



# ASIAL Code of Practice Protective Security Services Subcontracting

The peak body for security professionals



# About ASIAL

Established in 1969, the Australian Security Industry Association Limited (ASIAL) is the peak national body representing security professionals in Australia.

ASIAL provides advice, assistance and representation to members in the security sector, reflecting its membership of owners and operators of security businesses providing all forms of protective security services, cash in transit, electronic, physical and associated security services.



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# 1. FOREWORD

## 1.1 Objective

The objective of this Subcontracting Code of Practice ("Code") is to provide industry best practice guidance with respect to the proper use of subcontractors in the protective security services sector.

It is a practical guide which aims to:

- (a) Ensure professional behaviour within the security industry;
- (b) Help security operators understand key legal obligations;
- (c) Promote compliance with legislative requirements;
- (d) Eliminate sham contracting in the private security sector;
- (e) Protect vulnerable workers against exploitation;
- (f) Improve business practices; and
- (g) Improve service delivery to the customers of the security industry as a whole.

## 1.2 Commencement

This Code commences on 1 July 2021.

# 2. SCOPE AND APPLICATION

This Code applies to and must be complied with by ASIAL Members ("Members") in the protective security services sector who either:

- (a) Subcontract security services that other parties (their "clients" or "customers") have contracted them to supply; or
- (b) Are subcontracted by other security businesses to supply security services to the clients or customers of the other security businesses

For clarity, nothing in this Code reduces, limits or otherwise impacts the obligation to comply with all applicable laws, including but not limited to the legislation referred to in Part 3 of this Code.

If there is a conflict between anything set out in this Code and any applicable legislation, the legislation shall prevail to the extent of any inconsistency.

# 3. NORMATIVE REFERENCES

Key legislation covering the security industry in Australia and which is also relevant to subcontracting includes, but is not limited to the following, with which ASIAL members must comply.

**Federal**      *Corporations Act 2001*  
*Fair Work Act 2009*  
*Independent Contractors Act 2006*  
*Modern Slavery Act 2018*  
*Privacy Act 1988*  
*Superannuation Guarantee (Administration) Act 1992*  
*Work Health & Safety Act 2011*

**ACT**            *Security Industry Act 2003*  
*Security Industry Regulation 2003*  
*Long Service Leave (Portable Schemes) Act 2009*

- NSW** *Contracts Review Act 1980*  
*Modern Slavery Act 2018*  
*Security Industry Act 1997*  
*Security Industry Regulation 2016*  
*Security Industry Amendment (Private Investigators) Act 2016*
- NT** *Private Security Act 1995*  
*Private Security (Crowd Controllers) Regulations 1996*  
*Private Security (Miscellaneous Matters) Regulations 2006*  
*Private Security (Security Firms) Regulations 1998*  
*Private Security (Security Officers) Regulations 1998*  
*Security Industry Act 1997*  
*Security Industry Amendment (Private Investigators) Act 2016*  
*Security Industry Regulation 2016*
- QLD** *Labour Hire Licensing Act 2017*  
*Security Providers Act 1993*  
*Security Providers (Crowd Control Code of Practice) Regulation 2008*  
*Security Providers Regulation 2008*  
*Security Providers (Security Firm Code of Practice) Regulation 2008*  
*Security Providers (Security Officer – Licensed Premises Code of Practice) Regulation 2008*
- SA** *Security and Investigations Industry Act 1995*  
*Security and Investigations Industry Regulations 2011*
- TAS** *Security and Investigations Act 2002*  
*Security and Investigations Regulations 2005*
- VIC** *Labour Hire Licensing Act 2018*  
*Long Service Leave Benefits Portability Act 2018*  
*Private Security Act 2004*  
*Private Security Regulations 2016*
- WA** *Security and Related Activities (Control) Act 1996*  
*Security and Related Activities (Control) Regulations 1997*

*All State and Territory Work Health and Safety Legislation*

## **4. KEY DEFINITIONS, STAKEHOLDERS AND ISSUES**

### **4.1 The protective security services sector of the private security industry**

- (a) Patrolling, protecting, screening, watching or guarding any people and/or property, by physical means (which may involve the use of patrol dogs or the possession or use of a firearm) or by electronic means;
- (b) Critical infrastructure protection;
- (c) Crowd, event or venue control whether through physical or electronic means, body guarding or close personal protection, the operation of a security control room or monitoring centre, loss prevention;
- (d) Private investigation and surveillance;
- (e) Cash-in-transit either armoured or non-armoured, the installation, maintenance; repair or replenishing of Automatic Teller Machines (ATMs); and
- (f) Traffic control when it is incidental to, or associated with, these activities.

## 4.2 Subcontracting

Subcontracting is essentially a business to business relationship involving the outsourcing by one entity (the “Prime Contractor” or “Head Contractor”) of some of the obligations or work under a contract which that entity has with a customer or client, to another entity (“subcontractor”).

In the private security industry, subcontracting usually refers to the practice of bringing in an outside entity to perform specific parts of a security services contract or project (for example, where the Prime Contractor needs to “top up” the number of personnel, or provide specific expertise, it requires) to perform work under the contract.

## 4.3 Prime Contractor or Head Contractor

A Prime Contractor or Head Contractor (also commonly referred to as “the contractor”) is an entity that enters into a contract (the “head contract”) directly with the client (“the principal”) and has full responsibility for the completion of the work under that contract. A Prime Contractor may engage (and manage) one or more subcontractors to perform specific parts of the work under the contract.

## 4.4 Subcontractor

A subcontractor is an independent entity that has a direct relationship with and is engaged by the Prime Contractor to perform some (or in some rare cases, all) of the obligations or work under a contract the Prime Contractor has with a customer or client. The terms of the engagement are usually set out in a written contract between the Prime Contractor and the subcontractor – known as a subcontract or subcontract agreement.

A subcontractor is technically another contractor, that contracts/deals directly with the Prime Contractor and not the principal client. A subcontractor may be an individual/person or other entity such as a company.

A subcontractor is legally responsible for its own work and takes a commercial risk, however, the Prime Contractor will typically have contractual responsibility and will answer to the client and be liable for issues with any work undertaken by the subcontractor. It is, therefore, important for the Prime Contractor to ensure subcontractor compliance with their subcontracted obligations and the law.

## 4.5 Multi-level Subcontracting

A multi-level subcontractor is an independent entity that is engaged not by the Prime Contractor but by the subcontractor of the Prime Contractor to perform some of the obligations or work the subcontractor has agreed to supply under its subcontract with the Prime Contractor.

*Using multi-level subcontracting is a risky exercise.* The more levels there are in the supply chain the harder it gets to monitor compliance with legal and contractual obligations. Some key areas of risk include ensuring worker health and safety, ensuring workers are suitably trained and licensed and that they receive all their entitlements under the *Fair Work Act* and other industrial laws – and in particular that they are paid in accordance with the relevant industrial instrument – either the award (*Security Services Industry Award*) or an enterprise agreement (that has been approved by and registered with the Fair Work Commission).

Because of the risks and complexities involved, the use of multi-level subcontracting is not a recommended practice and should only be relied on if suitable systems are in place to ensure that each party in the chain complies with its obligations – and is also reasonably able to comply with its obligations – for example, that each party in the chain is paid sufficiently to enable the subcontractor at the end of the chain to pay their employees appropriately and the Client is fully aware of all businesses involved.

## 4.6 An independent contractor

An independent contractor is someone who runs their own business/is self-employed. They usually negotiate their own fees or charges and working arrangements and can work for more than one entity at a time. Contracts between an independent contractor and the entity they are engaged by are known as contracts for service.

Independent contractors are paid for the results they achieve and are personally responsible if their business makes a profit or loss. They are often engaged for a specific task or work.

Independent contractors are commonly set up using the sole trader business structure and run their own business with their own Australian Business Number (ABN) - issuing invoices periodically for the services they provide. Merely, having an ABN and issuing invoices does not, however, automatically make the individual a bona fide or genuine independent contractor. In fact, it is important to note a person who is engaged to provide services, who is told they are an independent contractor and who operates under an ABN could very likely be deemed as an employee.

## 4.7 Employee

A person who works under a contract of service (an arrangement that is wholly or principally for their labour) is the employee of the other party to the arrangement - the employer.

Employers have specific responsibilities to their employees under various laws in Australia including the obligation to provide the entitlements set out in the National Employment Standards ("NES") under the *Fair Work Act*. Amongst other things, employers are obliged to:

- provide the employee with the Fair Work Information Statement;
- pay employee at least the minimum wages and conditions in accordance with a proper industrial instrument such as the applicable award or enterprise agreement;
- maintain and keep proper employee records;
- withhold and remit PAYG withholding tax from the employee's wages;
- pay the superannuation guarantee levy on behalf of the employee;
- maintain workers compensation insurance with respect to that employee; and
- report and pay Fringe Benefits Tax (FBT), if fringe benefits are provided.

## 4.8 The difference between an independent contractor and an employee

Differentiating between an independent contractor and an employee can be a complex issue and depends on the nature of the working arrangement and not merely the label or description given to the worker.

A number of factors must be considered when determining whether a person is an employee or an independent contractor. These factors include such things as the nature of control exercised over the worker, the worker's ability to delegate or subcontract, whether the worker has an ABN and invoices for the work done, the nature of the agreement with the worker, the basis of their payment, how they are taxed, the risks taken, the provision of equipment and tools and the extent of the worker's obligation to work.

Regardless of how the parties decide to characterise the arrangement, the law will ultimately decide whether the person is a contractor or an employee depending on the facts. In considering the issue, a court will look at the whole relationship and make a decision on balance. A multi-factorial test is often applied when making an assessment.

*Appendix 1: Employee Vs Independent Contractor Checklist will assist in determining if the independent contractor is actually an employee.*

## 4.9 Sham contracting

Sham contracting arises where an employer attempts to disguise or misrepresent an employment relationship as an independent contractor one. This is usually done for the purposes of avoiding responsibility for employee entitlements. Sham contracting is prohibited in law. Under the sham contracting provisions of the *Fair Work Act*, an employer must not:

- Misrepresent an employment relationship as an independent contracting arrangement;
- Dismiss, or threaten to dismiss, an individual so as to re-hire them as an independent contractor to perform substantially the same work; or
- Make a knowingly false statement to a current or former employee to persuade them to become an independent contractor to perform substantially the same work.

Sham contracting conduct can attract heavy fines for an individual and for a company.

## 4.10 Is there any legislation that is specifically relevant to independent contractors?

Section 3 of this Code references various legislation that is relevant to the security industry and subcontracting including the below statutes that are of particular importance to the question of independent contractors.

### ***Independent Contractor's Act 2006 (Cth)***

This Act sets up a national unfair contracts scheme for independent contractors where they can ask a court to set aside a contract which is harsh or unfair. The court is able to consider:

- The terms of the contract;
- The relative bargaining strengths of the contract parties;
- Whether there was any undue influence or pressure, or any unfair tactics used against, a party to the contract;
- Whether the contract provides remuneration that is less than that of an employee doing similar work;
- Any other matters the court thinks is relevant.

Under this Act, each of the following grounds is an unfairness ground:

- The contract is unfair;
- The contract is harsh or unconscionable;
- The contract is unjust;
- The contract is against the public interest;
- The contract is designed to, or does, avoid the provisions of the *Fair Work Act 2009 (Cth)*; a state or territory industrial law or an award, agreement or other FWC approved industrial instrument;
- The contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work.

The *Contracts Review Act 1980* (NSW) similarly allows NSW courts to review contracts that are unjust. If the contract is considered unjust, the court can refuse to enforce any or all of its terms; it can make an order declaring the contract void or it can order a variation of the terms.

## 4.11 Labour Hire Licensing Legislation in Queensland and Victoria

Labour hire licensing schemes in Queensland and Victoria protect vulnerable labour hire workers, including those workers in the security industry, from exploitation and regulate the provision of labour hire services in these states. Three key elements of the schemes are that:

- Labour hire providers must be licensed to operate;
- Those who use labour hire providers must only engage licensed providers;
- Labour hire providers must report annually on their labour hire activities, including the number of workers, their visa types, services, industries and locations.

In order to be granted and maintain a license, labour hire providers are required to demonstrate compliance with the *Fair Work Act* and work health and safety laws as well as meeting their superannuation, tax and (if applicable) immigration law obligations.

Breaches of the legislation can result in significant financial penalties.

A labour licensing scheme also applies in South Australia but does not apply to the security industry.

## 4.12 Modern Slavery Act 2018

In 2018, the Federal Government enacted modern slavery laws requiring entities to report on the risks of modern slavery in their operations and supply chains and on the actions taken to address those risks. NSW also enacted modern slavery legislation in 2018 but as at 1 January, 2020, this legislation had not yet commenced.

“Modern slavery” is a non-legal term that refers to situations where coercion, threats or deception are used to exploit individuals and undermine their freedom to make choices. It is more prevalent with respect to young and especially migrant or temporary workers and exists in the agriculture, horticulture, mining, construction, hospitality, domestic, cleaning and security sectors.

There are many risk indicators of modern slavery including low pay or no pay, extremely long working hours and days without a break, the forced keeping of identity documents (e.g. passports), on boarding fees leading to bonded labour which is when a person works to pay off a debt while losing control over working conditions and repayments. On their own the indicators do not always equate to modern slavery but they may point to the risk of modern slavery or to other forms of exploitation.

Under the federal legislation some businesses are required to prepare annual modern slavery statements to demonstrate the efforts taken to reduce or eradicate modern slavery within their operations and supply chains. Whilst the Act targets businesses with a consolidated revenue of \$100 million, it also impacts smaller businesses by virtue of the fact that they are, or will be, part of the supply chain of the larger organisations.

## 5. REQUIREMENTS TO BE COMPLIED WITH

### 5.1 Compliance with the Code

Members must:

- (a) Comply with this Code;
- (b) Respond to reasonable requests from ASIAL concerning matters relating to this Code.

### 5.2 Compliance with the law

Members must ensure they are aware of and comply with all applicable laws, including the legislation referred to in section 3 of this Code.

### 5.3 Specific obligations of prime contractors

The following provisions apply specifically to Code Covered Entities who are Prime Contractors:

- (a) Prime Contractors must:
  - (i) Ensure that their subcontracts with their subcontractors include provisions requiring the subcontractors to comply with this Code and with all applicable laws;
  - (ii) Use all reasonable efforts to ensure their subcontractors comply with all relevant provisions of this Code and take prompt remedial action to rectify non-compliant conduct;
  - (iii) Ensure that relevant requirements with respect to subcontracting that are set out in applicable head contracts are complied with;
  - (iv) Undertake periodic audits of their subcontractors to ensure compliance with this Code.

*Refer to part 5.8 of this Code and Appendix 4: Security Contractor Audit that provides a framework against which periodic audits may be conducted.*

- (b) Prime Contractors must require all their subcontractors to provide all relevant information relating to its subcontractors.

*Appendix 2: Subcontractor Information Form provides a template for capturing and recording the relevant information about subcontractors. This form (or a form in a different format that contains substantially the same information) must be kept as a record and be reviewed and updated as and when necessary.*

- (c) A Prime (Head) Contractor should not give out work without making a record in writing of the following details:
  - The name of the other employer (or the other entity or person(s)) to whom the work is given; and
  - The Australian Business Number and/or Australian Company Number of the other subcontractor (or the other entity or person(s)) to whom the work is given;
  - The address of the subcontractor (or the other entity or person(s)) to whom the work is given;
  - The date of giving out the work and the date for completion or cessation of the contract or arrangement under which the work is performed;

- A description of the nature of the work to be performed;
- Where a Prime (head) Contractor gives out work to more than one subcontractor, entity or person(s), the Prime Contractor must keep an up to date consolidated list of those subcontractors, entities or persons which contains all of the information required to be kept;
- Where the work is subcontracted to others, each entity or person should have a subcontract agreement detailing the work to be performed and the rights and responsibilities of each of the parties to the agreement.

## 5.4 Written subcontracts

All subcontracting arrangements involving Prime Contractor Code Covered Entities and their subcontractors must always be in the form of a written subcontract and contain certain key information and provisions.

*Appendix 3: Checklist of Recommended Terms – this contains a table and checklist of key details and information that should be included in a subcontract agreement.*

## 5.5 Avoidance of sham contracting

- (a) Members must not:
  - (i) Engage in sham contracting; or
  - (ii) Engage another party that engages in sham contracting
- (b) To avoid sham contracting:
  - (i) Members must undertake a suitable due diligence process which may include reviewing arrangements with its independent contractors to ensure that the true character of the arrangement is not one of employment.

*Refer to Appendix 1: Employee Vs Independent Contractor Checklist.*

- (ii) Prime Contractors who are Members must include relevant provisions in subcontracts.
- (iii) Prime Contractors who are Members must undertake periodic audits in accordance with Part 5.8.

*Refer to Appendix 4: Security Contractor Audit provides a framework against which periodic audits may be conducted.*

## 5.6 Payment of employees

- (a) All Members must ensure that the fees it pays its subcontractors are sufficient to enable its subcontractor to fulfil its employee payment obligations under either;
  - (i) The relevant award which in the case of the security industry is the *Security Services Industry Award 2020*, or as varied by decisions of the Fair Work Commission or;
  - (ii) A current enterprise agreement that has been approved by and registered with the Fair Work Commission or;
- (b) Prime Contractors must ensure that the fees it pays its subcontractors are sufficient to enable its subcontractor to fulfil these employee payment obligations.

## 5.7 Avoidance of Multi-level subcontracting

- (a) Multi-level subcontracting is not a recommended practice.
- (b) Members must not engage in Multi-level subcontracting unless:
  - (i) This practice is expressly permitted by the head contract and that relevant disclosures have been made to and authorisations provided by the Head Contractor and the client;
  - (ii) This practice is expressly permitted by the subcontract between the Prime Contractor and its subcontractors and that relevant disclosures have been made to and authorisations provided by the Prime Contractor;
  - (iii) There are effective systems in place to ensure that each party in the subcontracting chain complies with its obligations under this Code with specific regard being placed on ensuring that each party is paid sufficiently to ensure that the subcontractor at the end of the chain is able to comply with their payment obligations to their employees; and
  - (iv) There are effective systems in place to monitor compliance with this Code by each party in the subcontracting chain.

## 5.8 Periodic audits

Prime Contractors must use their best efforts to ensure that subcontractor compliance with this Code and to this end Prime Contractors should undertake an audit of its subcontractors on a periodic basis of at least once a year

*Appendix 4: Security Contractor Audit provides a framework against which periodic audits can be conducted.*

# 6. CONSEQUENCES OF NON-COMPLIANCE WITH THE CODE

ASIAL is committed to transparency and accountability in ensuring its Members provide a quality service to the Australian community. The ASIAL Complaint and Dispute Resolution Policy is based on Australian Standard 4269 and promotes efficient, fair and accessible mechanisms for resolving complaints.

Notifications of alleged non-compliance with the ASIAL Code of Practice for Protective Security Services subcontracting can be lodged through the Association's online Complaint and Dispute Resolution process.

ASIAL's Disciplinary Committee is responsible for investigating alleged breaches of ASIAL Codes of Practice.

Consequences for non-compliance with the ASIAL Code of Practice for Protective Security Services subcontracting may include:

- The need for remedial action or measures;
- The imposition of a financial sanction;
- Suspension or expulsion from the membership.

## 7. MONITORING AND REVIEW OF CODE

This Code will be reviewed every 2 years or as required by legislative change.

## 8. APPENDICES

**Appendix 1: Employee Vs Independent Contractor Checklist** – A checklist to assist in determining whether an independent contractor is actually an employee.

**Appendix 2: Subcontractor Information Form** - A template for capturing and recording relevant information about subcontractors.

**Appendix 3: Checklist of Recommended Terms** - A checklist of key details and information that should be included in a subcontract agreement.

**Appendix 4: Security Contractor Audit** - A framework against which periodic audits can be conducted.

*Note: Access to these Appendices is available exclusively to ASIAL members by logging into the ASIAL member area.*

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