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Submission: Review of Victoria's Private Security Industry

Submission prepared by the Australasian Centre for Corporate Responsibility (ACCR)

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The Australasian Centre for Corporate Responsibility (ACCR) is pleased that the Victorian Government is reviewing the private security industry, and is grateful for the opportunity to make a submission to that inquiry.

While the scope of this inquiry is suitably broad, ACCR will focus our submission on one particular matter identified in the Issues Paper:

- e) employment frameworks and practices, and the application of workplace laws and instruments to the industry

ACCR's submission will focus specifically on how the dominant employment model in the security industry - namely complex labour hire and subcontracting arrangements - has led to a culture of non-compliance and endemic failure to properly apply workplace laws and instruments.

ACCR recently published an investor brief that highlighted how the hollowing out of wages and conditions in the security industry over a number of years was implicated in the spike in Victorian COVID infections.¹ In this submission, ACCR highlights how subcontracting arrangements in the sector are not just a public health risk - they also put workers at risk of severe exploitation and even modern slavery.

We argue, furthermore, that the risks to workers of non-compliance and labour exploitation will only escalate as a result of job losses related to COVID-19. Unemployed migrant workers with no access to government support will become vulnerable to taking on increasingly exploitative contracts in order to survive. With the first round of reporting under the Modern Slavery Act due in a few months, ACCR will be calling on lead companies (and their investors) to identify and address risks in their security supply chains.

The need to reform the security industry has long been evident. COVID-19 has highlighted the urgency of the required reform, to protect workers and the broader community.

This submission concludes with recommendations for lead companies and investors in this industry. While beyond the scope of this inquiry, which is focused on reforms to government regulation, we note the role that companies who procure security services have had in putting downward pressure on conditions in the industry. Any government reform must also take steps to stop these companies from outsourcing responsibility and profiting from non-compliance in the industry.

In making this submission, ACCR draws on our experience and expertise in corporate management, business and operational risks associated with employment relationships (in particular labour hire and subcontracting), occupational health and safety (OHS), modern slavery and the provision of decent work. We

¹ K Hepworth, *Broken chains of responsibility: Victorian COVID-19 clusters reveal subcontracting risks*, ACCR, 2020, <<https://bit.ly/2CTcJSu>>.

hope that this will assist the committee to understand how the issues of 'sham contracting', insecure work, and wages and superannuation underpayment impact the industry (13.1.1, Issues Paper).

In 2020 ACCR published a major report, [Labour Hire and Contracting Across the ASX100](#), which explored some of the key workforce and operational risks associated with labour hire and contracting arrangements.

Our report focused on the mining, construction and commercial cleaning industry. However, we note that many of the findings for the commercial cleaning industry are applicable to the private security industry. As noted in the Migrant Task Force report, both the cleaning and private security industries share attributes, specifically:

... work which is low to semi-skilled, employee costs make up the primary cost of doing business, work is subject to competitive tendering, there is high use of subcontracting and independent contracting arrangements and a prevalence of vulnerable migrant workers.²

Subcontracting and the Private Security Industry

The proliferation of complex subcontracting and sham contracting arrangements in the security industry have been highlighted by government inquiries, unions and academics for years.³

The Inquiry's Issues Paper quotes observations made by the United Workers Union (UWU) that:

... labour hire, including extensive subcontracting, is prevalent in the private security industry, that private security services in Victoria are now almost entirely supplied by contract security firms, and there is a growing practice within the contract security industry to supplement their directly employed labour force with the use of subcontracted labour (Issues Paper 13.6.3).

On sham contracting, the Issues Paper (13.2.1) notes that:

Many security workers are classified as independent contractors, rather than employees, although this classification can be contestable' (including as a result of deliberate sham contracting). Individual contracting arrangements mean that workers are not covered by most employment-related protections, such as minimum wages, paid leave entitlements, regularity of engagement and notice of termination (13.2.5).

The use of subcontracting, labour hire and sham contracting intersects with a more widespread use of casual labour across the industry, even where "permanent employment would be more appropriate" (13.6.1).

The Fair Work Commission has found a significant correlation between workplace breaches and the presence of multiple levels of subcontracting. In their inquiry into the procurement of security services by local government, they found that "63 per cent of subcontractors were found to be non-compliant compared to 42 percent of principal contractors, who had a direct relationship with the council".⁴

² Commonwealth of Australia, *Report of the Migrant Workers Taskforce*, Canberra, Commonwealth of Australia, 2019, , p. 103, <<https://bit.ly/39SJs5a>> [accessed 6 April 2020].

³ See for example: Department of Premier and Cabinet, *Inquiry into the Labour Hire Industry and Insecure Work (2015 - 2016)*, Melbourne, Victorian Department of Premier and Cabinet, 2016, <<https://bit.ly/2UN0zRo>> [accessed 6 April 2020].

⁴ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180625-igpi-report>

Risks due to Subcontracting

ACCR's report [Labour Hire and Contracting Across the ASX100](#) found that companies choose to use labour hire and subcontracted workers for a number of reasons: to reduce costs, to adapt to volatile labour markets, to address the need for specialisation, to undermine or circumvent union presence, to avoid employer obligations, to exert greater control over a workforce, or to shift their risks and liabilities.⁵ However, such choices are not without risks and costs.

Drawing on extensive research, our report found that labour hire, subcontracting, and other forms of 'triangular' working arrangements can lead to:

- Poorer Occupational Health and Safety (OHS) outcomes
- Increased possibility of involvement in modern slavery, labour exploitation and wage theft
- Lower levels of worker engagement and loyalty
- Loss of human and intellectual capital
- Reduced visibility of workforce composition, including diversity
- Reduced workforce development, due to reduced access to, or poorer quality of, training and skills acquisition.

Modern Slavery, Labour Exploitation and the Security Industry

Private security is an industry that evidences significant illegality and labour exploitation, and is at high risk for the presence of modern slavery. The endemic non-compliance with workplace law in the private security industry (as in other high-risk industries), is linked to a range of factors, including:

- A predominantly migrant workforce, often with low English language competency and knowledge of Australian workplace laws, and precarious - or no - visa rights;
- Significant downward price pressures by lead companies, particularly in industries where lead companies have significant market power;
- **Complex and informal subcontracting and labour hire arrangements**, often involving sophisticated pyramid structures and multiple subcontracting arrangements; and
- **Low barriers to entry for labour hire providers.**⁶

Modern Slavery Risks increased due to COVID-19

Modern slavery is not an isolated phenomenon. It exists on a spectrum of labour exploitation and abuse. Widespread wage theft and excessive working hours can quickly deteriorate into modern slavery through threats and coercion, with some workers particularly vulnerable to slavery-like conditions.⁷

Migrant workers' vulnerability has only increased during the COVID crisis.

At the time of writing, temporary migrant workers in Australia are not eligible for either the JobSeeker or JobKeeper payments if they are stood down or terminated due to the virus. Temporary migrant workers make up a significant proportion of the industry workforce. These low-paid workers live paycheck to paycheck, and

⁵ R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Sydney, University of Sydney, April 2002.

⁶ Commonwealth of Australia.

⁷ J Nolan & M Boersma, *Addressing Modern Slavery*, Sydney, UNSW Press, 2019, , p. 10.

have minimal or low savings. Job loss puts these workers at greater risk of falling into slavery-like conditions as they are likely to seek out:

...even more precarious work and expos[e] themselves to a greater risk of exploitation. ... As work dries up, desperation among workers grows. In such circumstances working conditions can quickly deteriorate at the hands of unscrupulous employers.⁸

As companies respond to the COVID-19 crisis, their focus has been predominantly on their direct workforce. It is crucial that companies also take responsibility for their labour hire and contracting workforce - particularly where those workers perform core functions for a company.

Furthermore lead companies and investors must undertake additional due diligence in relation to their private security supply chains to mitigate against any increased modern slavery risks.

The Role of Lead Companies and the Outsourcing Non-compliance

Complex and informal subcontracting and labour hire arrangements have allowed lead companies to evade responsibility for workplace non-compliance in key, high-risk industries - including private security. A number of legal and other compliance initiatives have emerged in recent years in order to address modern slavery and labour exploitation risks in supply chains, and to prevent lead companies from “outsourc[ing] their non-compliance”.⁹ These include:

- The Modern Slavery Act.
- The Fair Work Ombudsman (FWO) using accessorial liability provisions and proactive compliance agreements to hold the top of the chain accountable.
- Multi-stakeholder agreements that include lead companies, suppliers and trade unions, which include an active role for workers.

ACCR welcomes these initiatives, and advocates that they be used to address supply chain risks related to private security.

The Modern Slavery Act

The Commonwealth Modern Slavery Act (MSA) came into effect on 1 January 2019. The MSA requires Australian businesses with a revenue of at least AU\$100 million to submit annual reports on the risks of modern slavery in their supply chains and operations to a central, public register. For companies reporting on a financial year, their first reporting period will end on 30 June 2020, and they will be required to report by 31 December 2020.¹⁰

There are seven mandatory criteria that must be included in a reporting entity’s modern slavery statement. These include a description of the risks in the entity’s operations and supply chains, the actions taken by the entity, including any due diligence and reporting processes, and how the company assesses the actions they

⁸ CAF, ‘Cleaners are our frontline defence’, in *Cleaning Accountability Framework Inc.*, , 2020, <<https://bit.ly/2XkOuom>> [accessed 6 April 2020].

⁹ S Kaine & M Rawling, ‘Strategic “Co-enforcement” in Supply Chains: The Case of the Cleaning Accountability Framework’, in *Australian Journal of Labour Law*, , 2019, 305–331 (p. 329).

¹⁰ Parliament of Australia, ‘Modern Slavery Bill 2018: Explanatory Memorandum’, Parliament of Australia, 2018, <<https://bit.ly/3aYztN3>> [accessed 6 April 2020].

take.¹¹ The Australian Council for Superannuation Investors (ACSI) has produced detailed guidance for companies and investors on the Act and its implications for reporting and engagement.¹²

As both ACSI and the Responsible Investment Association of Australia (RIAA) note, investors have a responsibility to address modern slavery, both as procurers of services (including security) and by investing in companies that procure services (or directly provide those services.)

ACSI identifies private security as a key area where their members may be exposed to modern slavery related risks, such as:

Bonded labour, delayed wages, human trafficking, abysmal working and living conditions, withholding of passports and limitations of movement are forms of modern slavery that have been found to be present in Australian cleaning, security and asset and tenant maintenance operators.¹³

However, while the Modern Slavery Act emphasises the role of lead companies and investors in ensuring compliance throughout their supply chains, it is no panacea for workplace exploitation. The legislation must be combined with robust regulatory measures that hold the top of the supply chain accountable if their actions (or failures to act in the face of known risks) lead to non-compliance.

Accessorial Liability and Proactive Compliance Agreements

The FWO has paid increasing attention to the responsibility of lead companies in a supply chain for labour rights violations by their suppliers and labour hire providers. The FWO has two mechanisms at their disposal:

- **Accessorial Liability:** This allows parties other than the direct employer to be considered an accessory to any contraventions of workplace laws, and be held liable for penalties and compensation that stem from such contraventions.¹⁴ The Fair Work Act includes accessorial liability provisions. These were increased via the Protecting Vulnerable Workers Act in 2017.
- **Proactive Compliance Deeds:** These are legally binding enforcement mechanisms between the FWO and a company or companies accused of non-compliance with the Fair Work Act. Companies at the top of the supply chain and/or host companies can be parties to a deed if the FWO believes they have legal, ethical or moral responsibility to promote compliance, due to their:
 - significant power over suppliers and/or contractors, or
 - degree of oversight over their supply chain, and therefore a legal, ethical or moral responsibility to promote compliance.¹⁵

ACCR supports initiatives that hold the top of the supply chain legally accountable for their role in driving conditions along the supply chain, and recommends that the inquiry investigate the current efficacy of these arrangements, and whether they require strengthening.

¹¹ Department of Home Affairs, *Commonwealth Modern Slavery Act 2018: Guidance for reporting entities*, , 2018, p. 96, <<https://bit.ly/2WIWUd0>> [accessed 5 April 2020].

¹² ACSI, *Modern Slavery, risks, rights and responsibilities*, Melbourne, ACSI, 2019, <<https://bit.ly/3bVUmIz>> [accessed 6 April 2020].

¹³ ACSI, , p. 19; ACSI & RIAA, *Modern slavery reporting guide for investors*, ACSI, RIAA, 2019, , p. 20, <<https://bit.ly/2Xgngz7>> [accessed 8 April 2020].

¹⁴ Lander & Rogers Lawyers, 'Accessorial Liability – where do your responsibilities begin and end?' , 2014, <<https://bit.ly/2UPE7ax>> [accessed 15 January 2020].

¹⁵ FWO, 'Compliance partnerships', in *Fair Work Ombudsman*, , 2020, <<https://bit.ly/2yGsUQP>> [accessed 7 April 2020].

Multi-stakeholder agreements

Multi-stakeholder initiatives, which actively involve workers and their representatives in compliance measures, have been shown to be effective in addressing labour risks.¹⁶ These initiatives often support workers to raise workplace issues early, allowing businesses to resolve them “before they escalate into more lengthy and complex disputes that may come at a high cost”.¹⁷

In lieu of the establishment of formal, multi-stakeholder arrangements, ACCR calls on the inquiry to recommend measures that protect workers who identify workplace issues. The inquiry must examine any proposed changes to industrial relations legislation that seek to weaken workers’ ability to exercise their freedom of association, as they will undermine the efficacy of multistakeholder models.

Conclusion/Recommendations

This submission has focused on the role that employment relationships involving subcontracting and labour hire have played in driving down conditions in the security industry.

Our submission recommends that in addition to measures to regulate labour hire in the industry, the government take steps to regulate the role of lead companies in the industry, to stop companies from outsourcing their responsibility for compliance, and profiting from labour exploitation in their security supply chains.

We welcome the renewed attention that the Modern Slavery Act has brought to the role of lead companies in driving conditions throughout their supply chains. However, we note that this new awareness must be coupled with robust regulatory frameworks that hold these companies accountable.

About ACCR

ACCR is a registered charity with the Australian Charities and Not-for-profits Commission (ACNC). ACCR invests in and engages with Australian listed companies in regard to their performance on various issues, including the provision of decent work.

ACCR frequently engages with Australian listed companies, their shareholders, and their investors on these issues. ACCR is a shareholder in many companies that make up the ASX100 index. ACCR regularly meets with ASX-listed companies about environmental, social and governance (ESG) issues, and regularly briefs investors about the ESG performance of ASX-listed companies.

ACCR strongly believes in the importance of the workforce in delivering long-term strategic objectives for companies. Judicious management of the workforce can directly improve value creation, while poor management of the workforce may not only reduce value creation but also may increase various business and operational risks.

¹⁶ <https://wsr-network.org/success-stories/>

¹⁷ L Curtze & S Gibbons, *Access to remedy - operational grievance mechanisms. An issues paper for ETI*, London, ETI, 2017, <<https://bit.ly/2KXxLjm>> [accessed 3 March 2019].