

Penalty against MCG head contractor over underpayments a “wake-up call”

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A surprise night-time visit to the MCG by Fair Work Ombudsman inspectors to investigate exploitation of overseas workers in the venue's supply-chain for cleaning staff has led to a \$132,217 penalty against the Australian arm of a global cleaning company.

ISS Facility Services Australia Limited – which holds a contract to provide a variety of cleaning services at the MCG and is part of the ISS Group, which has operations in more than 50 countries – has received the penalty in the Federal Circuit Court.

The penalty is a result of the Fair Work Ombudsman taking legal action after its investigation discovered 11 overseas workers were underpaid \$37,471 for cleaning work at the MCG after AFL matches in 2014.

Given ISS was not the direct employer of the 11 exploited cleaners, the Fair Work Ombudsman used accessorial liability laws to hold ISS lawfully accountable for its part in the workers being underpaid.

The 11 cleaners were employed by First Group of Companies Pty Ltd, a now-deregistered company ISS had subcontracted between 2009 and 2014 to provide post-event cleaning services at the MCG.

In Court, ISS admitted knowing in 2014 that the rates it paid First Group of Companies were “not sufficient to cover the employees' entitlements” and that it was aware of the unlawfully low rates First Group of Companies was paying workers. ISS admitted its conduct contravened workplace laws.

The Fair Work Ombudsman commenced its investigation into the MCG's supply chain for cleaning staff in 2014 in response to media reports and intelligence suggesting significant compliance issues.

A key part of the investigation was a team of six Fair Work inspectors making a surprise visit to the MCG after the AFL preliminary final between Hawthorn and Port Adelaide in September 2014 to speak to cleaners.

Once inspectors made cleaners aware of their presence and the purpose of the visit, the workers inundated inspectors with their desire to tell their stories.

The inspectors spoke to about 44 cleaners between about 9pm and just after midnight.

The workers were mostly international students from India, the Philippines, Colombia and Brazil. Many said they had obtained work at the MCG through word-of-mouth and friends.

First Group of Companies had engaged the cleaners under sham contracts, treating them as independent contractors despite their correct lawful classification as employees.

The investigation discovered cleaners were paid flat rates of between \$18 and \$25 an hour to clean after AFL matches.

The rates failed to meet minimum pay and entitlements under the Cleaning Industry Award 2010, including base hourly rates, casual loading, penalty rates, overtime and allowances.

Under the award, the workers were entitled to rates of between \$18 and \$46 for some shifts.

The 11 workers who were the subject of the legal action were underpaid individual amounts ranging from \$276 to \$7272 over a five-month period in 2014.

Fair Work Ombudsman Natalie James says the significant penalties handed down should serve as a wake-up call to any head contractors who think they can turn a blind eye to non-compliance by the subcontractors they engage.

“The Fair Work Ombudsman has been warning businesses for years: you can't turn a blind eye to exploitation of contracted workers in your labour supply chains,” Ms James said.

“This case provides a clear example of what can happen if you fail to actively manage your contractors in high risk sectors.

“The Fair Work Ombudsman will hold-to-account all those involved in exploitation, from head contractors down, and they risk serious consequences if they fail to take steps to ensure that all subcontractors in the supply chain treat workers lawfully.

"These responsibilities start with the procurement process.

"Price driven procurement that disregards the cost of wages and the dynamics in the market is a recipe for exploitation of vulnerable workers.

"Proving accessorial liability can be complex and I'm pleased that in the cases we have been able to obtain the evidence necessary to hold those involved in breaches of workplace laws to account."

In Court, ISS submitted that it had been a "third party" to the underpayments.

However, Judge Suzanne Jones said that "in light of the admissions" made by ISS "it is simply incorrect to describe [ISS] as a 'third party', if the use of that word is designed to minimise or reduce [ISS's] responsibility for its involvement in the contraventions".

In imposing 43 per cent of the possible maximum penalties against ISS, Judge Jones said principal contractors "must be deterred" from using non-compliant subcontractors.

"Principal contractors must be deterred from engaging subcontractors without taking steps to ensure that so long as those subcontractors are engaged by them, they comply with the [Fair Work] Act," Judge Jones said.

"If principal contractors do not treat this as a business imperative, the notion of a level playing field in which principal contractors tout for business on the basis of the same labour costs, would collapse."

Judge Jones also imposed penalties of \$17,926 against each of the former owner-operators of First Group of Companies – Sharad Patel and Sidarth Luthra – for their involvement in sham contracting, frequency of pay and pay slip contraventions by their company.

The penalties take total penalties secured by the Fair Work Ombudsman in the case to \$168,070.

First Group of Companies rectified the underpayments in full before it was deregistered.

Judge Jones highlighted the impact of the "substantial" underpayments on the employees, given the dependence of low-paid workers on minimum Award rates.

Judge Jones noted the negative impact on the workers arising from the monthly pay contraventions, pointing to one example where a worker had to borrow money from friends in order to meet rent, bills and basic living expenses after waiting 45 days to receive his first payment.

Judge Jones also emphasised the seriousness of the sham contracting contraventions, designed as they were to "save costs and avoid the [employer's] obligations under the Act and the Award, in circumstances where it was clear that the employees were not independent contractors running their own businesses".

Judge Jones noted that the failure to provide pay slips further disadvantaged the workers, disempowering them from enforcing compliance by preventing them from being able to independently verify their entitlements and creating "a structure within which breaches of industrial laws can easily be perpetrated".

Ms James says labour contracting arrangements, including in the cleaning industry, have been a focus of the Fair Work Ombudsman for several years, with successive inquiries and operational activities uncovering often shocking levels of non-compliance where labour supply chains have been inadequately managed.

"As the court found in this matter, principal contractors should not be able to absolve themselves of the responsibility to ensure the people performing the work in their networks are being paid correctly and treated fairly," Ms James said.

"Businesses must take their supply chain responsibilities seriously and ensure that the companies they engage to provide labour services abide by workplace laws, or expose themselves to significant financial and reputational risks."

The Fair Work Ombudsman has a suite of free resources available at www.fairwork.gov.au/supplychain (<http://www.fairwork.gov.au/supplychain>) to assist businesses and other organisations to monitor and manage their contract arrangements.

Ms James says she is pleased that ISS has since taken steps to improve oversight and management of their supply chain, including auditing all of its subcontractors for compliance with workplace laws, reviewing its procurement system to ensure greater insight into the wage arrangements of prospective subcontractors, implementing training about workplace laws for its managers and rolling out an electronic sign-in system to monitor employees' times of work and calculate entitlements.

"We also welcome the strong contribution of ISS as a leader in improving workplace standards in the cleaning sector through their involvement in the [Cleaning Accountability Framework](http://www.cleaningaccountability.org.au/)³ (<http://www.cleaningaccountability.org.au/>), an industry-led initiative which promotes the adoption of best practice throughout the cleaning supply chain," Ms James said.

"It is clear that head contractors have a vital role to play in promoting workplace compliance within their labour networks, and it is encouraging to see that ISS has learnt from its mistakes and has taken concrete action to prevent such breaches from occurring again."

Ms James adds that her agency is prepared to take legal action in cases where vulnerable workers such as visa holders have been deliberately exploited.

Under the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017, which came into effect in September last year, new higher penalties of up to \$630,000 per contravention for a company and \$126,000 per contravention for an individual now apply in relation to serious breaches of work laws.

In addition, the maximum penalties for failing to keep employee records or issue pay slips have doubled to \$63,000 for a company and \$12,600 for an individual, and the maximum penalty for knowingly making or keeping false or misleading employee records has tripled to \$12,600 for an individual.

“Deliberate exploitation of migrant workers is completely unacceptable conduct and we will do everything within our power to hold employers engaging in such activities to account,” Ms James said.

In recent years the Fair Work Ombudsman has conducted inquiries into labour procurement arrangements of the [Baiada Group](http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161128-baiada-media-release) (<http://www.fairwork.gov.au/about-us/news-and-media-releases/archived-media-releases/2016-media-releases/november-2016/20161128-baiada-media-release>), procurement of housekeepers by four and five-star hotel groups (www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/may-2016/20160520-hotel-housekeepers-inquiry), and Woolworths’ trolley collection (www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/october-2017/20171011-woolworths-pcd-trolley-collectors-release) and cleaning services (www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners) procurement, resulting in partnerships with a number of businesses aimed at improving compliance in their networks.

Employers and employees seeking assistance can visit www.fairwork.gov.au, where information is available in 40 languages, or call the Fair Work Infoline on 13 13 94. Small business callers can opt to receive priority service via the Small Business Helpline and an interpreter service is available on 13 14 50.

The Fair Work Ombudsman has also recently launched a Small Business Showcase - www.fairwork.gov.au/smallbizshowcase (<http://www.fairwork.gov.au/smallbizshowcase>) - which is a virtual hub providing a wealth of resources for small business owners seeking information about their workplace obligations.

Resources available include the Pay and Conditions Tool (PACT) (<https://calculate.fairwork.gov.au/>), which provides advice about pay, shift, leave and redundancy entitlements and there are templates for pay slips and time-and-wages records.

The Fair Work Ombudsman’s ‘Record My Hours’ smartphone app (www.fairwork.gov.au/tools-and-resources/record-my-hours-app) is aimed at tackling the persistent problem of underpayment of vulnerable workers by using geofencing technology to provide workers with a record of the time they spend at their workplace. The app can be downloaded from the App Store and Google Play.

In recognition that some employees are reluctant to complain about their workplace issues, the Fair Work Ombudsman now has an “Anonymous Report” function to allow the community to [confidentially report potential workplace breaches](http://www.fairwork.gov.au/workplace-problems/fixing-a-workplace-problem/workplace-help-in-other-languages/report-a-workplace-issue-in-your-language) (www.fairwork.gov.au/workplace-problems/fixing-a-workplace-problem/workplace-help-in-other-languages/report-a-workplace-issue-in-your-language) in English and 16 other languages.

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