment of wages in defiance of legal obligations. We do not endorse poor health and safety practices, nor do we support the exploitation of any and all workers. Employers are obliged to comply with legal requirements for all employment relationships.

The ARA promotes a compliance culture to our members, and our members treat workplace law seriously.

2. Alternative Work Forms and Industry:

While alternative forms of work extend across all industries, the ARA will focus on commercial cleaning and retail with respect to this Inquiry.

The commercial cleaning industry employs 142,300 Australians, with 38.1% of these employees working full-time¹. It is generally accepted that a fair proportion of those working as commercial cleaners are employed under contracting or subcontracting arrangements. In comparison, the retail trade industry is Australia's largest private employer, with over 1.26 million employees, with 48% of these employed full-time².

Whilst the ARA does not possess detailed knowledge of our members' commercial arrangements in relation to supply chains or services procurement, it is commonly understood that a broad range of businesses outsource building services, including cleaning, to contractors and subcontractors. With this in mind, the ARA is not aware of any conclusive evidence suggesting that retail employers which hire workers through such arrangements, or through labour-hire agencies, are systemically less compliant with employment obligations relative to other forms of employment.

Alternative forms of work, including contracting and sub-contracting and labour-hire, arrangements, are legitimate forms of work and play an important role in the economy. Persons who engage in these forms of work genuinely and freely enter into contracts for the provision of their services. These arrangements should not be interfered with by persons or bodies who are not parties to those contracts. The ARA does accept that enforcement agencies such as FWO have an important role to play, however.

¹ Australian Government, Department of Jobs and Small Business 2018, *Commercial Cleaners*, <https://joboutlook.gov.au/occupation.aspx?code=8112>.

² Australian Bureau of Statistics 2018, 6291.0.05, *Labour Force (Quarterly)*, 'Employed Persons by State, Territory and Industry Division of Main Job (ANZSIC)', May 2018.

In this vein, it is important to emphasise the important role that enforcement agencies play where instances of exploitation and underpayment do occur. The FWO actively pursues these occurrences, and the ARA has confidence in the FWO's fairness, impartiality and oversight into occurrences where obligations may have been breached.

The following examples illustrate occasions where the FWO has intervened after alleged breaches have become apparent. With respect to this Inquiry's focus, each example has been selected to reflect occurrences involving contractor or subcontractor cleaners:

Case Study 1: ISS Facility Services Australia Limited and First Group (MCG Cleaners)³

The Fair Work Ombudsman conducted a surprise visit to the MCG in 2014 to investigate intelligence that subcontracted cleaners were underpaid and denied casual loading and penalty rates.

The investigation by the FWO resulted in legal action in the Federal Circuit Court. Penalties were imposed by the Court in 2018

Case Study 2: Ramos Cleaning Services and Victorian Public Schools 2017⁴

Ramos cleaning services was contracted by the Victorian Government to service 18 public schools. The subcontracted cleaners were allegedly underpaid, and the Victorian Education Department launched an investigation after representations from trade unions.

The Victorian Education Department subsequently cancelled the contracts with Ramos Cleaning Services and the FWO is currently undertaking an investigation.

Case Study 3: NewKlean Management Services Pty Ltd and Burnside Village

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The Fair Work Ombudsman launched an investigation in 2014 to determine whether subcontracted cleaners had been underpaid. FWO imposed an enforceable undertaking for NewKlean to reimburse all owed monies and engage auditors to undertake an independent review.

³ Fair Work Ombudsman 2018, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180529-iss-penalty-mr>.

⁴ Sydney Morning Herald 2017, 'Victorian Schools Axe Cleaning Company over Underpayment Claims' article, <https://www.smh.com.au/business/workplace/victorian-schools-axe-cleaning-company-over-underpayment-claims-20170516-gw5oah.html>.

⁵ Fair Work Ombudsman 2014, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/june-2014/20140623-newklean-eu-presser>.

These examples demonstrate that cases of exploitation in the cleaning industry are not endemic to, nor systemic within the retail industry. This also highlights the FWO's preparedness to ensure that obligations are met, including through prosecution where necessary. The FWO, Trade Unions and Professional Associations perform important roles in ensuring breaches of workplace law do not go unnoticed.

Thus, we do not believe it is necessary for industry-specific or targeted regulation to be implemented. Exploitation, underpayment, or mistreatment of any workers, whether full-time, labour hire, contractor or subcontractor, are practices which should be determined solely by enforcement agencies. Any incidents, however isolated, must be taken seriously, and followed by appropriate enforcement actions.

Notably, it is doubtful that the retail industry warrants consideration as the defining example of such violations. We do not believe that such issues are systemic within, nor endemic to, the retail industry. The ARA encourages the Committee to consider this matter in a broader context.

3. Workplace Relations Framework:

Australia's system of workplace relations is highly complex (including by international standards), and this presents compliance challenges for employers. This is particularly true for SME retailers and employers who are new to Australia and its legal systems, as well as those who may have limited English literacy skills.

Exploitation of vulnerable workers, unintended or otherwise, is a suitable target for enforcement agencies. Nonetheless, alternative forms of work do exist and should not be considered a pox on the industrial relations system which requires treatment. Labour hire, independent contracting, subcontracting and other forms of employment are critical for the labour market and deliver benefits to workers, businesses and consumers.

Many workers value the opportunity to work the shifts and hours which suit them. These forms of work also provide individuals with the opportunity to balance work with studies or other personal commitments. The focus on policy responses to alternative work should not deprive individuals of the opportunity to do so.

The inflexible and complex award structures under Australia's workplace relations system, including prescriptive minimum engagement periods, highly regulated part-

time hours and outdated penalty rates structures, impose significant limitations on work patterns offered by retail businesses. These are significant barriers to participation for retail businesses *and* workers who require ultra-flexibility.

3.1: The necessity of alternative work-forms:

In the Productivity Commission's final report from the 2015 *Inquiry into Australia's Workplace Relations System*, it assessed the benefits and necessity of alternative forms of work:

“Whether or not an employer seeks to use a certain form of work depends on their assessment of how productive and how costly the workers might be. For workers, the attractiveness of various forms of work depends largely on the associated financial and non-pecuniary benefits.”⁶

There is no doubt that these forms of employment have an increasingly important role to play in ensuring an innovative, agile and productive workforce. This can be said for both businesses and workers alike. Consumers also benefit from alternative forms of work, as they deliver efficiencies, increased productivity, and introduce competition, which assists with lowering prices for goods and services. According to the PC:

“Where using alternative labour forms does lower costs then, in any workably competitive market, the wider community will typically capture most of the benefits through lower prices.”⁷

For retail businesses aiming to engage building services workers (for example, cleaners), subcontracting and labour hire arrangements provide specialised workers, while eliminating complexities. Without them, these arrangements would usually be subject to a multifaceted interplay of operating hours, state and local-government derived trading hours restrictions, and differing Awards structures, among other factors. These aspects increase the difficulty for businesses in engaging ongoing services employees, especially for businesses whose employment practices are focused on one industry or Award.

These factors increase the necessity for businesses to engage contractors and subcontractors to perform services. Businesses and consumers derive employment resource and cost benefits by relying on sector-specific expertise to engage workers, who ultimately also amass benefits by increased access to employment opportunities and flexible working arrangements.

⁶ Productivity Commission 2015, *Inquiry into Australia's Workplace Relations Framework: Final Report*, p.801.

⁷ Productivity Commission 2015, *Inquiry into Australia's Workplace Relations Framework: Final Report*, p.803.

3.2: Protections under workplace law:

There exists an intricate and comprehensive network of workplace relations laws designed to ensure that workers are protected, which includes, but is not limited to:

Commonwealth Regulations:

- *Fair Work Act 2009, and associated Awards structures, national employment standards, national minimum wage orders, and the Fair Work Ombudsman.*
- *Fair Work (Protecting Vulnerable Workers) Act 2017.*
- Superannuation and taxation laws (including the recent introduction of SingleTouch Payroll, a key wage compliance mechanism).

State Regulations:

- Labour Hire Licensing laws (QLD; SA and VIC proposed)
- Workplace Health and Safety laws.
- Workers compensation laws.

Of relevance to this Inquiry is the recent move by various State Governments to introduce labour hire licensing schemes. These measures are intended to establish mandatory licensing schemes for labour hire businesses (including contracting and subcontracting), to verify minimum employment standards and provide accountability.

The ARA believes that these measures provide a potential opportunity to work with industry and professional bodies, including industry associations and labour hire associations, to establish voluntary measures. Such measures, including codes of conduct, can assist in increasing compliance and promoting rights and obligations of workers and businesses.

The ARA remains of the view that the workplace relations framework should be simplified and streamlined in order to assist employers to comply with their requirements and obligations. We believe that this will assist in increasing compliance outcomes, achieving productivity benefits, and a more comprehensive understanding of the rights and obligations for both employers and employees.

Conclusion:

The retail industry provides a vital source of direct employment and income for over 1.23 million Australians. Additionally, some Australian retailers provide essential

support to other industries, including building services contractors and subcontractors, through the procurement of services via alternative forms of work.

It is necessary to recognise the legitimacy of working arrangements which differ from the traditional full-time, 9am-5pm Monday-Friday model. Individuals, businesses and consumers all benefit from the flexibility, choice, and economic benefits that alternative forms of work provide.

The ARA and our members believe that government should prioritise a forward-thinking, flexible industrial relations system which can more readily adapt to alternative forms of work. This includes a system which places faith in the integrity of our enforcement agencies such as the FWO, in investigating breaches of obligations.

The ARA and our members do not support or condone any breach of obligations, including underpayment or non-payment of wages, or other forms of exploitation, under Australian workplace law. While such instances should be condemned, it is important to note that the ARA is not aware of conclusive evidence which suggests that such practices are systemic, nor endemic to one industry in particular.

The ARA would like to take this opportunity to thank the Committee for the opportunity to submit to this Inquiry. Please contact ARA Executive Director, Russell Zimmerman or ARA Director of Policy, Government and Corporate Relations, Heath Michael for further comment.

Kind regards,

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