

An Inquiry into the procurement of security services by local governments

June 2018

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LOCAL GOVERNMENT PROCUREMENT INQUIRY



INQUIRY FOCUSED ON:

23 LOCAL GOVERNMENT COUNCILS

WHAT DID WE FIND?



security businesses engaged across 57 different contracting arrangements



61% of Councils had non-compliance within their labour supply chain



63% of subcontractors failed to comply with Commonwealth workplace laws



42% of principal contractors failed to comply with Commonwealth workplace laws



Enforceable Undertaking with Melnor Security Services Pty Ltd, the principal contractor engaged by Tamworth City Council for its Tamworth Country Music Festival



Legal proceedings commenced against Gold Coast company VIP Security Services Pty Ltd alleging contraventions affecting 5 employees including adverse action and underpayments of almost \$16,000 to three of the employees



464 employee records assessed



\$72,250 recovered for 54 employees

COMPLIANCE AND ENFORCEMENT ACTIONS



26

FORMAL
CAUTIONS



4

INFRINGEMENT
NOTICES



15

COMPLIANCE
NOTICES



1

ENFORCEABLE
UNDERTAKING



1

LITIGATION

Executive summary

The Fair Work Ombudsman [FWO] conducted an Inquiry [the Inquiry] in response to industry concerns that security employees were being underpaid in the local government sector by forcing prices to unsustainably low levels.

Following a comprehensive information and awareness campaign, the Inquiry focused on 23 local government councils¹ [Councils] and examined the labour procurement arrangements relating to the engagement of security services.

The Inquiry found:

- every state had at least one instance of non-compliance with Commonwealth workplace laws²
- 49 security businesses engaged across 57 different contracting arrangements³
- security services for Councils are predominantly provided by employees of principal contractors⁴ and subcontractors⁵, rather than by direct employees of the Councils
- the 'further away' a business was from the Council in the supply chain, the greater the non-compliance; subcontractors had 21% higher levels of non-compliance than the principal contractors who had a direct relationship with the Council:
 - 63% of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws, compared to 42% of principal contractors (16 of 38).
- 14 of the 23 (61%) Councils had non-compliance within their labour supply chain. Of those 14 labour supply chains:
 - four Council labour supply chains had non-compliant subcontractors
 - five Council labour supply chains had non-compliant principal contractors and subcontractors
 - five Councils had non-compliant principal contractors.

¹ The Australian Capital Territory does not have local government councils so it fell outside the scope of this Inquiry - <http://www.australia.gov.au/about-government/how-government-works/local-government>.

² The Northern Territory had no instances of non-compliance as they engaged predominantly direct employees rather than contractors supplying labour.

³ Some businesses had multiple contracts with one Council or contracts with more than one Council.

⁴ For the purpose of this Inquiry, principal contractors are those who contract directly to local government councils to provide security workers.

⁵ For the purpose of this Inquiry, subcontractors are those who are engaged by principal contractors to provide security workers to Councils, rather than dealing directly with the Councils.

The Inquiry found a range of breaches of Commonwealth workplace laws:

- total underpayments of \$72 250 to 54 (12%) employees from 464 employee records assessed (all of which have since been rectified)
- just over \$51 400 was underpaid by nine subcontractors, with the remainder underpaid by five principal contractors
- four Infringement Notices [IN] issued to one principal contractor and three subcontractors
- 15 Compliance Notices [CN] issued to seven principal contractors and eight subcontractors
- 26 Formal Cautions [FC] issued to 15 principal contractors and 11 subcontractors
- one Enforceable Undertaking [EU] entered into with Melnor Security Services Pty Ltd, the principal contractor engaged by Tamworth City Council for its Tamworth Country Music Festival⁶
- legal proceedings commenced against VIP Security Services Pty Ltd (in liquidation) and director Adam Marcinkowski alleging contraventions affecting five employees undertaking security work on behalf of the Gold Coast City Council, including adverse action and underpayments of almost \$16 000 to three of those employees⁷

The most common reasons for non-compliance related to employees being paid below minimum award hourly rates as well as underpayment and / or non-payment of penalty rates (weekends, public holidays), overtime and issues around regular part-time hours of work.

⁶ Copy of EU available at <https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/enforceable-undertakings/2016-2017-enforceable-undertakings>

⁷ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/july-2017/20170712-vip-security-litigation>.

Recommendations

As a result of the findings of the Inquiry, the FWO recommends that Councils review and amend their security services tender documents to:

- enable full visibility and monitoring of the labour supply chain
- reflect best practice as contained in FWO's Guides on contracting labour and supply chains⁸
- include a specific reference that requires principal contractors and subcontractors to comply with the Fair Work Act [FW Act]
- require principal contractors seek written permission to subcontract work
- require both principal contractors and subcontractors to regularly report on their compliance with the FW Act (FWO recommends annually)
- ensure that the "schedule of fees" contained in contracting agreements be indexed against the applicable award rates effective every 1 July
- require principal contractors and subcontractors to undertake training on the provisions and obligations of the Security Industry Award
- disclose the input items associated with the total cost of an employee⁹
- ensure that the amounts paid in their contracts are sufficient to allow both principal contractors and subcontractors to cover employee entitlements
- require all principal contractors and subcontractors to sign up to FWO's *My account* service and provide evidence of their knowledge of the wages required to be paid under the relevant industrial instrument including any applicable penalties for weekends, public holidays or overtime
- require the principal contractors to provide evidence that any subcontractors are aware of the distinction between contracts of employment and contracts for service.

That principal contractors and subcontractors:

- sign up to FWO's *My account* online service

⁸ <https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains>

⁹ The 'total cost of an employee' is discussed later in this report and includes direct costs such as ordinary hourly wages, overtime and public holiday rates, casual loadings, allowances (such as first aid) and leave payments (personal or annual). There are also indirect costs in running the business such as cars, parking, insurance, health insurance contributions, communication devices, licenses, training, accommodation and superannuation.

- review and revise all practices to ensure their employees are provided with all of their entitlements under the FW Act and the relevant industrial instrument
- seek independent advice from a professional such as a lawyer, accountant and/or employer organisation prior to entering into an agreement with Councils
- ensure when quoting future tenders, the submission recognises all operating costs including wages and entitlements
- incorporate monitoring measures of subcontractor compliance
- recognise the distinction between an employee and an independent contractor¹⁰
- reflect best practice compliance¹¹
- ensure the offering of Individual Flexibility Arrangements [IFAs] to employees meets all the requirements of the FW Act¹².

That principal contractors, where any subcontracting occurs:

- implement regular (six monthly) compliance auditing on subcontractors to ensure their ongoing compliance
- amend their subcontracting agreements to include specific reference to the subcontractors' ongoing obligation to be compliant with the FW Act and the relevant industrial instrument.

That employer and employee organisations:

- ensure they provide their members with education about all required legislation for their businesses including providing information on current wage rates
- provide their members with updates in relation to wage increases as soon as they occur
- promote best practice compliance
- encourage or require their members to subscribe to the FWO *My account* online service
- encourage or require their members to subscribe to the FWO online newsletters and updates

¹⁰ Sham contracting occurs where a worker should be an employee, but is instead engaged as an independent contractor. Further information about these sorts of arrangements can be located on the FWO website <https://www.fairwork.gov.au/find-help-for/independent-contractors>

¹¹ <https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains>

¹² <https://www.fairwork.gov.au/about-us/legislation>

- ensure their workplace relations advisers are fully educated in relation to the Fair Work legislation so they can provide their members with the most accurate advice
- educate their members about the use of IFAs
- encourage their members to locate information on the FWO website when they are uncertain about entitlements.

Within 12 months of the publication of this report, the FWO will request the Councils:

- audit their security industry supply chains and provide the FWO with a report on their audit methodology and findings
- provide FWO with an additional report detailing improvements made to their corporate governance framework and procedures for the lawful contracting of security service providers throughout the supply chain.

The FWO will assess these reports to ensure compliance with Commonwealth workplace laws, and:

- conduct follow up audits and/or investigations where non-compliance is identified
- within two years of the publication of this report, survey security employees performing duties for the Councils subject to this Inquiry, to assess whether the subsector has changed its governance arrangements to ensure compliance with the FW Act.

Background

In 2012, the FWO began receiving intelligence that a number of Councils were procuring¹³ security services at contract prices that were insufficient to cover the total cost of an employee, thus facilitating non-compliance with Commonwealth workplace laws in a number of security businesses. In the FWO's experience, such instances of insufficient monies from the top of a supply chain being funnelled downwards, lead almost inevitably to workers being underpaid, as businesses are unable to make a profit while still paying all relevant entitlements in these circumstances.

The FWO considered it appropriate to test the intelligence and secure a better understanding of the supply chain arrangements adopted by local government with respect to the security sector by conducting an Inquiry.

Partnering with the Australian Security Industry Association Limited [**ASIAL**] and United Voice, communications and education activities commenced in 2014. In August 2015, the FWO issued a media release¹⁴ formally detailing the terms and objectives of the Inquiry.

The purpose of this communication and education phase was to ensure Councils throughout Australia, particularly those officers with responsibility for procurement, understood the obligations under the FW Act. That phase included a number of presentations across the security, building and local government sector nationally¹⁵.

FWO then embarked on the second phase of the Inquiry, which involved a series of compliance activities examining the various labour supply chain arrangements entered into with security service providers by 23 Councils.

¹³ For the purposes of this report, procurement refers to tendering for the provision of security guards for Council sites and events.

¹⁴ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/august-2015/20150806-spotlight-on-council-tenders>

¹⁵ FWO presented to the Regional Procurement Network in VIC, Building Services Contractors Association of Australia in QLD, ASIAL in NSW, Local Government & Public Sector Building Maintenance Conference in NSW, and others.

The Inquiry's methodology

In conducting the Inquiry, the FWO exercised statutory functions as set out in subsections 682(1) (a), (b) and (c) of the FW Act.

During the course of the Inquiry, FWO undertook a number of activities including:

Preliminary stage:

- collaborating with both ASIAL and United Voice in designing the compliance and education elements of the Inquiry
- meeting with four local government associations to outline the rationale for, and objectives of, the Inquiry as well as encourage awareness of the same throughout the association's respective networks
- developing and publishing a range of information and education products relating to local government procurement best practice on www.fairwork.gov.au in late 2014.

Inquiry stage:

- holding meetings in 2015 with representatives from the state-based local government associations to confirm their ongoing cooperation and obtain a deeper understanding of the procurement processes adopted by local governments in their respective states
- securing additional input from United Voice and ASIAL during the course of the Inquiry to ensure FWO interventions were relevant and appropriate
- engaging with 23 selected Councils, both metropolitan and regional:
 - QLD – Brisbane City Council, Logan City Council, Gold Coast City Council
 - NSW – Sydney City Council, Penrith City Council, North Sydney Council, Bankstown City Council, Mosman Council, Wollongong City Council, City of Wagga Wagga, Tamworth Regional Council
 - NT – Alice Springs Town Council, City of Darwin
 - SA – Adelaide City Council, Adelaide Hills Council, Barossa Council
 - WA – City of Perth, Town of Cambridge
 - TAS – City of Hobart, Kingborough Council
 - VIC – Melbourne City Council, Moreland City Council, Ballarat City Council

- interviewing Council procurement officials regarding the terms of their procurement arrangements and requesting records relating thereto
- interviewing the principal contractors who provided the security services regarding their tendering processes, including the nature of their records, direct employee entitlements, and how they engage subcontractors
- interviewing the subcontractors regarding their employment practices and their contracting arrangements with the principal contractors
- conducting visits to the sites that were staffed by security employees of the 49 businesses subjected to audits
- interviewing employees regarding their understanding of their legal entitlements, where relevant
- requesting time and wage records from all principal contractors and subcontractors for a one-month sample period
- reviewing records and information obtained from interviews with labour supply chain participants to identify if employees received the appropriate entitlements
- analysing and testing contractual documentation
- calculating wages for a sample period to determine if employees were paid correctly.

The Inquiry's findings

With regard to Councils, the Inquiry found:

- 14 of the 23 (61%) Councils had a non-compliant labour supply chain
- Councils failed to utilise their respective local government association for procurement support or advice
- the majority of metropolitan Councils had procurement departments which included legal support
- the majority of metropolitan Councils designed and drafted their own procurement processes, policies and contracts
- smaller Councils (mostly in regional areas) did not have procurement departments
- contracts contained generic references requiring principal contractors to be compliant with all relevant State and Commonwealth legislation but silent on any requirement relating to 'real-time' compliance auditing
- some contracts contained generic references to an obligation by principal contractors to seek permission from the relevant Council before subcontracting, although in many instances this wasn't referenced
- an absence of any proactive governance measures or real-time compliance auditing once a principal contractor was engaged
- no evidence of any security workers engaged on ABNs or workers claiming to be independent contractors.

With regard to the principal contractors and subcontractors, the Inquiry found:

- 42% of principal contractors (16 of 38) and 63% of subcontractors (12 of 19) failed to comply with Commonwealth workplace laws, with every state (but not the NT) having at least one instance of non-compliance
- total underpayments of \$72 250 to 54 (12%) employees from 464 employee records assessed (just over \$51 410 was underpaid by subcontractors, with the remaining having been underpaid by principal contractors), resulting in the following compliance outcomes:
 - four INs issued to one principal contractor and three subcontractors totalling \$900
 - 15 CNs issued to seven principal contractors and eight subcontractors
 - 26 FCs issued to 15 principal contractors and 11 subcontractors

- one EU entered into with Melnor Security Pty Ltd
- legal proceedings commenced against VIP Security Services Pty Ltd and Adam Marcinkowski alleging adverse action and underpayments.

Case study - Legal proceedings: VIP Security Services Pty Ltd

The FWO commenced proceedings against VIP Security Services Pty Ltd (in liquidation) and director Adam Marcinkowski alleging contraventions affecting five employees undertaking security work on behalf of the Gold Coast City Council, including adverse action and underpayments of almost \$16 000 to three of those employees. Among other things, the FWO is seeking declarations that VIP Security Services Pty Ltd and Mr Marcinkowski terminated one security guard for making enquiries in the course of his employment.

The Inquiry found the non-compliance was attributable to employees being denied:

- their full ordinary hourly rate entitlements
- penalty rates (weekends, public holidays)
- overtime rates.

There were also a number of concerns with regular part-time hours of work, such as employee hours not being set out in writing when they were engaged as part-time, or working more hours than their set hours without receiving overtime pay.

- The NT was the only state/territory where the Inquiry did not identify any non-compliance with Commonwealth workplace laws¹⁶.
- The Inquiry identified the following levels of non-compliance among businesses providing security employees to Councils:
 - QLD - 70% (seven of 10)
 - SA – 60% (three of five)
 - NSW – 53% (nine of 17)
 - TAS – 50% (three of six)
 - VIC – 40% (four of 10)
 - WA – 25% (two of eight).

¹⁶ The majority of Councils audited during this Inquiry in the NT directly employed security workers, and where they didn't, there was only one principal contractor who was fully compliant.

Other findings made by the Inquiry included:

- NSW and QLD Councils had more levels of subcontracting than the other states
- in some instances, principal contractors were subcontracting without the knowledge or consent of the Councils
- in some instances, subcontracting agreements were silent on any requirement to be compliant with the FW Act
- in some instances, subcontracting agreements were silent on any measures relating to proactive governance or compliance auditing on its part
- 28 of 49 (57%) principal contractors/subcontractors were members of an employer association, and of those, 16 of 28 (57%) were found to be non-compliant
- 42% of principal contractors/subcontractors derived their employee entitlements from enterprise agreements, with nearly half of those agreements having been negotiated between unions and the employer
- 57% of these enterprise agreements (encompassing 18% of principal contractors and 16% of subcontractors) were past their nominal expiry dates at the time of the Inquiry occurring.

The following Councils had principal contractors and subcontractors using expired enterprise agreements within their supply chains:

- QLD – Brisbane City Council, Logan City Council, Gold Coast City Council
- NSW – Sydney City Council
- SA – Adelaide Hills Council
- WA – City of Perth, Town of Cambridge
- TAS – City of Hobart
- VIC – Melbourne City Council, Moreland City Council.

IFAs were in place for three (5%) of the 57 principal contractors and subcontractors. Those three IFA arrangements were not compliant with the FW Act. Some were presented as a condition of employment,

others were not entered into voluntarily and others did not meet the specific requirements for making the IFAs, as set out in the relevant industrial instrument or FW Act¹⁷.

With regard to the employees, the Inquiry found:

- 74% of employees (344 of 464 employees) were aged over 21 years of age (national average of all employed workers is 77% - Census 2016)
- 70% of employees were from English speaking backgrounds (national average of all employed workers is 77% - Census 2016)
- security licencing requirements in each state required a qualification ranging from a Certificate II to a Certificate IV (the qualification could be obtained in any state jurisdiction)
- employees were generally unaware of workplace relations legislation including entitlements such as penalty rates of pay for weekend work, overtime and public holiday work.

¹⁷ The FWO assesses the process that is involved in making IFAs to ensure they meet the requirements specified in the Modern Award and FW Act, however as there is no 'better off overall' test legislated for IFAs. The FWO does not assess wages agreed to under such an agreement as this is the responsibility of the employer under the FW Act:
<https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/individual-flexibility-agreements>

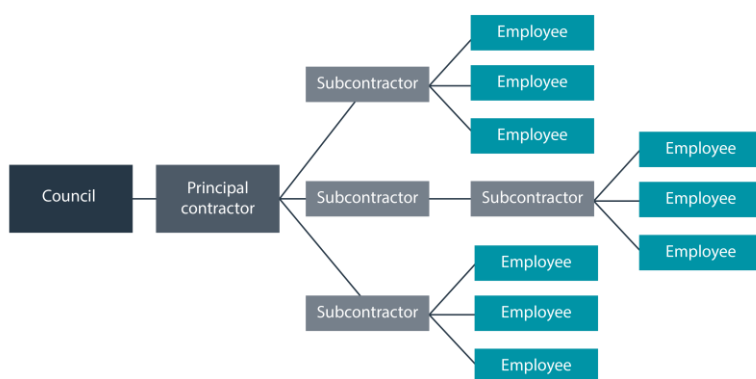
A labour supply chain – the contracting of labour

This Report uses the term ‘labour supply chain’ to describe the situation where one business contracts another business to provide workers or services. When a business procured to provide labour services further subcontracts that responsibility to another business, this creates a labour supply chain or contracting network. The FWO has guidance material published on www.fairwork.gov.au that helps explain contracting labour and supply chains¹⁸.

The FWO has conducted several Inquiries into labour supply chain arrangements that include the contracting of trolley collection, cleaning and poultry processing services¹⁹. The findings of these Inquiries have disclosed ineffective governance at the top of the supply chain contributes to a culture of non-compliance by contractors. For the purposes of this Inquiry, the labour supply chains examined involved Councils, principal contractors and subcontractors.

The FWO’s experience conducting Inquiries of this nature is that multiple levels of subcontracting can create conditions which allow non-compliance to occur. The reasons for this include 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.

Further, the FWO has identified that those at the top of supply chains must have robust monitoring and governance in place so they have clear visibility of what is occurring throughout their supply chains. Failing to do so risks those at the top being blind to the potential unlawful conduct by those engaging the workers providing them with their services, and could potentially expose those businesses to action under section 550 of the FW Act as accessories to the unlawful conduct.



¹⁸ <https://www.fairwork.gov.au/find-help-for/contracting-labour-and-supply-chains>

¹⁹ <https://www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports>

FWO's supply chain strategy

The FWO's strategic approach to regulating labour supply chains is based on the regulator using **four interconnected levers** in order to proactively influence behaviour change. Those levers are:

- **Market structures** – where we work with businesses to better understand the cost pressures facing labour supply chain participants within a particular market. This information enables us to gather intelligence and map industry sectors so as to identify the drivers of non-compliance and then provide businesses with support tools which promote a culture of compliance.
- **Environmental settings** – by exploring the specific cultural, physical and location factors that labour supply chain participants operate within, we are able to collaborate with community groups, employer and employee associations as well as government agencies to influence compliant behaviours.
- **Legal** - utilising the compliance and enforcement provisions contained within the FW Act as well as the means available to other regulators (under their respective authorising statutory and regulatory regimes) so as to enhance deterrence and ensure compliance.
- **Brand reputation** – by leveraging brand profile, the FWO is able to highlight compliance outcomes in the public domain so as to improve transparency and accountability within a labour supply chain.

Applying all four levers enables the FWO to identify and address the causes of non-compliance within the relevant labour supply chains and help build a culture of compliance.

Market structure

Councils

In Australia, around 537 Councils attend to a range of community needs. The majority of Councils (60 – 70%) are regional or rural, and they can differ greatly in size. For instance, ‘...*the largest local government authority by population is the Brisbane City Council with 1,052,458 residents (and) ...the largest council by area is the Shire of East Pilbara in WA covering 371,696 square kilometres.*’²⁰

Councils spend in excess of \$32 billion each year providing services to community residents and employ around 188 900 staff.

Local government revenue comes from three main sources; rates, user charges and grants from Federal and state/territory governments. Local government assets have a net worth of more than \$333 billion (2012-13)²¹.

The Australian Local Government Association advises²² that roles and responsibilities of Councils vary by state, and include functions such as:

- infrastructure and property services, including local roads, bridges, footpaths, drainage, waste collection and management
- provision of recreation facilities such as parks, sports fields and stadiums, golf courses, swimming pools, sport centres, halls, camping grounds and caravan parks
- health services such as water and food inspection, immunisation services, toilet facilities, noise control, meat inspection and animal control.

Councils are required under various procurement guidelines and legislation to tender when entering into a contract for services (such as security). When tendering, Councils are required to act in the best interests of the Australian public. They must be open, transparent and accountable in their dealings, ensure they promote fairness, and obtain the best value for public monies²³. This does not necessarily mean the lowest price, but instead considering all aspects of a tender bid such as reliability, level of service, experience as well as cost.

²⁰ <http://www.australia.gov.au/about-government/how-government-works/local-government>

²¹ <http://alga.asn.au/?ID=42#>

²² <http://alga.asn.au/?ID=59&Menu=41,83>

²³ <https://www.olg.nsw.gov.au/sites/default/files/Tendering-Guidelines-for-NSW-Local-Government.pdf>

Security industry

The security industry in Australia generates around \$6 billion in revenue²⁴. There are in excess of 6000 security businesses around the country, with over 54 000 workers.

The industry is forecast to grow by a further 1.6% by 2020, with over 60 000 workers to be employed²⁵.

The sector includes several major companies as well as a large number of smaller operators. It is not uncommon for a number of the smaller operators in the industry to have commenced as security guards themselves. QLD, NSW and VIC account for approximately 78.8% of industry revenue due to higher population and business numbers²⁶.

The industry is predominantly male, and the majority of workers work in excess of 40 hours per week (72.6%). The most common level of education is a Certificate III or Certificate IV, with many states and territories requiring at least a Certificate II as an entry requirement to obtain a security licence. The main age group is 25 – 34 years, and the median age is 41. In all states, workers are required to be at least 18 to obtain a licence²⁷.

While the sector accounts for only around 0.5% of total employment and 0.4% of businesses in Australia, the security industry has consistently represented more than 2% of requests for assistance involving a workplace dispute lodged with the FWO.

In the 2015-16 financial year, at the time the compliance activity component of the Inquiry commenced, the security sector was ranked ninth-highest in terms of workplace disputes requiring FWO intervention. The most common age group lodging requests for assistance with the FWO in the security industry is the 40 – 49 age cohort (28.7%).

Within the security industry, a Council or other government contract is highly sought after, as they provide a larger degree of ongoing work than other contracts. This has created a highly competitive playing field, with some businesses tendering bids lower than would be required to pay the total cost of the employee just to win a contract and some councils awarding contracts based on the price without conducting due diligence.

²⁴<https://www.ibisworld.com.au/industry-trends/market-research-reports/public-administration-safety/investigation-security-services.html>

²⁵ CPSISC Security Sector – Snapshot

<http://www.cpsisc.com.au/resources/CPSISC/Industry%20Snap%20Shot/Security%20Industry%20Snapshot.pdf>

²⁶ Ibid

²⁷ Ibid

Terms and conditions of employment

The terms and conditions of employment for security services are regulated by the FW Act and the Fair Work Regulations 2009 [the **FW Regulations**].

The relevant modern award for the purpose of this Inquiry was the *Security Services Industry Award 2010* [the **Security Award**]²⁸.

The Inquiry found that employees performed duties listed for a Security Officer Level 1 or a Security Officer Level 2. At the time of the compliance phase of the Inquiry, the ordinary hourly pay rate for a full-time/part-time Security Officer Level 1 was \$19.42 and for a full-time/part-time Security Officer Level 2 was \$19.98²⁹.

The 'total cost of an employee' comprises both direct and indirect costs.

Direct costs may include:

- minimum ordinary hourly wage rates
- overtime and public holiday rates
- shift and weekend penalties
- casual loadings
- allowances (including first aid)
- leave payments, e.g. personal leave or annual leave
- annual leave loading.

Indirect costs may include two categories:

- cost of items that provide a benefit to the individual employee, or
- cost of items that are a part of running a business and a consequence of employing staff.

'Benefits' cover a very wide range of items in the security sector, for instance, cars, parking, insurance, health insurance payments or contributions, mobile phones, laptops/other computers, education expenses, cost of licenses and training and accommodation.

The value of superannuation contributions should also be counted as an indirect cost because they are paid

²⁸ Security Award found on FWO website <http://awardviewer.fwo.gov.au/award/show/MA000016>

²⁹ Pay and Conditions Tool, FWO website <https://calculate.fairwork.gov.au/FindYourAward>

directly to a fund rather than as cash to the employee. Superannuation contributions are compulsory, and if they are not paid the employer must pay the Superannuation Guarantee [SG] Levy. The SG charge should be added to indirect costs.

Other common indirect costs include workers compensation premiums and payroll tax. Workers compensation premiums vary quite widely according to the industry and type of employment, as well as the employer's past history. Payroll tax is a state tax and typically does not apply to small businesses, but the rates vary from state to state.

The total cost of employing an employee includes:

- base salary and wages
- other direct cash payments such as penalty rates, leave loading, allowances etc.
- cash value of employee benefits provided to the employee, including superannuation contributions
- Fringe Benefits Tax payable on these benefits
- value of any incentive and bonus payments
- workers compensation premium (per employee)
- payroll tax (per employee)
- SG charge, where payable
- other miscellaneous costs such as cost of training courses.

It is not normal practice in the security sector to include the cost of items such as the provision of uniforms for employees to wear or office equipment because these items are regarded as tax deductible business expenses.

Industry sources estimate on-costs to be around 35-40% of direct costs, however, it is agreed there are possible variables:

- the percentage will be higher than average if there are many supervisory employees as they are usually paid at a higher rate;
- the percentage will be higher than average if the business has high workers compensation premiums due to their workers compensation claims experience, or because it operates in a high-risk sector of the security industry; and
- costs such as workers compensation and payroll tax vary from state to state.

Enterprise agreements

Employees of a business may derive their entitlements from an enterprise agreement, which has been lodged with, and approved by, the Fair Work Commission³⁰. Where an enterprise agreement exists, employee entitlements come from the enterprise agreement and the modern award does not apply. However, the ordinary hourly base rate of pay cannot be less than the modern award rate, and the National Employment Standards also apply³¹.

During the Inquiry it was identified that 20 of the businesses audited (42%) derived their employee entitlements from an enterprise agreement rather than the Security Award. Of the 21 agreements in place (one business had two agreements for different types of security employees), nine (43%) were negotiated in conjunction with one of the relevant employee associations.

Depending on when an enterprise agreement was lodged, there were various assessments that it may have undergone prior to approval. The table below details the history of the enterprise agreement approval process for those businesses subject to the Inquiry:

Table 1: History of the enterprise agreement approval process for businesses subject to the Inquiry

Timeframe when agreement was lodged/approved	# of Inquiry agreements lodged during this timeframe	Assessment agreement was subject to at time of lodgement	Organisation that assessed and/or approved the agreement
Up to 26 March 2006	1	No Disadvantage Test	Australian Industrial Relations Commission or relevant state industrial relations department
27 March 2006 (Workchoices) to 6 May 2007	3	No Assessment – agreement applied on lodgement exactly as written	Office of the Employment Advocate
7 May 2007 to 27 March 2008	3	Fairness Test	Workplace Authority
28 March 2008 to 30 June 2009 (Forward with Fairness)	3	No Disadvantage Test	
1 July 2009 (Fair Work Act)	-	No Disadvantage Test	

³⁰ <https://www.fwc.gov.au/awards-and-agreements/agreements/make-agreement>

³¹ <https://www.fairwork.gov.au/awards-and-agreements/agreements>

Timeframe when agreement was lodged/approved	# of Inquiry agreements lodged during this timeframe	Assessment agreement was subject to at time of lodgement	Organisation that assessed and/or approved the agreement
1 January 2010 (Fair Work Act)	1	Better Off Overall Test	Fair Work Australia
1 January 2013 (Fair Work Act)	10	Better Off Overall Test	Fair Work Commission

Once an agreement is approved it continues to apply until terminated or replaced, with agreements made prior to 1 January 2010 (pre-Fair Work Agreement) potentially providing entitlements lower than the modern award as they were assessed under previous legislation. Such agreements must provide at least the base ordinary hourly rate of pay from the modern award, but do not have to match the various penalty rates such as weekend, public holiday, overtime, and night shift. In this Inquiry, the FWO found that four of the 21 agreements (19%) were approved prior 7 May 2007, and were therefore not subject to assessment against the full award entitlements (compared to the remaining 81% which were compared to the relevant awards before approval).

Case study of a pre-Fair Work Agreement

One of the audited businesses, Securecorp VIC Pty Ltd [SCV] contracted directly to Melbourne City Council (MCC). The inspector conducting the audit identified that SCV pays their security employees under the Securecorp (VIC) Workplace Agreement 2007 [**the SCV Agreement**]. The legal rates SCV had to pay at the time of the Inquiry under the SCV Agreement were as follows:

SCV Agreement rates per hour:

- o Security Officer Level 1, ordinary hours \$19.42
- o Security Officer Level 1, Saturday \$21.27
- o Security Officer Level 1, Sunday \$21.27
- o Security Officer Level 1, Public Holiday \$27
- o Security Officer Level 1, Night Shift \$19.42

The Inquiry found that SCV was fully compliant with the FW Act and the SCV Agreement, and paid their employees correctly. SCV's subcontractors Global Manpower Solutions Pty Ltd [**GMS**] and ACS Services Pty Ltd [**ACS**], who were engaged and paid by SCV to assist in providing security services to MCC, were required to pay their security employees the legal rates specified in the Security Award:

SCV Agreement rates per hour:

- o Security Officer Level 1, ordinary hours \$19.42
- o Security Officer Level 1, Saturday \$29.13
- o Security Officer Level 1, Sunday \$38.84
- o Security Officer Level 1, Public Holiday \$48.55
- o Security Officer Level 1, night shift \$23.63

The inspectors conducting the audits of GMS and ACS found that they had both underpaid their employees. Both businesses fully cooperated with the FWO and rectified the underpayments, and have committed to continuing to pay correct entitlements.

This MCC supply chain demonstrates that a contractor with an older agreement may have a financial advantage when tendering for a contract, however if they then subcontract to businesses who pay under a modern award, there may not be enough money to pay the total cost of workers and for businesses to make a profit further down the supply chain.

Individual Flexibility Arrangements³²

An IFA can be used to vary specific modern award or enterprise agreement terms for an individual at the request of the employer or the employee³³. IFAs can be beneficial to both parties as they allow certain terms to be varied to meet the needs of both. For example, under an IFA an employee may choose to work longer hours two days per week as 'ordinary hours' so their employer doesn't have to pay overtime, and in return, the employer allows them to finish early two days per week and pick their children up from school.

The FWO does not have a role in assessing the entitlements under an IFA. Under the FW Act it is the obligation of the employer to make sure the employee is better off overall compared to the relevant award. An employee does not have to sign an IFA if they believe they are not better off overall.

The Inquiry identified that three businesses had employees on IFAs, and for all three businesses, the IFAs failed to fully meet the award flexibility requirements set out in clause seven of the modern award³⁴. Once an IFA is made it still applies even if it doesn't meet these requirements, but it is also still considered to have breached the legislation. The FWO has taken enforcement action against all three businesses as a result. Two businesses have been issued Letters of Caution, and the third is the subject of legal action in relation to IFA and other contraventions³⁵.

³² <https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/individual-flexibility-agreements>

³³ FW Act section 144 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s144.html and section 202 http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fwa2009114/s202.html

³⁴ <http://awardviewer.fwo.gov.au/award/show/MA000016>

³⁵ Refer to footnote 7.

It is important that businesses entering into IFAs with their employees ensure they meet all the requirements set out in the FW Act and the relevant modern award/enterprise agreement.

Independent contractors

Another element of engaging security workers that was of interest to the Inquiry relates to independent contractors performing security work. An independent contractor's remuneration is not governed by the terms of a modern award or enterprise agreement, rather a contractor is able to agree upon any price point. There is therefore an incentive by some businesses to engage independent contractors rather than employees as the price of labour can be lower.

Independent contractors are workers who have their own Australian Business Number [ABN], run their own business, and are responsible for their own tax (including goods and services tax) and superannuation. They usually negotiate their own fees and working arrangements, and can work for more than one client at a time³⁶.

Councils, principal contractors and subcontractors need to ensure they are educated about the difference between a genuine independent contractor and an employee, to avoid sham contracting³⁷.

The nature of work in the security industry means it is unlikely that an individual security worker would be a genuine independent contractor running their own business. This is due to a range of factors including:

- no specialist skills required
- commercial risks are borne by the principal contractor rather than the individual security worker
- the work that they perform promotes the brand/reputation of the principal contractor rather than the individual security worker
- guards provided with, and required to wear, the uniform specified by the principal contractor or the Council
- guards required to perform work as prescribed by the principal contractor or Council
- guards are paid an hourly rate of time based on the number of hours worked rather than being paid for specific tasks/projects

³⁶ <https://www.fairwork.gov.au/find-help-for/independent-contractors>

³⁷ 'Sham contracting' is where an employer deliberately attempts to disguise an employment relationship as an independent contracting arrangement: <https://www.fairwork.gov.au/find-help-for/independent-contractors>

- guards are unable to subcontract work out.

The evidence gathered during this Inquiry through discussions with workers, reviews of records provided by employers and discussions with Councils did not identify any evidence of sham contracting. This finding appears to be due to the higher level of awareness by Council procurement officers as well as contractual requirements to notify Councils and/or seek permission to subcontract.

Environmental settings

Councils typically source security services for the following types of work:

- static guarding of infrastructure
- CCTV monitoring
- remote monitoring of infrastructure and events.

Geographical differences

The Inquiry found security employees in metropolitan councils generally perform more remote monitoring of infrastructure and CCTV and carpark monitoring than event work. Contracts with metropolitan Councils tend to be for longer durations, around two to three years. In regional areas, security monitoring involves smaller distances, and work tends to be more sporadic in nature with event work or shorter contract durations.

It is often easier to move from one security business to another within a metropolitan area, whereas in regional areas there are less businesses operating. This can create a situation where employees are potentially more reluctant to voice concerns about their working entitlements, as there may not be many other work opportunities, or they may get a reputation for being a difficult staff member within the industry.

Security industry culture

Security is an industry requiring certifications, from the Certificate II to the Certificate IV level, for registration as a security worker. No specialist skills are required, with registration in all states mainly focusing on potential criminal records. Many security business owners started as security workers themselves and then progressed to starting their own businesses. As a result, there is a lack of awareness and education regarding employer obligations and employee entitlements, with businesses instead doing things “the way they were done” when the business owner used to do similar work for someone else.

There are also many small businesses competing for contracts against both small and large businesses, and businesses may cut their profit margin to win a contract.

Case study – security employee becomes business owner

A business owner audited during this Inquiry, 'Thomas', advised the FWO that he was a security guard for around 10 years, and then decided to run his own company to spend more time with his family. However, he advised he has instead found that he spends even less time with his family as a business owner, as he has to operate close to his profit line and do more of the work himself. He is also based in a regional area which makes it harder to attract employees and to win contracts. Thomas indicated to the FWO that he finds himself both time and cash poor in running his business, so even though he wants to do the right thing by his staff, he doesn't have time to fully educate himself across all relevant legislation.

Security licencing is not standard throughout Australia, and the requirements to hold a licence can vary considerably. In NSW, VIC and WA the police are responsible for licencing, while in other states it is the responsibility of various state government departments. QLD requires all security firms to be a member of an approved association to hold a licence; VIC requires either association membership or a Certificate IV in Security & Risk Management, while no other states appear to have a requirement relating to association membership.

Hours and physicality of work

The Inquiry observed that security employees tend to work late at night, particularly on weekends. They are more likely to be classified as 'shift workers', with disrupted sleep patterns that can have an impact on their health. The work is highly physical, with static guards required to be on their feet the majority of the time. Security guards are also more likely to encounter higher risks to their safety than in other industries, due in part to the physicality of the work, as well as their interactions with members of the public who may be intoxicated, highly emotional, or irrational³⁸.

The relevant industry bodies involved in this Inquiry

ASIAL is a registered organisation, and they indicate on their website that their members "...account for approximately 85 per cent of the Australian security industry."³⁹ The FWO has a Memorandum of Understanding (**MoU**) with ASIAL which provides a framework for both parties to enhance existing relationships and work together to improve compliance with Commonwealth workplace laws through the

³⁸ Article detailing one of the risks faced in the workplace by security guards:

<https://www.brisbanetimes.com.au/national/queensland/teen-charged-over-alleged-nurse-assaults-20160516-gow1ko.html>

³⁹ Australian Security Industry Association Limited, About Us Platform, <http://www.asial.com.au/about-us/our-association>, accessed 4 May 2016.

exchange of accessible, reliable and credible information to workplace participants. In 2013, ASIAL raised concerns with the FWO following member feedback about the lack of transparency and fairness in the awarding of local government tenders to private security companies, often at the lowest price⁴⁰.

United Voice is a registered organisation representing over 120 000 workers across a wide range of industries including security, as well as hospitality, health and aged care, manufacturing, mining and miscellaneous, property services and children's services⁴¹.

⁴⁰ Security Insider Magazine, August 2014, <https://issuu.com/asial/docs/aug2014-insiderweb/37>

⁴¹ There are two additional employer associations relevant to this industry, the Building Services Contractors Association of Australia (BSCAA) and the Security Providers Association of Australia Limited (SPAAL). BSCAA is Australia's peak industry representative body for the building services industry, with members including contractors for cleaning, security, facilities management and ground maintenance. SPAAL is an approved national industry association. Membership is open to all security providers in Australia. SPAAL is a member of the Construction and Property Services Industry Skills Council, in addition to Standards Australia.

Legal

Accessorial liability

Participants (such as Councils) within a labour supply chain may be held legally responsible if their principal contractors or subcontractors are not complying with the Fair Work legislation where it can be demonstrated that they had a role to play in those breaches of the law.

That is, it is not just employers who can be held liable for contraventions such as underpayments but also any persons knowingly involved in contraventions may also be found legally responsible. A range of accessories have been held liable in actions taken by the FWO including individuals (accountants, managers, directors, lawyers) or businesses involved in the supply chain. This is known as accessorial liability⁴², and falls under section 550 [s550] of the FW Act, which 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.

The FWO uses s550 to commence court proceedings against alleged ‘accessories’ to contraventions. The outcomes of FWO legal proceedings that resulted in penalties against directors in supply chains in industries such as cleaning⁴³, security⁴⁴ and trolley collection⁴⁵ demonstrate the importance of ensuring there is full compliance with workplace laws at all levels. This includes maintaining an awareness of the supply chain and ensuring that measures are in place to avoid non-compliance. While it was reassuring that we did not find evidence of accessorial liability during the course of the Inquiry, it is important to note that all participants within any labour supply chain are exposed to potential legal proceedings if they ‘turn a blind eye’ to contraventions of the FW Act.

⁴² <https://www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability>
<https://www.fairwork.gov.au/about-us/our-policies> FWO Guidance Note 1 – Litigation Policy

⁴³ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/may-2018/20180529-iss-penalty-mr>
⁴⁴ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2013-media-releases/november-2013/20131119-safecorp-security-litigation>

⁴⁵ <https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/march-2016/20160310-trolley-trifecta-presser>

Brand reputation

A contracted provider found to be engaging in underpayment of wages or exploitation presents a key risk to the reputation of a Council. Ratepayers expect Councils to deliver cost effective services. But the community has also shown little tolerance for those at the top of supply chains failing to take responsibility for vulnerable workers. The desire to deliver value for money needs to be balanced with the moral and ethical dimensions of how those services are delivered and the impact that a publicly funded entity such as a Council may have in influencing prices and behaviour in a highly competitive sector. The reality is likely to be that security providers will be primarily motivated by commercial considerations in a market where price is often the key driver to whether they will be successful in securing work.

Case study – potential brand damage mitigated

Melnor Security Service Pty Ltd [**Melnor**] was contracted by Tamworth City Council to provide security services at the Country Music Festival in 2015. Two security guards at the festival were underpaid more than \$6000, with their rates of \$26 to \$28 per hour not enough to meet minimum entitlements under the Security Award. Depending⁴⁶ on their classification, they should have been paid up to \$43.85 per hour for night, weekend and overtime work.

When the Inquiry identified this underpayment, Melnor cooperated with the FWO, promptly reimbursed the guards, and entered into an EU with the FWO to ensure future compliance.

Council procurement officers are balancing these tensions in deciding who to engage and what sort of monitoring arrangements to put in place. Unless they manage these tensions carefully and conscious of the dynamics in the sector, Councils risk being seen to have contributed to underpayment of workers ‘down the chain’ just as much as the security providers, with damage to their reputation and standing in the community.

⁴⁶ <https://www.fairwork.gov.au/about-us/news-media-releases/2016-media-releases/august-2016/20160823-melnor-eu-release>

Conclusion

The findings and recommendations within this Inquiry provide an opportunity for Councils (and all heads of supply chains) to effect change within their industry from the top down. This starts with Councils having full awareness of the total cost of the worker when they assess tenders, and ensuring they award their security contracts to businesses that are ethical, pay their workers correctly, and provide value for money, not necessarily the lowest price. Once the contracts are in place, Councils can then ensure they continue to impact this industry-wide change by putting measures in place to monitor ongoing compliance within their supply chains. Making these changes will also ensure businesses don't benefit from winning contracts by underpaying staff and discourage such behaviour from occurring as the consequence will be to lose out on the highly desirable Council contracts.

The FWO will continue to monitor the issues identified in this report and may conduct further enquiries.

The FWO has guidance materials on contracting labour and supply chains available at www.fairwork.gov.au/supplychain.

About the Fair Work Ombudsman

The FWO is an independent statutory agency, created by the *Fair Work Act 2009* (FW 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.

For further information and media enquiries please contact FWO media (media@fwo.gov.au).

Our Strategic Intent as well as our Compliance and Enforcement Policy can be located at www.fairwork.gov.au/about-us/our-vision.

If you would like further information about the FWO's compliance and enforcement activities please contact Lynda McAlary-Smith, Executive Director – Compliance and Enforcement (lynda.mcalary-smith@fwo.gov.au).