

# USING PUBLIC PROCUREMENT TO PROMOTE BETTER LABOUR STANDARDS

A Case Study of the Victorian Government Schools  
Contract Cleaning Program



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The Centre for Employment and Labour Relations Law was established in the Law School at the University of Melbourne in 1994. Its broad aims are to consolidate the teaching of, and research into, labour law at the University of Melbourne, to contribute to the development of labour law teaching and research throughout Australia, and to engage with labour law scholars throughout the world.

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The views expressed in this report are those of the authors and do not reflect the views of the DET, or any other individual or body associated with the research.

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	iii
1. Introduction.....	1
2. Our Research Agenda .....	2
2.1 Methodology .....	5
3. Origins of the Program .....	6
4. The Program.....	9
4.1 Applications for Panel Status.....	10
4.2 The Standard.....	12
4.3 Assessment of Applications .....	13
4.4 Monitoring Compliance .....	16
4.5 Sanctions and Dispute Resolution .....	17
5. Assessing the Impact of the Program.....	21
6. Areas for Improvement Identified by Interviewees .....	23
6.1 Simplification .....	23
6.2 Monitoring Compliance .....	24
7. The Victorian Government Schools Contract Cleaning Program as a Form of Responsive Regulation.....	24
8. Conclusion .....	28



## **EXECUTIVE SUMMARY**

The Federal Government's Work Choices legislation has severely curtailed the capacity of State Governments to regulate labour practices directly by legislation. Of the possible State Government regulatory responses to Work Choices, it is the use of public procurement as a means for regulating labour standards in the private sector that has been canvassed most extensively. However, there is little consensus on how this might be done most effectively.

This report is a case study of the design and administration of the Victorian Government Schools Contract Cleaning Program, which regulates the procurement of cleaning services in over 1500 schools across Victoria. This program was established in 2005 to address complaints about widespread non-compliance with minimum labour standards applicable to contract cleaners in the industry, as well as problems with the quality of services being provided to many Schools.

The study found that the program is an innovative response to the challenge of using procurement to improve labour standards in a particular industry. Drawing on program documentation and interviews with representatives of government, trade unions, and employers in the industry, we found that the program has many characteristics consistent with a model of 'responsive regulation'. If designed properly, responsive regulation maximises the effectiveness of a regulatory regime by involving stakeholders in standard-setting as well as in monitoring and enforcement of standards. Further, employing a 'regulatory pyramid' which allows regulators to negotiate compliance through provision of information and education while providing for punitive sanctions if necessary, enhances effective enforcement of regulatory goals.

The program achieves some of these ideals by establishing an accreditation process whereby contractors wishing to be considered for Victorian government schools cleaning contracts must apply to be members of a Panel of approved cleaning contractors. The application process is overseen by an assessment committee made up of a number of different stakeholders, including trade unions and a representative of cleaning contractors. Applicants must satisfy the committee of their compliance with

a number of 'Key Assessment Criteria'. These criteria include requirements with headings such as 'Sound practices to promote Occupational Health and Safety', 'sound practices in human resource management', and 'compliance with relevant Industrial Awards/Instruments'.

Although the program is in its infancy, participants in the study were positive about the establishment of the program and its impact on labour standards in contract cleaning in government schools to date. The existence of an active trade union and a strong employers association, along with a well-resourced bureaucracy providing expert assistance and advice, has been important to the success of the program. However, concerns were raised about the difficulty in oversight presented by the sheer number of contractors which have been afforded Panel Status, to date in excess of 800 firms.

Some of these difficulties might be overcome by the establishment of a more formally tripartite monitoring process. Such a process would need to enhance the role of employees and their representatives or other independent monitors in the process of monitoring ongoing compliance by contractors with the labour standards set by the program. This would need to be done in a way which did not undermine the legitimacy of the program in the eyes of contractors.

While the Key Assessment Criteria which set labour standards are adequate given the early stage of this program, the study found that the criteria appear to be fairly static. Program processes do not provide for upward revision of labour standards to reflect improved industry conditions and/or changing community expectations regarding employment arrangements.

While there are some areas where the design and administration of this program could be improved, the report concludes there is enormous potential to extend this model to other areas of government procurement. If State Governments in Australia are to respond to Work Choices in a way which addresses both minimum labour standards and employee 'voice' in the workplaces of government contractors, then the Victorian Government Schools Contract Cleaning Program provides an excellent starting point.

# **USING PUBLIC PROCUREMENT TO PROMOTE BETTER LABOUR STANDARDS**

## **A Case Study of the Victorian Government Schools Contract Cleaning Program**

### **1. Introduction**

State Governments in Australia have long used their purchasing power to encourage actors within the private sector to adopt particular labour standards and practices. This regulatory technique is only becoming more widespread as State Governments seek innovative ways to respond to the Federal Government's recent raft of workplace reforms. Yet, despite the widespread use of public procurement as a regulatory technique and the increasing awareness of labour law scholars to this practice, the ways in which State Governments use this technique remain largely unexplored. This case study focuses on one program through which the Victorian Government has sought to improve labour standards in a particular industry where compliance with industrial minimums was widely recognised as being problematic. In 2005, the Victorian Government introduced the Victorian Government Schools Contract Cleaning Program. Under this program, all contractors who wish to provide cleaning services to Victorian Government schools must demonstrate to the Department of Education and Training that they meet a number of key criteria, including compliance with specified labour standards. This report provides a description and analysis of this program. It is too early to evaluate the overall effectiveness of the program in bringing about improvements in labour standards within the school cleaning industry and, in any case, such an evaluation is clearly beyond the scope of this study. In this report, however, we argue that, while there are areas in which the program design and administration could be significantly improved, the Victorian Government Schools Contract Cleaning Program is an innovative regulatory model with considerable potential to be applied to other areas of government procurement.

The report is structured as follows. Part 2 outlines our research agenda and methodology. In Part 3, we describe the reasons for the program and the context in which it was implemented. Part 4 explains how the program works. It looks in turn at the application process; the role of the LHMU Code; the assessment of applications; the standards which contractors must comply with; monitoring compliance; and sanctions and dispute resolution. In Part 5, we look at the impact of the program on employment practices. Part 6 identifies areas in which the program could be improved. In Parts 7 and 8, we provide a brief evaluation of the program as a form of ‘responsive regulation’ and discuss the potential for the program to be extended to other areas of government procurement.

## **2. Our Research Agenda**

The research presented in this report forms part of a broader study by the authors into the use of ‘light touch’ labour regulation by the Australian states.<sup>1</sup> This study has investigated the various ways in which State Governments seek to influence private sector labour practices other than through formal labour law systems. The procurement of goods and services by governments in order to carry out their functions provides Governments with the opportunity to regulate labour standards through the leverage it enjoys by virtue of its purchasing power. Despite the extensive use of public procurement to promote labour standards by both the federal and State Governments, there has been little empirical analysis of how this is done or of the extent to which such regulatory techniques are effective in achieving social change.

The case study into the Victorian Government Schools Contract Cleaning Program presented in this report was conducted to provide insight into these issues. We were interested in why and how the program was developed; who was involved in the design and administration of the program; and how actors within the program viewed its legitimacy and effectiveness.

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<sup>1</sup> For an overview, see J Howe and I Landau, ‘Light Touch Labour Regulation by State Governments in Australia: A Preliminary Assessment’, *Working Paper No 40*, Centre for Employment and Labour Relations Law, University of Melbourne, 2006

We were also interested in the extent to which this program was an effective form of regulation. Effectiveness can, of course, be assessed in a number of ways. Economists may evaluate a government program, for example, purely from the perspective of economic efficiency or ‘value for money’.<sup>2</sup> In public policy, value for money is often assessed against the extent to which it obtains a minimum level of service for the lowest price. Successful achievement of social goals, a desirable and legitimate outcome for government, may not be economically efficient on this definition. An alternative way of assessing the effectiveness of various forms of regulation in achieving both social and economic goals, and the one used in this study, is to assess it against a normative model of *responsive regulation*. For Ayres and Braithwaite, who first developed this model, in order for regulation to be effective in aligning private sector or market behaviour with public goals, it must be responsive to complex regulatory environments and the interests of stakeholders.<sup>3</sup> Responsive regulation can both enhance the success of government policy, thus going some way to justifying public expenditure on implementation of the policy, and improve the extent of participatory democracy in a society. Responsive regulation consists of a number of elements. First, responsive regulation provides for the participation of interested parties in regulatory regimes. In the labour law context, this means that the regulatory process facilitates the involvement of the state, business and employee representatives in developing and setting standards, monitoring compliance and so on.<sup>4</sup>

A second key element of responsive regulation is the notion of an ‘enforcement pyramid’ (see Figure 1, page 4). Responsive forms of regulation will involve a number of stages in enforcement. The base of the pyramid represents the least intrusive forms of intervention: for example, regulation through provision of information, education and persuasion. At the apex of the pyramid are punitive sanctions such as penalties for non-compliance with legal rules and norms enshrining rights and standards as non-negotiable minimums. In between might be other ‘steps’

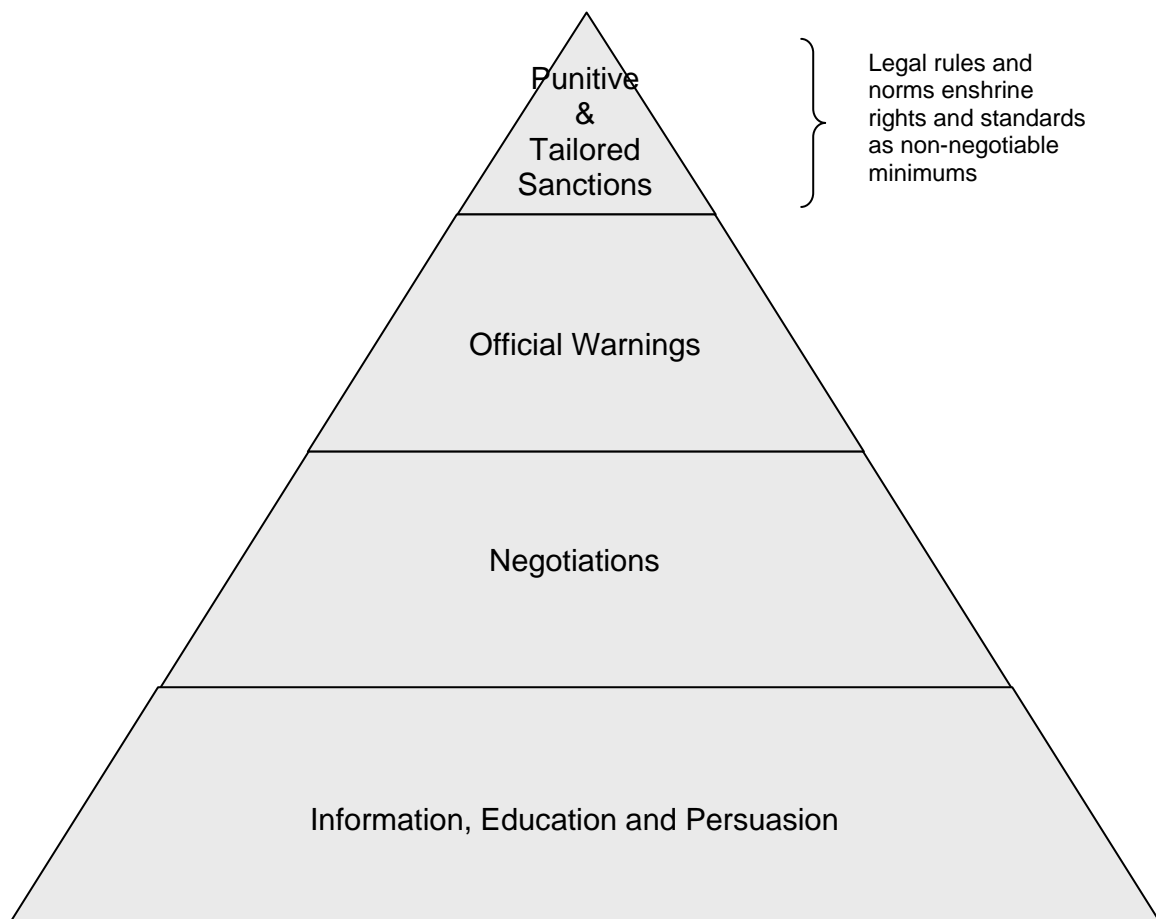
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<sup>2</sup> J Howe, “‘Deregulation’ of Labour Relations in Australia: Towards a More ‘Centred’ Command and Control Model’ in C Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 147, 151–2.

<sup>3</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>4</sup> *Ibid* 57–60; C Estlund, ‘Rebuilding the Law of the Workplace in an Era of Self-Regulation’ (2005) 105 *Columbia Law Review* 319; Howe, above n 2, 152.

in the enforcement of regulatory norms, such as the use of negotiation and official warnings of future application of sanctions. It is the availability of more punitive sanctions at the apex that ensures the effectiveness of the less intrusive techniques.<sup>5</sup> If necessary, regulators might need to escalate enforcement by choosing approaches closer to the apex of the pyramid. However, frequently the most effective way for governments to achieve behavioural change is for employers to *choose* to comply with relevant rights and standards, *without* the application of sanctions. The pyramid therefore contemplates other regulatory strategies that the state might use which enhance the legitimacy of regulation, often necessitating collaboration with other regulatory actors such as workers and their trade unions, to achieve the desired change in a manner that is responsive to the circumstances of businesses and the needs of workers.



**Fig 1: The Enforcement Pyramid<sup>6</sup>**

<sup>5</sup> Ayres and Braithwaite, above n 3.

<sup>6</sup> Diagram adapted from Ayres and Braithwaite, above n 3.

## **2.1 Methodology**

The case study was designed to answer a series of questions relating to the design, administration and perceived impact of the Victorian Government Schools Contract Cleaning Program. More specifically, we wanted to find out exactly what labour practices the Government seeks to regulate through this program. We wanted to know how the Government designed the program to achieve its objectives, and we also wished to examine how the program operates in practice, so we could assess it against the model of responsive regulation described above.

The data for this study was gathered in two principal ways. First, we drew upon documentary evidence. This included the rules and guidelines produced by the Victorian Department of Education and Training (DET) for potential applicants; the detailed application forms; and model contracts.

Secondly, we conducted semi-structured interviews with a number of individuals who were involved in the design and/or administration of the program.<sup>7</sup> Selection of interviewees was based upon information provided by DET regarding their involvement in the program. We asked all of the interviewees questions about the structure of the program, what processes need to be followed in the administration of the program, and the content of criteria used in the administration of the program. These questions were tailored to take account of the nature of each interviewee's involvement with the program. All interviewees were asked about their views on the positive and negative aspects of the design and administration of the program, and were asked to comment on the impact of the program. We also sought the opinion of interviewees on whether the program design could be implemented in other areas of government procurement.

Interview subjects were selected on the basis of their capacity to provide different perspectives on the program and their willingness to participate. From the Victorian Government, we interviewed a representative from the Minister of Industrial Relations' Office; several employees of Industrial Relations Victoria (IRV); and two

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<sup>7</sup> We undertook to keep the identity of interviewees confidential as far as practicable, and to this end the participants are referred to as 'Interviewee 1' through to 'Interviewee 9'.

representatives from the DET's School Contract Cleaning Unit. We also interviewed the Chair of the Contract Cleaning Assessment Committee (CCAC) - the committee established to assess applications for Panel Status – who is an Executive Member of the Victorian Principals Association (VPA).

To obtain the views of the relevant employees' and employers' associations in the industry, we interviewed a representative from the Liquor, Hospitality and Miscellaneous Union (LHMU) and a representative from the Building Services Contractors' Association of Australia (BSCAA), both of whom had been involved in the program from the initial design stage.

Finally, we interviewed two employers who had applied for and received Panel Status. It must be noted that this is a tiny sample of the total number of contractors who have received Panel Status. We approached several other contractors for interviews. However, for various reasons, these contractors declined to participate in the study. Nevertheless, the two interviews that we were able to conduct, when combined with the information provided by the BSCAA, ensured that we had access to some information from the perspective of contractors. As will be explained in more detail below, the program classifies employers into two categories: a 'contractor with employees' or a 'proprietor labour contractor'. The first employer we interviewed was classified as a 'contractor with employees'. The interviewee was a director of a large cleaning company that has been in operation for over twenty years and employs several hundred staff. The company provides cleaning services to schools and tertiary educational institutions and to commercial premises. The second contractor we interviewed is classified as a 'proprietor labour contractor'. The interviewee runs a small family business with four to five cleaners. The company provides cleaning services to several public schools and to offices. Both companies provided cleaning services to public schools prior to the introduction of the Program and continue to do so today.

### **3. Origins of the Program**

The Victorian Government Schools Contract Cleaning Program was introduced in response to the failure of the contract cleaning system introduced by the Kennett

Government to ensure both acceptable labour standards within the school cleaning industry and clean schools. In the early 1990s, the Kennett Government sought to reduce budgetary costs in the Directorate of School Education by terminating all government-employed school cleaners. Government schools were prohibited from engaging cleaners as school employees. Rather, they received an allocation of funds and were required to engage a contract cleaning company to perform cleaning services.<sup>8</sup> At the same time, the amount of funds allocated to cover cleaning services was more than halved and the school cleaning inspectorate, responsible for ensuring adequate standards of cleanliness in schools, was reduced dramatically.<sup>9</sup>

In 2004, the LHMU published a report documenting the negative impacts of the Kennett reforms on government schools and on those who clean them.<sup>10</sup> This report, which was based on an audit of 45 schools by the LHMU, found that the current system was suffering from a lack of effective regulation. The low levels of funding provided to schools to engage contract cleaners, combined with a lack of knowledge and experience amongst school principals on securing tenderers, led to a ‘race to the bottom’ as school principals accepted the lowest bid offered, regardless of whether, at the price of the contract, the tenderer could feasibly deliver acceptable standards of service and comply with their obligations under labour law. The LHMU report reached two principal conclusions. First, cleaners who provided services to government schools were often paid below the minimum wage, lacked basic occupational health and safety standards, and were denied basic employment entitlements such as annual leave and superannuation. Second, schools were not being cleaned to the satisfaction of key stakeholders in the school community.<sup>11</sup> The LHMU Report advocated a response consisting of additional funding and a Government-endorsed Code of Conduct for school cleaning.

The LHMU report was effectively crafted to emphasise the failure of the school cleaning contract system to benefit any of the key stakeholders: schools, students and parents, the State Government, reputable contractors and the cleaners themselves. The

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<sup>8</sup> This allocation is formulated according to the number of square meters to be cleaned in the property and the number of students enrolled at the school.

<sup>9</sup> J Walsh, ‘Dirty Schools, Forgotten Cleaners: The Injuries of Victoria’s Failed Experiment in Contract School Cleaning’, Research Report, LHMU, Melbourne (Undated) 4.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid v.

report, which received widespread media attention,<sup>12</sup> was accompanied by strong LHMU lobbying of the Minister for Education Services.

In response to union concerns and to increasing dissatisfaction in the wider community, the Minister for Education Services, Ms Jacinta Allan, directed the DET to develop a program in response to these concerns in conjunction with IRV.<sup>13</sup> The initial design stage of the program involved the establishment of a committee of stakeholders, including the Department of Treasury and Finance (DTF), IRV, DET, the LHMU and a number of representative groups from the public education community.<sup>14</sup> According to representatives from the DET, there was a lot of good will surrounding the initial design process as the proposed reforms were seen as benefiting all stakeholders.<sup>15</sup> While this process did not, in the end, finalise a model, it was, according to one interviewee, instrumental in identifying the issues at stake and identifying the interests and concerns of those who were familiar with the needs of the schools and cleaning industry.<sup>16</sup> The model that was eventually adopted, however, was developed and agreed upon by the Minister of Industrial Relations Office and the LHMU.<sup>17</sup> The model does not have a statutory basis, rather it appears to be an initiative established through Ministerial policy statement and departmental action. The parameters of the program were set through the adoption and promulgation of administrative policy documents.

The program was announced publicly in April 2005 by the Education Services Minister, Jacinta Allan.<sup>18</sup> It was to be accompanied by an injection by the State Government of an additional \$10 million a year to help offset the cost impact to schools of a 15% pay increase for cleaners.<sup>19</sup> The annual budget for administration of

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<sup>12</sup> See, eg, P Beauchamp, 'Schools in Filthy State', *Herald Sun* (Melbourne), 26 October 2004, 9; F Tomazin, 'Students Hold On as Cleaners Cut Back', *The Age* (Melbourne), 27 October 2004, 9; 'Study Finds Schools Far From Spic and Span', Australian Broadcasting Corporation (ABC) News, 26 October 2004; F Tomazin, 'Exposed: Dishonest Cleaners Make Schools a Health Hazard', *The Age* (Melbourne), 26 October 2004, 1.

<sup>13</sup> Interviewee 1, Interviewee 3 and Interviewee 4.

<sup>14</sup> Interviewee 1.

<sup>15</sup> Interviewee 3 and Interviewee 4.

<sup>16</sup> Interviewee 1.

<sup>17</sup> Interviewee 1.

<sup>18</sup> See 'More Money, Better Standards for School Cleaners', Media Release from the Minister for Skills and Education Services, Thursday 21 April 2005.

<sup>19</sup> Interviewee 3

the program through the DET's School Contract Cleaning Unit has been approximately \$600 000.<sup>20</sup>

The model was based on a similar program that had been developed by the LHMU in the Australian Capital Territory and adopted by the ACT Government.<sup>21</sup> The program was modified, however, to suit the Victorian context. For example, the process was adapted to make allowances for the relatively high numbers of small or 'mums and dads' cleaners operating in Victoria.<sup>22</sup> The basic documentation for the program, such as the rules and guidelines provided to applicants and the model contracts, were drawn up by a large consulting firm.

The documentation consists of:

- Application by School Contract Cleaners for Panel Status: Information Sheet and Glossary of Terms;
- Rules and Guide for Application by Contract Cleaners for School Panel Status; and
- Model Departmental Panel Cleaning Agreement.

#### **4. The Program**

The key innovation of the program was to establish a system of accreditation for cleaning contractors in Victorian Government schools. From 1 July 2005, contract cleaning companies were informed that as of 1 July 2006, all cleaning contractors who wished to be considered for Victorian Government schools cleaning contracts were required to be members of a Panel of approved cleaning contractors: that is, to gain 'Panel Status'. Contractors were invited to submit an application for Panel Status to the DET. Schools were prohibited from engaging contractors after 1 July 2006 that had not been granted Panel Status by the DET. There are currently 822 contractors with Panel Status: 561 Proprietor Labour Contractors and 261 Contractors with

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<sup>20</sup> Interviewee 5.

<sup>21</sup> See ACT Government, 'Pre-Qualification Status for Cleaning Contractors: Department of Education and Training', 22 April 2006. Available from <[www.basis.act.gov.au](http://www.basis.act.gov.au)>. See also the ACT Cleaning Industry Code of Best Employment Practice.

<sup>22</sup> Interviewee 3 and Interviewee 4.

Employees.<sup>23</sup> A diagram setting out the various steps in the application process is included at the conclusion of this section of the report (Figure 2).

#### **4.1 Applications for Panel Status**

Details of the application process are available in several languages from the DET's School Contract Cleaning website.<sup>24</sup> The application process is governed by a series of guidelines which are available from the same website (the Program Guidelines). Contractors may apply either as a 'Contractor with Employees' or as a 'Proprietor Labour Contractor'. There are different requirements depending upon the category under which an application is made. 'Proprietor Labour' is defined as:

- (a) an applicant who is operating as a sole trader or as a partnership of up to two partners, that does not have employees;
- (b) an applicant operating as a sole trader or as a partnership of up to two partners, that employs a maximum of four persons to perform services, and those employees are exclusively, themselves, their parents, spouse or children; or
- (c) an applicant operating as a company engaging up to a maximum of four employees, and those employees are either shareholders of the applicant or the parents, spouse or children of a shareholder,

provided that:

- (i) the applicant must never have more than 4 people working in the business performing services, including any sole trader, partners or employees; and
- (ii) during the time it has Panel Status the Applicant must continue to operate within the above definitions.

There is no application fee. Receiving Panel Status does not guarantee a contractor a school cleaning contract. Schools continue to have the responsibility for securing tenders and managing cleaning contracts.<sup>25</sup>

Under the Program Guidelines, cleaning contractors who wish to apply for Panel Status must provide documentary evidence that they meet the Key Assessment Criteria. A feature of the program is that, while signatories are not required to sign the LHMU Code of Best Practice Employment Agreement 2005 – 2008 (the Code), signatories to the Code are exempt from having to provide evidence for some of these

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<sup>23</sup> Figures provided by School Contract Cleaning Unit.

<sup>24</sup> See <<http://www.sofweb.vic.edu.au/cleaning/>>

<sup>25</sup> The DET provides schools with a model contract, which must be completed between the school and the successful tenderer. This 'School Cleaning Services Agreement' may be modified by the signatories.

key criteria. The Code is a model enterprise agreement developed by the LHMU. It requires signatories to comply with the *Building Services (Victoria) Award 2003*; to provide a safe workplace and to ensure good communication between the employer and union; and to follow the specified dispute resolution process. Signatories to the Code are not required to submit detailed evidence of compliance with components of the industrial award requirements and some of the occupational health and safety requirements, on the basis that the DET is satisfied that Code signatories meet these standards.<sup>26</sup> Applicants must also provide the DET with a completed Statutory Declaration and two signed copies of the Department Cleaning Panel Agreement.

During the design process, the LHMU favoured a model whereby companies would be required to provide substantial documentation on their industrial relations practices directly to DET for assessment.<sup>27</sup> However, this was rejected by DET on the basis that contractors were reluctant to make their records accessible to the LHMU (which, as is explained below, is a member of the assessing committee), who could then use them for recruitment and campaign purposes.<sup>28</sup> To mollify these concerns, the program involves a mechanism whereby contractors submit the documentary evidence required to accountants who have been approved by DET for verification.<sup>29</sup> Nonetheless, if problems arise in relation to a specific application, the documentation provided by the contractor may be scrutinised by the body responsible for assessing applications, the Contract Cleaning Assessment Committee (CCAC).<sup>30</sup> The LHMU is sceptical that the current verification process adequately ensures that contractors are fulfilling their industrial relations obligations.<sup>31</sup> Ironically, the BSCAA is equally sceptical that contractors who sign the LHMU code are complying with their obligations.<sup>32</sup>

To date, only two or three contractors have chosen to sign the LHMU's Code.<sup>33</sup> Neither of the two contractors interviewed in this study had signed an enterprise

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<sup>26</sup> LHMU Code of Best Employment Practice Agreement, 2005.

<sup>27</sup> Interviewee 6.

<sup>28</sup> Interviewee 3.

<sup>29</sup> Interviewee 3 and Interviewee 4.

<sup>30</sup> Interviewee 3. The role of the CCAC is discussed in more detail later in the report.

<sup>31</sup> Interviewee 6.

<sup>32</sup> Interviewee 7.

<sup>33</sup> Interviewee 3 and Interviewee 4. This is in contrast to the ACT model where, according to the LHMU, around 85% of the cleaning industry were signatories to the Code in 2003. See 'Cleaners win Code of Practice for Responsible Contracting': LHMU News, 8 October 2003.

agreement with the union. The contractor with proprietor labour said that he paid his employees above-award rates and did not believe the Code was relevant to a small business such as his. The large employer explained that BSCAA had warned their members not to sign up to the Code. Both employers cited concern over providing the LHMU with access to their employment records as a key reason for not signing up to the Code.

#### **4.2 The Standard**

The program guidelines require applicants to provide evidence that they comply with the following Key Assessment Criteria:

1. Sound practices to promote Occupational Health & Safety;
2. Sound practices in human resource management;
3. Compliance with relevant Industrial Awards/ Instruments;
4. Ability to effectively manage contractual commitments; and
5. Ability to provide client focussed services.

There are several key components of the industrial relations requirements that fall under the first three Key Assessment Criteria outlined above. First, under Key Assessment Criterion 3, applicants are required to demonstrate a commitment ‘to meet or exceed’ the requirements of the *Building Services (Victoria) Award 2003*. This effectively designates the award conditions as the minimum standard within the industry. Key Assessment Criteria 2 and 3 outline what applicants must address in order to demonstrate ‘sound practices’ in the areas of occupational health and safety and human resource management. For example, in order to satisfy Criterion 3, applicants must provide evidence of ‘compliance and commitment to an equal opportunity and harassment-free workplace’, details of management qualifications and structure, and so on.

For each Key Assessment Criterion, the program documentation identifies the precise evidence that must be submitted to prove compliance. For example, in relation to Key Assessment Criterion 2, applicants are required to attach a copy of their written policies which support Equal Employment Opportunity (EEO) and are encouraged to implement the policies when working at a school. Applicants are also asked to provide evidence that

EEO policies have been communicated to staff. Proprietor Labour Contractors are exempt from providing evidence on a number of the criteria. Significantly, given our focus on labour standards, Proprietor Labour Contractors are exempt from providing evidence regarding Key Assessment Criterion 3, although these contractors must satisfy some aspects of Key Assessment Criteria 1 and 2.

Contractors with Panel Status are also required to comply with the Victorian Government's general procurement policies and guidelines, including the Ethical Purchasing Policy.<sup>34</sup> This policy establishes an Ethical Employment Standard, which requires persons who supply goods and services to the Victorian Government to meet its obligations to its employees under applicable industrial instruments and legislation.<sup>35</sup>

### ***4.3 Assessment of Applications***

The first mechanism by which the program seeks to enforce the standards is through the application process. Applications are assessed against the Key Assessment Criteria by the Contract Cleaning Assessment Committee (CCAC). The negotiation of the CCAC membership was, according to one DET representative interviewed, one of the most challenging aspects of the program design.<sup>36</sup> The final composition of the CCAC is tripartite: there are two representatives from the LHMU, one representative from BSCAA; and three representatives from school organisations: one from each of the Victorian Principals Association (VPA), the Victorian Association of State Secondary Principals (VASSP), and the Australian Education Union (AEU).<sup>37</sup>

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<sup>34</sup> See Panel Agreement, [10]. The Ethical Purchasing Policy is available from <[www.vgpb.vic.gov.au](http://www.vgpb.vic.gov.au)>.

<sup>35</sup> In November 2006, the Victorian Government introduced the 'Ethical Purchasing Policy – Mandatory Safety Net for Nominated Sectors', in response to Work Choices. This policy applies to 'vulnerable sectors' including cleaning services, where the purchase of the goods or services is valued in excess of the public tender threshold (currently \$102, 500). While the relevant Guidelines for this policy are yet to be published by the Government, the policy would appear to strengthen the standards for contract cleaners through imposing a standard by which contracts must provide their employees with terms and conditions of employment which are 'no less favourable' than those provided prior to the introduction of Work Choices. See 'Ethical Purchasing Policy – Mandatory Safety Net for Nominated Sectors', available from <[www.business.vic.gov.au](http://www.business.vic.gov.au)>. This new policy will apply to contractors with Panel Status by virtue of clause [10.4] of the Panel Agreement, which stipulates that clause 10 shall be deemed to change automatically in accordance with and at the same time as any amendment to the Ethical Purchasing Policy.

<sup>36</sup> Interviewee 3 and Interviewee 4.

<sup>37</sup> Interviewee 3.

The CCAC may approve, reject or provide deferred conditional approval to an application (under the latter, approval is only effective from the date that the contractor has satisfied a particular requirement). The CCAC makes its recommendations concerning the assessment of applications and the ongoing Panel Status of applicants to DET. The Deputy-Secretary of the DET makes the final determination and is not bound to follow the CCAC's recommendations. It appears that DET has generally followed CCAC recommendations, with some exceptions.<sup>38</sup>

Very few applications have been rejected outright by the CCAC.<sup>39</sup> A great deal of work has generally gone into the pre-screening of applicants by the contract cleaning unit. As a result, by the time the applications reach the CCAC, they generally conform with the Key Assessment Criteria.<sup>40</sup> In cases where the CCAC has found applications fail to fulfil the criteria, they have generally kept the applications on the table until they are rectified.<sup>41</sup> Where applicants have been rejected, according to DET representatives, this has been because the personal qualities of the applicants were not deemed suitable for employment in a school context or because the quality of service they provided was considered consistently sub-standard.<sup>42</sup> Nonetheless, a number of interviewees referred to anecdotal evidence to suggest that some contractors had simply not bothered to apply for Panel Status as they did not believe they could fulfil the Key Assessment Criteria.<sup>43</sup>

Compliance with the Building Services Award seems to be the most important of the Key Assessment Criteria pertaining to labour standards or practices. This signifies that compliance with minimum standards is the focus of the CCAC. We found little evidence that the CCAC places much emphasis on applicants' human resource management practices (another Key Assessment Criterion). This, and the fact that the Guidelines do not address desired human resource management practices other than the existence of an EEO policy, suggests that the program is not used to identify and

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<sup>38</sup> Interviewee 3 and Interviewee 4.

<sup>39</sup> Interviewee 3 and Interviewee 4.

<sup>40</sup> Interviewee 3 and Interviewee 4.

<sup>41</sup> Interviewee 3 and Interviewee 4.

<sup>42</sup> Interviewee 3 and Interviewee 4.

<sup>43</sup> Interviewee 3 and Interviewee 4.

encourage adoption of appropriate working conditions or forms of work organisation ‘above the floor’ of minimum standards.<sup>44</sup>

The requirement that a contractor meet or exceed the minimum labour standards set out in the Building Services Award provides a challenge to the CCAC when the contractor is using an alternative industrial instrument. Applicants who are party to other industrial instruments, such as collective enterprise agreements or Australian Workplace Agreements (AWAs) which are negotiated between employers and individual employees, must provide DET with a copy of this agreement. In the year of its operation, there have been several applications for Panel Status by contractors who use AWAs.<sup>45</sup> In such cases, the CCAC is faced with the challenge of determining whether the provisions within the agreement ‘meet or exceed’ those in the relevant award. The LHMU has on several occasions challenged workplace agreements on the basis that they fail to comply with the minimum standards in the relevant award.

In such cases, the CCAC applies a process to the assessment of instruments used by contractors that is, in essence, similar to the now-defunct ‘no disadvantage test’ that was used to vet enterprise agreements under the *Workplace Relations Act 1996* (Cth) prior to Work Choices.<sup>46</sup> In performing this task, the CCAC has requested advice from the Office of Employment Advocate (OEA)<sup>47</sup> (the regulatory agency responsible for vetting AWAs against the no disadvantage test prior to Work Choices), Industrial Relations Victoria (IRV) and, more recently, the Victorian Workplace Rights Advocate (VWRA).<sup>48</sup> Nonetheless, the CCAC itself has also continued to play a key role in determining whether or not an agreement complies with the minimum standards. For example, despite receiving advice from the OEA to the effect that a

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<sup>44</sup> ‘Above the floor’ standards or practices might include availability of family friendly working arrangements not provided for in the relevant award. The distinction between minimum standards and ‘above the floor’ standards is discussed in greater detail in S Cooney, J Howe and J Murray, ‘Time and Money Under Work Choices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Journal* 215.

<sup>45</sup> Interviewee 3, Interviewee 4 and Interviewee 5.

<sup>46</sup> The no-disadvantage test was designed to protect employees from reduction in employment conditions through bargaining. The test was applied to both collectively bargained enterprise agreements (by the Australian Industrial Relations Commission (AIRC)) and to AWAs (by the Office of the Employment Advocate (OEA)). Neither the AIRC nor the OEA were permitted to register any enterprise bargaining agreement which disadvantaged employees when compared to an award ‘safety net’ and statutory minimum standards.

<sup>47</sup> Interviewee 3 and Interviewee 4.

<sup>48</sup> Interviewee 1 and Interviewee 6.

particular AWA complied with the standards in the award, the CCAC rejected the advice on the basis that the OEA had taken an ‘overall’ approach and the CCAC preferred to look in turn at each provision.<sup>49</sup> To date, contractors who have used AWAs have generally been willing to change their industrial practices to conform to the award standards in order to facilitate the passage of their application.<sup>50</sup>

#### **4.4 Monitoring Compliance**

Through signing the Department Cleaning Panel Agreement, a contractor undertakes to satisfy the applicable Key Assessment Criteria and the Ethical Purchasing Policy on an ongoing basis. Notwithstanding the existence of this legal obligation, the maintenance of an effective regulatory regime in any field is dependent upon adequate monitoring and evaluation of compliance to ensure that regulatory goals are being met.<sup>51</sup> In the case of the Schools Cleaning Program, it appears that there are two mechanisms for monitoring and evaluating the program. The first is a formal monitoring role for the DET. The Panel Agreement notes that the applicants may be subject to audits, for the purposes of checking the accuracy and completeness of the application and the applicant’s ongoing compliance with the agreement and Key Assessment Criteria.<sup>52</sup> Contractors who are signatories to the LHMU Code and who comply with the audit requirements in the Code are not subject to the general DET audit. The DET may conduct audits for the purposes of checking: (a) the accuracy and completeness of the Application; and/or (b) ongoing compliance with the Agreement and with the Guide; and/or (c) that the contractor continues to meet a level of compliance with the Key Assessment Criteria which is satisfactory to the Department.<sup>53</sup>

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<sup>49</sup> Interviewee 3 and Interviewee 4. For a discussion of the approach taken by the OEA in the application of the no disadvantage test, see R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, *Protecting the Worker’s Interest in Enterprise Bargaining: The ‘No-Disadvantage Test’ in the Australian Federal Industrial Jurisdiction – Final Report*, Workplace Innovation Unit, Industrial Relations Victoria, 2004.

<sup>50</sup> Interviewee 3 and Interviewee 4.

<sup>51</sup> The importance of monitoring and evaluation as an aspect of responsive regulation of employment matters is emphasised by Estlund, above n 4.

<sup>52</sup> Panel Agreement, [9].

<sup>53</sup> Panel Agreement, [9.1].

Although the program documentation provides for regular audits, these have not yet been implemented. To date, it has largely been left to the schools to ensure a contractor's compliance with the terms and conditions of the agreements.<sup>54</sup> The DET has, however, developed two audit processes and plans to implement these in 'Stage Two' of the program's development (in 2007). One of these audits is concerned with auditing financial documentation (including, for example, payslips) and the other is concerned with the quality of services provided. The CCAC has identified a number of applicants which, although they have been granted Panel Status, are flagged to be 'early audit targets'.<sup>55</sup>

In addition to the Department's 'audit' function and any monitoring conducted by schools, the LHMU monitors compliance by contractors who are signatories to the LHMU Code of Best Practice. Under the terms of the Code, an enterprise agreement between the contractor and the LHMU, the LHMU is empowered to monitor compliance with the award on an ongoing basis.

It also appears that monitoring may occur on a less formal basis, where the LHMU raises possible cases of non-compliance by Panel contractors, or where Panel contractors complain about non-compliance by rival Panel members. To date, where concerns have arisen in relation to allegations of non-compliance, these appear to have been resolved pursuant to CCAC directions, through the DET's Contract Cleaning Unit.<sup>56</sup>

#### ***4.5 Sanctions and Dispute Resolution***

The key sanction available for the enforcement of the labour standards set by the program is of course the denial of Panel Status. Once an applicant achieves Panel Status, the heaviest sanction available in case of non-compliance with the labour standards agreed to by the contractor is revocation of Panel Status. A company will maintain Panel Status indefinitely unless the contractor is not engaged by a school for

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<sup>54</sup> Interviewee 3 and Interviewee 4.

<sup>55</sup> Interviewee 3 and Interviewee 4.

<sup>56</sup> Interviewee 5.

a period of two years or DET revokes the Panel Status under the terms of the Department Cleaning Panel Agreement.

The DET retains considerable discretion as to whether to revoke Panel Status in the case of non-compliance with the terms of the Panel Agreement, including where the contractor ‘seriously or wilfully fails to comply with the Key Assessment Criteria’. The DET may, for example, consider the number of instances of non-compliance or whether remedial action can reasonably be taken to prevent further instances of non-compliance in the future. It does not appear that there have been any revocations of Panel Status to date.

As noted earlier, contractors with Panel Status are also required to comply with the Victorian Government’s general procurement policies and guidelines, including the Ethical Purchasing Policy. The Panel Agreement provides that the DET may make an Assessment regarding satisfaction of the Ethical Employment Standard, subsequent to a court, tribunal, commission or board making a finding of a breach of an applicable industrial instrument by the contractor or convicting a contractor of an offence under an applicable industrial instrument.<sup>57</sup> Where the Ethical Employment Standard is found not to be satisfied, the contractor must provide a statutory declaration to the DET setting out: (i) any additional information which the contractor believes is relevant to the Assessment; (ii) details of any information on which the Assessment is based which in the opinion of the contractor is incorrect, incomplete or otherwise unfairly prejudicial to the contractor; and (iii) any existing or planned remedial measures which the contractor has taken or will be taking to prevent a recurrence of the breach or offence.

On the basis of this statutory declaration, or where a statutory declaration is not provided within the stipulated time period, the DET may, at its discretion, request the contractor to show cause why its Panel Status should not be suspended or revoked; suspend the contractor’s Panel Status for a specified period of up to 6 months; and/or revoke the contractor’s Panel Status.<sup>58</sup> If the contractor’s Panel Status is revoked by

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<sup>57</sup> Panel Agreement, [10].

<sup>58</sup> Panel Agreement, [11.1]. For the factors the Department will take into account when exercising this discretion, see [11.1(c)].

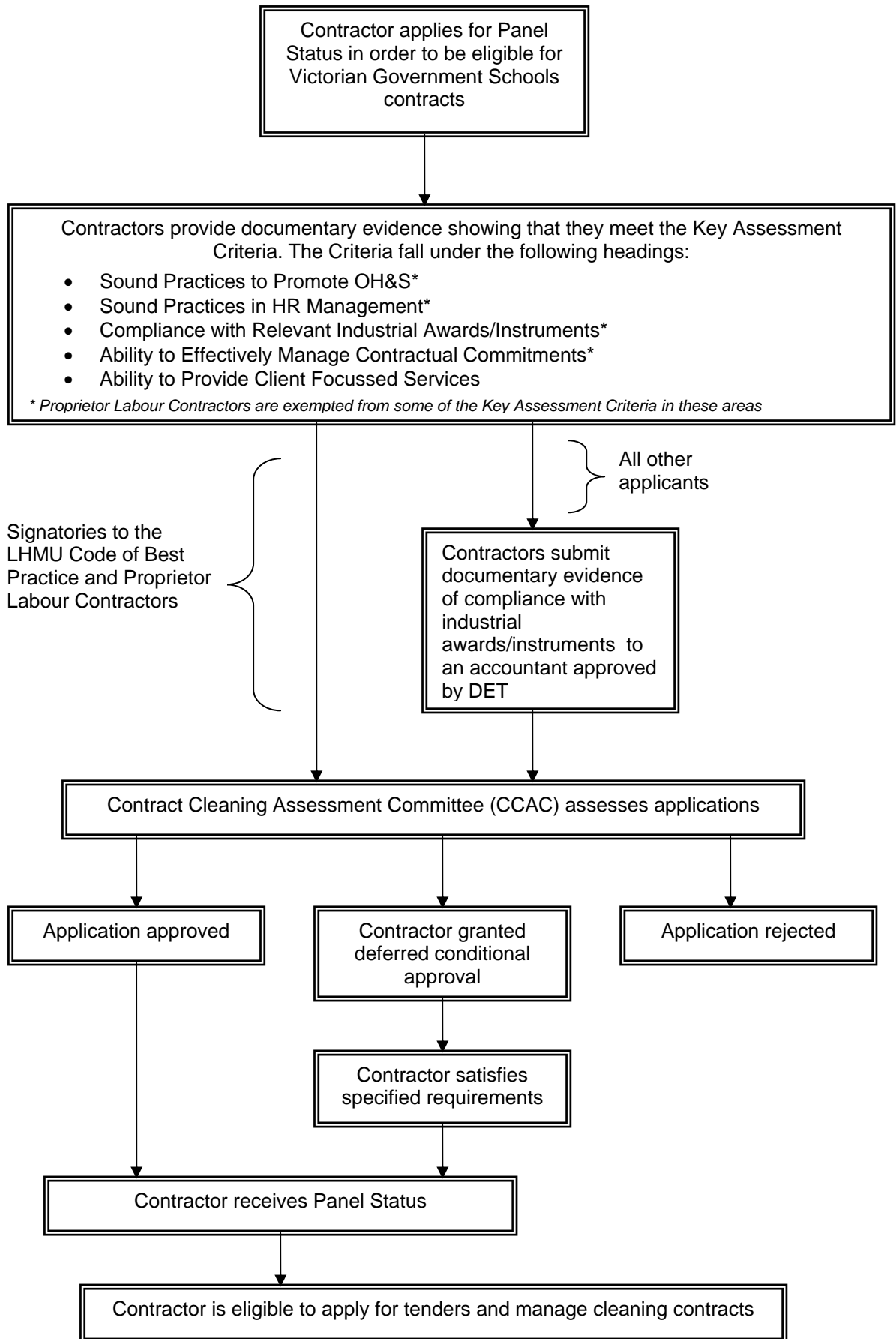
the DET as a result of a breach of the Ethical Purchasing Policy, the contractor's name and details will be included on the Government's Ethical Employment Reference Register for a period of 24 months from the date termination takes effect. This register is accessed by Victorian Government departments for the purposes of applying the Ethical Purchasing Policy. The Ethical Purchasing Policy Guidelines emphasise, however, that this register is not a 'black list'. Rather, the purpose of the register is to record a department's decision to disqualify a contractor in accordance with the Ethical Purchasing Policy. A contractor who is listed on the register may still win government contracts: an assessment of whether they satisfy the Ethical Purchasing Policy is conducted afresh with every new tender process.<sup>59</sup>

Interestingly, there does not appear to be any process outlined in the documentation in the case of a dispute arising as a result of CCAC deliberations, although it is possible that administrative law remedies may be available in such cases. Those who sign up to the Code, however, are bound by the dispute settlement procedure outlined in that agreement.<sup>60</sup> Under this procedure, where disputes cannot be resolved at the workplace level, a consultative committee will be convened to resolve the matter. The consultative committee shall include equal numbers of representatives from the BSCAA and the LHMU. In the event that the committee fails to resolve the dispute, the matter is to be referred to the Australian Industrial Relations Commission.

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<sup>59</sup> See 'The Victorian Government's Ethical Purchasing Policy: Supporting Fair and Safe Workplaces' (Process Guidelines for Government Buyers, December 2003) 5 and 'Appendix B – Part 2'.

<sup>60</sup> See 'Code of Best Employment Practice Agreement 2003 – 2006', clause 18.



**Fig 2: Applying for Panel Status**

## **5. Assessing the Impact of the Program**

To date, there does not appear to have been any assessment conducted by DET of the impact of the program on employment practices within the contract cleaning industry. This is perhaps because the Panel system was only fully implemented as of 1 July 2006. Moreover, DET is yet to carry out any of the planned audits designed to check that contractors are complying with the standards set by the program. However, while clearly it is not possible to draw conclusive observations on the impact of the program at this early stage and from this limited case study, the qualitative interviews that were conducted as part of the case study suggested that the program has been successful in influencing levels of awareness, and employment practices, among the parties.

A number of interviewees stressed the educative function of the program, particularly for smaller contractors. Representatives from DET believed the program had been instrumental in raising the awareness and knowledge of smaller contractors. For example, the application process requires small contractors to engage with the Key Assessment Criteria in a manner which is more onerous than simply 'ticking boxes'. The manager of a small family business observed that the program application process required the business to make extensive changes to its employment practices. While applying for Panel Status was 'lots of work', having done so, the proprietor felt the program was a 'great thing' and 'something definitely needed.'

Interviews conducted with two contractors who had applied for and received Panel Status suggested that the program had been successful in influencing labour practices within these firms. First, both contractors felt strongly that there had been a need for the program, reinforcing the conclusions of the LHMU Report into the industry published in 2004 which was discussed earlier in this paper. The representative of the larger contractor complained that, under the Kennett Government, schools lacked an understanding of how to organise the cleaning of schools and would just accept the lowest bid. In the interviewee's opinion, contractors who had submitted the lowest cost tender cut corners, and reputable companies who did comply with their legal obligations could not compete with smaller 'backyard' cleaners who did not comply with their industrial obligations. The smaller contractor interviewed also believed

there was a lot of scope for exploitation of employees prior to the implementation of the program.

The smaller contractor felt the application process gives small businesses greater credibility in dealing with employers. The interviewee noted that the assessment criteria was very useful and practical, especially the occupational health and safety requirements. The interviewee noted that he now applied the practices and standards throughout his business activities, not simply when his business was cleaning government schools. For the interviewee, while there would always be some employers who failed to comply with the minimum standards, the program had been successful in creating a higher standard by which everyone in the industry was judged.

The interviewee from the larger contractor said that the company had to only make minor changes to its workplace practices to be compliant. However, the interviewee said that while larger companies had adjusted quickly, the smaller cleaner companies had found it much more difficult to comply. The interviewee believed the program had improved employment standards in the industry and the quality of cleaning delivered to schools.

Obviously it is not possible to draw concrete conclusions about the impact of the program on contractors from the evidence of DET and the two contractors, given that the sample is a tiny proportion of the large number of contractors who are members of the Panel. As noted earlier, we did approach several other contractors who declined to participate in the study, including one contractor whom we were referred to by an interviewee on the basis that the contractor was unhappy with the operation of the CCAC.

DET representatives also emphasised the educative function of the program for schools themselves. The increased knowledge of schools was important as they remained largely responsible for service delivery and monitoring.<sup>61</sup>

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<sup>61</sup> Interviewee 3 and Interviewee 4.

## **6. Areas for Improvement Identified by Interviewees**

In conducting qualitative interviews for the case study, interviewees were asked to identify areas where design and implementation of the program could be changed in order to improve the program. The interviewees identified two main areas of weakness: the first was the complexity of the program requirements and the second was the lack of adequate monitoring of contractor compliance.

### **6.1 Simplification**

As demonstrated in the brief outline above, the program is very detailed and places extensive evidentiary requirements on applicants seeking Panel Status. The smaller contractor felt some of criteria were not appropriate to the size of his business, and that there could have been more consultation in writing up the specific requirements to be used for determining panel status.

Several interviewees indicated that many applicants who are members of the BSCAA receive assistance from the association in preparing their applications, including some members who are illiterate. In particular, BSCAA helps them develop or collect together the paperwork needed to demonstrate compliance with the Key Assessment Criteria, including 'model' EEO, OHS and HR policies.<sup>62</sup> Further assistance is provided by the DET Schools Contract Cleaning Unit.

This suggests that the existence of a strong employers association and a well-resourced bureaucracy providing expert assistance and advice are important to the success of the program. It may be that a detailed program such as this would not work so well in an area where these institutional supports were absent.

The LHMU representative questioned whether maintaining a system whereby a large number of schools purchased cleaning services individually from such a large pool of contractors was sustainable in the long term. The union would prefer it if the government restricted eligibility in the program to a smaller number of larger

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<sup>62</sup> Interviewee 3, Interviewee 4, Interviewee 7 and Interviewee 9.

contractors. This would, of course, enhance the union's capacity to recruit members and initiate collective bargaining. However, the union representative argued that such a change might also enhance the cost-effectiveness of the program.

## ***6.2 Monitoring Compliance***

Another area for improvement which was identified concerns effective monitoring and evaluation of ongoing compliance with the Key Assessment Criteria and contractual provisions. A number of interviewees emphasised the logistical difficulty presented by attempting to monitor over 800 contractors working in over 1500 schools across the state.

Notwithstanding this challenge, the program is only in the early days of its operational existence. The evidence garnered for this case study suggests that DET is planning to establish audits of the program. It is not yet clear what the scope of these audits will be and how they will be undertaken, whether other actors participating in the program will be involved, and how regularly they will be conducted.

Nevertheless, it does appear that the large number of contractors has the potential to inhibit the effectiveness of the program, a problem which might be resolved if eligibility was restricted in the manner proposed by the LHMU.

## **7. The Victorian Government Schools Contract Cleaning Program as a Form of Responsive Regulation**

Having provided this overview and analysis of the Schools Contract Cleaning Program, it remains to assess the program against the responsive regulation model and to discuss whether it could be applied more widely where public procurement is used to promote better labour standards. As noted at the beginning of this case study, responsive regulation provides for the participation of interested parties in regulatory regimes, and also incorporates the notion of an enforcement pyramid.

There are two aspects of the program which can be assessed as highly responsive forms of regulation based on the extent to which interested parties participate in the regulatory process. Both the process adopted for the development of the labour

standards to be applied through the program, and the design and establishment of the CCAC as a mechanism for implementing those standards, provided for the input and involvement of the state (government and schools), business and employee representatives. The CCAC is certainly one of the best features of the program. All participants in this case study were positive about its role, especially the CCAC's ability to work through issues in a constructive manner. This suggests that the CCAC is important to the legitimacy of the program from the perspective of participants.

The criteria pertaining to labour practices and standards appear to be adequate at this stage of the program. The agreed standards, and the exemption of Proprietor Labour Contractors from compliance with some of these standards, represent a compromise reached by the various stakeholders. There appeared to be consensus that the adoption of these standards would lead to improvements in the conditions of employment of cleaning workers if effectively enforced. However, in the future it may be necessary to provide a process for upward adjustment of standards, and the widening of their scope of application, to ensure that labour practices in the cleaning of government schools continue to improve in line with community expectations. This would include a mechanism for the introduction of new standards so that other issues important to the improvement of job quality for workers can be addressed. In a different industry context, it may be possible to build such a process into the procurement model from the design stage.

The findings suggest that monitoring and evaluation is an area where involvement of stakeholders could be increased. Although there is evidence of informal, complaints-based monitoring initiated by both employee representatives and business participants, at the time of this case study it appears that the only formal monitoring mechanisms will be administered by DET. Also, the large number of contractors on the panel creates resourcing issues for the DET with respect to proper monitoring of compliance with the standards set by the program. A truly responsive model would include a formal, well-resourced and tripartite monitoring mechanism.

A partial example of such a model is provided by regulatory innovation in the textile, clothing and footwear industry.<sup>63</sup> A sharp increase in the number of ‘outworkers’ working in that industry under poor conditions in the late 1980s and early 1990s caused unions and community groups to push for a change in labour regulation which would improve conditions for these workers. This pressure led to a number of initiatives designed to extend formal entitlements to outworkers and ensure that these entitlements were adequately enforced. These initiatives included a Homeworkers’ Code of Practice developed by trade unions and community groups, and the passage by several State Governments of legislation to regulate supply chain outsourcing in the textile, clothing and footwear industry.<sup>64</sup>

A common element in all of these aspects of supply chain regulation is the formal involvement of trade union and industry representatives in the development of minimum standards and the oversight and enforcement of those standards. For example, the various legislative initiatives in each State were steered by tripartite advisory committees responsible for overseeing the implementation of the legislation. This legislation assigns enforcement tasks to a number of actors. The Victorian *Outworkers (Improved Protection) Act* (2003) empowers ‘information services officers’ to disseminate information, and to monitor and enforce laws. The legislation also assigns a number of rights to trade union officials, including a right of entry into workplaces and a right to bring legal proceedings on behalf of workers.

Nevertheless, there are limitations to this model. For example, unions have a more formal role in monitoring and enforcement of labour standards under the TCF legislation than they do under the Schools Contract Cleaning Contract Program. However, the TCF industry initiatives do not provide unions with the resources necessary for those unions to properly enforce the legislation.

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<sup>63</sup> The discussion of these innovations in this section draws on: S Marshall, ‘Australian Textile Clothing and Footwear Supply Chain Regulation’, paper delivered at the *Legal Protection of Workers’ Human Rights: Regulatory Changes and Challenges Conference*, International Institute for the Sociology of Law, Onati, Spain, May 2006; and M Rawling, ‘A Generic Model of Supply Chain Regulation’, in C Arup, P Gahan, J Howe, R Johnstone, R Mitchell and A O’Donnell, *Labour Law and Labour Market Regulation*, (2006).

<sup>64</sup> Marshall, above n 63.

This problem could at least in part be addressed by government providing incentives to contractors which provide independent evidence of their ongoing compliance on a regular basis. The provision of ‘incentives for compliance’ in this way is also a feature of the Homeworkers Code of Practice, whereby accredited manufacturers are licensed to display a ‘No Sweatshop’ label on their goods. This label confirms that the labour involved in the manufacture and assembly of garments has been engaged according to minimum labour standards. Implementation of such an incentive in the Schools Contract Cleaning Program would be relatively straightforward. Contractors who agreed to provide independent verification of ongoing compliance, whether through the existing use of approved accountants or by having employee representatives verify compliance, could be recognised by the DET as a preferred contractor: an ‘employer of choice’.<sup>65</sup> This recognition could be used by the contractor not only in seeking contracts with Victorian Government schools, but also in the wider marketplace for cleaning services.

The supply chain regulation model would also be relevant in the context of government procurement of goods as distinct from services. Purchasing of goods such as stationary and apparel are significant areas of government procurement. While government may procure such goods from local suppliers, it is likely that procured items or at least components of those items have been sourced from overseas suppliers and manufacturers. These suppliers may operate in developing countries with lower labour standards than generally enjoyed in Australia. Any extension of the model to these areas would need to give consideration as to how to implement minimum standards down the supply chain. This challenge has been addressed under the voluntary Homeworkers Code of Practice. Manufacturers who are signatories to the Code of Practice agree to ensure that their suppliers are only sourcing from suppliers which comply with minimum labour standards set by the Code.

Finally, it remains to assess the Schools Cleaning Program against the concept of the enforcement pyramid, where it is suggested that an effective regulatory regime will

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<sup>65</sup> The concept of ‘employer of choice’ is used by the Equal Opportunity for Women in the Workplace Agency, which maintains a list of ‘Employers of Choice for Women’ ([www.eowa.gov.au](http://www.eowa.gov.au)). See also the prizes offered by the Human Resources Magazine as part of their annual ‘HR Awards’ ([www.hrwards.com.au/default.asp](http://www.hrwards.com.au/default.asp)).

combine a range of enforcement approaches ranging from softer, informational techniques through to ‘hard’ sanctions such as imposition of financial penalties. The array of options/ levels of sanctions available to DET in enforcing the rules of the program suggests good design in terms of the enforcement pyramid concept. The indications are that DET is using very soft, informal techniques, relying heavily on education/ persuasion to bring about change in employment practices. Beyond this, policy documents provide DET with the option to request compliance; that is, to warn Panel members and negotiate change to bring about compliance before revoking Panel Status. It does seem that both DET and the CCAC make extensive use of both of these approaches in conducting ‘regulatory conversations’<sup>66</sup> with contractors and the contractors’ association about the rules and their interpretation which are designed to bring about changes in behaviour. This in itself can be a key indicator of the existence of a responsive regulatory regime.<sup>67</sup> However, the question remains whether in the current environment the base of the pyramid – the minimum standards and the threat of withdrawal of Panel Status – is strong enough to give DET and the CCAC sufficient leverage when negotiating compliance. That is, these regulatory conversations will be of limited utility if participants in the program are not committed to the process which it establishes. There is unlikely to be sufficient commitment in the absence of a monitoring process which contractors and trade unions can trust to identify non-compliant firms, and without adequate sanctions for non-compliance with minimum standards established by the program. Moreover, the absence of a formal dispute resolution mechanism means that in the event of conflict over interpretation and application of the program, a contractor might choose to go outside the program to seek redress through the courts via judicial review. This would undermine the legitimacy of the program in the eyes of other participants.

## **8. Conclusion**

The Victorian Government Schools Contract Cleaning Program is an innovative development in the use of public procurement to regulate labour standards. It is too early to evaluate the effectiveness of the program in bringing about improvements in labour standards and service quality in school cleaning in Victoria. There is a need for

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<sup>66</sup> J Black, ‘Talking About Regulation’ [1998] *Public Law* (Spring) 77.

<sup>67</sup> *Ibid* 92.

further research and evaluation to assess the overall impact of the program at some time in the future. However, the regulatory model of a pre-qualification process administered by a tripartite committee is consistent with many aspects of evidence-based theories of responsive regulation, and is supported by many ‘stakeholders’ in this area of procurement.

While we have identified some areas where the design and administration could be improved, there is enormous potential to extend this model to other areas of government procurement. All of those interviewed for this case study believed that the program design could, in principle, be extended to other industries. Indeed, the Victorian Government is presently considering whether this type of pre-qualification system should be extended to all cleaning contracts. The findings of this case study largely support such an extension. Any extension of the model to other areas of service provision, and indeed to the procurement of goods, would raise a number of new challenges for regulatory design. Nevertheless, if State Governments in Australia are to respond to Work Choices in a way which addresses both minimum labour standards and employee ‘voice’ in the workplaces of all government contractors, the Victorian Government Schools Contract Cleaning Program provides an excellent starting point in the design process.