

An inquiry into the procurement of cleaners in Tasmanian supermarkets

A report by the Fair Work Ombudsman under the *Fair Work Act 2009*

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Australian Government

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An inquiry into the procurement of cleaners in Tasmanian Supermarkets



Visited **55 supermarket sites** in Tasmania:



Findings

Indications of **non-compliance** by contractors at **90% of Tas Woolworths sites** including:



Workers paid below minimum hourly rates



Employees not issued payslips



84% of records inaccurate or not kept at all



Evidence of unrecorded and unreported cash in hand payments being made by contractors to cleaners



WIDESPREAD AND SIGNIFICANT UNDERPAYMENTS



3

contractor referrals to the ATO



4

individuals / entities in Woolworths' supply chain subject to ongoing legal proceedings

Executive summary

The Fair Work Ombudsman (FWO) commenced an inquiry into cleaning arrangements in Tasmanian supermarkets in response to regular reports that cleaners were being significantly underpaid.

The inquiry specifically examined the labour procurement arrangements adopted by the major supermarket brands in Tasmania; Coles [Wesfarmers limited ACN 008 984 049], Woolworths [Woolworths Limited 000 0014 675] and IGA [Metcash Limited 112 073 480].

The decision to commence an inquiry was based on intelligence, observations of consistent trends and the FWO's experience of a correlation between multiple levels of subcontracting and non-compliance with the *Fair Work Act 2009* (the Act).¹ Other inquiries conducted by the FWO have shown that this is particularly the case in industry sectors where the nature of the work is low-skill and intensive, such as cleaning.² These characteristics often attract vulnerable workers, including migrant workers. The inquiry was chiefly concerned with businesses at the top of the labour supply chain and their capacity to control settings and determine how much money was going into and through the supply chain.

In its early phase, the inquiry established that there were different practices in operation for cleaning services at the three main supermarkets. Consequently, the inquiry focused on 55 supermarket sites (43% of total Tasmanian supermarket sites), involving 31 Woolworths sites (100% of its Tasmanian sites), seven (7) Coles sites (44% of its Tasmanian sites) and 17 IGA sites (21% of its Tasmanian sites).

At Coles supermarket sites the daily cleaning requirements were undertaken by direct employees, and contract cleaners were only used for occasional strip and polish work. At IGA supermarket sites, cleaning was primarily undertaken by direct employees. However, at all Woolworths supermarket sites, cleaning services were provided by contractors and contractor employees.

This is why, as the inquiry progressed, it came to concentrate on Woolworths' cleaning labour supply chain. The inquiry found that at the time Woolworths' approach to procurement and oversight of its cleaning contracts had contributed to a culture of non-compliance characterised by:

- significant underpayment of cleaners
- multiple levels of subcontracting in breach of the direct terms of Woolworths' own service agreements
- networks of corporate structures reliant on the engagement of vulnerable workers

¹ See 'Department of Education and Child Development procurement of minibuses – November 2014', 'Labour procurement arrangements of the Baiada Group – June 2015', 'Trolley collection services procurement by Woolworths Limited – June 2016' - <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>

² See 'Procurement of housekeepers by four and five star hotel groups – May 2016' - <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>

- inaccurate and/or false records
- difficulties in identifying the true employers of labour within a supply chain
- inadequate monitoring and identification of who is cleaning each site.

The inquiry uncovered indications of non-compliance by contractors at 90% of Tasmanian Woolworths sites and to date, the inquiry has uncovered a range of breaches resulting in total underpayments of \$64 162.54. However, it is estimated that the total underpayment quantum is much greater, as Fair Work Inspectors were impeded in quantifying employees' entitlements by poor record-keeping, incomplete, inaccurate and / or false records, and a lack of cooperation from workers. In this respect, the inquiry observed links between the employees' level of vulnerability, for instance their visa status, and their willingness to provide evidence.

Of the total underpayments identified, \$21 332.37 has been repaid.

The inquiry has led to:

- three referrals to the Australian Taxation Office concerning cash payments and misleading or false tax declarations
- four individuals / entities in the Woolworths' supply chain subject to ongoing legal proceedings.

At the time of publishing this report, there remains an ongoing investigation into a number of businesses that clean Woolworths supermarkets. We also note that at the time of publishing, Woolworths has implemented improvements in its governance and monitoring of contractors within its supply chain and is continuing to work productively with the FWO to implement further improvements.

Recommendations

As a result of the inquiry's findings, the FWO recommends:

- Coles, IGA and Woolworths become members of the [Cleaning Accountability Framework](#) and seek to progressively certify their retail sites - see **Appendix A**
- Woolworths enters a compliance partnership with the FWO designed to enhance management of its cleaning contractors throughout Australia, in response to the significant levels of non-compliance at Woolworths sites.

In particular, FWO recommends that Woolworths enters a [compliance partnership](#) to, amongst other measures:

- commit to paying cleaners if they're found to be underpaid (for cleaning services provided to Woolworths), and the relevant subcontractor fails to rectify the underpayment, and
- conduct regular audits of subcontractors (verified by third party accounting, legal or workplace relations professionals) to ensure compliance with Australian workplace laws.

Background

According to the ABS³, the cleaning sector in Australia was estimated to be comprised of 26,904 enterprises employing 131,908 workers (10,033 of these are registered as employing businesses).

ABS Census 2016 data relating to workers in the 'Building and Other Industrial Cleaning Services' sector revealed:

- 50% of workers within the cleaning industry were born overseas (compared to 31% of all employed persons in Australia)
- 40% spoke a language other than English at home (compared to 21% of all employed persons in Australia)
- of those who spoke a language other than English at home, 19% either didn't speak English at all, or did not speak English very well – compared to 8% of all employed persons in Australia
- 28% did not have Australian citizenship compared to 12% of all employed persons in Australia
- 12% were current students
- 68% of workers in the industry were employees (as opposed to contractors or owner/managers), compared to 86% of all employed persons in Australia.

The FWO has undertaken several inquiries involving the exploitation of employees engaged in low-skilled work in supply chains. These include:

- labour procurement arrangements of the Baiada Group
- trolley collection services procurement by Woolworths Limited
- procurement of housekeepers by four and five-star hotel groups.⁴

An inquiry into the procurement of cleaners in Tasmanian supermarkets was prompted by information received by the FWO indicating that there was significant non-compliance in the Tasmanian supermarket cleaning sector. For instance, the FWO received intelligence that cleaners in some supermarkets were being paid as little as \$7.00 per hour for training and \$14.00 per hour for all hours worked. Information also indicated the prevalence of labour supply chains, involving multiple levels of sub-contracting, which, based on the FWO's prior inquiries, can be a source of non-compliance. Intelligence held by the FWO also suggests non-compliance may not be limited to Tasmanian sites and also occurs on the mainland.

³ ABS Census 2016

⁴ See - www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports

In previous investigations into the cleaning sector, the FWO found many workers were reluctant to engage with or approach the FWO for assistance due to cultural reasons, immigration status, limited workplace rights knowledge, or concerns about employment security.

The FWO inquiry sought to test the validity of the intelligence received (alleging non-compliance) and gain a greater understanding of the employment conditions and wages being paid to supermarket cleaners in Tasmania.

In addition, the results may assist the FWO to identify the distinct market structure and environmental settings in this sector, to map the various business relationships and engage with the price-setters.

The cleaning market

The Australian supermarket and grocery store industry is highly competitive, generating \$105.1 billion in revenue⁵.

During the period of the inquiry, Australia-wide, Woolworths Ltd (Woolworths, Safeway, and Thomas Dux) held 34.1% market share, followed by Wesfarmers Ltd (Coles and Bi-Lo) which held 30.1%. ALDI Supermarkets Pty Ltd⁶ and Metcash Ltd (IGA, Supa IGA, IGA X-press, and Foodland) held 7.9% and 7.2% respectively⁷.

As at June 2015, Woolworths held a significant corporate and industrial footprint as Australia's ninth-largest company. During the 2014-15 financial year, Woolworths operated 3729 stores across Australia and New Zealand and employed approximately 197 000 employees. In addition to its 961 supermarkets across all Australian states and territories, Woolworths operated 1445 liquor outlets, 516 petrol stations, 330 hotels, 184 Big W stores, nine Thomas Dux stores, 58 Masters stores, 44 Home Timber and Hardware stores as well as a wholesale operation in home improvement servicing with a further 452 stores⁸.

In 2014, (as the inquiry commenced,) Woolworths' sales totalled \$60.7 billion resulting in an after-tax profit of \$2.5 billion. At that time, Woolworths had a long term target of opening 20–30 new Woolworths supermarkets across Australia each year⁹.

In Tasmania, Woolworths had 31 supermarkets and Coles had 16. While the IGA banner in Tasmania was used by 85 independently owned small to medium sized stores (with its products chiefly supplied by Metcash), Coles and Woolworths represented approximately 88% of market share in Tasmania¹⁰.

⁵ IBISWorld report – [IBISWorld Industry report G4111](#) – Supermarkets and grocery stores in Australia – Nathan Cloutman, September 2016 – pages 4 - 5

⁶ During the course of the inquiry, ALDI did not have a presence in Tasmania

⁷ *ibid*, page 22

⁸ [Woolworths Limited annual report 2015](#)

⁹ [Woolworths Limited annual report 2014](#)

¹⁰ [The Mercury – TasWeekend: Independents deliver price check on supermarket giants](#)

Tasmania's two major cities, Hobart and Launceston, feature a high concentration of supermarkets reflecting their population. The Master Grocers Australia *Competition Policy Review 2014* reported four Woolworths supermarkets, six Coles supermarkets and one Supa IGA supermarket; all within a five kilometre radius¹¹ in Launceston at that time. The same report refers to the issue of 'market saturation' and estimates that Woolworths and Coles stores were collectively holding 90% of the Launceston area¹².

Labour pricing pressures

There are a number of costs for supermarket owners, such as depreciation, utilities, rent, advertising, administration and transportation, but a key cost is labour.

For the labour costs associated with contract cleaning services, the terms and conditions of employment derive from the *Fair Work Act 2009* (the Act) and the [Cleaning Services Award 2010](#) (Cleaning Award).

The Act and the *Fair Work Regulations 2009* (the Regulations) regulate the employee and employer relationship in Australia. Among other things they provide a safety net of minimum entitlements, give employees the right to request flexible working arrangements, and prohibit discrimination against employees or prospective employees in respect of protected attributes.

Some of the features of this statutory framework include:

- 10 minimum National Employment Standards such as personal and annual leave
- awards that apply nationally to specific industries and occupations
- registered agreements that could apply to one or a group of businesses
- record-keeping requirements
- protection from unfair dismissal and adverse action.

The Cleaning Award covers employers who provide cleaning services under contract. Key features of that award for the purposes of this inquiry include the following:

- Part-time employees get paid a 15% part-time allowance when working:
 - on weekends
 - ordinary hours on a public holiday
 - early morning, afternoon or non-permanent night shifts.

¹¹ http://competitionpolicyreview.gov.au/files/2014/06/Master_Grocers.pdf

¹² http://competitionpolicyreview.gov.au/files/2014/06/Master_Grocers.pdf

- Casual employees receive a 25% casual loading for all hours worked. They may also receive penalty or overtime rates.
- Minimum engagement provisions for part-time and casual employees range from one to four hours, depending on the size of the total cleaning area. That is, the greater the size, the longer the minimum hours per shift.
- Employees are entitled to overtime rates when they work more than:
 - 7.6 hours a day
 - five days a week, or
 - 38 hours a week.
- Full-time employees who work outside their agreed rostered hours are also entitled to overtime rates.

Employees receive an additional 50% loading for the first two hours and an additional 100% loading thereafter when they work overtime between Monday and Saturday. Employees receive an additional 100% loading for all overtime worked on Sunday. For overtime worked on public holidays, employees receive an additional 150% loading.

There are also a range of loading rates for employees working early morning, afternoon and non-permanent night shifts.

The inquiry found nearly all cleaners in the supermarkets were performing duties listed for the Cleaning services employee level one classification.

Store cleaners employed by Coles Supermarkets are covered by the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011*. This provides uniform conditions of employment for most of its employees.

Workers employed directly by a supermarket, such as IGA employees, who are not covered by an enterprise agreement to clean retail stores, are covered by the *General Retail Industry Award 2010* (the Retail Award).

Relevant features of the Retail Award for the purposes of the inquiry include:

- The minimum daily engagement is three hours for part-time and casual employees, noting a minimum engagement of one-and-a-half hours can apply to full-time secondary school students.
- Overtime rates are available to full-time, part-time and shift work employees.
- Employees (except casuals) who work ordinary hours after 6.00 pm receive a 25% penalty.

- Full-time and part-time employees get a 25% penalty for ordinary hours worked on Saturday. Casuals receive a casual loading and a 10% penalty when they work between 7.00 am and 6.00 pm on Saturday.
- During the period of the inquiry, employees received an additional 100% penalty for all hours worked on Sunday. Casuals don't get their casual loading when they work on a Sunday.¹³
- During the period of the inquiry, employees received an additional 150% penalty for all hours worked on a public holiday. Casuals also receive a casual loading in addition to the penalty, which is calculated on the casual's base pay rate.¹⁴
- Full-time and part-time employees receive a 30% loading when they complete shift work between midnight Sunday and midnight Friday. Casuals receive a 55% loading, which includes a casual loading.
- Full-time and part-time employees receive a 50% loading when they work shift work on a Saturday. Casuals receive a 75% loading, which includes a casual loading.
- Full-time and part-time employees receive a 100% loading when they work shift work on a Sunday. Casual employees receive a 125% loading, which includes a casual loading.

A number of other local, state and federal laws inform the cost of labour in addition to the Act and the Regulations. These include the *Work Health and Safety Act 2012*, the *Workers Rehabilitation and Compensation Act 1988* and the *Food Act 2003*.

Contractors

Independent contractors

Workers can also be engaged as independent contractors to perform cleaning work. Contractors have different tax and superannuation obligations to employees. They are required to have an Australian Business Number (ABN), pay their own tax (including goods and services tax) and superannuation. They do not have statutory leave entitlements and may have to pay for damage made in the course of their work.

Contractors operate their own independent businesses. They have the ability to complete tasks or services as agreed to in their services contract or agreement and are free to accept or refuse extra work.

¹³ Some penalty rates in the Retail Award were varied effective the first full pay period commencing (ppc) on or after 1 July 2017. New penalty rates are being transitioned into the award. The Sunday penalty rate effective ppc 1 July 2017 is 95%.

¹⁴ Some penalty rates in the Retail Award were varied effective ppc on or after 1 July 2017. The public holiday penalty rate effective ppc 1 July 2017 is 125%.

Misclassification occurs when an employer engages a worker as an independent contractor who at law is an employee. Although it may not be deliberate, misclassification can result in an employer contravening the Act in regards to an employee's minimum entitlements and other employer obligations.

Misclassification which is deliberate may also result in sham contracting. Sham contracting arrangements occur where an employer deliberately attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done to avoid responsibility for employee entitlements.

Under the sham contracting provisions of the Act, an employer cannot:

- misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement
- dismiss or threaten to dismiss an employee for the purpose of engaging them to perform the same or substantially same work as an independent contractor
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The Act provides significant penalties for contraventions of these provisions.

The work environment: cleaners

Cleaning is a low-skilled role. It often attracts workers from overseas with limited English and low employment experience in Australia. The inquiry identified particular pressures associated with supermarket cleaning that played a significant role in determining whether a cleaning business retained its contract. These pressures include the expectation that cleaners will be required to work late evenings / early mornings and cleaning is to be completed in short timeframes (at minimal cost).

Workers engaged to clean supermarkets are also subject to a high level of scrutiny in relation to the store cleanliness by the supermarket management and the public. A cleaner is required to scrub, mop and polish the floors, as well as clean windows, toilets (public and staff), lunchrooms, store-rooms, staff offices and car parks.

Cleaning is physically demanding work and it is not uncommon for cleaners to be afforded approximately two to three hours to complete duties to the specifications detailed by the supermarket. Cleaning performance is regularly checked and scored. If scores for the store are at an unacceptable level in any area cleaners are asked to explain why and what they will do to rectify the situation. It is not uncommon for cleaners to report that they do not consider they are afforded sufficient time to complete all the required specifications to a high level.

Our approach

The inquiry aimed to:

- determine the levels of compliance by businesses engaging workers to provide cleaning services at Tasmanian supermarket sites
- enable the FWO to recommend strategies that would address non-compliance through building a culture of compliance within this subsector.

Of the three main supermarket operators who conduct business in Tasmania (IGA, Coles and Woolworths), IGA supermarkets have the highest number of sites in Tasmania. IGA's Tasmanian sites assessed during the inquiry employed their own staff to complete cleaning duties and use local contractors on an ad-hoc but infrequent basis.

In October 2014, Coles stores began directly employing cleaners to undertake the daily cleaning of their Tasmanian supermarket sites and assumed direct responsibility for the lawful minimum entitlements of their employees engaged in cleaning activities.

As Woolworths remained the major supermarket retailer contracting out its cleaning services, procurement arrangements at Woolworths' sites became a focus of the inquiry.

The inquiry relied on powers contained in subsections 682(1)(b) and 1(c) of the Act to examine individuals and businesses involved in the supply of cleaners at the audited Woolworths, Coles and IGA supermarket sites.

These provisions allow FWO inspectors to conduct monitoring, inquiry and investigation activities as per sections 708, 709, 711, 712 and 714 of the Act. This includes conducting interviews and issuing notices to produce records or documents on businesses involved in labour supply chains.

The inquiry formally commenced in late November 2014 and occurred in two phases.

The first phase involved inspectors visiting 15 Woolworths and Coles supermarket sites throughout Tasmania (based on specific intelligence indicating serious non-compliance), speaking with cleaners, and examining records.

Inspectors conducted unannounced site visits at the time cleaners were cleaning each site. Visits typically occurred between 3.00 am and 7.00 am. Inspectors identified cleaning staff at each site and conducted site visit questionnaires with workers. Subject to findings, investigations were then commenced if there was a reasonable view that non-compliance may have occurred.

After the initial site visits and surveys had been completed, it was decided that phase two of the inquiry would focus on 55 supermarket sites (43% of total Tasmanian supermarket sites):

- 31 Woolworths supermarket sites

- seven Coles supermarket sites
- 17 IGA supermarket sites.

This report details the findings of the outcomes of the investigations involving these 55 sites.

Our findings

The primary purpose of the inquiry was to test intelligence received (alleging non-compliance) relating to the procurement of cleaners by three major supermarkets.

As Woolworths was the only major supermarket retailer outsourcing its day-to-day cleaning services, procurement arrangements at Woolworths sites were the chief focus of the inquiry.

With respect to Woolworths sites, the inquiry found multiple contraventions of the Cleaning Award, with 90% of the Tasmanian sites indicating non-compliance¹⁵.

There were seven principal contractors responsible for managing cleaning services at the 31 Woolworths sites:

- four were Tasmanian-based companies (with three having no sub-contracting arrangements in place and directly employing workers)
- one was a franchisee
- two were interstate-based national businesses.

In turn, these principal contractors engaged 10 subcontractors to provide cleaning services to Woolworths sites. The inquiry was unable to confirm the legal identity of two of the 10 subcontractors.

A majority of the cleaners interviewed by inspectors during site visits were:

- unable to provide details as to the nature of their engagement (e.g. status of employment, identity of employer)
- unwilling to advise how much they were being paid
- not receiving payslips
- paid a flat rate for all hours worked
- unaware of the applicable penalty rates under the Cleaning Award
- unable to provide a clear indication of the business which employed them (except to provide a first name and sometimes a mobile number of the person they reported to)

¹⁵ Indications of non-compliance refer to observations by FW inspectors in the course of the inquiry suggesting that contraventions of the FW Act had occurred. While the great majority of investigations were conducted and concluded as a consequence of these observations, in some instances investigations were not able to be finalised due to the liquidation or disappearance of some of the subcontractors, particularly following changes to cleaning contracts by Woolworths in October 2015. Following the announcement of those changes by Woolworths some subcontractors lost their contracts and their businesses ceased trading. The FWO determined not to further pursue investigations or make formal findings of contraventions in those instances.

- from overseas or of a non-English speaking background.

Payment contraventions

Contraventions identified at Woolworths sites included:

- non-payment or incorrect payment of minimum wages, part-time allowances and minimum engagement provisions. Hourly rates for cleaners ranged from \$14 per hour to \$21 per hour with some employees being paid \$7 an hour during a training period
- non-payment or incorrect payment of permanent night shift allowances, and weekend and public holiday penalty rates
- non-payment or incorrect payment of overtime for workers who had worked:
 - in excess of 7.6 hours per day, five days per week or 38 hours per week
 - overtime for the first two hours and for time worked thereafter
 - overtime for Sunday work
- employees not paid weekly, fortnightly or on time.

Some of the rates of pay applicable at the time of the inquiry are set out below and show that the flat rates of pay being offered by sub-contractors to supermarket cleaners were in some cases up to \$26 below the applicable hourly rate.

2014

Employment status	Base hourly rate	Permanent night shift	Saturday	Sunday
Full time	\$18.01	\$23.41	\$27.02	\$36.02
Part time	\$20.71	\$23.41*	\$29.72	\$38.72
Casual	\$22.51	\$27.92	\$31.52	\$40.80 – Schedule A - Existing employee / change of contract \$40.52 – Modern Award - Employee new to the industry

2015

Employment status	Base hourly rate	Permanent night shift	Saturday	Sunday
Full time	\$18.46	\$24.00	\$27.69	\$36.92
Part time	\$21.23	\$24.00*	\$30.46	\$39.69
Casual	\$23.08	\$28.61	\$32.31	\$41.54

*Part-time employees are not paid the 15% allowance when working permanent night shifts.

Rostering breaches

At the majority of Woolworths sites, no rosters were in place and communication between a cleaner and employer was often via text message. Rostering breaches noted in Woolworths stores included:

- not engaging part-time employees in writing with the working hours and days specified
- employees not being rostered two days off per week
- employers not preparing rosters with normal start and finish times.

Payslips and record-keeping

The inquiry found that many contractors were unable to provide records to Fair Work Inspectors, including where these were required to be kept under the Regulations. The breaches found included:

- failure to provide pay slips to employees
- record-keeping breaches such as failure to make and keep required records, as well as the making and provision of false or misleading records. At 52% of sites, the records provided to the inquiry were inaccurate and at 32% of sites, time and wage records were not kept by employers at all.

Woolworths service agreements with its principal contractors

Under the terms of a service agreement that Woolworths has with its principal contractors, all and any subcontractors are required to be approved by Woolworths before they work in a supermarket site. Moreover, the agreements only allow for one level of subcontracting. However, the inquiry found Woolworths regularly failed to monitor that only one level of subcontracting was occurring at its sites.

Case Study

Contractor A¹⁶, a principal contractor for Woolworths, won a tender to provide cleaning services at a Woolworths site. They were to perform cleaning services to this site for \$873.00 per week for 14 hours of cleaning labour per week, including provision of all the equipment and consumables.

Contractor A then contracted the work to Contractor B (a wholly owned subsidiary of Contractor A) who then subcontracted the cleaning work out again to Contractor C. Contractor C was to perform the cleaning services for \$625.00 per week. Contractor C was required to provide all cleaning materials at its cost.

Contractor C engaged its workforce as 'independent contractors', requiring the workers to invoice for hours worked at a flat rate of \$20.00 per hour for 14 hours work per week (\$280.00).

Figure 1: Case study supply chain



Subcontracting

The FWO doesn't hold a view on the respective merits of operating models such as insourcing or outsourcing. The FWO's interest extends only to whether a particular model is lawful and its impact on compliance in the labour supply chain.

However, the FWO's experience is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include the pressures of multiple businesses taking a profit as additional subcontractors are added to the contracting chain, and the perceived ability to hide non-compliance within convoluted business structures.

¹⁶ References to Contractor A, B etc in case studies in this report are de-identified and are not intended to relate to specific entities, and do not suggest that the same company is referred to throughout.

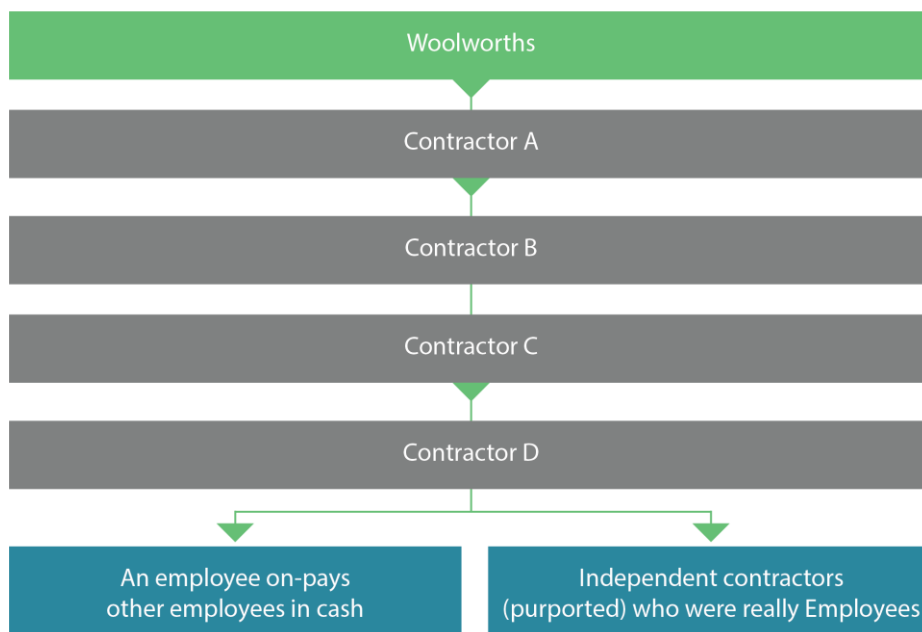
Case Study

Contractor A operated as a principal contractor in Tasmania for cleaning several Woolworths sites. The inquiry encountered significant difficulties in determining the identity of the employer of labour at each of the sites.

There were a number of sites where there was more than one level of subcontracting occurring, with both the principal contractor and subcontractors adding additional levels to the labour supply chain at different times. As an example, at some sites, Contractor A subcontracted to a wholly owned subsidiary, Contractor B. Contractor C (not related to contractors A or B) acting as a 'middle player' then subcontracted to Contractor D. Contractor D then paid an employee on behalf of all workers, and that employee then paid other employees in cash. Contractor D also engaged some purported independent contractors who were really employees.

The multiple layers of people involved in the payment of workers and the insufficient records provided to the inquiry made it difficult for the FWO and the supermarket to identify the true employer in some instances.

Figure 2: Case study labour supply chain



Case Study

Contractor A provided employee time and wage records to the inquiry following two separate notices to produce documents. They indicated all cleaners had received their minimum entitlements.

Comparing the records with the relevant Woolworths' visitors' books and employer bank records (which showed payments to employees) revealed significant discrepancies in worker identities. There were also four levels in the labour supply chain. The inquiry subsequently found that Contractor A provided false records to disguise further subcontracting of labour, which was a clear breach of the Woolworths contract terms.

Contractor A's director provided admissions about the false records to the FWO. However, none of the cleaners from the bottom of the supply chain were willing to 'go on the record' regarding their pay or entitlements, the identity of their employer or the agent who actually employed and paid them.

Accessorial liability – the involvement of others in a breach

One key question for the inquiry was whether any of the supermarkets was involved in supply chain non-compliance.

Section 550 of the Act provides that a person who is 'knowingly involved in' a contravention of a civil remedy provision is taken to have contravened that provision and is exposed to penalties and other orders flowing from that contravention. A person is 'involved in' a contravention if they:

- aided, abetted, counselled, procured or induced the contravention
- conspired with others to effect the contravention
- were in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

Section 550 furnishes the FWO with the power to commence court proceedings against alleged 'accessories' to contraventions. Most commonly, accessories are individuals involved in running the employing entity that committed the contravention (the 'primary contravener'). This may for example include company directors, company officers, human resources officers and professional advisers.

Accessories can also be other businesses in a position of power within the same supply chain as the employing entity, such as a head contractor or franchisor¹⁷.

¹⁷ See joint penalty decision: [Fair Work Ombudsman v Al Hilfi](#) [2016] FCA 193

The inquiry considered contracts across various labour supply chains to assess the contract price, along with the Woolworths benchmarking tool for checking a tender's viability.

The inquiry reviewed the hours of work required and the time that labour was needed (important because penalty rates and allowances apply under the modern award during certain days and times).

In the examples assessed, the Woolworths contract price was sufficient to meet employee minimum entitlements if there were no more than two levels of contracting in place. However, the inquiry noted that Woolworths only passed on 90% of the annual national wage increases to its principal contractors, meaning that the contractor was required to meet an additional amount of wages each year of the contract without additional payment from Woolworths. This increase was not always passed on by the principal contractors to their subcontractors.

The inquiry identified that one principal contractor was taking as much as 45% of the payments from Woolworths, before passing any payments onto subcontractors.

Woolworths confirmed the margin at which it decides whether a contract is sustainable is one that 'can move' in the process of assessing a competitive tender.

The inquiry also noted that the oncost¹⁸ Woolworths factored in was very low, especially bearing in mind that the contract could be further subcontracted on. However, the inquiry did not find evidence that demonstrated that Woolworths was an accessory to the breaches committed by others in the labour supply chain.

At the subcontracting level, the inquiry found subcontractors were told what price they would be paid by the principal contractors and for what supermarket sites. There was no evidence of any genuine negotiations on price between the principal contractor and subcontractors. A number of subcontractors informed the inquiry that they had to accept the price being offered by the principal contractor, or an alternative provider willing to take on the sites at the price they were offering would be sourced.

Case Study

Contractor A was responsible for cleaning multiple supermarket sites and was invited by Woolworths to review its most recent tender and resubmit a 'more competitive' final pricing schedule. This followed Contractor A's submission of a tender which had increased its pricing by 33%.

Contractor A explained that it was unable to revise its pricing due to substantial rises in operating costs, including:

¹⁸ Oncost refers to costs carried by subcontractors such as workers compensation, labour costs if sub contracted, chemicals for cleaning, GST, equipment, insurance etc.

- increases in general insurance, workplace health and safety compliance and workers compensation (despite a 'no-claim' history)
- investments in new labour saving machinery to keep labour costs lower
- prior 'absorption' of annual consumer price index (CPI) increases
- the need to comply with modern award rates, including penalties and allowances
- the need to fund potential redundancies
- the state long service leave act was set to change the eligibility from 15 years to 10 years (effective from 1 July 2012)
- increase in expenses associated with maintaining and travelling to non-metropolitan stores
- enhanced cleaning standards contained in the tender.

Following consideration of the tenders, Contractor A was only retained for one store. Cleaning contracts for the remaining sites were awarded to Contractor B at a lower price than was submitted by Contractor A. Subcontractor B then subcontracted the work to Contractor C.

The FWO investigated the sites awarded to Contractor C during this inquiry and identified serious non-compliance at these sites, including underpayments.

Supermarket policies

On-site identification

The inquiry found it is Woolworths' policy to require all visitors, including cleaners, to sign a visitors' book, recording people in the store at any given time. The inquiry found that this requirement and enforcement of it is often ignored with respect to cleaning staff. No evidence was provided to the FWO of a particular contractor being penalised or questioned about breaching the visitors' book protocol.

Cleaners often signed the visitors' book with the principal contractor's company name. Consequently, the inquiry found it difficult to identify the true employer of cleaning labour at a particular site, date and time.

Inconsistent use of the visitors' books made it very difficult for the inquiry to verify the accuracy of contractor and sub-contractor records and contributed to the sense of an 'invisible workforce'.

The FWO's site visits also found that identification cards were not worn by the cleaning staff as required by Woolworths, and that this was not monitored. Woolworths was unable to provide copies of all the identification cards that should have been issued to all cleaners working in the stores visited by inspectors. Some cleaners advised inspectors that they worked in Woolworths stores without

having completed the relevant induction as required. With no record of them working in the sites, cleaners were open to potential work health and safety risks and exploitation by subcontractors.

While identification cards are issued to cleaners after completing an induction, the inquiry found that Woolworths did not keep accurate records for all employees of subcontractors. The inquiry further found that temporary identification cards could simply be printed off by a sub-contractor and no records were kept of these either. This made it very easy for workers to enter Woolworths sites with no accurate records of them ever performing work.

Woolworths assess whether the subcontractors / cleaners are meeting their contract requirements (the specifications) on a monthly basis. However, it was clear during the inquiry that Woolworths were failing to check the wages and conditions of the cleaners at the same time. For instance, the principal contractors' monitoring was primarily concerned with the cleanliness of the stores rather than compliance with Commonwealth workplace laws.

Case Study

Contractor A, a subcontractor responsible for cleaning multiple Woolworths stores, provided records to the inquiry. These records contained calculations for a small number of employees who the employer admitted had been employed.

When the records were checked against the supermarket's visitors' book, they didn't match and the inquiry found there were actually many more employees who had been underpaid. However, due to poor records and a lack of cooperation from some identifiable employees, the full quantum of underpayments could not be confirmed.

Speaking up

Woolworths operate a 'Speak Up' service. This allows employees and others to report, anonymously or otherwise, any suspicions of worker exploitation.

Woolworths advised the FWO during the inquiry that no calls had been made in relation to cleaners being exploited in Tasmania. During site visits at the 31 Tasmanian sites, no information or notice regarding this service could be identified by inspectors at any store.

Cleaning performance is regularly checked and scored by Woolworths. In Woolworths' stores, quality control is completed via a monthly cleaning check. If the score for the store is unacceptably low in any area cleaners are asked via the head contractor to explain why and how they will rectify the situation. A number of cleaners informed the inquiry that they weren't afforded sufficient time to complete all specifications required at a high level.

Woolworths internal auditing

Woolworths advised that principal contractors are responsible for auditing 5% to 10% of their portfolio sites per year for compliance with workplace laws. Woolworths require the auditors to be approved by them, and where non-compliance is detected, rectification is required by the contractor. However, Woolworths advised the FWO that they could not confirm they had sought to independently check that the sub-contractors were compliant or whether any further documents were checked or kept by Woolworths.

The FWO observed that this auditing system did not adequately measure compliance because the system was vulnerable to influence by the primary contractor and subcontractors, who could choose the sites for audit and had the capacity to influence the information gathered. The FWO also had concern for the level of rigour of the audits conducted and the capacity for these to identify non-compliance.

Case Study

Woolworths requires that principal cleaning contractors audit 5% to 10% of its contracted stores to check their compliance with workplace laws. Woolworths allows its contractors to select which subcontractor(s) to audit.

Contractor A selected one of its subcontractors, Contractor B for an audit. During the auditor's site visit, the auditor noted that there were two people on site cleaning. However, Contractor B advised that he did not have any employees. The auditor accepted that Contractor B did not have any employees and therefore found Contractor B was compliant with his workplace relations obligations.

When inspectors conducted a site visit at this store, they identified Contractor B and one employee of Contractor B, which indicated to the inspectors that the information provided in the course of the Woolworths audit was incorrect.

Hours of work

The inquiry observed that cleaners in Woolworths' supermarkets are typically required to attend work late at night or early in the morning when the store is not open. While the time the cleaners attend is negotiated between the cleaning business and the relevant store manager, cleaners are required to complete their duties prior to the store opening.

The inquiry found Coles cleaning employees work within store opening hours and can be clearly identified as Coles staff by the public. Similarly, cleaning in Tasmanian IGA supermarkets visited by the FWO was performed by employees as part of their everyday duties.

Case Study

An early morning unannounced visit to a Woolworths supermarket highlighted the value of on-site inspections between 3.00 am and 7.00 am when cleaners were performing work. One of the cleaners, who was not wearing any identification or uniform, let the Fair Work Inspectors in to the store. Following a head count of cleaning staff, inspectors identified three cleaners and commenced individual site visit questionnaires with them.

While upstairs interviewing one of the cleaners, inspectors heard a noise from a nearby toilet area and discovered an additional cleaner hiding inside, speaking on his mobile phone. This employee advised inspectors that he started work at 6.00 am, despite the interview taking place at 5.30 am.

Prior to the site visit, the employer had provided documents to the inquiry indicating that two people cleaned this site for two hours each day.

Any large additional cleaning work, such as strip and polish work, is performed outside of store opening hours. Coles engages contractors for major floor strip and polish requirements which occur approximately every three to four months depending on the site's flooring type. The inquiry found that this work is contracted to one principal contractor, the work performance is coordinated by a Coles manager, and Coles staff remain onsite during the work. This suggests that Coles is more likely to be aware of who is carrying out strip and polish work in their store. Nonetheless, measures such as Cleaning Accountability Framework certification would provide an additional level of security against subcontractors failing to meet their workplace relations obligations.

Case Study

Cleaners at one site informed the inquiry that they had endured a very stressful night conducting strip and polish work at a store. The store was not connected to the three supermarkets which are the subject of this inquiry, but a common contractor was involved. The cleaners advised Fair Work Inspectors that they had been locked into the store for the night by the store's duty manager, and were unable to leave the premises until the duty manager arrived at the store the next day. The next day, the cleaners informed their contractor, Contractor A, that this had occurred. Contractor A told them that this was required by the store and he was unable to change it. A referral to Worksafe Tasmania was made due to the FWO's concerns over the employees' work health and safety.

The inquiry observed a number of cleaners from Korea, India, Nepal and Pakistan who were prepared to work for low wages in order to secure employment and work with others from similar cultural backgrounds. Moreover, some workers informed the inquiry that if they were to make a complaint against their employer it would bring shame upon them (the employee) and not the employer.

A number of temporary visa holders were observed to have worked 'off the books' and were paid in cash. Under the *Migration Act 1958*, student visa holders are only permitted to work 40 hours per fortnight while their course is running. The FWO has previously observed in other contexts that employees who were subject to student visas may work 'off the books' by undertaking more hours of work than their visas permitted. This may be initiated by the employee because they perceive that this suits them or by the employer requiring the employee to do so.

Many of the workers at Woolworths sites contacted in this inquiry provided information to Inspectors which indicated that they were vulnerable to coercion, loyal to their cultural community and grateful to have a job in Australia. Many advised the FWO that they felt they would lose their job if they spoke out against their employer and they would struggle to find any employment within their community.

Some overseas students advised Inspectors of the appeal of undertaking cleaning work when they needed additional income as it was an easy way to enter and exit the business. These workers informed the inquiry that contraventions of workplace laws had occurred. However, when Inspectors sought further insights, the same workers were reluctant to provide specific information that would lead to their employer 'getting into trouble' with the FWO.

In the FWO's experience, workers in regional locations may be particularly vulnerable due to high unemployment rates and low levels of workplace law awareness.

Case Study

Seojun¹⁹, a Korean university student employed as a supermarket cleaner in a regional city, was asked by his employer to provide his tax file number so the employer could pay the wages of Seojun's Korean co-workers into Seojun's personal bank account. The wages would be paid at the correct minimum award rate with Seojun not required to work any hours. The employer told Seojun that he would make the wage records appear as if Seojun was working at one of the sites.

The employer then requested that Seojun pay his co-workers from his personal bank account at the agreed rate of \$14.00 per hour and return the surplus wages to the employer in cash. The employer also asked Seojun to return any tax refunds Seojun received to the employer in cash at the end of the financial year.

Once the FWO had commenced an investigation into his employer, the employer further requested that any money paid to Seojun as a result of the FWO inquiry be paid back to the employer in cash once the FWO was satisfied that any underpayments had been made and the matter closed. Seojun said the employer did not want to directly pay the other workers their

¹⁹ All names used in case studies in this report have been changed and do not identify actual individuals.

correct entitlements because he didn't trust that they would return their tax to him at the end of the financial year.

Seojun refused to participate in this arrangement.

Conclusion

The findings of this inquiry indicated that while Woolworths had measures in place to manage the risks of non-compliance in its supply chain relating to cleaning services (for instance, auditing, visitors' books, identification and limits of contracting), the company failed to invest in ensuring these measures were complied with.

By not actively checking to ensure that its principal contractors were complying with the terms of the service agreements, Woolworths failed to properly manage its labour supply chain at the time.

Woolworths also failed to appreciate the dynamics of the market below the principal contractor level.

Based upon the FWO's observations and experience of other labour supply chains, there is little utility in establishing governance arrangements if they are not going to be enforced by active, regular and frequent management interventions.

In practice, the terms of the service agreements Woolworths had secured with its principal contractors were 'optional'.

The passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* has resulted in the increase of penalties for record keeping breaches and 'serious non-compliance'.

The supermarkets subject to this inquiry are on notice of the new powers and penalties at FWO's disposal.

The inquiry has informed a series of recommendations to be considered by Woolworths, Coles and IGA.

The FWO is open to working with these supermarket retailers to ensure that their employees and workers within their supply chains continue to receive their lawful workplace entitlements.

In particular, the FWO is seeking to enter into a compliance partnership with Woolworths that incorporates a range of measures designed to enhance management of its cleaning contractors at all of its sites, not just those in Tasmania.

It is intended that the partnership be modelled on the [existing compliance partnership](#) that regulates Woolworths trolley collecting services. This partnership, underpinned by a proactive compliance deed, has set the benchmark on managing compliance within a labour supply chain. The FWO is keen to implement a similar arrangement to ensure best practice governance arrangements apply to its contracting of cleaning services and thus position Woolworths as a market leader in this domain.

About the Fair Work Ombudsman

The FWO is an independent statutory agency, created by the Act on 1 July 2009.

The FWO supports compliant, productive and inclusive Australian workplaces. The FWO ensures compliance with Australia's workplace laws by:

- offering people a single point of contact to receive accurate and timely advice and information about Australia's workplace relations system
- educating people working in Australia about their workplace rights and obligations
- monitoring compliance with, inquiring into and investigating any act or practice that may be contrary to workplace laws, awards and agreements
- litigating to enforce workplace laws and to deter people from not complying with their workplace responsibilities.

Further information

For media enquiries, email media@fwo.gov.au

Check out our [Strategic Intent](#) and [Compliance and enforcement policy](#) on our website, www.fairwork.gov.au

For more information about our compliance and enforcement activities, please email Lynda McAlary-Smith, Executive Director Compliance and Enforcement at lynda.mcalary-smith@fwo.gov.au

Appendix A - Cleaning Accountability Framework

The Cleaning Accountability Framework (CAF) is an independent, industry-led entity comprised of representatives from across the cleaning supply chain, including:

- property investors, owners and managers
- cleaning companies
- employee representatives
- industry associations
- government agencies
- universities.

The objectives of the CAF are to:

- identify best-practice tendering and compliance approaches in the cleaning industry that support quality-focused cleaning services, fair wages and labour standards, including the management of a national certification scheme
- recognise stakeholders who have implemented best-practice standards.

CAF acknowledges that all those involved in the cleaning supply chain have to work together on improving industry standards. CAF has developed a code of conduct, a procurement toolkit (pricing schedule and industry benchmarks), compliance and auditing tools and a certification scheme.

The purpose of the certification scheme is to focus on labour supply chains in the cleaning sector and to:

- support sustainable business models and responsible contracting practices
- help site owners and investors manage risk by ensuring a company is not indirectly allowing illegal labour practices to occur on its sites
- assist tenants by ensuring they benefit from quality cleaning services
- improve the employment conditions of cleaners.

A property can become CAF certified once all the participants in their cleaning supply chain meet the compliance requirements. The certification scheme has been specifically developed to help property owners, who don't always see the subcontracting arrangements proliferating within their cleaning supply chains, manage the number of contracting tiers and their risk.

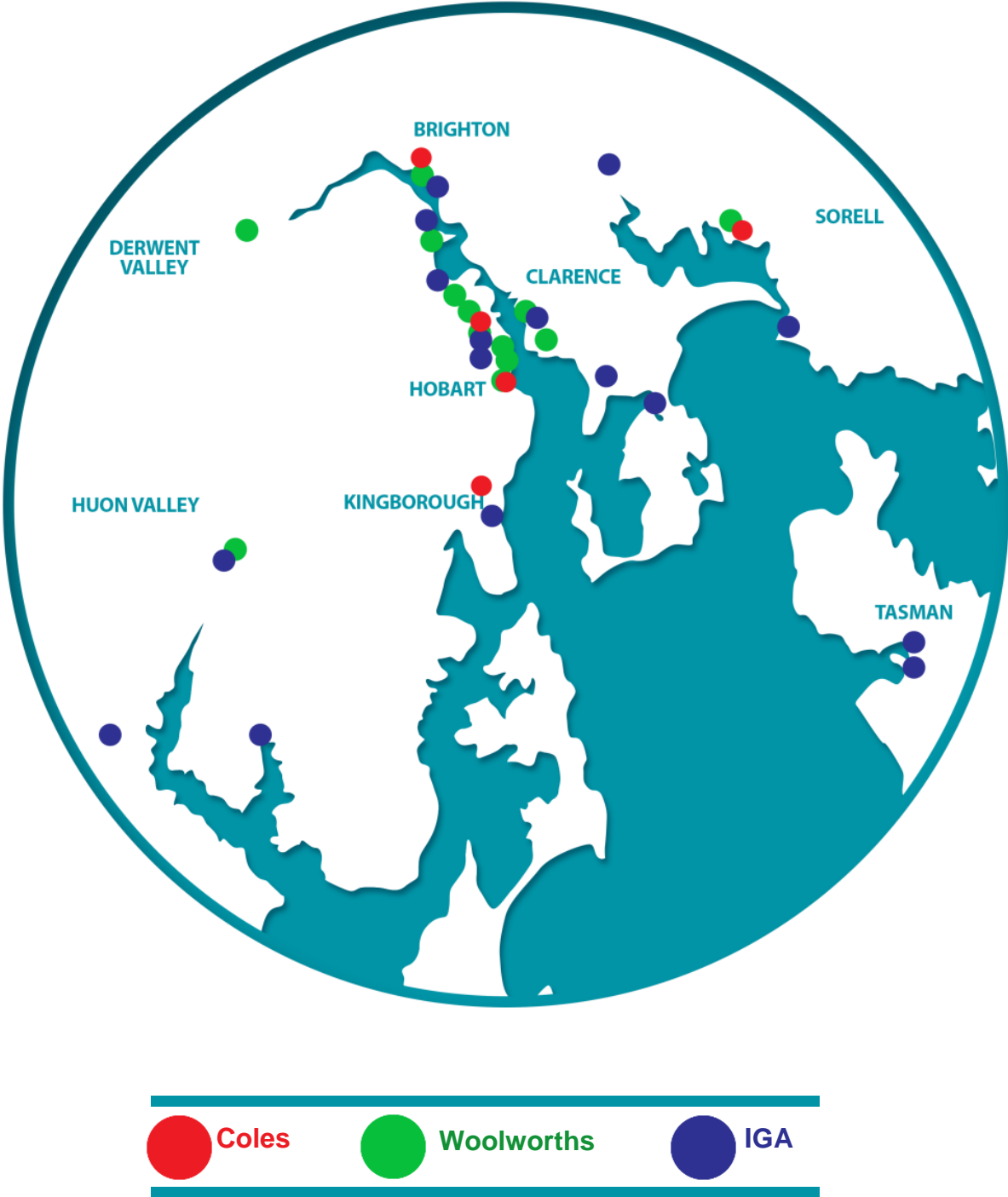
The FWO is a member of the CAF Steering Committee. For further information regarding membership, certification and the resources available via the framework, visit www.cleaningaccountability.org.au.

Appendix B – Inquiry location maps

Map A – Supermarket locations in Tasmania



Map B – Supermarket locations in Hobart



Map C – Supermarket locations in northern Tasmania

