



National Retail Association

IN 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

DATE: 9 July 2018
Lodged by: National Retail Association
Address for service: Level 3, 33 Park Road, Milton QLD 4064

PREAMBLE

- [1] National Retail Association (**NRA**) is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).
- [2] NRA has over 5,500 members across Australia in the retail, fast food, hairdressing and beauty, and hardware industries, representing 19,000 shop fronts and their attendant employees.
- [3] This membership encompasses some of the largest retail enterprises in Australia, as well as a plethora of small and medium businesses, including franchisees and licensees.
- [4] NRA is intimately familiar with the day-to-day challenges faced by businesses when engaging with and managing relations with their customers and suppliers, including the suppliers of services.

NATURE OF THESE SUBMISSIONS

- [5] These submissions are made at the request of the Committee in anticipation of the public hearing of this inquiry and the appearance of NRA at same.
- [6] NRA makes these submissions having regard for the experiences of its members and the retail and fast food industries more broadly.
- [7] These submissions will, as much as possible, address each of the terms of reference of the inquiry in turn, namely:
 - [a] frameworks at both Commonwealth and industry level to protect workers from harm, including exploitation, wage theft, underpayment, wage stagnation and workplace injury;
 - [b] measures designed to ensure workers have adequate representation and knowledge of their rights;
 - [c] compliance with relevant workplace and taxation laws, including the effectiveness and adequacy of agencies such as the Fair Work Ombudsman and the Australian Tax Office;
 - [d] practices including 'phoenixing' and pyramid subcontracting; and
 - [e] any related matters.

OVERVIEW

- [8] At the outset, NRA wishes to clarify that it is an industrial organisation which represents employers in the retail, fast food and hair and beauty industries. It does not represent employers in the contract cleaning industry.
- [9] As such, NRA has little knowledge or interaction with the employment practices of contract cleaning service providers, and to that extent the ability of NRA to assist the Committee in this inquiry may be limited.

COMMENT ON THE ORIGIN OF THIS INQUIRY

- [10] NRA understands that this inquiry is largely in response to a report by the Fair Work Ombudsman, published in February 2018, into the procurement of cleaners in Tasmanian supermarkets.¹

¹ *An inquiry into the procurement of cleaners in Tasmanian supermarkets* (February 2018), Fair Work Ombudsman

- [11] Commencing in November 2014, the inquiry considered the contract cleaning arrangements of retail supermarkets in the State of Tasmania. The report does not expressly state when the investigation on which the report is based was concluded.²
- [12] NRA considers it a matter worthy of note that the Fair Work Ombudsman determined that Coles, Bi-Lo, ALDI, IGA, Supa IGA, IGA X-Press and Foodland did not require further investigation beyond the first phase for the very simple reason that these businesses did not outsource their day-to-day cleaning activities.³
- [13] The Fair Work Ombudsman's investigation came to focus on Woolworths for the very simple reason that of the myriad businesses engaged in the retail supermarket sector, this was the only brand that outsourced its day-to-day cleaning activities.⁴
- [14] As such, NRA submits that the focus of this inquiry on the retail nature of the service recipient is misguided, and that greater benefit may be obtained by focussing instead on the nature of the contract cleaning industry itself.

SUPPLY CHAIN MANAGEMENT AND THE PASSING OF THE BUCK

- [15] NRA has made no secret of its historic opposition to any legislation which 'passes the buck' up or down a supply chain. This was made clear in our submissions to the Senate Education and Employment Legislation Committee with respect to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*.
- [16] In that instance, NRA opposed the notion that franchisors be held as guarantors for the compliant conduct of unrelated third parties, their franchisees.
- [17] As the Committee may expect, NRA will also oppose any proposal which seeks to impose regulatory oversight obligations on businesses with respect to third party service providers, which likely have even less of a connection to each other than a franchise arrangement.
- [18] Fundamentally, NRA takes the view that, unless two businesses are truly related, no business is their brother's keeper.⁵
- [19] Unless there is a real, structural relationship between two businesses (such as holding company and subsidiary) there is no lawful means by which one business can influence the other in their commercial activities or to make a full and genuine disclosure of employment or contracting practises.
- [20] Whilst businesses can implement processes by which they can attempt to vet service providers or suppliers for compliance prior to engaging their services, it is important to remember that businesses are not regulatory bodies. They have no power to compel an honest answer.
- [21] The very real danger which NRA fears may be mooted at some point in this inquiry is that larger businesses may be expected to use their market power to exert influence over smaller businesses to compel the provision of information. Not only is this contrary to sound business practice, it is also contrary to current competition law.⁶

² Ibid at page 11

³ Supra at note 1, pages 11 and 12

⁴ Ibid

⁵ Genesis 4:9

⁶ *Competition and Consumer Act 2010* (Cth) Schedule 2, Part 2-2 (Unconscionable conduct)

FRAMEWORKS AT BOTH COMMONWEALTH AND INDUSTRY LEVEL TO PROTECT WORKERS FROM HARM

[22] NRA notes that the terms of reference include expressions such as ‘exploitation’ and ‘wage theft’ which, while excellent rhetorical devices, lack the certainty of meaning needed to make a truly considered submission on the point.

Commonwealth framework

[23] At present, the *Fair Work Act 2009* (Cth) provides an effective minimum safety net for employees, and workers who ought properly be called employees, both through legislative provisions with respect to modern awards and the National Minimum Wage⁷ and the provisions against sham contracting.⁸

[24] In NRA’s view, these provisions are fully adequate to protect the rights of workers in arrangements which are the subject of this inquiry.

[25] If there is any failure, it is not a failure in the legislation, but a failure in education and enforcement of the legislation.

[26] As the Fair Work Ombudsman’s report indicates, the contract cleaning industry consists of a disproportionate number of overseas-born workers when compared to the national workforce. These individuals may not have had the benefit of an honest education in the Australian industrial relations system and their rights within it.

[27] We within NRA are also aware from own experiences that the Australian education system is not presently equipped to provide young workers with information about their rights in our industrial relations system.

[28] The Fair Work Information Statement, given when an employee commences employment, is often the first and only attempt made to educate workers about their rights and entitlements under the *Fair Work Act 2009* (Cth).

[29] In NRA’s view, the existing legislative framework needs to be supported by additional educational processes, both in our own schooling system and our migration system, to properly ensure maximum effectiveness.

[30] Improved education will allow workers to more effectively determine, and enforce, their rights at work on their own, ideally alleviating some of the strain on the Office of the Fair Work Ombudsman.

Industrial framework

[31] As an industrial organisation, NRA takes measures to ensure that its members, the employers, have all the necessary information that they need to ensure that they are compliant with the law. We are aware, however, that not all industrial organisations are equipped for this role.

[32] We note that on the employee side, trade unions extend a similar advisory service to their members. However, with union membership in decline, especially among young people and overseas workers, the reliance on trade unions to be the primary provider of this education is insufficient.

WORKER REPRESENTATION AND KNOWLEDGE OF RIGHTS

⁷ *Fair Work Act 2009* (Cth) Parts 2-3 and 2-6

⁸ *Fair Work Act 2009* (Cth) Part 3-1, Division 6

- [33] As mentioned above, in NRA's view the exploitation of workers in any industry is not a failure of the legislation, but a failure of the wider system to educate workers in their rights under the legislation.
- [34] To be clear, this is not meant as an excuse for non-compliant behaviour by employers. Rather, enforcement agencies such as the Fair Work Ombudsman can only take action if non-compliance is brought to their attention. If employees are unable to recognise non-compliant behaviour, then that avenue of intelligence gathering is lost to the enforcement agency.
- [35] Further, the *Fair Work Act 2009* (Cth) and the processes under it are designed to allow workers to more readily take matters into their own hands. Workers cannot do this if they are not aware that those systems exist, or indeed that there is any reason to activate them.
- [36] We are aware that many schools provide a basic education with respect to the necessity of having a tax file number, and some schools go so far as provide some education in workplace skills. However, we know of no formalised attempt to educate young people about their rights under the Fair Work system, even in formal traineeships and apprenticeships.
- [37] In NRA's respectful submission, investment in formalising education in workplace rights for:
- [a] young people – through co-operation between the Fair Work Ombudsman, industrial organisations and the Departments of Education at the state and federal levels; and
 - [b] new arrivals to Australia – through co-operation between the Fair Work Ombudsman, industrial organisations and the Department of Immigration;
- will have a significant effect in improving the effectiveness of the current legislative provisions.

ADEQUACY OF ENFORCEMENT AGENCIES

- [38] Following the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, the Fair Work Ombudsman has increased powers to compel the production of information. As this was perceived as one of the agencies greatest structural weaknesses, it appears that this capability gap has now been plugged.
- [39] However, the Fair Work Ombudsman continues to be under-resourced for the role it is called upon to perform.
- [40] The Fair Work Ombudsman, according to recent budget figures, has an estimated average staffing level of 745 for the 2018/19 financial year.⁹
- [41] This staff of 745 – of which only a fraction are enforcement staff such as inspectors and lawyers – is expected to regulate the workplace practices of an estimated 2.17 million businesses trading in Australia.¹⁰
- [42] This equates to 2,914.8 businesses per FWO employee; bearing in mind that less than half of these employees are likely engaged in enforcement activities, the ratio of businesses to inspectors is likely much, much higher.

⁹ *Budget 2018-19, Agency Resourcing – Budget Paper No. 4* (2018), Commonwealth of Australia, at page 183

¹⁰ Australian Bureau of Statistics 2018, *Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, 'Table 1: Businesses by Industry Division: June 2013 – June 2017', data cube: Excel spreadsheet, cat. no. 8165.0, viewed 6 July 2018, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0Jun%202013%20to%20Jun%202017?OpenDocument>

- [43] Conversely, the Queensland Police force as of the end of June 2017 had one fully-trained officer for every 414.9 people in the state¹¹, and this service remains stretched.
- [44] If one enforcement officer per 415 people is still an under-resourcing, how can any side of Parliament expect the Fair Work Ombudsman to operate effectively when it has less than one enforcement officer for nearly every 3,000 businesses?
- [45] Academics, industry and unions have long lamented the critical under-resourcing of the Fair Work Ombudsman¹², which is unfortunate as the legislative structure for this agency to achieve its objectives is there, waiting to be used.
- [46] NRA reiterates the position it has consistently taken in the past – that the Fair Work Ombudsman has all the legislative powers it needs to be an effective regulator under the *Fair Work Act 2009* (Cth).
- [47] A change to fiscal policy, rather than legislation, needs to happen in order for those powers to be utilised in the manner Australian businesses and the Australian public expect.

PRACTICES INCLUDING ‘PHOENIXING’

- [48] NRA’s members do not, to our knowledge and understanding, engage in phoenixing activities as the nature of retail (retail floor space, storage space, stock on hand and the like) is prohibitive to such practices.

CONCLUSION

- [49] In summary, NRA is of the view that:
- [a] this inquiry would be better-served by focussing on the contract cleaning sector rather than the retail nature of some clients of contract cleaning service providers;
 - [b] there is little practical means by which one business may regulate the conduct of another unregulated business;
 - [c] the legislative scheme in place is sufficient to protect workers, however it is not properly supported as:
 - [i] there are no adequate systems in place to educate workers of their rights under Fair Work laws; this is substantially limited to the two-page *Fair Work Information Statement*; and
 - [ii] there is a woeful lack of resources provided to the Fair Work Ombudsman for the performance of its role, and this has been the case since its inception.
- [50] The NRA is grateful for the opportunity to represent its members in this inquiry. If NRA can be of any further assistance, please do not hesitate to contact NRA Chief Executive Officer, Ms Dominique Lamb.

¹¹ Derived from information published by the Australian Bureau of Statistics 2018, *Australian Demographic Statistics, Dec 2017*, ‘Table 4: Estimated Resident Population, States and Territories (Number), data cube: Excel spreadsheet, cat. no. 3101.0, viewed 6 July 2018,

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Dec%202017?OpenDocument>, and State of Queensland (Queensland Police Service) 2017, *Annual Statistical Review 2016-17*, page 178

¹² See, for example, Patty, A. (2018, May 9) “Unions watchdog gets funding boost, but fair wages enforcer misses out”, retrieved from <https://www.smh.com.au/business/workplace/unions-watchdog-gets-funding-boost-but-fair-wages-enforcer-misses-out-20180509-p4zea5.html>

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