



Employment Law Centre of WA (Inc)

Working for WA Workers

ABN 36 365 876 841

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

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Dear Committee Secretary

The exploitation of general and specialist cleaners working in retail chains

Thank you for the opportunity to participate in the inquiry into the exploitation of general and specialist cleaners working in retail chains for contracting or subcontracting cleaning companies (the **Inquiry**), as referred by the Senate to the Education and Employment References Committee (**Committee**).

Please see below our submissions in relation to the Inquiry.

We would be happy to provide further information to the Inquiry and participate in further consultation should there be any opportunity to do so.

Yours faithfully

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Employment Law Centre of Western Australia (Inc) Submissions

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

Summary

Employment law framework

In theory, the existing Commonwealth employment law framework should protect vulnerable workers such as cleaners in retail chains from harm. In practice, it is not effective in doing so. This is partly because those people who most need to rely on the framework are often the least able to do so.

The Employment Law Centre of Western Australia (Inc) (**ELC**) considers the employment law framework needs to be reviewed and enhanced with the objectives of ensuring:

- access to justice for vulnerable workers;
- proper governance by principal or head contractors for supply of labour through intermediaries; and
- the employment law framework can accommodate changes in labour market practices, such as the gig economy.

The ELC notes the Fair Work Ombudsman's (**FWO**) increased focus on accessorial liability provisions to hold those involved in contraventions accountable. As part of this, it is important that those accessorial liability provisions are not only used to make individuals within the contravening entity accountable, but are also strong enough to make other entities (and individuals inside those entities) within the contractual supply chain accountable.

Recommendations regarding employment law framework and legislative change

- ELC recommends that the employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of simplification, procedural formality and evidentiary requirements in an employment context.
- ELC recommends that the accessorial liability provisions be reviewed with the specific objective of applying those provisions to supply chains. As part of this, consideration should be given whether a positive due diligence duty should be placed on a principal or head contractor, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.
- ELC supports any finding or recommendation of the Committee that enhances the FWO's regulatory power in investigating and enforcing accessorial liability provisions.
- ELC recommends that further consideration be given to whether the labour hire industry should be further regulated at a federal level.
- ELC recommends that the legal definition of employee be modified to provide employment law protections to workers performing services in the gig economy.

- ELC recommends that:
 - there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment and dismissal, where there is a prospect the employee may be leaving the jurisdiction to return overseas; and
 - where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue claim easily even if they are not in Australia.

Funding for education, advice and support to vulnerable workers

Further, the ELC considers there needs to be greater funding and resources given to addressing this issue, which funding should adopt a multi-layer approach of:

- community education;
- further funding given to the regulator with greater inspector resources; and
- further funding given to the community legal sector and other third parties to provide legal advice, education and support.

Recommendations regarding further funding and resources

ELC recommends that further funding and resources be provided to:

- the FWO for the purpose of:
 - protecting vulnerable workers; and
 - ensuring proprietors of the gig economy are also operating within the current legislative regime;
- the community legal sector for the purpose of enabling further assistance and community legal education to be given to vulnerable workers; and
- third parties for the:
 - purpose of educating and advising workers;
 - ensuring proprietors of the gig economy are also operating within the current legislative regime; and
 - specific purpose of gaining access to, educating and advising overseas workers on their employment law rights and obligations, including prior to the commencement of work; and
 - specific purpose of subsidising the cost of enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

Trade unions

ELC refers to its recommendations above regarding further funding and resources to be provided to third parties.

Recommendations regarding trade unions

- ELC supports any submissions by other parties or recommendations by the Committee which provide trade unions greater scope to assist employees in low-wage industries, such as the cleaning industry.

Other supporting material

ELC assumes that the Committee is aware of and will consider as part of the Inquiry:

- the work the FWO has done and reported on relevant to this Inquiry (including on the gig economy, sham contracting, accessorial liability, exploitation of vulnerable workers and the cleaning industry); and
- the June 2018 report by PricewaterhouseCoopers Consulting (Australia) Pty Ltd (**PWC**) on phoenix arrangements¹.

ELC's experience with vulnerable employees

The ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance, education and representation to vulnerable non-unionised employees.

Each year, ELC assists thousands of callers in Western Australia through its Advice Line and provides further assistance to some of these callers. In assisting callers, ELC obtains information as to what the person's occupation is. From this information, ELC can determine that it regularly hears from cleaners. However, ELC does not specifically seek information as to whether these cleaners are contracted or subcontracted in retail chains. Consequently, ELC is not able to easily determine whether a cleaner is a general and specialist cleaner working in retail chains.

Nevertheless, the nature of exploitation experienced by cleaners working in retail chains is not unique to this subset of the cleaning industry. Through ELC's experience in assisting vulnerable workers, it can identify common issues that align with the Terms of Reference of the Inquiry and support its submissions, both:

- for the cleaning industry generally; and
- for workers in other industries where vulnerable low paid workers form a significant portion of the workforce. This also includes workers who are subcontracted to retail chains in a non-cleaning capacity, such as trolley collectors.

General comments regarding vulnerability to, and level of, exploitation

In ELC's experience, participants engaged to work in the cleaning industry are particularly vulnerable to exploitation. This vulnerability to exploitation appears to be taken advantage of by some employers. Consequently, in ELC's experience, a vulnerability to exploitation is translated to actual exploitation, with cleaners more likely to experience exploitation than other more highly paid categories of workers.

¹ PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The Economic Impacts of Potential Illegal Phoenix Activity*, (June 2018), available at https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/economic-impact-of-phoenix-activity-update_june-18_56257.pdf

By exploitation ELC means the act of using someone unfairly for your own advantage.² As part of this, ELC also includes situations where a principal or head contractor exploits market forces by creating and taking advantage of a competitive environment that necessarily results in a cleaner further down the contractual chain not receiving their minimum entitlements, whilst nominally that principal or head contractor has abrogated its legal risk by ensuring it has no active knowledge of that underpayment.

Vulnerability to exploitation

It is difficult for ELC to conclusively assess and determine the likely causes of why cleaners are particularly vulnerable to exploitation. Nevertheless, ELC sees common themes arising between cleaners and other vulnerable low paid workers. ELC is of the view that this exploitation may be the result of cleaners being:

- relatively low paid and heavily reliant on those wages, such that the importance of continuing to be paid is more important than ensuring compliance with workplace relations laws;
- at the end of multiple layers of contractual relationships, where the cleaner is engaged by a contracting company which sits between the retail chain and the cleaner, albeit the work done by the cleaner is for the benefit of the principal atop of the retail chain. Competitive tendering with the associated cost cutting then leads to the last person in the chain (the cleaner) receiving the least benefit from the contract, despite it being that person who performs the work;
- the nature of cleaning work in retail chains means this work often occurs outside of normal business hours (with potentially limited supervision and third-party oversight), which can lead to a 'hidden' exploitation;
- unable to easily secure alternative employment in a different occupation;
- willing to acquiesce to unlawful conduct, such as bullying or unilateral variations to their employment, being fearful of the consequences if issues are raised with the prospect of dismissal if they do not accept that unlawful conduct; and
- subject to other vulnerabilities such as speaking English as a second language, having literacy issues, being from overseas and not being familiar with Australian laws and institutions, particularly where Australia's workplace laws and modern award system are generally recognised as being complex and often requiring legal advice.³

ELC's experience is supporting by the findings of the FWO regarding the exploitation of vulnerable workers.

As such, while ELC's submissions will briefly deal with some of the findings of the FWO in support of its submissions, it will not extensively refer to the various reports FWO has prepared in this area.

The FWO reported following the National Cleaning Services Compliance Campaign 2014/15,⁴ that 47% of workers were born in countries other than Australia, and 35% had English as their second language.⁵

² <https://dictionary.cambridge.org/dictionary/english/exploitation>

³ Financial Review, Fair Work Ombudsman blasts award complexity (2014), available at <https://www.afr.com/news/policy/industrial-relations/fair-work-ombudsman-blasts-award-complexity-20140722-j4245>; and generally the decision of Deputy President Sams in *Applicant v Respondent* [2014] FWC 2860.

⁴ Fair Work Ombudsman, *National Cleaning Services Compliance Campaign 2014/2015 – A report prepared by the Fair Work Ombudsman under the Fair Work Act 2009*, (March 2016).

⁵ Ibid, 3.

As noted by the FWO⁶:

“Ms James acknowledged that competitive tendering and tight profit margins may have compromised the ability of some cleaning businesses to meet their compliance obligations.

However, she warned that employers could not look to cut costs by under-cutting and ignoring minimum wage rates.

...

According to the last Census, almost two-third of cleaners are female and almost 40 per cent of employees were born overseas. Many are international students.

Ms James says the cleaning workforce is therefore considered to be a vulnerable cohort and open to exploitation by unscrupulous operators.”

The FWO also recently concluded an inquiry into the procurement of cleaners in Tasmanian supermarkets.⁷ In request of this inquiry, the FWO stated⁸:

“The Inquiry was commenced in late 2014 in response to intelligence received by the Fair Work Ombudsman that supermarket cleaners in the state were being significantly underpaid.

The report reinforces the importance of the Fair Work Ombudsman’s ongoing focus on businesses improving its supply chain governance after successive inquiries have revealed a correlation between multiple levels of subcontracting and workplace breaches.

Fair Work Ombudsman Natalie James said that the Inquiry report shows how alarming levels of exploitation can occur where supply chains involving vulnerable workers are not adequately monitored.”

The FWO also observed (similarly to its observations in 2016)⁹:

“Ms James noted that the cleaning sector often attracts overseas workers with limited English-language skills and little experience working in Australia, who can be vulnerable to exploitation and can be reluctant to speak up if something is wrong.

A number of overseas workers interviewed as part of the Inquiry told inspectors that they felt they would lose their job if they spoke out about their employer and would struggle to find more work.

“We see too many cases of vulnerable workers engaged in low-skilled work in supply chains of major companies being exploited,” Ms James said.”

ELC assumes that the Committee is aware of and is considering as part of the Inquiry the work the FWO has done and reported on relevant to this Inquiry (including on the gig economy, sham contracting, accessorial liability, exploitation of vulnerable workers and the cleaning industry), as ELC’s experience is supported by the findings of the FWO.

⁶ Fair Work Ombudsman, *Cleaning industry compliance needs to improve* (2016), available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser#>.

⁷ Fair Work Ombudsman, *An inquiry into the procurement of cleaners in Tasmanian supermarkets – A report by the Fair Work Ombudsman under the Fair Work Act 2009* (2018).

⁸ Fair Work Ombudsman, *Fair Work Ombudsman Inquiry uncovers rampant exploitation of Woolworths cleaners* (2018), available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners>.

⁹ Ibid.

Level of exploitation

In ELC's experience looking at the number of calls it receives from cleaners, cleaners (and other occupations which are typically comprised of low paid vulnerable workers) appear to suffer greater exploitation than many occupations.

ELC classifies callers in 32 different occupations, one of which is cleaners. Between 1 July 2017 to 30 June 2018, 121 callers (3%) who contacted ELC about problems at work were cleaners.

In contrast, according to recent data from the Australian Bureau of Statistics, "*building and other industrial cleaning services*" accounted for approximately 1.2% of the Australian workforce, and the industry in general has experienced sustained growth as businesses looked to outsource non-core activities, and time-poor households sought support for domestic services.¹⁰

ELC's experience aligns with that of the FWO, who found following an audit of 54 employers nationally that 33% of cleaning businesses were paying their workers incorrectly.¹¹

Of additional concern, it also appears to be a high level of repeat offenders. In 2016, the FWO stated that previous campaigns have identified similar levels of non-compliance and that "[o]f concern was the finding that 18 businesses which had previously been found to be non-compliant were underpaying staff".¹²

Nature of exploitation

A common form of exploitation cleaners face is the failure to pay correct wages and entitlements (often associated with a lack of proper record keeping).

Underpayment

A failure to pay an employee their proper wages and entitlements is a contravention of minimum standards of the most fundamental kind.¹³

It is also important to understand that in a low paid industry, a small underpayment can result in a disproportionately large impact on the cleaner's financial stability.¹⁴

Consequently, in ELC's experience where an underpayment has occurred, most of its clients are focused primarily on ensuring they are paid their correct wages and entitlements. They are not concerned about taking punitive action against the employer. The tools available to them to recover the underpayment involve:

- seeking to negotiate a resolution;
- referring the matter to an industrial inspector to investigate and enforce on their behalf; or
- bringing a claim.

¹⁰ Australian Bureau of Statistics, *Building and other industrial cleaning services* (2018).

¹¹ Fair Work Ombudsman, *Cleaning industry compliance needs to improve* (2016) available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160513-cleaning-compliance-campaign-presser#>; and Fair Work Ombudsman, *National Cleaning Services Compliance Campaign 2014/2015 – A report prepared by the Fair Work Ombudsman under the Fair Work Act 2009* (2016), 3.

¹² Ibid, at 7.

¹³ *Fair Work Ombudsman v Dawe* [2013] FMCA 191.

¹⁴ Whilst not directly relevant to the cleaning industry, in *Philip Moyle v MSS Security Pty Ltd* [2016] FWC 372 at [24], a Full Bench of the FWC comprised of Hatcher VP, Hamberger SDP and Saunders C, commented that "a \$1 per hour reduction in wages for an award-dependent and low-paid worker ... may well have been significant in the context of ... personal circumstances".

Each of the tools above can cost time, expense and stress. In these circumstances, it is not unusual for an employee to compromise their claim to get a payment sooner to resolve the matter, rather than pursuing the full amount of their underpayment, particularly if there are evidentiary difficulties with their claim such as a failure to keep proper records of work performed.

Example: Case study of Ana

Ana¹⁵ was employed as a cleaner.

During Ana's employment, she experienced various forms of exploitation.

- Her contract said that she was an employee, but her employer then asked her if she had an ABN and said it would be better if she was paid as a contractor.
- Ana's employer deducted several hundred dollars from her pay without her authorisation, supposedly because she had left work early.
- Ana fell sick one day and went to the doctor. She informed her boss that she had a fever and couldn't make it to work that day. The next day she came in, she was told that she would be sacked if she didn't turn up for work.
- Ana was consistently paid below the minimum wage and was always paid the same rate even when she worked at night. She also didn't receive any annual leave or sick leave and didn't receive any casual loading either.
- Ana spoke to her boss about how much she was being paid and was dismissed as a result.

Other forms of exploitation

Other common forms of exploitation of cleaners include:

- the classification of their engagement as being as independent contractors rather than employees (which is dealt with in more detail below); and
- the unfair cessation of the cleaners' engagement.

Efficacy of existing Commonwealth employment law framework

In theory, the existing Commonwealth employment law framework should protect vulnerable workers such as cleaners in retail chains from harm. This is because the framework provides a regime for:

- minimum conditions of employment that cannot be contracted out of (the National Employment Standards, modern awards and entitlements prescribed by workplace relations law);
- protections from unlawful and unfair conduct (such as sham contracting, general protections and unfair dismissal);
- enforcement and penalty provisions for non-compliance; and
- a regulator who can separately investigate and take enforcement action in relation to contraventions.

In ELC's view, a strong employment law framework does not in itself mean an effective employment law framework.

¹⁵ Name has been changed for confidentiality reasons.

Firstly, a strong employment law framework must necessarily evolve to accommodate changing workplace patterns as companies look for ways to reduce costs and improve productivity, from outsourcing to an increased use of casual employees to the emergence of the gig economy.

Second, for a workplace protection to be truly effective it must also be easy to understand and easy to enforce. However, in ELC's experience the Commonwealth employment law framework is complex and difficult for vulnerable workers to:

- understand; and
- seek to enforce their rights under those laws.

This is in an environment where:

- the more vulnerable an employee is, the greater potential there is for the employee to be exploited;
- there are numerous barriers to vulnerable employees enforcing their rights, for example where they do not speak English as a first language, they do not know where to go for assistance, they are not familiar with Australian workplace laws and institutions, and are concerned about speaking up about their rights for fear of being dismissed, and in some cases, deported (since their employment is tied to their right to remain in the country);
- frequently workers are unable to pay for expert advice, support and representation;
- those workers unable to pay for expert advice, support and representation may have limited opportunities to obtain free third-party assistance from organisations such as community legal centres and unions; and
- agencies such as the Australian Taxation Office and the FWO have finite resources and may be limited in the assistance they can provide.

Flexible and informal enforcement processes

For laypersons who are unable to secure support and representation, it is vital that enforcement processes be clearly set out in the legislation and appropriate for them to rely upon. They should be flexible and as informal as possible. In ELC's experience, procedural and evidentiary formality prevents vulnerable employees from accessing justice.

However, it is important that the focus on enforcement (and the general deterrent effect of penalties and accessorial liability provisions) does not draw attention away from measures that can be adopted to prevent underpayment in the first place. This can be achieved through a range of different activities, from education and training to more detailed and involved governance arrangements by entities higher up the contractual supply chain.

ELC recommends that the employment enforcement framework be reviewed with the specific objective of enabling self-represented individuals to more easily access justice, looking at issues of simplification, procedural formality and evidentiary requirements in an employment context.

ELC recommends that further funding and resources be provided to third parties for the specific purpose of subsidising the cost of enforcement action. For example, funding could be provided for the specific purpose of representation in underpayment disputes.

ELC recommends that further funding and resources be provided to third parties for the general purpose of educating and advising employees.

Current strategies used to defeat workplace protections

In ELC's experience, two common strategies often used to defeat workplace protections are:

- the classification of workers as contractors rather than employees – a clear example of this practice, and the difficulty in determining a worker's *actual* classification should the matter be in dispute, is the significant increase in the gig economy; and
- distancing the entity from whom the work is performed from the entity that employs or engages the worker.

The two principal mechanisms currently available for overcoming these arrangements are:

- The enforcement of the sham contracting provisions.

Example: FWO proceedings against Foodora Australia Pty Ltd

On 12 June 2018, the FWO commenced legal proceedings in the Federal Court of Australia against Foodora Australia Pty Ltd, alleging it had engaged in sham contracting activity that resulted in the underpayment of workers. Fair Work Ombudsman Natalie James was quoted as saying sham contracting is a priority for her Agency, not just because of the direct impact of these arrangements on individual workers but because those adopting sham contracting as a business model are availing themselves of an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections¹⁶; and

- Accessorial liability provisions.¹⁷

Example of accessorial liability for managers/directors: *Fair Work Ombudsman v Commercial and Residential Cleaning Group Pty Ltd & Ors* [2017] FCCA 2838

Penalties were issued against two managers and directors of the first respondent, Commercial and Residential Cleaning Group Pty Ltd, for (among other things) failing to meet a broad range of minimum entitlements due to be paid to employees of the first respondent and failing to keep and maintain adequate or correct records to issue payslips. One of the factors the Court considered in assessing a penalty was that in another similar Court action against a different cleaning company, the two managers and directors also operating that company – and compensation and penalties ordered in that action had not been paid.

*By reason of the fact that the first respondent in these proceedings and ACN 146 435 118 Pty Ltd had common directors, including the second respondent and the third respondent in these proceedings, and that the third respondent in ACN 146 435 118 (No.2) is the second respondent in these proceedings, the Court considers that appropriate weight must be given to the previous contravention by the third respondent and the previous similar conduct by a corporation in which both the second and third respondents were involved.*¹⁸

¹⁶ Fair Work Ombudsman, *Fair Work Ombudsman commences legal action against Foodora*, (2018), available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation>.

¹⁷ See for example s. 550 of the *Fair Work Act 2009* (Cth).

¹⁸ At para 57.

Example of accessorial liability for another entity: *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810

A declaration was made that and accounting firm, Ezy Accounting 123 Pty Ltd, was accessorially liable for knowingly helping one of its clients exploit a vulnerable worker. The underpayments occurred despite the FWO having previously put Ezy Accounting 123 on notice of their obligations under workplace laws. It was found that Ezy Accounting 123 had “*deliberately shut its eyes to what was going on in a manner that amounted to connivance in the contraventions by the first respondent*”.¹⁹

In a retail chain environment, while an employer may be directly responsible for the payment of wages, it is important to push liability for non-compliance with employment laws up the contractual supply chain to the ultimate beneficiary. Retail chains are typically well-resourced sophisticated companies and it must be made clear to them that there is a business case for having strong governance arrangements in this area and direct consequences to them if non-compliance occurs.

ELC notes that the FWO has recently emphasised its commitment to use the accessorial liability provisions to “*ensure that all accessories to that conduct are held to account*.”²⁰

Further legislative changes

Legislative changes: Protecting vulnerable workers

Regulatory intervention to protect vulnerable workers is starting to receive greater Government attention and support.

In September 2017 the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 passed into law. These amendments to the *Fair Work Act 2009* (Cth) were in response to community concern about the exploitation of vulnerable workers, in particular migrant workers and many of those who work in the franchise sector.²¹

One of the changes arising from this Bill was extended liability for franchisors and holding companies.

In ELC’s view, the concepts contained in the extended liability for franchisors and holding companies, together as to what factors a court may have regard when determining whether reasonable steps have been taken to prevent a contravention, could similarly be applied to a contractual supply chain such as that involving a retail chain and a cleaning contract.

However, ELC also recommends the legislation go further and a stronger positive obligation be placed on retail chains to prevent a contravention; rather than a retail chain seeking to abrogate its legal risk of being accessorially liable for non-compliance by limiting its involvement in the conduct of entities further down the contractual supply chain.

ELC recommends that the accessorial liability provisions be reviewed with the specific objective of applying those provisions to supply chains. As part of this consideration should be given whether a positive due diligence duty should be placed on a principal or head contractor, such that they will be held liable unless they can demonstrate they have taken proper and reasonable steps to ensure compliance by entities lower down the supply chain with employment laws.

¹⁹ At para 102.

²⁰ Fair Work Ombudsman, *HR Manager among those penalised almost \$400,000 for “systematic” exploitation at restaurant*, (2017), available at <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/november-2017/20171117-nsh-north-penalty-mr>.

²¹ Explanatory Memorandum to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Cth), page i.

ELC supports any finding or recommendation of the Committee that enhances the FWO's regulatory power in investigating and enforcing accessorial liability provisions.

Regulation of labour hire providers

In addition to the recent legislative changes that have occurred at federal level to better protect vulnerable workers, several States have introduced legislation to regulate the labour hire industry, in recognition of the fact that labour hire agencies have been involved in the exploitation of such workers:

- both South Australia and Queensland have introduced *Labour Hire Licensing Acts 2017*; and
- Victoria has introduced the Labour Hire Licensing Bill 2017.

Such legislation requires labour hire agencies to obtain a licence in order to operate.²²

ELC recommends that further consideration be given to whether the labour hire industry should be further regulated at a federal level.

Legislative changes: Manner of engagement

While greater protection is being given to vulnerable workers, ELC submits that the employment law framework has failed to keep pace with the way in which workers are being engaged in modern society to perform work.

For example, the gig economy has, arguably, moved from an emerging market to a developing market.

What started with ride share and food delivery, has expanded to the undertaking of a raft of 'tasks' (which can include long-term assignments with large employers and even providing aged care).

It is perhaps inevitable that cleaning companies will look at the gig economy model (if they have already not done so) to determine if this type of arrangement provides it with a competitive advantage.

For example, cleaners' vulnerability to exploitation, the unskilled nature of parts of the work, the ability to mobilise cleaners quickly and easily to a principal's premises are all factors that could make a gig economy platform attractive.

What is also attractive about a gig economy arrangement is the current status of the law, which provides a measure of protection against a finding that in such an arrangement an employer has disguised an employment relationship as one of an independent contractor relationship (sham contracting).

An individual, or the FWO can prosecute an employer who engages in sham contracting. To do so, it must first be proved, having regard to the relevant indicia when applying the 'multi-factorial test', that a worker is an employee, and not an independent contractor. Once proven, the court can make orders with declaratory effect and penalise the employer.²³

ELC recommends that the legal definition of employee be modified to provide employment law protections to workers performing services in the gig economy.

²² See further A. Stewart, *Stewart's Guide to Employment Law*, Sixth edition, The Federation Press, 2018, pp. 78-79.

²³ See generally *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 where the FWC, in applying the multi-factorial test, rejected a Victorian Uber driver's argument that he was an 'employee' protected by unfair dismissal laws.

ELC recommends that further funding and resources be given to FWO and other third parties for the purpose of ensuring proprietors of the gig economy are also operating within the current legislative regime.

Legislative changes: Migrant workers

One of the factors which can make an employee vulnerable to exploitation is whether they are a migrant worker.

In ELC's experience migrant workers:

- have reported receiving less favourable pay and conditions than Australian workers;
- have been exploited on threat of deportation – e.g. they have been required to pay for vehicle damage for which they were not responsible, or which could have been recovered on insurance;
- have been subjected to assaults, underpayment of entitlements, threats of deportation, unreasonable working hours and other forms of mistreatment;
- have been threatened by their employers that they repay visa fees and other associated costs if they leave their employment within a certain period of time; and
- have been selected for redundancy and they consider that they were selected because they were temporary work visa holders.

ELC recommends that:

- ***funding and resources be provided to third parties for the specific purpose of gaining access to, educating and advising overseas workers on their employment law rights and obligations, including prior to the commencement of work;***
- ***there be an expedited process for courts and tribunals to deal with employment law claims relating to underpayment and dismissal, where there is a prospect the employee may be leaving the jurisdiction to return overseas; and***
- ***where it is not possible for a claim to be dealt with on an expedited basis, the various courts and tribunals processes should be flexible enough to allow claimants to pursue claim easily even if they are not in Australia.***

Do workers have adequate representation and knowledge of their rights?

In ELC's view:

- workers do not have adequate representation and knowledge of their rights; and
- insufficient resources are currently devoted to measures designed to ensure cleaners have adequate representation and knowledge of their rights.

As mentioned previously, a necessary precursor to enforcing employment rights is having a basic understanding of those rights and the ability to either self-represent or obtain third party assistance.

In ELC's experience in dealing with thousands upon thousands of vulnerable non-unionised callers; there is a lack of basic knowledge of employment laws, minimum entitlements and enforcement mechanisms. A significant portion of ELC's work is then to provide callers with at least a minimal understanding of these matters to empower them going forward with their matter.

Level of available third party resources for workers

Agencies such as the FWO

Agencies such as the FWO do not have unlimited resources to enforce the relevant workplace laws.²⁴

Similarly to ELC, the FWO undertakes a number of alternative measures to gain maximum benefit from its resources, including undertaking education campaigns, providing information resources²⁵, various types of investigation and enforcement actions to litigation (prioritising what is in the public interest to prosecute).

Additionally, the FWO uses its regulatory powers to conduct 'industry' investigations and audits, allowing it to identify and address trends of non-compliant behaviour.

The FWO also has a limited capacity to provide funding to community organisations. In its 2016-17 Budget, the Federal Government committed \$7.3 million over four years to fund the FWO's 'Community Engagement Grants Program'. The Program involves the FWO providing total funding of \$1.8 million a year for four years to not-for-profit community organisations to undertake a range of services, projects and programs of work to supplement the Agency's statutory functions. ELC is a recipient of a portion of this funding, an amount we are extremely grateful for, and which funding is put to great use in the community in which we serve. ELC, however, is still unable to meet demand for its services.

The reality though is the FWO does not have the resources and funding to investigate and enforce every incident of non-compliance with employment laws. Nor is it feasible to envisage a situation where sufficient funding or resources could ever be provided to FWO to enable it to do so.

The FWO needs to prioritise what is in the public interest to pursue and, for those most serious instances of non-compliance, prosecute. Relevantly, one of the factors considered in whether to litigate an issue of non-compliance is the exploitation of vulnerable workers.²⁶

ELC notes that the passing of the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 will go some way to ensuring the public's interest and the FWO's limited resources are continued to be guided to this area.

ELC recommends that further funding and resources be provided to the FWO for the purpose of protecting vulnerable workers.

Community Legal Centres

As mentioned previously, ELC is a community legal centre that specialises in employment law. It is the only not-for-profit legal service in Western Australia dedicated to offering free employment law advice, assistance, education and representation to vulnerable non-unionised employees.

Unfortunately, the demand for ELC's services greatly exceeds ELC's resources.

To provide a State-wide service that is not geographically limited, ELC primarily operates a telephone service through an Advice Line. Currently, ELC is only able to answer approximately

²⁴ See 'FWO and ROC Budget Statements', which provide the budget estimates for 2018-19 as at Budget, May 2018, and appropriate total departmental annual appropriations of \$180.1 million.

²⁵ For example, on 26 April 2018, the FWO launched an initiative entitled 'Small Business Showcase': *a virtual hub providing a wealth of resources for small business owners seeking information about their workplace obligations*. This initiative was launched as a direct response to the FWO receiving 500,000 calls to its dedicated small business helpline since its establishment at the end of 2013.

²⁶ Fair Work Ombudsman, "Compliance and Enforcement Policy", August 2017, available at <https://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy>.

one in six calls on our Advice Line²⁷. This potentially means as many as five in six vulnerable non-unionised employees in WA who cannot otherwise afford to pay for a lawyer are missing out on receiving legal or employment advice on their situation.

In addition to providing one-off advices to callers on its Advice Line, ELC provides some particularly vulnerable workers with further legal assistance. However, ELC is unable to provide most clients with further assistance by way of representation due to resourcing and funding requirements constraints.

However, in respect of the balance of callers the majority are unable to afford representation and must then self-represent if they are not members of a union, often against well-resourced employers.

To try and alleviate this ELC adopts a multi-faceted approach to maximise the benefit of the services it provides. For example, it also:

- conducts community legal education, information and training sessions across the State;
- offers 20 Fact sheets and eight Information Kits that cover a range of employment issues and remedies on the ELC website (www.elcwa.org.au);
- provides an online InfoGuide on the ELC website (www.elcwa.org.au) to help users find the relevant referral or information they need, either within the tool itself or via links to appropriate ELC or external information;
- will refer some of these callers to federal and State regulators (FWO and Department of Mines, Industry Regulation and Safety) to obtain assistance; and
- secures pro bono representation support for a limited number of ELC's callers.

In December 2014, the Productivity Commission released its inquiry report on Access to Justice Arrangements.²⁸

In looking at legal assistance funding of community legal centres, the report noted the uncertainty of funding (under the heading of 'Getting off the funding merry-go-round'). This uncertainty of funding is something the ELC has experienced, and recently led to a significant contraction of its services, before being able to expand its services as further funding was obtained.

The Productivity Commission considered that greater predictability of funding is required.²⁹ The Productivity Commission also recommended that:

"Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of \$200 million — from the Australian, state and territory governments — is required per year."

Interestingly in the Inquiry Report, the Productivity Commission examined the top five most accepted areas of pro bono practice³⁰ and the top five most rejected pro bono practice areas³¹. On a percentage basis, employment law was the fourth highest area under both the top five most accepted and most rejected pro bono practice areas. The Productivity Commission noted that the rate of rejection for employment law may "*simply reflect the volume of applications*".³²

ELC regularly reviews the effectiveness and efficiency of service delivery in relation to the amount of funding received each year. ELC can leverage an average of \$700,000 annually in pro bono

²⁷ Based on records between 1 July 2017 and 31 December 2017.

²⁸ Productivity Commission, *Inquiry Report – Access to Justice Arrangements* (2014).

²⁹ Ibid, n 13, 753.

³⁰ Ibid, n 13, 812.

³¹ Ibid, n 13, 820.

³² Ibid, n 13, 819

and volunteer support from the funded services. Further, according to a social return on investment research project conducted in 2016, every dollar invested in ELC returns conservatively \$1.53 to the investor.³³

ELC recommends that further funding and resources be provided to the community legal sector for the purpose of enabling further assistance and community legal education to be given to vulnerable workers.

Trade Unions

Trade unions have traditionally played an important role as protectors and enforcers of employment legal rights. Among other things, trade unions also provided a 'herd immunity' whereby their presence in protecting union members, and the fear of detection by employers, provided indirect protection to other non-unionised employees by motivating employers to comply with the law.

To do so though, trade unions need to have access to employees, records and information. It is trite to say, but unless a trade union has knowledge of employer non-compliance, it is unable to take on the role of the enforcer.

ELC supports any submissions by other parties or recommendations by the Committee which provide trade unions greater scope to assist employees in low-wage industries, such as the cleaning industry.

Cost to Australian economy and phoenixing

The issue of exploitation is not merely an issue for vulnerable workers.

Relevantly, where exploitation permeates through an industry and provides a competitive advantage, it makes it difficult for businesses who comply with the law to equally compete. A level playing field of full compliance with the law then not only benefits underpaid employees, but it also benefits businesses who engage in good business practices.

There is also a broader impact on the Australian economy, including employees, businesses and government, from unlawful business practices, such as phoenixing. The June 2018 report by PWC³⁴ found that the direct cost to the Australian economy of potential illegal phoenix activity in 2015-16 was between \$2.85 billion and \$5.12 billion a year. This included between \$31 million to \$298 million in unpaid entitlements to employees.

The PWC report also stated that³⁵:

... that some costs are not currently able to be captured in the direct analysis. These costs include, for example:

- *employee stress*
- *discouragement effect on labour supply*
- *social welfare burden through increased government transfers*
- *competition effects.*

³³ Orban Holdgate, Michael Geelhoed, Liz Geelhoed, Kaylene Zaretsky, Gareth Eldred & Paul Flatau, *Assessing the social value of the Employment Law Centre using Social Return on Investment methodology*, (September 2016).

³⁴ PricewaterhouseCoopers Consulting (Australia) Pty Ltd, *The Economic Impacts of Potential Illegal Phoenix Activity*, (June 2018), available at https://www.ato.gov.au/uploadedFiles/Content/ITX/downloads/economic-impact-of-phoenix-activity-update_june-18_56257.pdf

³⁵ Ibid, 16

Relevantly, in respect of employee stress, the PWC report stated³⁶:

This is the cost of stress on workers in potential illegal phoenix businesses arising from instability in their work environment or as a direct result of losing their job or outstanding entitlements. These costs are not reliably captured in the direct costs as the data is not readily available as it sits outside of traditional market forces. Similarly, although labour dynamics and productivity are captured in the CGE analysis, this does not capture the private cost to the individual of stress and without reliable direct costs inputs the economy-wide impacts will not capture the cost of employee stress.

Stress can have adverse effects on household finances as it has been shown to have adverse health effects, and therefore is seen as an increase personal costs of 'impaired physical and mental functioning, more work days lost, increased impairment at work, and a high use of health care services'.

Stressed workers can also impact the wider economy through lower labour productivity by:

- *adding to the cost of doing business due to absenteeism*
- *errors of judgement and action*
- *conflict and interpersonal problems*
- *violence*
- *customer service problems*
- *resistance to change*
- *feelings of 'no time to do it right'*
- *loss of intellectual capital.*

A similar impact of stress may also be felt by people within the honest businesses that interact with potential illegal phoenix operators. As another kind of creditor, they will also bear stress of not being paid their full entitlements, which can have personal and professional impacts.

ELC's clients have reported the same impact and outcomes on their lives as a result of employment exploitation.³⁷

ELC assumes that the Committee will consider the PWC report when examining the wider implications and costs of the 'bad' business practices on the broader Australian economy, and consequently the value to the broader Australian economy of lawful employment behaviour.

³⁶ Ibid, 16 & 17.

³⁷ Orban Holdgate, Michael Geelhoed, Liz Geelhoed, Kaylene Zaretsky, Gareth Eldred & Paul Flatau, *Assessing the social value of the Employment Law Centre using Social Return on Investment methodology*, (September 2016).