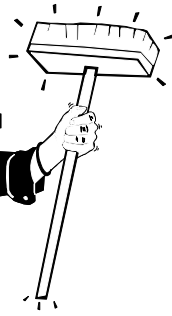


# CLEAN START

## FAIR DEAL FOR CLEANERS



17 October 2009

### SUBCONTRACTING AND ILLEGAL PRACTICES

#### KEY POINTS

- Competition is fierce and contract prices are falling in real terms leading to a situation where the industry is 'devouring itself from within' with cleaning companies cutting corners and illegitimately subcontracting to make a profit.
- Consequently, subcontracting is flourishing and a significant number of cleaning companies are failing to meet statutory obligations to their staff who are risking serious injuries and poverty level wages.
- Owners and tenants have been left with substandard services.
- Owners are increasingly aware that liability cannot be completely limited and that minimum cost practices encourage subcontracting and other practices that leave them exposed.
- The Clean Start campaign has been working with all parties to minimise risks through a Collective Agreement and broader industry reform to ensure safe and responsible practices – a systematic approach with across industry co-operation will the issues associated with subcontracting and other illegal practices resolved.

The accountability of cleaning companies over the cleaning of commercial buildings is diminished by the prevalence and use of subcontracting. "Subcontracting can be fully above-board, but its survival and spread in the cleaning industry seems to derive from the opportunities it provides for fostering illegal practices".<sup>1</sup>

Subcontracting blurs the lines of responsibility and entrenches informal structures and practices. It is often multi-tiered,<sup>2</sup> "to cover up for the lack of proper documentation and credentials by subcontractors" and is blamed for both perpetuating and exacerbating the worst of practices in the cleaning contract industry.<sup>3</sup>

"The chain of subcontracting at ever reduced prices trails away into a shadowy realm of small firms and individuals, where illegal practices can be pursued without much risk of detection or protest."<sup>4</sup>

<sup>1</sup> I Campbell & M Peeters, 'Low pay and working time: the case of contract cleaners', *Working Paper Series No. 2*, Centre for Applied Research, RMIT University, 2008.

<sup>2</sup> R Guthrie & M Quinlan, 'The occupational safety and health rights and workers' compensation entitlements of illegal immigrants: an emerging challenge', *Policy and Practice in Health and Safety*, vol. 03 no. 2, 2005, pp. 69-89.

<sup>3</sup> I Campbell & M Peeters, 'Low pay and working time: the case of contract cleaners', *Working Paper Series No. 2*, Centre for Applied Research, RMIT University, 2008, p 14.

<sup>4</sup> *ibid.*

Legitimate cleaning companies trying to do the right thing are disadvantaged in the process and forced to compete against companies offering ever-lower standards<sup>5</sup>. With 80-85% of contract prices wrapped up in labour-related costs<sup>6</sup> companies are left with very few legal options for cost savings in their businesses. Cleaning companies can secure a “40% cost saving” by simply not paying workers compensation, superannuation or even the award minimum; and instead resort to illegal cash in hand payments and imposition of unpaid ‘training’ periods which can stretch on for many weeks.<sup>7</sup>

As a result, cleaning contract prices have fallen by as much as 21%, in real terms, in the Sydney market since 1998.<sup>8</sup> Industry sources say subcontracting is now the only way most cleaning companies can generate decent margins on their turnover<sup>9</sup>.

“The only way you can cut prices is to cut labour. So they [the cleaning companies] think: we’ll make our people work a bit harder and we’ll get our commission bonuses for the job. On the one side you’ve got cleaning companies cutting each other’s throats to get work, and on the other side you’ve got property owners taking the lowest price for each job.”<sup>10</sup>

Even though a cleaning contract may stipulate against subcontracting, it can be difficult to uncover these arrangements. An expose in *The Australian* at the end of 2008 titled ‘Cleaning Industry’s Dirty Secrets’, documented how illegal subcontracting was rife at a number of Westfield and Mirvac sites even though subcontracting was strictly prohibited under the terms of the tenders. When confronted with evidence of cash in hand night shift payments of \$12/hour and the use of overseas students working over their allowed 20 hours, Mirvac Asset Management General Manager Chris Luscombe said that “the difficult thing is how you prove it and how you police it”.

“Subcontracting has become another weapon for cleaning companies to use in order to reduce their price. The result is that clients get more for less and the poor worker ends up carrying all the costs with no benefits. The only beneficiaries are the bully owners who have been able to force prices down and who think they are improving productivity but in fact are overseeing a drastic reduction in quality and service.”<sup>11</sup>

Under section 20 of the NSW *Workers Compensation Act 1987* a building owner can be held accountable for costs if: “A contractor’s worker is injured and the contractor engaged failed to take out workers compensation...where a contractor fails to take out workers compensation and one of his workers is injured, then in certain cases the ‘principal (e.g. the property manager) shall be substituted for reference to the employer’ (i.e. the property manager or owner incurs the costs).”<sup>12</sup>

Property owners and managers may also risk the instigation of civil law suits from workers and tenants who are injured in their buildings if the contractor is uninsured:

<sup>5</sup> I Campbell & M Peeters, ‘Low pay and working time: the case of contract cleaners’, *Working Paper Series No. 2*, Centre for Applied Research, RMIT University, 2008.

<sup>6</sup> R Jeffs ‘Australian and New Zealand Cleaning Industry’, *European Cleaning Journal*, April 2001.

<sup>7</sup> I Campbell & M Peeters, ‘Low pay and working time: the case of contract cleaners’, *Working Paper Series No. 2*, Centre for Applied Research, RMIT University, 2008.

<sup>8</sup> Property Council of Australia, *Benchmarks: Survey of Operating Costs: Sydney Office Buildings*, Property Council of Australia, Sydney, 1998-2006.

<sup>9</sup> E Wynhausen, ‘Cleaning industry’s dirty secrets’, *The Australian*, 4 October 2008.

<sup>10</sup> I Campbell & M Peeters, *Low pay and working time: the case of contract cleaners*, Working Paper Series No. 2, Centre for Applied Social Research, RMIT University, 2008.

<sup>11</sup> J Laws, ‘Industrial relations issues to preoccupy cleaning industry in ‘08’, *InClean Australasia*, February/March, p.28.

<sup>12</sup> WorkCover NSW, *A Guide for Property Owners and Managers: Health and Safety for Cleaning companies in NSW Guide 1*, WorkCover NSW, Publication No. 1221, Sydney, 2003.

“For subcontractors working without proper workers compensation or alternate injury and income protection, the coverage afforded by the owner or occupier of a work-site through a common-law public liability claim may be their only legal protection in the event of a work injury”.<sup>13</sup>

The Fair Work Ombudsman (FWO) (formerly the Workplace Ombudsman) and State health, safety & workers compensation Authorities have recognised the vulnerability of contract cleaners. Workplace inspectors are not just an ‘inconvenience’ to cleaning companies or owners: there are legal implications, they can be invasive and disturbing to tenants with workplace inspectors having the power to conduct interviews, take photographs and examine documents<sup>14</sup>; and owners can be subjected to negative publicity thereby undermining their own tendering specifications and corporate social responsibility policies.<sup>15</sup>

In May 2009 a FWO investigation of sham contracting arrangements, underpayments and avoidance of entitlements led to raids of 16 office towers in Sydney and an \$88,000 fine for one cleaning contractor.<sup>16</sup> At the beginning of 2009 a South Australian cleaning contractor received a record \$288,000 fine for underpaying two cleaners<sup>17</sup>. Similar inspections took place in Queensland in 2008<sup>18</sup> and investigations are ongoing in South Australia<sup>19</sup> and NSW.<sup>20</sup>

Due to the proliferation of subcontracting the Fair Work Ombudsman has approached Building Service Cleaning companies Association of Australia (BSCAA) to participate in a joint initiative to limit illegitimate sub-contracting in the future. “The Ombudsman’s office has made it quite clear that continued non-compliance will lead to spot audits...and prosecutions.”<sup>21</sup>

The prevalence of these inspections across the country means it is difficult to blame the presence of subcontracting on a few rogue cleaning companies. However, the authorities are only able to prosecute for illegal breaches and are limited in their ability to address the underlying causes or bring about fundamental reform to subcontracting and illegal practices in the industry.

Owners and managers should remain alert where cleaning companies are tendering at prices and conditions below statutory and industry standards as it encourages cleaning companies to engage in the risky work practice of subcontracting, along with other more straightforward risks like cutting corners by using the cheapest products and forcing cleaners to use broken and damaged equipment.

Where authorities can infer that owners had knowledge of the illegal practices, the professed ignorance of a subcontractor’s violations is not a strong defence. The overarching responsibility for ensuring safety systems and cleaning practices to protect cleaners, tenants and the public are in place cannot be contracted out.

Clean Start, together with responsible property owners and cleaning companies, has made the commitment for a more transparent and sustainable contract cleaning industry that addresses the underlying causes of illegitimate subcontracting. Owners who use Clean Start Collective Agreement signatories are using cleaning companies who are legally accountable to cleaners and their union to ensure safe and fair employment practices.

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<sup>13</sup> B Cochrane, *Independent Contracting and Labour Hire Arrangements*, Australian Lawyers Alliance, Sydney, March 2005, p. 4.

<sup>14</sup> WorkCover NSW, *A Guide for Property Owners and Managers: Health and Safety for Cleaning companies in NSW Guide 1*, WorkCover NSW, Publication No. 1221, Sydney, 2003.

<sup>15</sup> BSCAA, ‘Cleaning industry prepares for tough times,’ *InClean Australasia*, February/March 2009.

<sup>16</sup> K Needham, ‘\$80,000 fine for threats over pay deal’, *Sydney Morning Herald*, 6 August 2009.

<sup>17</sup> Workplace Ombudsman, *\$288,800 penalty for failing to pay two cleaners \$3842.60*, Media Release, Australian Government Workplace Ombudsman, 4 February 2009.

<sup>18</sup> Workplace Ombudsman, *Brisbane Cleaners Face Random Audits*, Media Release, Australian Government Workplace Ombudsman, 18 December 2008.

<sup>19</sup> Fair Work Ombudsman, *More Adelaide cleaners to get back-pay*, Media Release, Fair Work Ombudsman, 5 October 2009.

<sup>20</sup> Workplace Ombudsman, *Sydney Cleaners Face Scrutiny*, Media Release, Australian Government Workplace Ombudsman, 27 May 2009.

<sup>21</sup> BSCAA, ‘Cleaning industry prepares for tough times,’ *InClean Australasia*, February/March 2009.