Article

ELRR

The Economic and
Labour Relations Review
2015, Vol. 26(1) 43–59

DOI: 10.1177/1035304614546450
elrr.sagepub.com
SAGE

Government procurement contracts and minimum labour standards enforcement: Rhetoric, duplication and distraction?

Sasha Holley
Macquarie University, Australia

Glenda Maconachie and Miles Goodwin
Queensland University of Technology, Australia

Abstract

Government contracts for services typically include terms requiring contractors to comply with minimum labour standards laws. Procurement contract clauses specify reporting procedures and sanctions for non-compliance, implying that government contracting agencies will monitor and enforce minimum labour standards within contract performance management. In this article, the case of school cleaners employed under New South Wales government contracts between 2010 and 2011 is the vehicle for exploring the effectiveness of these protective clauses. We find that the inclusion of these protective clauses in procurement contracts is unnecessary in the Australian context, and any expectations that government contracting agencies will monitor and enforce labour standards are misleading. At best, the clauses are rhetoric, and at worst, they are a distraction for parties with enforcement powers.

JEL Codes: J880; J810; L590

Keywords

Cleaners, enforcement, government procurement contracts, minimum labour standards

Corresponding author:
Sasha Holley, Faculty of Business and Economics, Macquarie University, Sydney, NSW 2109, Australia.
Email: sasha.holley@mq.edu.au

Introduction

Over the past three decades, governments have increasingly used contracting-out as a central strategy of public policy (Sullivan, 1997: 3). The proliferation of contracting-out of government services through public procurement (Freiberg, 2010: 23–24) has impacts on labour standards of workers performing contracted-out services. It is labour standards, and their enforcement, that are the focus of this article. In particular, our interest is in the minimum labour standards (MLS) of cleaners operating under New South Wales (Australia) government procurement contracts. In the Australian industrial context, MLS are minimum wages and working conditions established through legislation, and through legally binding industrial tribunal determinations, awards[1] and industrial agreements relating to any particular employment relationship.

Total Australian government procurement constitutes approximately 20% of gross domestic product (United Nations (UN), 2008). Many have argued that the substantial purchasing power of government contracting can influence private sector practices (Arrowsmith et al., 2000; Freiberg, 2010; Howe, 2010; McCrudden, 2012). When public monies are being spent, there are ethical arguments that government has a duty to at least uphold MLS for workers providing contracted services (Australian Government, 2010; Howe, 2006; McCrudden, 2004; Seddon, 2009). Furthermore, government procurement can be considered a regulatory tool because it is influenced by policy objectives and may seek to regulate business (Collins, 1999: 58–60). For instance, governments can use their purchasing power as a policy tool by including specific labour standards provisions in contracts for services (Howe and Landau, 2009; McCrudden, 2007).

The use of public procurement as a regulatory tool has become increasingly popular (Howe and Landau, 2009: 577), and accordingly, the concept has generated scholarly interest and analysis in the last two decades (Arrowsmith and Kunzlik, 2009; Bolton, 2006; Howe and Landau, 2009; McCrudden, 1999; Weiss and Thurbon, 2006). More research is required to understand how government contracts for services operate as a mechanism for government to regulate labour (Collins, 1999; Johnstone and Mitchell, 2004: 103). Howe and Landau's (2009) study of the Victorian government school cleaning programme offered preliminary findings from a tripartite programme to use procurement to regulate school cleaners' labour standards. They found that communication and collaboration are needed for regulation to be effective. This article builds on that study, providing a broader understanding of how labour standards are regulated across the entire New South Wales (NSW) government school cleaning service. This article offers a first comprehensive exploration of how the use of public procurement as a regulatory tool impacts MLS for workers providing contracted services. These cleaners are employed by profit-seeking cleaning companies that have successfully tendered for NSW state government contracts. A total of 90% of the cleaning takes place in NSW government schools and these workers are known in the industry (and in this article) as 'school cleaners', even though they do not all clean schools.

This exploration highlights the inadequacies of arguments that MLS can be regulated through government procurement contracts for services in the Australian industrial relations (IR) context. Any expectations that government bodies managing procurement contract performance will also monitor and enforce MLS are misleading. A further risk is that trade union efforts to enforce MLS through procurement mechanisms could

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

constitute a distraction, detrimental to their broader industrial roles. This article asks whether enforcement of MLS is best left to Australia's federal labour inspectorate, the Fair Work Ombudsman (FWO), as attempts to enforce through other mechanisms could duplicate and distract from the inspectorate body's functions.

Government procurement and labour standards

Although the use of public procurement as a regulatory tool has become increasingly popular (Howe and Landau, 2009: 577), the practice is not new (McCrudden, 2007: 26). Public procurement was an important tool for social protections throughout the 19th and 20th centuries in Britain, the United States and France (McCrudden, 2007: 4–12, 26–62). For instance, the 1891 British Fair Wages Resolution directed government departments to insert a clause stipulating that workers would be paid 'generally accepted rates' in procurement contracts (Bercusson, 1978; McCrudden, 2004: 258). The use of clauses specifying base working and pay conditions, or prohibiting discrimination of workers on the basis of gender, disability or race, has continued in many countries such as Australia, the United States, United Kingdom and South Africa (Bolton, 2006; McCrudden, 2007). Clauses regulating labour standards in procurement contracts can therefore reinforce compliance with existing labour standards regulations, or impose additional standards, such as a quota for employing people of a particular race or gender of workers (Howe, 2010; McCrudden, 2007).

Australian public policy has tended toward the use of social protection clauses in public procurement contracts, with the Australian Government releasing a statement acknowledging that it has a 'role as a model purchaser to encourage good practices from its suppliers' (Australian Government, 2009). This statement included new measures to ensure that private contractors protect labour rights for workers hired through government contracts. Contracted cleaners were identified in the government statement, as a distinct worker group the FWO recognised as being at risk (Australian Government, 2009).

Australian government bodies have expanded their policies of contracting-out since the 1990s. Since this time, only a handful of scholarly research has been undertaken to understand the impact of contracting-out on cleaners' labour standards. Fraser (1997) examined the impact of contracting-out of the NSW government cleaning service (GCS) on female workers from non-English-speaking backgrounds (NESBs). Ryan and Herod (2006) outlined the rise of precarious employment across the Australian and New Zealand cleaning industries. Ryan's (2007) doctoral research focused on the employment relations and workplace organisation of cleaners contracted-out by the NSW private sector. Holley and Rainnie (2012) uncovered the rising income disparities between cleaners and other employees in Australia, related to the proliferation of contracting-out. Campbell and Peeters (2008) conducted research into the labour standards and working conditions of cleaners contracted-out by the private sector in Victoria. A case study of occupational health and safety (OHS) standards of NESB cleaners working for a large contract cleaning company in NSW was conducted by Alcorso (2002), while Howe and Landau (2009) contributed a case study of the regulation of labour standards under the Victorian government school cleaning programme. Despite these studies and the long use of government procurement contracts to

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

regulate workers, there remains a paucity of research on *how* labour standards clauses are regulated and enforced in such contracts (McCrudden, 2007).

The regulation of government contracts can incorporate the definition, monitoring and enforcement of terms that are both directly and indirectly related to labour standards. The use of labour-related clauses in government contracts is a technique for regulating these standards. In this way, contracts are used to establish acceptable norms through the incentive of being awarded contracts with government bodies (Daintith, 1994). The contract as a form of regulation is reliant on the limited tools of contract law (Freiberg, 2010: 132). By including labour standards provisions in outsourcing contracts, government agencies are purporting to protect workers providing those services. However, any contractual problems or disputes will focus on whether the terms of the contract have been met (Seddon, 2009), and the onus is on parties to the contract to conduct their own monitoring and enforcement of contractual terms (Collins, 2000: 87). The objectives of contracting are circumstance,

> Secrecy ('commercial in confidence'), no duty to act fairly (though this is arguably changing), participation of the immediate parties but otherwise non-inclusiveness, no duty to act impartially, accountability only to the extent required by the contract and no more (and certainly not to anyone else), honesty and no duty to act rationally in the sense required by public law. (Seddon, 2009: 18)

Thus, contract law suffers from a 'poverty of sanctions' (Collins, 1999: 90) for non-compliance. The enforcement options available to either party to a contract are limited to contract termination and remedies payable for breaches of contract (Collins, 1999: 90–93; Seddon, 2009: 44). The onus of proof lies with the aggrieved party in the transaction. It is difficult to prove a violation of service standards with contracts for services. It is unusual for such a violation to justify contract termination, and even more unlikely that financial losses can be calculated for compensation (Collins, 1999; Seddon, 2009). The risk of litigation by companies whose contracts have been terminated is a major deterrent to the use of this enforcement strategy by governments (Seddon, 2009). The deterrent arises not only because of the weaknesses of contract law enforcement but also for political reasons. Furthermore, clauses in contracts for services pertaining to labour standards for workers are often 'regarded as "extraneous" to the primary purpose of the contract although considered to be in the public interest' (Seddon, 2009: 44), and contract termination or other remedies are even more difficult to apply (Seddon, 2009: 18). This circumstance raises questions about how labour standards in government contracts can be enforced. The elephant in the room at this stage is, of course, the fact that labour law and IR (industrial relations) mechanisms in Australia have a long-standing tradition of regulating, monitoring and enforcing workers' labour standards.

The provision and enforcement of labour standards in Australia has a long history (see Goodwin and Maconachie, 2011). Our focus here is only on the period contemporaneous with the NSW cleaning contracts under examination, when the school cleaners' labour standards were primarily provided under the framework of the federal *Fair Work Act* (2009). At the time of this study, OHS was regulated by the NSW state government under the *Occupational Health and Safety Act 2000* (NSW). As part of the federal IR

framework, workers were also provided with a range of minimum employment conditions under the National Employment Standards (NES).[2]

The instruments that directly regulate the school cleaners' labour standards are Enterprise Bargaining Agreements (EBAs) collectively negotiated between their contracted cleaning company and their trade union, United Voice (formerly the Liquor, Hospitality and Miscellaneous Workers' Union). Little variation exists between the EBAs for each contracted cleaning company. EBAs are underpinned by the general award conditions in the industry, as well as NES provisions, and prescribe a range of additional employment conditions such as pay rates, overtime, penalty rates and provisions for clothing and protective equipment. The EBAs include grievance procedures and encourage timely internal conflict resolution. Unresolved matters can be referred to the Fair Work Commission (the industrial tribunal) for conciliation or arbitration.

The FWO also monitors and enforces labour standards. FWO inspectors have broad powers to assess whether employers are meeting their obligations under the industrial instruments like EBAs and the NES safety net. The FWO facilitates employees recovering entitlements, helps with negotiation or assists employees in taking claims to a relevant court. In serious cases (large-scale underpayment or where victims are considered especially vulnerable), the FWO may prosecute businesses.

The FWO monitors workplace laws in several ways: through employees reporting alleged non-compliance, through periodic 'checks' of time and wage records at workplaces and through specific campaigns targeting industries or sectors with either high non-compliance reports or a history of non-compliance. For example, in the cleaning industry generally in Australia, cleaners constitute only 2.5% of the Australian workforce, yet between March 2006 and April 2010, cleaners lodged 24% of employee complaints to the FWO, and between July 2009 and April 2010, they lodged 39% of employee complaints (Fair Work Ombudsman, 2010: 3). This high level of complaints resulted in a campaign targeting the Australian cleaning services sector between September 2010 and May 2011. This campaign found that 37% of businesses audited were not compliant with all the required wage and workplace regulations. Most of these were monetary contraventions, such as underpaying hourly pay rates. Where businesses were prosecuted, penalties were roughly equal to the amount they had to back-pay employees (Fair Work Ombudsman, 2011: 4). These prosecutions demonstrate that the FWO is better resourced and has taken a more aggressive stance in prosecuting than most previous Australian inspectorates (Hardy, 2009: 85–87; Goodwin and Maconachie, 2011).

Traditionally, the inspectorate has focused on non-unionised sectors of the workforce, leaving trade unions to monitor and enforce labour standards for their members (Goodwin and Maconachie, 2011). Throughout the 20th century, Australian trade unions had a central role in setting labour standards within both centralised and decentralised IR systems. They were also involved in the education about and enforcement of those labour standards (Hardy, 2012: 118; Hardy and Howe, 2009). Trade unions have the power to protect members not paid in accordance with minimum standards, by prosecuting non-compliant companies (Ryan and Herod, 2006: 492), but most restitution occurs through negotiation. Successful enforcement by unions is contingent on high levels of union participation, and problems started to arise when participation rates began falling in the 1980s and dipped to 18% by 2010 (Cooper and Ellem, 2011: 37). Subsequently, unions have been

constrained in carrying out their important enforcement role (Hardy and Howe, 2009: 330–331).

NSW school cleaners are an anomalous group having retained a particularly high level of trade union density. Their union, United Voice, has negotiated EBAs with each of the companies contracted to the NSW government cleaning contracts and is recognised by these companies as a legitimate voice of the workforce. United Voice therefore has the potential to monitor and enforce NSW school cleaners' labour standards through these IR instruments. The following section considers the case study of school cleaners and issues regarding their employment entitlements, the parties to the contracts and their roles in enforcing labour standards.

The case of the NSW school cleaners

The interest in NSW school cleaners' MLS arises because they constitute an unusual group of workers within the cleaning industry. Many were previously employed by the NSW GCS with full-time, secure, highly unionised employment. The GCS was the largest employer of cleaners in NSW until 1994 when contracting-out of these services commenced. The objective of contracting-out the GCS was to reduce the cost of cleaning services for the government (Industry Commission Australia, 1995: 21, 136). There was an emphasis on reducing labour costs, because labour-related costs constitute more than 70% of a cleaning company's expenses (IBIS*World*, 2010). Before contracting-out the cleaning services, the GCS had reduced staff numbers from 12,500 to 7500 through voluntary redundancies (Fraser, 1997: 15). Once contracted-out, the intentions of contracted cleaning companies to reduce cleaning hours and improve 'efficiency' were explicit; most of this was achieved through natural attrition and by moving cleaners around to different work sites (interview, contracted cleaning company manager; Fraser, 1997: 18). Substantial work intensification occurred as staff numbers were cut by 24% from 1994 to 1999, without a reduction in required work output (Fraser, 1997; Ryan, 2007).

Currently, these school cleaners comprise between 15% and 25% of all cleaners working in NSW (IBIS*World*, 2010; interview, United Voice official 2010).[3] The majority are permanent full-time or part-time employees of cleaning companies with government contracts, have employment which rolls over to the next successful tendering company and have a union membership of 67%, all unusual characteristics in the cleaning industry.

The aim of this case study was to understand how workers' labour standards are regulated through the intersection of labour standards and contractual regulatory mechanisms. Participants included 38 school cleaners and 14 other participants in the NSW government contracted cleaning industry, such as cleaning company managers, school principals and trade union officials. This study therefore constitutes a comprehensive analysis of the regulation of labour standards for a large group of workers, who are providing services under government contracts.

This study explores the third cycle of cleaning contracts, from January 2006 to June 2011, so the contracts were well established and any early teething problems had been overcome. Third-cycle NSW government cleaning contracts included the provision of cleaning services for over 4000 sites divided into 21 packages contracted-out to six

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

cleaning companies. Each package consisted of a range of sites for which cleaning services were to be provided. During the 5½ year period, the contracts were renewed twice. This research took place between July 2010 and April 2011 in metropolitan Sydney, and considered 9 of the 21 contracted-out packages and three cleaning companies involved with those 9 packages.

The 38 cleaners who participated in this study were divided equally by gender, a feature which is unusual in the female-dominated cleaning industry (ABS, 2000), but mirrors the gender representation of NSW school cleaners. Almost 60% of participants were from a NESB. Half of the participating cleaners worked at primary schools, while 15 worked at high schools and 4 at other government sites. Most cleaners were recruited for the research through the trade union, so 35 were union members. Of the 38 cleaners, 35 were employed directly by a lead contracting company, while 3 were employed as subcontractors. The average age was 55 years, with interviewees' age ranging from 20 to 66 years old. The average length of employment for participating school cleaners was 14.6 years, with three having worked for 1 year, and the longest period being 35 years. School cleaners generally have longer employment periods and durations at their sites than would be expected across the industry. These characteristics place the outsourced school cleaners in a much more stable position than most in the cleaning industry.

In spite of coverage by federal and state legislation, an EBA and contractual provisions, the school cleaners experienced the same types of non-compliance with entitlements as cleaners in the general industry. Multiple OHS issues (coming under state legislation) were also raised by the school cleaners, but the focus here is on entitlements falling under the *Fair Work Act 2009* and the EBA. These included delays with payment, non-payment for additional shifts, unpaid overtime, illegal sub-contracting and difficulties accessing leave. These matters are briefly outlined below to sketch the situation.

Almost half (17) of the interviewed cleaners worked unpaid overtime, with 7 working a great deal of unpaid overtime, and 10 undertaking small amounts of unpaid overtime regularly (such as staying back to solve particular problems like cleaning up children's vomit or waiting for teachers to leave so they could lock the gates). Additionally, 12 cleaners experienced problems with their pay entitlements. Three worked for sub-contractors, working 40 hours per week even though they were international students and this breached their student visa requirements. They received no entitlements and were paid cash-in-hand. Three other cleaners worked unpaid extra shifts, and six had experienced 2–4-month delays in receiving pay. Cleaners who worked unpaid overtime were also not permitted to record the actual times they worked on their site. The times a cleaner records as being on-site are important, providing a legal record of attendance and working hours, which can impact workers' compensation claims or suspicions of theft. Some cleaners also spoke of being threatened with termination by their supervisors if they failed to complete additional tasks not covered in the contracts.

Two-thirds of the interviewed school cleaners experienced difficulty in accessing sick leave. In some cases, this was related to the availability of relief cleaners, while in others, it was due to pressure, harassment or threats of dismissal from their supervisors if they took sick leave. Problems also arose when cleaners wanted to take extended leave (such as long service leave). To explore these issues of non-compliance, the following section considers the roles of parties to the contracts.

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

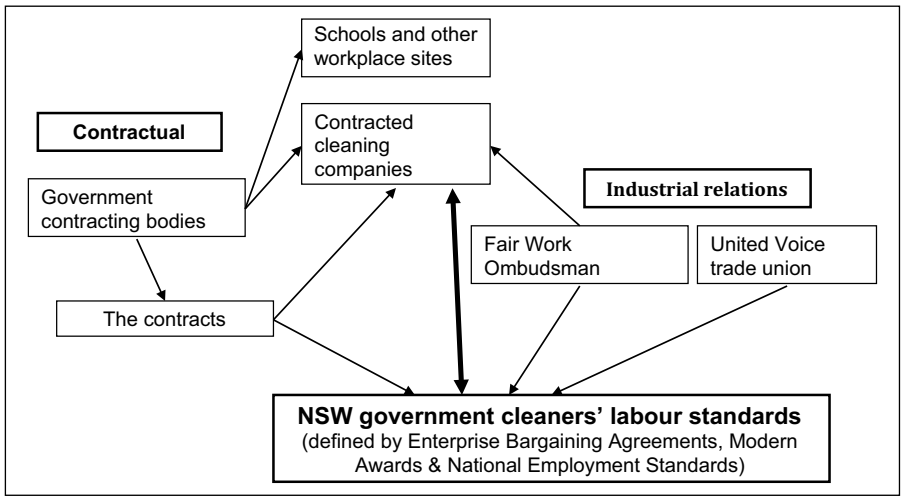

Figure 1. Regulating school cleaners' labour standards.

The regulatory roles of parties to the NSW government cleaning contracts

Figure 1 depicts the various parties and instruments regulating NSW government school cleaners' labour standards. The IR entities, the FWO and United Voice, have a direct role in enforcing cleaners' labour standards through their EBA and NES conditions. Indeed, the FWO has a critical role in monitoring and enforcing labour standards (Hardy et al., 2013; Hardy and Howe, 2009). The cleaners' labour standards are also regulated directly and indirectly through contractual mechanisms, with four government agencies overseeing the tendering and operational aspects of the contracts. These include the Department of Education and Communities (DEC), Department of Finance and Services (DFS), NSW Treasury and State Contracts Control Board (SCCB).

The contracts specify conditions of employment for cleaners (including the EBAs and OHS), and also contain clauses specifying that relevant labour law standards must be upheld. The contract terms are defined by the DEC and the DFS. United Voice, the cleaners' trade union, played a central role in negotiating for terms of employment to be contained in the procurement contracts for services (interview, industry consultant).

The DEC is defined as the 'client' in the contracts, with the school cleaners working primarily at DEC sites. DEC's role is to ensure 'efficiency and effectiveness of their [Treasury] procurement', while monitoring compliance with the NSW Government Procurement Policy, particularly in respect of preparing procurement proposals (NSW Treasury, 2004: 6). If non-compliance occurs, the DEC is responsible for lodging complaints of non-compliance with the SCCB (NSW Government, 1999: 28).

Operationally, DEC's role is to ensure schools are as clean as possible with its primary concern being child safety (interview, industry consultant). Other concerns relate to OHS for staff and students at the schools and with child-protection-related background checks

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

of the cleaners (interviews, industry consultant; DEC official). DEC operates on the assumption that large, reputable companies are unlikely to risk tainting their reputations or losing opportunities for future contracts by breaching contract terms (interview, DEC official).

The DFS role could be summarised as the 'project manager' of the NSW government cleaning contracts (interview, industry consultant). The DFS has four primary functions in regulating school cleaning contracts: the implementation of procurement through the SCCB, advising Treasury on procurement matters, maintaining web-based materials on behalf of Treasury and assisting Treasury with other related schemes (NSW Treasury, 2004: 6). The DFS' most visible role in day-to-day contract management is through WEBClean, an online system to manage, monitor and facilitate communication between parties to the school cleaning contracts.

The contract terms offered by DEC and DFS are constrained by financial and legal conditions placed on them by NSW Treasury and the SCCB. These two parties determine the financial resources to be allocated to school cleaning contracts and ultimately approve the awarding of contracts, thus implicating them both in the regulation of cleaners' labour standards. The process of tendering and awarding contracts impacts the provision of cleaners' labour standards, with the selection criteria having the potential to uphold or ignore labour standards.

Notably, Treasury and the SCCB prioritise 'best value for money' in the process of contracting-out, and price constitutes 70% of contract selection criteria. As more than 70% of cleaning services' costs are labour related (IBIS*World*, 2010), efforts to compete on the basis of price typically result in one of two practices occurring, both evident in the school cleaners' situation. The first is that MLS are observed and managers manipulate work time during the tendering process, ultimately resulting in work intensification once a bid is won (Ryan, 2007: 166). The second is the undercutting of labour costs by sub-contracting work out (Ryan and Herod, 2006), employing cleaners 'off the books', paying them cash and offering no entitlements or employment security (pp. 491–492).

The NSW government procurement policy has conflicting goals, with 'best value for money' competing against social policy initiatives. With regard to MLS compliance, it appears that 'value for money' is afforded a higher priority. When 70% of the criteria for assessing contracts is based on cost, and all tenderers are pre-approved (meaning that all tenderers have already satisfied the other 30% of tendering requirements), tenderers expect that the lowest price is paramount to winning the contract. The amount tendered by a bidding company sets the parameters for the pay and conditions of cleaners employed by that company. For the company to make a profit, the amount paid under the contract must include a surplus above the amount paid to employees. Ryan and Herod (2006: 491–492) have shown that price reductions made to win contracts are borne by the cleaners themselves through reduced labour standards.

The SCCB is responsible for investigating complaints about government procurement procedures by contractors or public sector agencies *(Public Sector Employment and Management Act, 2002)*. The SCCB's stated role is to deal with serious or repeated breaches of the contracts by terminating the contract, but in reality, this has never occurred. The SCCB's powers to enforce compliance appear to be seldom exercised. One exception was the non-renewal of contracts for one company in December 2009,

when all other companies' contracts were extended for 18 months. While this was a non-extension rather than a termination of the contracts in question, and no legal repercussions resulted, the fear of potential litigation almost prevented the agencies from acting (interview, industry consultant). Importantly here, the reason for contract non-renewal was largely about poor relationships between company management and school principals, while contracts were renewed with a company that was explicitly breaching labour standards through the sub-contracting of cleaning services (interviews, industry consultant; United Voice official).

The final party involved in enforcement of MLS for school cleaners is their trade union, United Voice. United Voice provides support and advice through a helpdesk, fielding many calls from school cleaners and assisting them to understand and assert their employment rights. The union also organises Regional Organising Committee (ROC) meetings, with members convening three or four times each year to discuss work issues. The issues raised in ROC meetings most frequently pertain to understanding school cleaners' task requirements, as per the contracts, with less frequent discussion of issues regarding the EBAs and labour law compliance. This forum is one mechanism that United Voice uses to monitor contract and labour law compliance. United Voice communicates directly with company management on matters arising during ROC meetings.

The contracts contain provisions for a Cleaning Communications Group (CCG), which includes representatives from the DEC, the DFS, school principals' representatives, Teachers' Federation representatives, Parents and Citizens groups' representatives and United Voice officials. The CCG meets every 3–4 months and provides a formal avenue for United Voice to discuss school cleaners' labour standards with the government agencies overseeing the contracts. Issues raised are 'on the record', allowing United Voice to follow-up whether they are being addressed.

United Voice has also initiated a 'Clean Start' campaign. Modelled on the US Justice for Janitors campaign, Clean Start targets the organisations, including government agencies, which contract-out cleaning services in the office building and retail sectors, placing the onus on them to only appoint contractors committed to upholding labour standards. The objective is that contracted cleaning companies must commit to the Clean Start standards of upholding MLS if they wish to win contracts with most major companies or government bodies (United Voice, 2012). The significance of this campaign and its impacts are discussed later.

Implications

McCrudden (2012) notes the potential for procurement contracts to act as a 'lever for ensuring greater attention is given to establishing minimum standards and effective employment rights in the workplace' (p. 87). McCrudden's research focuses on the UK where the situation in respect of MLS is vastly different to the Australian context. In the UK, governments have attempted to wed their own minimum standards and worker protection legislation, as well as that of the European Union, to a voluntarist system. The results have predictably been ad hoc, piecemeal and flawed, with a range of fragmented bodies, agencies, institutions, departments and jurisdictions enforcing different employment rights

https://doi.org/10.1177/1035304614546450 Published online by Cambridge University Press

and placing 'too much reliance … on individuals having to assert and pursue their statutory employment rights, which generally required only passive compliance from employers …' (Dickens, 2012: 206).

However, the highly regulated nature of the employment relationship in Australia provides a backdrop against which procurement contracts, with the types of socially responsible governance described by McCrudden (2012), may be unnecessary at best and a futile distraction for parties with enforcement powers at worst. In Australia, IR regulatory mechanisms are in place to monitor and enforce the MLS provided in employment contracts for all workers. These MLS are outlined in the NES, federal minimum wage, awards and EBAs. In this context, clauses in government procurement contracts purporting to uphold and enforce MLS for workers employed by contracted companies are rhetorical – the workers are entitled to those minimum conditions through their contract of employment, regardless of the procurement contract. This is different to other countries where individualised labour markets with little regulation are the norm, statutory provision of MLS is limited, and reliance is on 'an exclusively individualised, private-law model of enforcement' (McCrudden, 2012: 87). In such countries, inspectorates (where they exist) typically have weak powers, are poorly resourced or their roles are fragmented between multiple agencies with no overall cohesion (Dickens, 2012: 206–211). Monitoring and enforcement in these systems is largely left to individual workers.

The inclusion of MLS clauses in NSW school cleaners' procurement contracts originated from union efforts to maintain similar standards for workers who transferred from the GCS to the private sector when privatisation was initiated. In 1994, the current national employment system was not in effect in Australia, with federal Modern Awards and NES to come a decade later. The school cleaners would typically have been transferred from their more advantageous public sector conditions to either cleaning industry award conditions or EBA conditions existing in the contracting companies; thus, the MLS clauses in the procurement contracts acted as a transition instrument to ensure that school cleaners' wages and conditions did not change significantly. Subsequently, United Voice negotiated EBAs with the contracting companies, which included conditions identical to those in the procurement contracts. The NSW state IR system at the time provided an inspectorate for monitoring and enforcing awards and EBAs, and empowered trade unions to enforce conditions for their members, making procurement contracts' provisions redundant for the purposes of ensuring those standards. With the establishment of the national IR system and statutory MLS, the question of *why* such clauses continue to be included in procurement contracts arises.

Despite the regulatory and enforcement framework in Australia, the intersection of labour laws and contract law in the specific context of NSW government cleaning contracts causes sufficient distraction for the FWO and United Voice to potentially allow the undermining of the very MLS enforcement they are attempting to ensure. There was no evidence of involvement of the FWO in monitoring or enforcing labour standards for the school cleaners. This is entirely understandable as the FWO focuses more on non-unionised workplaces and industries, and is motivated by complaints and reports of non-compliance. If problems arose in their employment relationship, cleaners approached United Voice for advice on their rights and for support with claiming those rights. None of the cleaners interviewed mentioned being referred to the FWO for advice or support

in claiming their legal entitlements. The government contract context (with the tendering process and included MLS provisions), high union membership among school cleaners and the lack of complaints to FWO would have provided no reason for them to intercede. However, the FWO is clearly aware of non-compliance in the broader cleaning industry and has focused its efforts there.

United Voice demonstrated commitment to its enforcement role in multiple ways. It provided education, information and support for cleaners with problems, negotiated with cleaning company managements and reported labour standards issues relating to the contracts to the CCG. United Voice is the only party in regular, concerted contact with the workers, but does not appear to be using all its available resources. In terms of the contracts, United Voice can pressure the DEC and the DFS to award contracts only to tenderers with sufficient means to provide all entitlements. In Queensland and the Australian Capital Territory school, cleaners' EBAs set out minimum requirements for contract cleaning rates, measured in hours per square metre for each different type of flooring and space usage. United Voice has so far been unsuccessful in getting similar cleaning rates for NSW school cleaners (interview, United Voice official). In terms of using their industrial powers for enforcement, United Voice's results are ambivalent. While they have successfully negotiated with some managers on behalf of their members over particular, individual issues, this intervention does not appear to have had any more widespread deterrent effect on non-compliance with MLS. Indeed, issues with underpayment and delays in payments highlight the ineffectiveness of this approach.

Trade unions in many countries have demonstrated an increased propensity to engage with organisations and government agencies that contract-out services to address labour standards issues arising under the contracts (Tarrant, 2011). United Voice is committed to such actions, and indeed, their priority appears to be attempting to obtain additional inclusions in procurement contracts relating to labour standards, while also inducing companies to commit to Clean Start campaigns in other cleaning sectors (office building and retail cleaning). Unfortunately, the evidence in this study demonstrates that the MLS clauses in procurement contracts are not being complied with, nor are they monitored or enforced by the NSW government parties to the contracts. Furthermore, the distraction created by United Voice's reliance and focus on contractual provisions has a potentially negative impact on enforcement by the FWO. The unions' Clean Start campaign, garnering in-principle commitments from organisations that contract-out cleaning to uphold MLS is admirable; however, more research is required to understand the effectiveness of this campaign. This research of NSW school cleaners suggests such moves may be futile, both from an enforcement perspective and because workers already have these protections under labour law.

Government agencies overseeing the contracts showed little interest in monitoring compliance with labour standards' provisions included in the contracts. DEC assumed that contracted companies would comply because they had a financial incentive to do so if they hoped to be awarded future contracts (interview, DEC official). Such assumptions by agencies in the tendering process that commitments to uphold MLS are the same as compliance are flawed. In practice, even serious infringements of labour standards were not prioritised for enforcement, not having the same degree of severity and urgency as rumoured problems with service quality. This is partly because these agencies have no

expertise in enforcing labour law (and probably rightly assume that the FWO or the union should deal with the situation), and partly because contract law does not provide the flexibility to respond to such breaches appropriately. Contract law provides only for the termination of a services contract if there are serious breaches. There are no options for lighter penalties, such as remedies payable, if 'extraneous' clauses, like MLS provisions, are breached (Seddon, 2009: 44). As Dickens (2012) notes, '[u]se of procurement power and supply chain pressure may appear as alternatives to legal regulation but the evidence suggests that "hard law" is required to drive such employer action and to ensure substantive outcomes' (p. 223).

Another problematic aspect of the procurement literature requires further research. The literature on procurement contracts as a regulatory mechanism tends to focus on the tendering and awarding end of the procurement process, with little consideration given to enforcement of contract provisions, especially clauses considered extraneous to the contract, exemplified in the following quote:

> The diversity of ways in which procurement and social policy have been brought together goes beyond simply awarding contracts on certain conditions, and extends to include, for example, the definition of the contract, the qualifications of contractors, and the criteria for the award of the contract. (McCrudden, 2004: 257)

While these elements may ensure a transparent tendering process, and provide bureaucrats with comparable information on which to determine the awarding of contracts, they provide no link to the performance of the contract. Where enforcement of procurement contracts is addressed, it is usually to note that contract law provides few options by way of sanctions. This is especially the case for provisions of a social justice nature. Exceptions to this are Howe (2014: 394–399) and Howe and Landau (2009), which highlighted the need for enforcement of MLS in procurement.

Conclusion

This article has highlighted problems arising through the intersection of labour law and contract law in the enforcement of MLS in government procurement contracts for NSW school cleaners. As Trepte (2004) notes,

> … procurement regulation is only one instrument amongst many for the achievement of government policy … and it is rarely sufficient of itself to attain more general economic and social objectives …. As a consequence, procurement regulation needs to be complemented by other policy instruments if its objectives are to be successfully achieved. (p. 61–62)

While some of the elements of the school cleaners' situation may be unique (high unionisation rate, longevity of employment), it is likely that other workers employed by companies with government procurement contracts are experiencing similar issues with respect to compliance with MLS.

Despite an array of articles espousing procurement contracts as a means of establishing and ensuring MLS, this research argues that this is an unnecessary duplication in the Australian context. Australian IR legislation and instruments enshrine specific minimum

standards for all Australian workers. Including these standards as clauses within procurement contracts is merely rhetoric. It also provides a false impression of what can and will be done in respect of those MLS entitlements within contractual arrangements, as well as adding another layer of regulatory complexity.

MLS in procurement contracts come with expectations that government contracting agencies will monitor and enforce their terms. In the case of NSW school cleaners, this is misleading. These government contract administrators have no expertise in monitoring MLS, no resources to do so and few powers to rectify breaches within contract law. The FWO could potentially monitor and enforce the MLS in procurement contracts, but that would be redundant because they have the powers to monitor and enforce exactly the same provisions through labour law mechanisms, with an array of penalties at their disposal.

Government agencies overseeing procurement for services can, however, play a pivotal role when assessing tenders and awarding contracts, as this is where 'labour-related considerations [can be] subsumed within, or overlooked by government administrators under pressure to secure best value for money, which is assessed narrowly in terms of the cheapest available price' (Howe, 2010: 337). When assessing bids for cleaning services, it is easy to ascertain whether bidders have the capacity to pay legal minimum entitlements, because the square metres to be cleaned, the rate of cleaning per hour and the cost of providing those legal minimum entitlements are all known quantities. Focusing on this in the tender process would preclude awarding contracts that do not have the budget to allow the payment of minimum entitlements. As Dickens (2012) above has noted, procurement can be used to signal government expectations of those in its supply chain, but 'hard law' is still required to ensure employer compliance.

Such 'hard law' is already available through the labour law aspects of MLS enforcement but has been largely side-lined in the school cleaners' situation. The union's focus on individual non-compliance negotiations has had no apparent widespread deterrent effect. Their focus on the Clean Start campaign and the MLS clauses in the procurement contract are a distraction from more effective enforcement practices and outcomes. Concerted liaison and collaborative policy-making between inspectorates like the FWO, trade unions and government agencies involved in contracting-out could lead to more informed tendering processes, and coordinated and focused monitoring and enforcement, providing more substantive outcomes and better compliance with MLS. However, political, bureaucratic and resource practicalities make this unlikely.

Funding

The financial assistance and support of the University of Sydney, Business School for the initial research is gratefully acknowledged. United Voice staff and members were critical to the research project and warmest gratitude is extended to them.

Notes

1. Awards are legally enforceable determinations containing the minimum terms and conditions of employment in an occupation or industry. These conditions have been determined and certified by an industrial tribunal following agreements reached between employer groups and

trade unions. Awards provide the starting point for Enterprise Bargaining Agreement (EBA) negotiations at the enterprise level, and provide a safety net of conditions.

2. The National Employment Standards contain 10 minimum working standards for all Australian workers including maximum working hours, flexible work rights, parental leave, various types of leave, right to notice of termination and redundancy pay, and a right to a Fair Work Information Statement upon employment.
3. The high incidence of informal work in the cleaning industry and the lack of recent Australian Bureau of Statistics (ABS) data on the cleaning industry make it difficult to obtain accurate data on cleaners.

References

ABS (2000) *Cleaning Services Industry, Australia 1998–99*. Cat. no. 8672.0. Canberra, ACT, Australia: ABS. Available at: http://www.abs.gov.au/ausstats/abs@.nsf/productsbytitle/6F0B7E423A0DC6A6CA2568FD0083C4A8?OpenDocument (accessed 21 February 2011).

Alcorso C (2002) *Improving occupational health and safety information to immigrant workers in NSW*. Working paper no. 78 ACIRRT, 4 September. Sydney, NSW, Australia: University of Sydney.

Arrowsmith S and Kunzlik P (eds) (2009) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*. New York: Cambridge University Press.

Arrowsmith S, Linarelli J and Wallace DJ (2000) *Regulating Public Procurement: National and International Perspectives*. The Hague: Kluwer Law International.

Australian Government (2009) Australian government procurement statement. Minister for Finance and Deregulation, Australian Government, Canberra, ACT, Australia, July.

Australian Government (2010) Fair work principles user guide. Australian Government, Canberra, ACT, Australia, January.

Bercusson B (1978) *Fair Wages Resolution*. London: Mansell Information Publishing.

Bolton P (2006) Government procurement as a policy tool in South Africa. *Journal of Public Procurement* 6(3): 193–217.

Campbell I and Peeters M (2008) Low pay, compressed schedules and high work intensity: a study of contract cleaners in Australia. *Australian Journal of Labour Economics* 11(1): 27–46.

Collins H (1999) *Regulating Contracts*. Oxford; Melbourne, VIC, Australia: Oxford University Press.

Collins H (2000) Justifications and techniques of legal regulation of the employment relation. In: Collins H, Davies P and Rideout R (eds) *Legal Regulation of the Employment Relation*. The Hague: Kluwer Law International, pp. 3–27.

Cooper R and Ellem B (2011) The neoliberal state, trade unions and collective bargaining in Australia. *British Journal of Industrial Relations* 46(3): 532–554.

Daintith T (1994) *The Techniques of Government*. 3rd ed. Oxford: Oxford University Press.

Dickens L (2012) Fairer workplaces: making employment rights effective. In: Dickens L (ed.) *Making Employment Rights Effective: Issues of Enforcement and Compliance*. Oxford: Hart Publishing, pp. 205–228.

Fair Work Act (2009) *Fair Work Act (Cth)*. Available at: http://comlaw.gov.au/Series/C2009A00028 (accessed 10 March 2014).

Fair Work Ombudsman (2010) NSW – Sydney metropolitan cleaning contractors campaign. Final report, Fair Work Ombudsman, Canberra, ACT, Australia, June.

Fair Work Ombudsman (2011) National cleaning services campaign 2010–11. Fair Work Ombudsman, Canberra, ACT, Australia, June.

Fraser L (1997) *Impact of Contracting-Out on Female NESB Workers: Case Study of the NSW Government Cleaning Service*. Sydney, NSW, Australia: Research and Statistics Branch, Department of Immigration and Multicultural Affairs.

Freiberg A (2010) *The Tools of Regulation*. Sydney, NSW, Australia: The Federation Press.
Goodwin M and Maconachie G (2011) Minimum labour standards enforcement in Australia: caught in the crossfire? *Economic and Labour Relations Review* 22(2): 55–80.
Hardy T (2009) A changing of the guard: enforcement of workplace relations laws since work choices and beyond. In: Stewart A and Forsyth A (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy*. Sydney, NSW, Australia: The Federation Press, pp. 84–107.
Hardy T (2012) Enrolling non-state actors to improve compliance with minimum employment standards. *Economic and Labour Relations Review* 22(3): 117–140.
Hardy T and Howe J (2009) Partners in enforcement? The new balance between government and trade union enforcement of employment standards in Australia. *Australian Journal of Labour Law* 22: 306–336.
Hardy T, Howe J and Cooney T (2013) Less energetic but more enlightened? exploring the Fair Work Ombudsman's use of litigation in regulatory enforcement. *Sydney Law Review* 35: 565–597.
Holley S and Rainnie A (2012) Who cleans up? The declining earnings position of cleaners in Australia. *Economic and Labour Relations Review* 23(1): 143–160.
Howe J (2006) 'Money and favours': government deployment of public wealth as an instrument of labour regulation. In: Arup C, Gahan P, Howe J, et al. (eds) *Labour Law and Labour Market Regulation*. Sydney, NSW, Australia: The Federation Press, pp. 167–186.
Howe J (2010) The regulatory impact of using public procurement to promote better labour standards in corporate supply chains. In: Macdonald K and Marshall S (eds) *Fair Trade, Corporate Accountability and beyond*. Surrey: Ashgate, pp. 331–349.
Howe J (2014) Regulatory facilitation of voice. In: Bogg A and Novitz T (eds) *Voices at Work: Continuity and Change in the Common Law World*. Oxford: Oxford University Press, pp. 381–400.
Howe J and Landau I (2009) Using public procurement to promote better labour standards in Australia: a case study of responsive regulatory design. *Journal of Industrial Relations* 51(4): 575–589.
IBIS*World* (2010) *Cleaning services in Australia*. IBISWorld industry report L7866, April 2010. Melbourne, VIC, Australia: IBIS*World*.
Industry Commission Australia (1995) *The Growth and Revenue Implications of Hilmer and Related Reforms. Industry Commission to the Council of Australian Governments*. Canberra, ACT, Australia: Industry Commission Australia.
Johnstone R and Mitchell R (2004) Regulating work. In: Parker C, Scott C, Lacey N, et al. (eds) *Regulating Law*. Oxford: Oxford University Press, pp. 101–121.
McCrudden C (1999) International economic law and the pursuit of human rights: a framework for discussion of the legality of 'selective purchasing' laws under the WTO Government procurement agreement. *Journal of International Economic Law* 2(1): 3–48.
McCrudden C (2004) Using public procurement to achieve social outcomes. *Natural Resources Forum* 28(4): 257–267.
McCrudden C (2007) *Buying Social Justice: Equality, Government Procurement, and Legal Change*. 1st ed. Oxford: Oxford University Press.
McCrudden C (2012) Procurement and fairness in the workplace. In: Dickens L (ed.) *Making Employment Rights Effective: Issues of enforcement and compliance*. Oxford: Hart Publishing, pp. 87–114.
NSW Government (1999) *Implementation Guidelines for the NSW Government Procurement Code of Practice and Code of Tendering*. Sydney, NSW, Australia: New South Wales Department of Treasury.

NSW Treasury (2004) Policy and guidelines paper. NSW Government Procurement Policy, Office of Financial Management, Sydney, NSW, Australia, July.

Occupational Health and Safety Act (2000) *Occupational Health and Safety Act (NSW)*. Available at: http://www.legislation.nsw.gov.au/fullhtml/inforce/act+40+2000+FIRST+0+N (accessed 20 December 2013).

Public Sector Employment and Management Act (2002) *Public Sector Employment and Management Act (NSW)*. Available at: http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2002%20AND%20no%3D43&nohits=y (accessed 15 April 2014).

Ryan S (2007) *'Dirty Deads Done Dirt Cheap?' Employment relations and the organisation of work in the NSW commercial cleaning industry*. Unpublished PhD Thesis, University of Sydney, Sydney, NSW, Australia.

Ryan S and Herod A (2006) Restructuring the architecture of state regulation in the Australian and Aotearoa/New Zealand cleaning industries and the growth of precarious employment. *Antipode* 38(3): 486–507.

Seddon N (2009) *Government Contracts: Federal, State and Local*. 4th ed. Sydney, NSW, Australia: The Federation Press.

Sullivan B (1997) Mapping contract. In: Davis G, Sullivan B and Yeatman A (eds) *The New Contractualism*. South Melbourne, VIC, Australia: Macmillan Education Australia, pp. 1–13.

Tarrant L (2011) United voice. *Paper presented at employment relations in a global context conference*, Workplace Research Centre, Sydney, NSW, Australia.

Trepte P (2004) *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*. Oxford: Oxford University Press.

United Nations (2008) Public procurement as a tool for promoting more sustainable consumption and production patterns. August. Available at: http://www.un.org/esa/sustdev/publications/innovationbriefs/no5.pdf (accessed 23 December 2009).

United Voice (2012) *Clean Start Guidelines to Responsible Contracting*. Sydney, NSW, Australia: United Voice.

Weiss L and Thurbon E (2006) The business of buying American: public procurement as trade strategy in the USA. *Review of International Political Economy* 13(5): 701–724.

Author biographies

Sasha Holley is a Senior Research Assistant in the Centre for Workforce Futures, Macquarie University, Australia. Her current research focuses on labour standards for precarious workers. Her niche area of expertise is government contracts for services, the incentive structures that are built into the contracts and the resulting impacts on workers who are involved with the contracts.

Glenda Maconachie is Senior Lecturer at the Queensland University of Technology Business School, Australia. Her research interests include labour history, minimum standards entitlements – creation and enforcement, emotional labour and occupational health and safety/workers' compensation.

Miles Goodwin was the Director of Research (Economics Branch) in the Parliamentary Library, Canberra, before retiring. He is currently an adjunct professor with the School of Management, Queensland University of Technology (QUT) Business School, QUT, where his research with Glenda Maconachie focuses on labour regulation and enforcement.