



Submission: The role of private military and security companies in immigration and border management and the impact on the protection of the rights of all migrants

About Australasian Centre for Corporate Responsibility (ACCR)

The Australasian Centre for Corporate Responsibility (ACCR) is a not-for-profit, philanthropically-funded research organisation, based in Australia. ACCR monitors the environmental, social and governance (ESG) practices and performance of Australian-listed companies, including climate change, human rights, and labour rights. We undertake research and highlight emerging areas of business risk through private and public engagement.

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Overview

ACCR is grateful for the opportunity to make a submission to the OHCHR's Mercenaries Working Group inquiry into *The role of private military and security companies in immigration and border management and the impact on the protection of the rights of all migrants*.

Over the last 24 months, ACCR has engaged with companies, investors, legal experts, and human rights groups on the topic of immigration and border management by the Australian government. This engagement has focused particularly on the role of Australian airline companies, contracted by the Australian government to provide passenger air transportation services, including the transfer and removal of refugees and asylum seekers. This transportation primarily occurs between sites of immigration detention (both onshore and offshore mainland Australia), but also involves the deportation (or 'removal') of people from Australia to other countries.

ACCR is concerned about the significant human rights risks arising from this transportation activity, as well as the lack of transparency around the nature of the contracts governing this activity. It is unclear if and how Australian companies are guarding against the human rights risks associated with contracts of this nature.

Our submission to this inquiry focuses on our specific knowledge of the use of for-profit airline transportation companies in Australia, in the context of regulatory and contractual border management frameworks operating in this jurisdiction.

Regulatory and contractual border management context: Australia

Numerous international authorities have found that Australia's refugee law system contravenes international human rights law in a number of respects. Centrally, section 197C of the Migration Act 1958 (Cth), which was introduced in 2014, provides that the requirement to remove unlawful non-citizens from Australia is not limited by

Australia's non-refoulement obligations under the Refugee Convention. As the Refugee Advice & Casework Service (RACS) has noted:

The introduction of [section 197C] represents a significant and deliberate step by Australia away from honouring our international obligations, and means that the Department is obligated to attempt to remove certain people seeking asylum regardless of whether they have credible protection claims.

Therefore, the Australian legal system can no longer be relied upon to ensure compliance with international human rights law. RACS note:

While the Minister has the power to intervene in circumstances where an individual's human rights are threatened, these powers are non-compellable, discretionary, personal, and rarely exercised for the benefit of people seeking asylum. In this context, noting the inadequacy of domestic mechanisms to ensure human rights are upheld, it is more important than ever that corporations involved in facilitating the transport of asylum seekers and refugees on behalf of the Department exercise a high level of caution in relation to their human rights responsibilities.

Given this legal context, ACCR argues that companies contracted by the Australian government to provide immigration and border management services need to engage a heightened due diligence process, in order to anticipate, mitigate and avoid any adverse human rights impacts. For many companies, this is part of discharging their responsibilities as signatories to the UN Guiding Principles on Business and Human Rights (UNGPs).

The legal and business risks associated with complicity in the Australian government's immigration and border management have been demonstrated in other cases.

In the case of *Kamasee v. Commonwealth of Australia and Ors*, a class action, over 1600 detainees who had been held at the Manus Island detention centre at some point between 2012 and 2014 made a claim for negligence and false imprisonment against Commonwealth of Australia and its contracted service providers, G4S and Broadspectrum. The plaintiffs were awarded \$70 million plus costs in a negotiated settlement.

The legal and reputational risks associated with involuntary transportation by airlines have been acknowledged by companies in other jurisdictions. In June 2018, six US airlines, including Delta, United Airlines, and Frontier Airlines, announced their refusal to participate in transporting children who have been separated from their families at US borders. In June 2018, Virgin airlines in the UK announced that it would 'end all involuntary deportations on [the Virgin Atlantic] network', from August 1, 2018. This followed significant community campaigning over the wrongful deportation of at least 63 Windrush generation people to Caribbean countries.¹

Other companies have faced legal action over their contracts to assist with forcible deportations. In 2015 Louise Graham, a former flight attendant, sued her former employer British Airways after witnessing the death of a passenger who was 'fatally restrained' by G4S security guards in 2010. The passenger, Jimmy Mubenga, was being deported to Angola. Louise lost her career due to psychiatric trauma from the event.²

Airline border management services: Procurement rules, contractual requirements, monitoring and oversight of contractual clauses and standards, and accountability mechanisms put into place

The Australian Department of Home Affairs has a broad remit to manage: federal law enforcement, national and transport security, settlement services, and immigration and border-related functions, among other things.³ The Australian Border Force, which forms part of the Department of Home Affairs, is the government law enforcement agency responsible for: border control enforcement (both offshore and onshore), and detention operations in Australia.

¹ <https://www.theguardian.com/uk-news/2018/jun/29/virgin-airlines-no-longer-help-deport-immigrants-lgbt-windrush>

² <https://www.standard.co.uk/news/uk/flight-attendant-suing-g4s-after-seeing-deportee-die-on-british-airways-flight-a2958966.html>

³ <https://www.homeaffairs.gov.au/>

As part of border management and enforcement, the Department of Home Affairs contracts commercial and charter airlines to carry out voluntary and involuntary transfers, removals and deportations, of 'persons in custody' (PIC), including refugees and people seeking asylum. There is limited transparency around these contracts, and legal and human rights experts and advocates have raised concerns about the serious information gaps which exist in relation to these contracts.

Known airline companies with government contracts for deportations and transfers include:

1. Skytraders Pty Ltd, a provider of specialist air services to the Australian Federal Government. Skytraders has a current contract (CN3535862-A1, December 2018 - December 2021) with the Department of Home Affairs for 'passenger air transportation'. The contract is valued at AUD\$78.74 million. Skytraders is a private company, not listed on the Australian Stock Exchange (ASX).
2. Qantas Airways Limited (Qantas), the Australian national carrier airline. The company has an ongoing contract with the Australian Government to provide various airline services, including passenger air transportation of domestic prisoners, people seeking asylum, and other 'foreign nationals'. Qantas is listed on the Australian Stock Exchange (ASX). Qantas notes that 'As a part of [the company's] wide-ranging contract with the Australian Government, the Group repatriates deportees from Australia. While the overwhelming majority of transportations involve the return of unlawful non-citizens to New Zealand, the United Kingdom, the United States of America and Japan, on rare occasions the Group transports deportees who have sought and been denied asylum by the Australian Government'.⁴

Further details about the size and scope of these contracts are unknown. It is unclear how the Department of Home Affairs designates which air transportation service to use for different transfer, removal and deportation activities. It is unclear which processes are in place, by either company, to ensure the safety of airline staff, passengers, and the individuals who are being transferred or deported.

Furthermore, reports from ACCR partner organisations suggest that other airline companies provide deportation and transfer services on an ad hoc basis, although they do not hold long term contracts with the government to do so.

For any and all airline transportation activity of a person or persons in custody of the Australian government, custodial agencies must complete a 'Notice of proposed movement of persons in custody' form, approved by the Department, 'in order to notify aircraft and airport operators of the proposed movement of PICs where the PIC is being escorted or is undertaking a supervised departure'.⁵ The Department of Home Affairs' guidelines on carriage of "persons in custody" (PIC) note that "Aircraft operators are entitled to request additional information from the custodial agency and have the right to refuse to carry a PIC, even where the custodial agency complies with all the necessary requirements."⁶ It is unclear if Australian airline companies make use of their entitlement to request additional information, or if there have been any refusals from Australian airlines.

Over the last 24 months, ACCR has attempted to engage with Qantas, in order to establish further details about the nature of its contract, and to encourage the company to develop a heightened due diligence process in relation to any involuntary transportation activity in which it is involved as a service provider to the Australian government.

ACCR has suggested that a 'flat' due diligence process may be feasible for the company: for example, the company could ask the single question of custodial agencies (with appropriate carve-outs for voluntary transfers for medical treatment, for example), "has this person made a claim for protection?," and screening-out forced removal and transfer activity where the answer is affirmative.

⁴ <https://www.qantas.com/au/en/qantas-group/acting-responsibly/our-governance.html>

⁵ <https://www.homeaffairs.gov.au/about-us/our-portfolios/transport-security/air-cargo-and-aviation/aviation/movement-of-persons-in-custody>

⁶ <https://www.homeaffairs.gov.au/about/transport-security/aviation-security/movements-persons-custody>

Transportation activity: transportation of migrants; deportations and returns, including assisted or voluntary returns

As noted above, the transportation of asylum seekers and migrants between sites of detention in Australia, and the voluntary and involuntary deportation of people seeking asylum in Australia, is managed by the Department of Home Affairs. The Department contracts companies to provide air transportation services. Legal and human rights groups have raised concerns about the human rights risks inherent in this transportation activity, and the general lack of transparency over the contracts for these services.

In Australia, groups who are particularly exposed to human rights abuses, as part of these activities, include: those who have been unreasonably barred from making a temporary protection application; families which are being separated; those who face deportation to countries whose conditions are deteriorating; those suffering from prolonged and arbitrary detention; and those at risk of deportation where non-refoulement obligations have not been correctly considered⁷.

It is in this context that legal experts, human rights advocacy organisations, corporate social responsibility groups, and other civil society groups and individuals have raised concerns about the use of airline services performed in immigration and border management. In 2018 a joint public statement, signed by Australian business and human rights leaders, including former Australian Human Rights Commissioner Professor Gillian Triggs, was delivered to Qantas.⁸ The statement proposed that:

Given the inadequacy of Australian law and policy in upholding [relevant international legal and human rights] standards, airlines should engage a heightened due diligence process in order to determine the potential for contribution to adverse human rights impacts before conducting any deportations as a provider of services to the Australian government.

Contribution to human rights abuses and failure to discharge their international obligations can do damage to a company's reputation, undermine its social licence to operate, and pose material risks to a company's financial interests.

The public statement was also signed by 23 trade union officials, representing Australian and international trade unions, and trade union peak bodies including the International Trade Union Confederation (ITUC).⁹ Trade unions have recently raised concerns about the use of commercial airlines for immigration and border management as an issue of occupational health and safety for frontline workers.

When protests against deportations occur, it is airline workers who are required to respond and manage these situations. This is a fraught legal and moral position for an individual to be in, particularly in the event of involuntary or controversial transportation activity, which may be heavily protested and scrutinised. There are also legal complexities involved for staff. For example, under European Aviation Safety Agency regulations, pilots are responsible for ensuring the 'safety of the aircraft and of all crew members, passengers and cargo on board'¹⁰. However, pilots refusing to assist in deportations on moral grounds may face legal consequences. For example, Germany residency law legally compels airlines to accept deportation orders for asylum seekers who have had their claims rejected¹¹.

Last year, The International Transport Workers' Federation (ITF) published a statement on Commercial Airline Involvement in Forced Deportations, noting their increasing concern about the role of commercial airlines in forced deportations, and the impact that this has on front-line staff, as well as passengers:

⁷ Refugee and Advice Casework Service, August 2019, *Briefing note: Qantas and the deportation or forced movement of people seeking asylum and refugees*.

⁸ <https://accr.org.au/qantas-expert-statement/>

⁹ <https://accr.org.au/qantas-expert-statement/>

¹⁰ <https://www.easa.europa.eu/faq/19109>

¹¹ <https://www.thelocal.de/20171207/no-german-pilots-arent-defying-their-government-by-refusing-to-deport-asylum-seekers>

Internationally, our members are seeing an increase in deportation activity due to changes in immigration and refugee policies. In many cases, the policy changes that have led to this increase are hugely controversial and are accompanied by an increase in protest and other disruptive activity on flights.

Cabin crew directly experience this increase in deportation and associated protest activity. They are put in a position of having to negotiate between protestors and security staff accompanying deportees, while maintaining the safety of all passengers. In many cases, flight attendants must carry out this role despite struggling with their own opposition to the process.

The ITF is particularly concerned about reports of ongoing trauma suffered by flight attendants and other airline staff as a result of their working on flights carrying deportees. In some cases, this trauma was caused by witnessing the death of deportees on commercial flights.

The Association of Flight Attendants have also noted, in the context of forced family separations in the US, that¹²:

Flight Attendants are often the first to experience the fallout from a controversial change in social policy as commercial aviation is a microcosm of our communities, bringing together every race, gender, culture and creed in a confined space. Today there is growing public outrage over the new immigration policy that separates children from their parents. This national discussion and response is being felt on the planes and discussed among crews. Some are struggling with the question of participating in a process that they feel deeply is immoral. [...]

We expect this issue could continue to escalate and tensions rise when passengers or crew experience even the appearance onboard of children separated from their families.

In addition to forced deportations and returns, ACCR has significant concerns about the forced transfer of asylum seekers between sites of detention in Australia. RACS states:

The practice of transporting people from one detention centre to another also brings into play serious human rights considerations for companies. Transport of a detainee between onshore detention centres, such as Villawood Immigration Detention Facility in Sydney to the Yongah Hill Immigration Detention Centre in Western Australia, is often undertaken while the detainee is in handcuffs. While the Department's operational policy sets out relevant considerations when deciding whether to use handcuffs, in recent times it would appear that the policy of handcuffing is applied broadly, even where detainees have no history of criminal offending or pose any resistance, danger or risk of escape. The unnecessary use of handcuffs and restraints can inflict humiliation and physical and psychological suffering.

The manner in which transfers and deportations are carried out also causes distress to detainees. The Australian Human Rights Commission report on Yongah Hill Immigration Detention Centre notes that transfers are undertaken with little or no warning to detainees in the early hours of the morning. The Commission heard evidence that also suggested that the nature of transfers had created significant concern and anxiety among some people in detention. ¹² This has also been RACS' experience, where our clients are often removed without prior warning, preventing them from communicating their transfer to us. RACS is also aware of detainees being transferred from a detention centre close to their community and family in Sydney or Melbourne to remote centres such as Christmas Island or Yongah Hill.¹³

The Australian Human Rights Commission has found that people being transferred:

- may have received very little notice of the transfer (for example, they may not have been told until the morning of the day on which the transfer was due to take place);
- were often woken in the early hours of the morning to be informed of the transfer;
- had limited time to pack their belongings, shower and dress, and notify family members, friends and legal representatives, before they were escorted from their accommodation;

¹² http://www.afacwa.org/separated_families_intersecting_with_aviation

¹³ <https://accr.org.au/wp-content/uploads/RACS-Briefing-note-Airlines-and-People-Seeking-Asylum.pdf>

- may have spent hours waiting in the orientation area of the detention facility and/or at the airport before the transfer commenced; and
- may not have been informed of their destination until the transfer was underway or until they had arrived.¹⁴

An example of one such transfer, is that of a critically mentally ill, young, asylum seeker, who was transferred via passenger air in Australia last year. The man's advocates had arranged his admission into a mental health facility, but before his admission he was transferred on a Qantas flight from Melbourne detention centre to Perth detention centre. Reports state that the transfer was "allegedly without warning and without consulting the external health professionals who were arranging to have him readmitted to the Melbourne facility".¹⁵

The Role of Private Security in Immigration Deportations and Transfers

The involvement of private security companies in forced deportations and transfers have been shown to increase the risk of abuse to asylum seekers and migrants during those activities.

UK corporation, Serco, has been contracted by the Australian government to provide security for all asylum seeker movements, including deportations and transfers.¹⁶ Serco has also been contracted by the Australian government to run onshore detention centres. Serco has been associated with a number of human rights abuses in both their management of security and detention contracts.¹⁷

A 2019 report by the Australian Human Rights Commission on the use of force during transfers and deportations found that Serco's risk management tools were not "sufficiently nuanced to avoid unnecessary use of restrictive measures".¹⁸ The Commission raised particular concerns about the use of restraints during the movement of asylum seekers, and noted particular cases in which the use of force during transfers and deportations were contrary to people's rights under article 10 of the ICCPR to be treated with humanity and with respect for their inherent dignity.¹⁹

Conclusion

As noted, ACCR has been engaging with companies, investors, and other stakeholders about issues surrounding immigration and border management in Australia. We have significant concerns around the role of Australian airline companies in facilitating aspects of Australia's immigration regime. These concerns relate to: the high-risk activities airlines are involved in; the lack of transparency around contracts governing those activities; and the reliance by companies on government advice to mitigate risk. Two years of engagement have not relieved our concerns.

More broadly, ACCR has also been engaging numerous stakeholders globally about the involvement of private companies in the containment, exclusion and detention of migrants globally, and the likely growth or transformation of this industry in response to growing numbers of people on the move due to climate-related pressures or harms.

¹⁴ https://www.humanrights.gov.au/sites/default/files/document/publication/2019_aushrc_130.pdf;
<https://www.theguardian.com/australia-news/2019/jun/18/australias-onshore-immigration-detention-unlike-any-other-liberal-democracy>

¹⁵ <https://www.theguardian.com/australia-news/2019/oct/17/mentally-ill-asylum-seeker-sent-away-from-promised-treatment-on-5400km-qantas-round-trip>.

¹⁶ <https://www.theguardian.com/australia-news/2019/sep/20/australian-government-awards-serco-99m-contract-to-help-non-citizens-return-home>

¹⁷ For example, in December 2011, the NSW State Coroner in Australia found Serco Australia Pty Ltd failed to fulfil its duty of care to three detainees at Villawood Immigration Detention Centre (IDC) before their deaths: <http://www.austlii.edu.au/au/journals/BalJINTLawSoc/2012/80.pdf>. There have also been a number of media reports on allegations of assault, violence or excessive force in immigration detention facilities operated by Serco: <https://www.smh.com.au/politics/federal/worker-suspended-over-alleged-asylum-seeker-assault-amid-detention-centre-veil-of-secrecy-2016-0603-gpar2y.html>.

¹⁸ <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>

¹⁹ <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/use-force-immigration-detention>