Submission to

The Senate Standing Committee on Education and Employment

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

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About JobWatch

Job Watch Inc (JobWatch) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

a) provide information and referrals to Victorian, Tasmanian and Queensland workers via a free and confidential telephone information service (TIS);
b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
c) represent and advise vulnerable and disadvantaged workers; and
d) conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 200,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 10,000 calls per year.

The contents of this submission are based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

Summary of recommendations

1. Law reform to establish a presumption of employee status where workers directly provide services.

2. Law reform prohibiting contracting arrangements providing for pay and conditions below those that would be applicable to an employee doing the same work.

3. Stronger enforcement regarding sham contracting and underpayments.

4. Streamlining of the small claims process.

5. Law reform to preserve entitlements where a worker continues to perform the same work despite a change of employer.

6. Portable long service leave in the contract cleaning industry.

7. Law reform to reduce phoenixing.

8. Extending the Fair Entitlements Guarantee Scheme to all employees, and to include superannuation.

9. Law reform to protect migrant workers.

10. Law reform to make client entities responsible for illegal conduct by contracting entities.

Introduction

In the 2017-18 financial year, JobWatch's TIS responded to over 16,000 calls and assisted over 12,000 callers. Of these, approximately 150 reported that they worked as cleaners.

From January 2016 until February 2018, JobWatch ran a pilot program for the International Students Work Rights Legal Service (ISWRLS). This involved taking up employment matters for some 240 clients on student visas, many of which are ongoing. Of these, approximately 80 reported working as cleaners.

Job Watch is aware of widespread problems for workers engaged by cleaning companies (and other entities such as labour hire companies and sole traders) that contract with client entities to provide cleaning services.

These problems include:

- Sham contracting
- Underpayment
- Loss of entitlements due to change of employer, while doing the same work for the same client
- Employer insolvency and phoenixing
- Safety breaches
- Exploitation of workers on temporary visas

Sham contracting

A true independent contractor is self-employed and contracts with clients to provide goods and services. Many laws that protect employees do not apply, or apply differently, to independent contractors. A sham contracting arrangement occurs when an employer attempts to disguise an employment relationship as an independent contracting arrangement, usually to avoid responsibility for employee entitlements such as superannuation, leave, and minimum pay rates, or to avoid employer obligations such as withholding tax and workers' compensation insurance. Division 6 of the *Fair Work Act 2009* (the Act) protects employees from sham contracts and provides for penalties.

In JobWatch's experience, sham contracting arrangements are common across the cleaning industry.

JobWatch recommends better funding for enforcement bodies including the Office of the Fair Work Ombudsman and JobWatch. JobWatch also recommends law reform aimed at establishing a stronger legal presumption that an individual worker directly providing services at the bottom of the contracting "food chain" is to be regarded as an employee.

JobWatch also supports policies that would ensure that labour-hire workers receive the same entitlements as direct employees doing the same work.

Case study 1: Anna

Anna worked as a cleaner and was employed as an independent contractor for a period of less than 3 months, but has reason to believe she is an employee. She had ongoing work for regular clients and is provided with the necessary uniform and cleaning products to complete her work. She had not provided an ABN and did not invoice clients. The employer has denied her any employee entitlements such as paid leave or superannuation. Anna believes she is not a genuine independent contractor and claims sham contracting.

Recommendation 1: Amending the *Fair Work Act 2009* to establish a presumption of employee status for individual workers directly providing services under direction.

Recommendation 2: Amending the *Independent Contractors Act 2006* to prohibit contracts for services that do not provide the minimum pay and conditions that would apply to an employee doing essentially the same work.

Underpayments

In JobWatch's experience, many workers in the contract cleaning industry are unaware that they are protected by the *Cleaning Services Award* 2010 (Award) and are entitled to the minimum wages and other entitlements set out in the Award. All too often, employers pay less than the applicable award rate, and employees are required to undergo the lengthy process of making an underpayments claim.

The Fair Work Ombudsman may assist employees in this process but does not have sufficient resources to ensure recovery in every case, and many employees must take their claim to the small claims division of the Federal Circuit Court. Although the small claims jurisdiction is relatively informal and self-representation is the norm, it remains a daunting prospect for many employees.

Genuine independent contractors are not entitled to minimum pay rates or conditions, and the Fair Work Ombudsman is unable to assist workers in recovering underpayments. If these workers are not paid according to the terms of their contract, their only options are to begin legal proceedings at the relevant state tribunal or Magistrates' Court.

Case study 2: Steven

Steven worked as a cleaner and signed a contract that purported to treat him as a contractor. His contract provided that he would be paid a training rate of $16 per hour for the first four months of employment and would be required to reimburse this amount if he left. Steven was not provided with employee entitlements such as pay-slips and superannuation. He quit after his first month and was partially paid for 8 weeks work, with the remainder owed unlawfully deducted to cover the cost of his training. As a result, Steven claims sham contracting, underpayment of wages under the *Cleaning Services Award 2010,* non-payment of superannuation and non-provision of payslips.

Recommendation 3: That there be increased funding for stronger FWO enforcement of sham contracting and underpayments.

Recommendation 4: That the recovery of underpayments via the smalls claims process be streamlined.

Loss of entitlements due to change of employer

The Act protects the continuity of employees' entitlements in cases where there is a transfer of business, that is, where assets and the work associated with them are transferred from one employing entity to another. In that situation, employees' length of service for the purpose of entitlements such as redundancy and leave will be recognised by the new employer.

Long service leave entitlements generally come from State legislation but are usually similarly protected in transfer of business situations.

However, employee entitlements are not protected in this way where the employing entity loses a contract with a client, who then engages a new contracting entity who re-employs the employees, often without any interruption or change in their work beyond the name of the employer that appears on their payslips. In this situation, the continuity of employee entitlements is generally not recognised, as there is no transfer of business as that term is currently defined.

JobWatch regularly receives calls from cleaners, among other types of workers, who have done the same work at the same location for many years, but end up with little in the way of accrued entitlements, because the contract to provide cleaning at that location has changed hands several times in that period.

The implementation of portable long-service leave schemes enable workers to accumulate leave for the years they spend in an industry, not just with one employer. Portable LSL schemes were introduced in Victoria in 1976 for the building and construction industry in recognition of the project-based nature of employment. A portable LSL scheme for the cleaning industry was commenced by the NSW Long Service Corporation in 2011 and provides LSL for cleaning workers after 10 years in the industry, rather than continuous service. It involves employers paying a levy of 1.7% of employees' gross ordinary wage into a LSL fund.

JobWatch recommends an expansion of the portable LSL scheme to the cleaning industry in Victoria and elsewhere, and supports the introduction of the *Long Service Benefits Portability Bill 2018*.

In order to also preserve other entitlements that depend on length of service, an alternative approach would be to expand the definition of transfer of business to include the rehiring of employees to do essentially the same work in the same location and/or for the benefit of the same client entity, regardless of the lack of any direct connection between the new and old employers. This approach would also address a related issue that JobWatch has observed in these situations, where there is in fact a concealed connection between the two entities.

Case study 3: Andrew

Andrew is a cleaner and wants to claim annual and long-service leave. His employer is being wound up and his employment is being transferred to a new employer. The new company is run out of the same premises, with the same staff, and the previous manager is now the new CEO. Caller believes that the two companies are associated entities and wants to know if his entitlements will be preserved.

Case study 4: Josie

Josie has been working as a cleaner at the same business for almost 10 years. Recently, another company bought out the contracts for cleaning services for the school she works at. There was no discontinuation of service and all employees continued with work as usual. Josie applied to take long-service leave but her request was rejected. Her employer has claimed that she is not entitled to long-service leave as her entitlements reset when the company took over the contracts.

Recommendation 5: Law reform to preserve entitlements where a worker is continuing to perform work for the benefit of the same client entity, despite a change of employer.

Recommendation 6: Introduction of industry-based long service leave schemes such as those in the *Long Service Benefits Portability Bill 2018*.

Employer insolvency and phoenixing

JobWatch receives a significant number of calls from employees seeking to recover entitlements from contract cleaning companies where the employer has become insolvent, and in many cases, has subsequently become uncontactable.

The liquidation of a company usually terminates the employment of employees, and as unsecured creditors, employees are generally only entitled to recover pay if there are funds left over after payment of the liquidator's services. This may mean that employees are not able to receive outstanding pay, superannuation, annual and long service leave, and redundancy pay.

This situation is ameliorated by the Fair Entitlements Guarantee Scheme (FEG), which may pay entitlements – with the notable exception of superannuation – to employees of insolvent companies. However, this scheme is not available to non-permanent visa holders, and many cleaners are in this category.

Illegal phoenixing occurs when assets are transferred from an insolvent entity to another entity in order to avoid paying unsecured debts, including employee entitlements. Phoenixing may also be legal if there is no transfer of assets to avoid creditors, but what all phoenixing has in common is that the new entity rises from the ashes of the old running essentially the same business and controlled by the same people, but with the result that employment entitlements owed by the old entity may not be recoverable. JobWatch is aware of anecdotal evidence that the FEG scheme has sometimes been used as part of a business model based on repeated phoenixing.

Presently, phoenix activity is only illegal in so far as it involves the misuse of company assets or breaches of director's duties. With no specific illegal phoenix activity offence within the *Corporations Act 2001* or other relevant legislation, there is room for reform and amendments that would serve as a better deterrent to potential phoenix activity.

Recommendation 7: Law reform to reduce phoenixing, for example, by banning individuals with a history of involvement in insolvent companies from having control of companies for a period of time.

Exploitation of temporary visa workers

A key finding from JobWatch's ISWRLS program was that international students – and most likely foreign workers generally – are over-represented in the cleaning industry and are especially vulnerable to all the issues identified above.

Industries with high proportions of migrant workers – including cleaning, construction and food services – that have a weak regulatory environment leave workers vulnerable to exploitative labour practices and to modern slavery risks. Many of our callers employed or contracted as cleaners are on temporary visas and are primarily comprised of international students. It is often the case that they have limited English language skills and are not familiar with Australian employment laws, with sham contracting and underpayment matters arising frequently.

Student visa holders are also restricted to working 40 hours a fortnight but in some cases are compelled and pressured to work longer hours by their employers. Consequently, employees that raise issues relating to pay and working conditions may be threatened with being reported to immigration authorities for breaches of visa conditions.

In addition, non-permanent residents are not entitled to use the FEG scheme, leaving them with little recourse in the event of employer insolvency. JobWatch recommends extending the FEG scheme to all national system employees.

JobWatch recommends greater transparency in reporting requirements, and reforms to ensure the protection of foreign workers against exploitation.

Case study 7: Fiona

Fiona is an international student on a student visa who, along with her friend, was previously contracted as cleaner for less than a month. She underwent a brief period of training and together with her friend worked approximately 90hours over a period of a month. They had provided their boss with an ABN and an invoice for the work completed but the boss claimed the invoice was done incorrectly and refused to provide payment. Two months later, they remain unpaid. They have attempted to contact her and visit her office but were informed that they were not allowed to enter the premises.

Recommendation 8: Law reform to protect migrant workers, for example, by not punishing work-related visa breaches where these result from illegal conduct by employers.

Recommendation 9: Extending the Fair Entitlements Guarantee scheme to include superannuation, and making it available to all national system employees.

Making client entities responsible for illegal conduct by contracting entities

JobWatch believes that, in addition to the accessorial liability already imposed by s 550 of the Act on an "involved person" for certain breaches of the Act, a positive obligation should be imposed on entities that enter into contracts for labour to take reasonable steps to ensure there is no illegal conduct by the entities with which they contract. This is analogous to the positive obligation imposed by s 15 of the *Equal Opportunity Act 2010* (Vic) to take reasonable steps to eliminate discrimination.

The submission to this Committee from Professor Andrew Stewart and Dr Tess Hardy proposes a broader version of the liability imposed by ss 550 and 558B of the Act (the latter on subsidiaries and franchisors). Their proposal imposes liability for certain breaches of the Act on any person who has significant practical control (including price-setting) over the breaching entity, knew or ought to have known that such a breach would occur, and failed to take reasonable steps to prevent it. JobWatch supports this approach in imposing a positive obligation on client entities to take reasonable steps to ensure that the entities with which they contract are complying with the Act.

An alternative approach to the same goal is suggested by the *Fair Work Amendment (Making Australia More Equal) Bill 2018*, which proposes to empower the Fair Work Commission to make Minimum Entitlement Orders against a business or class of businesses in favour of a worker or class of worker. These orders would extend certain entitlements under provisions of the Act, modern awards or enterprise agreements to workers who work for the benefit of those businesses, regardless of whether the legal relationship between the workers and the businesses is strictly one of employment.

JobWatch approves of the approach taken in this Bill, because it short-circuits many artificial arrangements which have been used, and will certainly continue to be used, in the contract cleaning industry and elsewhere to avoid the rights and obligations that arise in employment relationships. These arrangements include sham contracting, pyramid contracting and labour hire, as well as more recent developments such as platform-based "gig economy" models like Uber, AirTasker and Deliveroo. JobWatch anticipates that such legislative innovations will be increasingly necessary to protect workers' rights in the future.

Recommendation 10: Law reform to make client entities responsible for illegal conduct on the part of entities they contract with for labour.

JobWatch thanks the Committee for considering our submission.
Please contact Zana Bytheway or Ian Scott on (03) 9662 9458 if you have any queries.

Yours sincerely,

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