

IN THE MATTER OF THE  
BOARD OF INQUIRY INTO THE  
COVID-19 HOTEL QUARANTINE PROGRAM

**CLOSING SUBMISSIONS OF THE  
DEPARTMENT OF JOBS, PRECINCTS AND REGIONS**

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Filed on behalf of: **The Department of Jobs, Precincts and Regions**

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## Overview

- 1 These submissions are made on behalf of the Department of Jobs, Precincts and Regions (**DJPR**). The submissions respond to the closing submissions to the Board of Inquiry (**Board**) by Counsel Assisting on 28 September 2020.
- 2 This part of the submissions provides a concise overview of the key issues that are covered in the responsive submissions.
- 3 Of all the submissions urged on the Board by Counsel Assisting, DJPR accepts two submissions. First, that the Board make findings concerning the role of DJPR as a support agency to the Control Agency within the State Health Emergency Response Plan (**SHERP**). Second, DJPR acknowledges that it

could have done more to scrutinise and respond to the extent of subcontracting by the private security companies engaged by it to provide security services to the COVID-19 Hotel Quarantine Program (the **Program**), once that issue came to DJPR's attention.

- 4 However, DJPR makes these following submissions urging the Board to take particular account of the evidence that it should have regard to when considering what findings it may make regarding a number of particular matters that are summarised below.

*The Department through its Secretary acted in accordance with its obligations in overseeing the role of DJPR in the Program and in reporting to the Minister and State Control Centre*

- 5 The evidence shows that Simon Phemister, Secretary of DJPR acted in accordance with his obligations in overseeing DJPR's role in the Program and reporting relevant matters to his Minister, the Honourable Martin Pakula.
- 6 Mr Phemister regularly briefed the Minister on key matters and otherwise briefed daily into the State Control Centre (**SCC**) in accordance with the *Emergency Management Act 2013 (Vic)* (**EM Act**).
- 7 Mr Phemister gave evidence that he provided briefings on operational matters relating to the Program to the SCC, and in particular the Emergency Management Commissioner.<sup>1</sup> Critically, this was also the understanding and expectation of Minister Pakula.<sup>2</sup> It is not, in DJPR's submission, the role of a Departmental Secretary to brief a Minister on operational issues of procurement and contracting. Minister Pakula's evidence was that he did not expect to be briefed on every aspect of a government program<sup>3</sup> and that he was generally kept abreast of the Program and DJPR's involvement in it, and he was aware of the reporting lines of Mr Phemister under the EM Act.<sup>4</sup>
- 8 In DJPR's submission, this line of reporting was entirely appropriate.

*DJPR effectively carried out its role as the support agency responsible for logistical matters in the Program*

- 9 DJPR submits to the Board that its function, as a support agency, was appropriately limited to the provision of logistical support and that the Department fulfilled that assistance role well.
- 10 Once DHHS was appointed the Control Agency DJPR was assigned to be a support agency because of its expertise in logistics. Health, wellbeing, and infection control was the responsibility of the Control Agency. Further, the Control Agency authorised which hotels would be activated and when,

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<sup>1</sup> T1854.23-30 (Phemister).

<sup>2</sup> T1928.30-42 (Pakula).

<sup>3</sup> T1931.20-31 (Pakula)

<sup>4</sup> T1927.15-27 and T1928.25-28 (Pakula).

determined operating policies for the Program, reviewed and signed off communications to guests and the scripts used by the government call centre.

- 11 Within this emergency management structure, DJPR was not the passive recipient of advice from the Control Agency. Rather, DJPR actively and repeatedly sought assurances that areas of concern or risk were addressed and resolved. The evidence shows that DJPR repeatedly took steps to share information so that the Control Agency could have full oversight and knowledge of all the department's activities.
- 12 The evidence shows that DJPR proactively and frequently raised matters of concern with the Deputy State Controller - Health and later to the Accommodation Commander of the Control Agency, in the daily State Control Centre meetings and Operation Soteria Command through formal and informal channels. These concerns included:
- (a) The need for police to be present at hotels 24/7;
  - (b) PPE supply and the guidance on when and how to wear PPE for security staff and authorised officers and others working in hotels;
  - (c) The need for written guidance on COVID-19 cleaning protocols (beyond 'Tips for non-health care settings') and waste management; and
  - (d) The imperative that DHHS conduct twice daily onsite safety briefings with those working in the hotels.

*DJPR did not have any role in the selection of private security as the enforcement option*

- 13 DJPR did not have any role in the selection of private security as the enforcement option. Once that decision had been communicated to DJPR at the meeting at the SCC on 27 March 2020, DJPR was tasked to take steps to identify and engage the services of security firms to provide security services at hotels to meet the immediate needs of the Program.

*The process for selecting private security companies was not flawed and was carried out in accordance with government procurement policy for this type of emergency*

- 14 We submit, among other things that it is not open to the Board to find that the initial process for identifying security contractors was flawed or that there was insufficient due diligence undertaken by DJPR before formal contracts were signed with the security contractors.
- 15 DJPR rejects any submission that the procurement of security was not consistent with government policy. The Victorian Government's announcement of a State of Emergency on 16 March 2020 triggered the critical incident

procurement policies of the Victorian Government Purchasing Board and DJPR.

- 16 During critical incidents, agencies are permitted to employ alternative procurement processes. Such flexibility fast-tracks the purchase of goods and services needed to respond to the emergency. In the case of the Program, the initial procurement was required in less than 36 hours. As more than 20,000 passengers were accommodated, the pace did not stop in the Program until 30 June 2020.
- 17 The feedback the department received from the Control Agency and Victoria Police on the performance of private security contractors was conveyed through various channels, including daily meetings chaired by the DJPR Agency Commander, which included views from those on-site as to the performance of these contractors. DJPR submits that it was appropriate for DJPR to rely on such feedback in allocating more work to Unified Security Group (Australia) Pty Ltd (**Unified**) and less work to Wilson Security (**Wilson**).

*DJPR's role in infection control and prevention was very limited*

- 18 We address the limited role of DJPR in regard to infection prevention and control (**IPC**) in the Program. In summary:
- (a) DJPR did not by its contracts seek to outsource IPC risk to contractors. The fact that contractors had contractual responsibility for IPC did not derogate from the State's own obligations in respect of IPC, was consistent with the parties' respective obligations under Workplace Health and Safety laws and was entirely appropriate.
  - (b) DJPR had a specific designated role as Support Agency. This role was defined by the various Operations Plans and directions of the Control Agency, including as set out by Jason Helps, State Controller, Health in his email dated 29 March 2020 (**Controller Directive**).<sup>5</sup> The evidence does not suggest that DJPR ever viewed itself as "a passive recipient of information". Quite the contrary.
  - (c) Insofar as IPC specifically was concerned, both DJPR leads (Claire Febey and Rachaele May) independently identified key areas of challenge as including the difficulties DJPR had in getting the Department of Health and Human Services (**DHHS**) to:
    - (i) provide cleaning protocols tailored to the Program environment;<sup>6</sup>
    - (ii) brief contractors and other staff twice daily, including on Personal Protective Equipment (**PPE**) requirements and proper usage.

<sup>5</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.101.004.4571).

<sup>6</sup> Exhibit 80 – First witness statement of Ms Rachael May at [66] and [155] (DJP.050.002.0001 at .0012, .0027-0028); Exhibit 32 – Witness statement of Ms Claire Febey at [89]-[93], [104] (DJP.050.010.0001 at .0021-0022, .0024).

- (iii) respond to multiple and repeated escalations by DJPR staff seeking tailored information and responses to specific questions about cleaning, from the only body with the authority and expertise to provide this advice, culminating in DJPR proactively combining all of this information into a tailored protocol for DHHS to approve (which was well beyond DJPR's remit as a Support Agency); and
  - (iv) carry out briefings in response to a number of escalations about contractor briefings raised by DJPR when it received information suggesting that briefings were not occurring as the Controlling Agency had committed to do.
- (d) The documents reveal that there never was, in fact, any confusion – on the part of DHHS, DJPR or others – that DHHS was the agency with responsibility from the State's perspective, for IPC measures across the Program and accountability for the Program as a whole. The documents bear this out. The responsibilities that DHHS took upon itself (proactively or reactively) reveal that this was the case.
- (e) The decision to expand the role of security guards was not made by DJPR, nor did DJPR have the authority to make any such decisions. DJPR had no decision-making power in relation to matters that bore risk, as the Controller Directive made clear. The contemporaneous documents bear out this truth;
- (i) DJPR (more than) discharged the responsibilities given to it as a Support Agency in relation to matters which touched on IPC. It should not now be held accountable for matters beyond its remit, authority and expertise. The submissions of Counsel Assisting are not a fair reflection of the evidence;

*DJPR did not make the decision to stand up the Rydges Hotel and it did not have an on-site presence at that hotel*

- 19 DJPR's role with regards to the use of Rydges Hotel as a 'hot' hotel within the Program was very limited. Counsel Assisting have made specific submissions concerning the operation of the Rydges Hotel which is the source of the majority of infections of COVID-19 in Victoria. We submit that it is not open to the Board to find that DJPR was responsible for, or caused or contributed to, any failures in the delivery of the Program at Rydges. DJPR did not make the decision to stand up Rydges as a hot hotel.
- 20 As explicitly agreed with the Control Agency, DJPR did not have an on-site presence at the Rydges Hotel. DJPR personnel were not permitted to enter Rydges without DHHS permission.
- 21 At other hotels the role of DJPR staff concerned the check-in and check-out of returned travellers, a role that was overseen by the Authorised Officers within the Program.

- 22 At all times prior to the Rydges outbreak, the Control Agency's direction to DJPR was to organise infectious cleans for COVID-positive rooms. Each hotel was required to clean or arrange cleaning of non-infected rooms, pursuant to their contracts with DJPR (which had been provided to the Control Agency). DJPR had sought, and the Control Agency provided directions to each hotel in relation to their (non-infectious) cleaning requirements.
- 23 There is no evidence that DJPR had any knowledge or was provided with any information that either hotel staff or security had been cleaning potentially infectious common areas, and that they were doing so with inappropriate cleaning materials or with deficient PPE.

### *The impact of the Program on returning travellers*

- 24 Finally, we address the submissions made by Counsel Assisting concerning the impact of the Program on returned travellers. DJPR submits that the evidence is clear that it was not tasked with looking after the health and welfare of returned travellers. However, when DJPR was presented with opportunities to assist quarantined travellers, some vulnerable, it took appropriate steps to either assist where it could or escalate the issues to DHHS.

## **A. Accountability and transparency**

- 25 Counsel Assisting submitted that there was a lack of accountability and transparency in the implementation, oversight and operationalisation of the Program.<sup>7</sup> In particular, Counsel Assisting submitted that Departmental Secretaries (being Mr Eccles, Ms Peake and Mr Phemister) each failed to adequately brief their respective ministers. This supposed failure, Counsel Assisting submitted, was a breakdown in the Westminster accountability model<sup>8</sup> and adversely effected the operation of the Program.<sup>9</sup>
- 26 Senior Counsel Assisting urged the Board to make the following findings:
- (a) there were significant issues which should have been brought to each respective Minister's attention;
  - (b) Departmental Secretaries were under an obligation to keep Ministers informed and they failed to discharge that obligation;
  - (c) in order for responsible government to work, it is imperative that Secretaries remain accountable to their Ministers, and to discharge that obligation they must keep their Minister informed; and

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<sup>7</sup> T2260.16-20 (closing submissions of Mr Ihle).

<sup>8</sup> T2261.37-44 (closing submissions of Mr Ihle).

<sup>9</sup> T2262.29-33 (closing submissions of Mr Ihle).

- (d) the failure of Department Secretaries to fulfil their obligation to keep Ministers informed contributed to the problems with the Program.<sup>10</sup>
- 27 DJPR rejects the submissions of Counsel Assisting and submits that it is not open to make the suggested findings as against Mr Phemister for the following reasons:
- (a) the suggested findings are imprecise, rolled up and fail to provide a factual foundation from which the Board could make such a finding;
- (b) there is insufficient evidence before the Board to make a finding that the provision of additional information from Mr Phemister to Minister Pakula would have meant that problems with the Program would have been addressed or ameliorated;
- (c) the propositions were not put to either Mr Phemister or Minister Pakula during their examinations before the Board, and as such the Board should not make such a finding where it has not afforded Mr Phemister procedural fairness; and
- (d) in the event that such a finding was open, Mr Phemister regularly briefed the Minister on key matters and otherwise briefed into the SCC in accordance with the EM Act.

*Lack of precision in the suggested findings*

- 28 A Departmental Secretary has an obligation to keep their Minister informed of issues in their department. However, the content and nature of that obligation must be clearly outlined and the circumstances in which that obligation may change must be properly outlined in order for the Board to make certain findings. The submission and proposed findings do not provide any details of the alleged content of the obligation on a Secretary or moreover, what information Counsel Assisting contends should flow from Mr Phemister to Minister Pakula.
- 29 The findings do not distinguish between each Secretary and Minister. They are, with respect rolled up allegations which do not allow DJPR to properly understand the nature of the allegation that is put regarding Mr Phemister's conduct, as opposed to the other Departmental Secretaries and Ministers.<sup>11</sup>

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<sup>10</sup> T2268.40 to T2269.6 (closing submissions of Mr Neal QC).

<sup>11</sup> There are, with respect, very different issues in relation to each Minister and Departmental Secretary. This appears to be conceded by Counsel Assisting in his closing submissions at T2262.8-18 (closing submissions of Mr Neal QC). It is also reflected in the evidence, see for example the evidence given by the Hon. Daniel Andrews regarding his expectation about being provided information about an offer of assistance from the Federal Government at T2151.45 (Andrews); and by the Hon. Lisa Neville regarding not being briefed regarding Commissioner Crisp's request for ADF personnel at T1961.10-21 (Neville); and Ms Peake's evidence that she did not brief Minister Mikakos on public health matters as she thought they had been resolved at T1977.18-26 (Peake).



- 30 The issue of what is or is not appropriate to brief the Minister on was not explored in Mr Phemister's examination, nor was it subject to any of the question put to Mr Phemister in his Notice to Produce. If this had occurred, DJPR would have been in a position to put on evidence of practices, policies and legislative instruments which outline the powers and responsibilities of Mr Phemister.<sup>12</sup>

### *No evidence*

- 31 DJPR submits that there is insufficient evidence to make the finding that the failure of Mr Phemister to fulfil his obligation to keep Minister Pakula informed contributed to the problems with the Program. Minister Pakula gave evidence that he was generally kept well abreast of issues by Mr Phemister. While these submissions have already criticised the lack of detail in relation to the obligation, there is insufficient evidence that would allow the Board to find that had certain information been provided to Ministers then certain problems would have been addressed. This is for two reasons.
- 32 First, it is not clear what information Counsel Assisting says Mr Phemister should have provided to Minister Pakula. It is unclear if Counsel Assisting suggests that the obligation extended to Mr Phemister briefing Minister Pakula on the details of each and every contract DJPR entered into with security firms, cleaning contractors and hotels.<sup>13</sup> Without any real clarity on these questions, DJPR submits that the Board is not in a position to find what might have occurred had such information been passed on.
- 33 Second, Counsel Assisting did not provide details about what problems could have been addressed by Mr Phemister briefing Minister Pakula. Consequently the Board is left without any evidence about the steps that could or would have been taken in response.

### *Procedural fairness*

- 34 In relation to the submission and proposed findings put forward in closing submissions, none of those matters were put to Mr Phemister in his examination in front of the Board nor was it contained in the questions attached to his Notice to Produce. It is, in DJPR's submissions, inappropriate to make such serious allegation about Mr Phemister's conduct in closing submissions and in proposed findings without putting it to him and allowing him to respond. Counsel Assisting had ample opportunity to ask Mr Phemister these questions during his examination. In fact, Counsel Assisting specifically asked Mr Phemister about his reporting to the SCC and to the Minister, but did not put to

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<sup>12</sup> The Board can infer that such evidence could have been provided by the answer Minister Pakula gave about delegation of authority to the Secretary at T1929.15-21 (Pakula).

<sup>13</sup> As noted in Minister Pakula's evidence, it is uncommon for ministerial approval to be sought regarding the entry into contracts; see T1931.20-31 (Pakula).



him that he had certain obligation to report operational matters to Minister Pakula or that his actions were in breach of his obligations.

- 35 The consequence of this failure is outlined in paragraph 30 above. If the matters were appropriately put, Mr Phemister could have provided his view. DJPR could have produced relevant evidence and it is likely Counsel Assisting would have provided further particulars of the obligation on Mr Phemister. That did not occur and the Board should not make the proposed findings against Mr Phemister.<sup>14</sup>

### *Reporting lines*

- 36 Notwithstanding the way in which the proposed findings were put by Counsel Assisting, DJPR submits that Mr Phemister acted in accordance with his obligations in overseeing DJPR's role in the Program and reporting relevant matters to the Minister. It is undoubtedly appropriate for Departmental Secretaries to brief Ministers on key policy areas and on important developments within the Department. As Mr Phemister noted in his evidence, part of his role was to "provide high level authoritative policy advice and briefings to portfolio Ministers and to Government on portfolio issues and the delivery of DJPR programs."<sup>15</sup>
- 37 Minister Pakula also gave evidence that Mr Phemister met with him weekly to provide briefings.<sup>16</sup>
- 38 It is not, in DJPR's submission, the role of a Departmental Secretary to brief a Minister on every aspect of a government program, such as issues of procurement and contracting. Minister Pakula's evidence was that he did not expect to be briefed on such matters<sup>17</sup> and that he was generally kept abreast of the Program and DJPR's involvement in it, and he was aware of the reporting lines of Mr Phemister under the EM Act.<sup>18</sup>
- 39 DJPR submits that it is essential for the proper functioning of the Department, that the Secretary has oversight of operations and that the Minister be briefed on significant issues.<sup>19</sup> While Secretaries are responsible for keeping a Minister informed of 'significant issues'<sup>20</sup> and providing information specifically requested by a Minister,<sup>21</sup> to suggest the Secretary should brief the Minister on

<sup>14</sup> For example, evidence could have been provided regarding the number of contracts DJPR entered into every year, see T1929.44-46 (Pakula). The effect of section 76(1) of the *Inquiries Act 2014* (Vic) is to afford a person against whom an adverse finding is to be made by a Board of Inquiry, knowledge of the matters upon which the adverse finding is based and the opportunity to respond to those matters.

<sup>15</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [10(c)] (DJP.050.001.0001 at .0002).

<sup>16</sup> T1927.15-27 (Pakula).

<sup>17</sup> T1931.20-31 (Pakula).

<sup>18</sup> T1927.15-27, T1928.25-28 (Pakula).

<sup>19</sup> *Public Administration Act 2004* (Vic) ss 13, 13A; Victoria Public Sector Commission, *Serving Government: A Guide to the Victorian Public Sector for Ministerial Officers*, 9.

<sup>20</sup> Victoria Public Sector Commission, *Serving Government: A Guide to the Victorian Public Sector for Ministerial Officers*, 9.

<sup>21</sup> *Public Administration Act 2004* (Vic) s 81(1)(c).

all operational matters is contrary to the established responsibilities of Secretaries, and in DJPR's submission, would be impractical and inefficient.

- 40 In relation to Mr Phemister's reporting lines, Mr Phemister gave evidence that he provided briefings on operational matters relating to the Program to the SCC, and in particular the Emergency Management Commissioner.<sup>22</sup> Critically, this was also the understanding and expectation of the relevant Minister, Minister Pakula.<sup>23</sup> In DJPR's submission, this line of reporting was entirely appropriate. Under the EM Act, the Emergency Management Commissioner is responsible for overseeing and coordinating agency functions and ensuring the establishment of effective control arrangements.<sup>24</sup> In terms of the reporting structure for Class 2 health emergencies, the SHERP sets out that the Emergency Management Commissioner's function is defined to include accountability for ensuring the response to emergencies in Victoria is systematic and coordinated.<sup>25</sup> This includes ensuring that control arrangements are in place during a Class 2 emergency, responsibility for consequence management for a major emergency, and management of the SCC on behalf of (and in collaboration with) agencies that may use it for emergencies. Given the SCC was activated for the Program in response to a Class 2 public health emergency, it was appropriate for Mr Phemister to escalate issues through the SCC for decision as opposed to the Minister.
- 41 Finally, DJPR resists the submissions that Mr Phemister's evidence on this question was unsatisfactory. As noted above, Mr Phemister acted in accordance with the reporting lined under the EM Act. Moreover, some of the comments ascribed to Mr Phemister in Counsel Assisting's closing submissions are incorrect. Counsel Assisting suggested Mr Phemister stated in evidence that 'I didn't think it was part of the portfolio' and 'I wasn't across the details of the contract.'<sup>26</sup> Those statements were not made by Mr Phemister in evidence<sup>27</sup> and due to the lack of written submissions from Counsel Assisting, DJPR is unable to identify what Counsel Assisting relied upon to make such a submission.
- 42 DJPR therefore urges the Board to resist making the proposed findings, and importantly to accept Mr Phemister's evidence that his obligation to report on operational matters was done in accordance with his obligations pursuant to the EM Act and the SHERP.

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<sup>22</sup> T1854.23-30 (Phemister).

<sup>23</sup> T1928.30-42 (Pakula).

<sup>24</sup> *Emergency Management Act 2013* (Vic), Part 4 – Division 1.

<sup>25</sup> Emergency Management Victoria, *State Health Emergency Response Plan, 2017* (4<sup>th</sup> ed).

<sup>26</sup> T2261.46-47 (closing submissions of Mr Ihle).

<sup>27</sup> Mr Phemister had the following exchange with Senior Counsel for Victoria Police: "Q. *Apart from that reference in the schedule, there's nothing in the actual contracts at all about a coordinating role for Victoria Police, is there? A. I'm not intimately familiar with the contracts*": T1867.11-21 (Phemister). The question posed to Mr Phemister concerned Mr Phemister's knowledge of operational matters that may or may not be recorded in the contract. DJPR submits it is not open for Counsel Assisting to infer from that exchange that Mr Phemister was not across the detail of the contracts (should that be Counsel Assisting's intention).

## B. The focus of the Agencies

- 43 Counsel Assisting outlined a number of issues relating to the set up and operation of the Program by the DHHS. In particular, Counsel Assisting submitted that there was too much focus on emergency management systems, logistics and compliance, as opposed to the issue of public health and the wellbeing of returned travellers.<sup>28</sup>
- 44 In closing submissions, Counsel Assisting set out the following propositions:
- (a) from its inception and during its operation the Program focused on issues of logistics, such as securing hotel rooms, buses and security services;<sup>29</sup>
  - (b) DHHS was overly focused on the question of control and enforcement;<sup>30</sup>
  - (c) this focus was understandable in the first few days of the Program as the system was set up, but following the transfer of the Program to DHHS from DJPR there should have been a shift in focus;<sup>31</sup> and
  - (d) there was insufficient focus on setting up systems for infection control. This included the decision not to place a public health official, such as the Chief Health Officer in the position of State Controller Health.<sup>32</sup>
- 45 Finally, Counsel Assisting suggested in its closing submission that it may be open to the Board to find that it was appropriate not to place the Program into the Emergency Management Framework and instead have the Program managed outside of that Framework, for example where it would be run by DJPR with input from DHHS without the use of the emergency management structures.<sup>33</sup>

### *Focus of the Program*

- 46 DJPR does not seek to make submissions on the question of whether there was insufficient focus on public health and the wellbeing of returned travellers. As these submissions set out, those were not matters within DJPR's remit. However, DJPR does submit that its function, as a support agency, was appropriately limited to the provision of logistical support and that the Department fulfilled that assistance role well.<sup>34</sup> The placement of DJPR as the logistics provider was made clear from the initial decision by Mr Eccles when

<sup>28</sup> T2199.41-44 (closing submissions of Mr Ihle).

<sup>29</sup> T2199.41-44 (closing submissions of Mr Ihle).

<sup>30</sup> T2266.18-20 (closing submissions of Mr Neal QC).

<sup>31</sup> T2220.27-29, (closing submissions of Mr Neal QC).

<sup>32</sup> T2203.30-39 (closing submissions of Ms Ellyard).

<sup>33</sup> T2204.29-32 (closing submissions of Ms Ellyard).

<sup>34</sup> See for example, Exhibit 184 – Witness statement of Mr Simon Phemister at [84]-[91] (DJP.050.001.0001 at .0017-.0019); Exhibit 32 – Witness statement of Ms Claire Febey at [67]-[68] (DJP.050.010.0001 at .0017); T405.27 to T406.5 (Febey); Exhibit 38 – Witness statement of Ms Gonul Serbest at [11]-[14] (DJP.050.009.0001 at .0003-.0004); T485.21-24, T494.34-39 (Serbest); See also emails between Ms Febey and Mr Helps dated 29 March 2020 (DJP.101.004.4571); Draft Site Manager Job Card (DJP.131.004.2631).

he stepped out of National Cabinet to contact Mr Phemister.<sup>35</sup> DJPR had experience in procuring hotel rooms as part of the Hotels for Heroes Program and the Department was appropriately skilled to fulfil that obligation.<sup>36</sup>

47 Moreover, in the first days of the Program, there was an acceptance by senior members of DJPR and DHHS regarding the division of responsibilities, which reinforced the logistical support DJPR would provide.<sup>37</sup> In fact both Ms Febey's and Mr Helps' evidence on this was consistent: following the transfer of control of the Program to DHHS, it was agreed that DJPR would continue to provide logistical support to the Program, such as procurement of hotels, engagement of contractors and decisions about the provision of support to returned travellers such as meals.<sup>38</sup> Ms Peake described the clear distinction between DHHS' responsibilities for health and wellbeing services and DJPR's responsibilities for providing hotels, security and food.<sup>39</sup> Ms May provided evidence of her view that DJPR's support to the Program was limited to logistical support in the form of the contracting of specialised cleaning, hotels and security, the provision of people and resources to facilitate the entry and exits of the travellers as they arrived and left the hotels,<sup>40</sup> the provision of essential items to assist travellers while they were quarantined, and the provision of the Government Support Service call centre.<sup>41</sup> In short, DJPR sought to provide logistical assistance in order to ensure the program ran smoothly and that returned travellers were as comfortable as possible during the period of their quarantine.<sup>42</sup>

48 Minister Pakula also gave evidence of his understanding that DJPR's responsibilities were limited to discrete logistical support matters.<sup>43</sup> DJPR's role was also described as the provision of logistics by the DHHS COVID-19 Accommodation Commander (**Operation Soteria Commander**), Ms Pam Williams, and the Victoria Operations Manager of Unified Security, Mr Nagi.<sup>44</sup>

DJPR submits that the Board should accept Counsel Assisting's submissions that it was appropriate that the Department was focused on those logistical questions as it had no experience in public health and infection control and it would not have been proper for it to have any involvement in those decision.

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<sup>35</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [26] (DJP.050.001.0001 at .0006-.0007); Exhibit 177 – First witness statement of Mr Christopher Eccles at [77]-[78] (DPC.0017.0001.0001 at .0019-.0020).

<sup>36</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [28] (DJP.050.001.0001 at .0007); Exhibit 49 – Witness statement of Mr Unni Menon at [19] (DJP.050.006.0001 at .0006).

<sup>37</sup> Exhibit 33(1) – Annexures to the witness statement of Ms Claire Febey (DJP.101.004.4571).

<sup>38</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [67]-[68] (DJP.050.010.0001 at .0017); Exhibit 164 – Witness statement of Mr Jason Helps at [50] (WIT.0001.0050.0001 at .0012); T1631.43 to T1632.1 (Helps).  
<sup>39</sup> T1901.32 (Peake).

<sup>40</sup> It should be noted that this personnel support did not include a 24 hour presence at the hotels, see for example: Exhibit 80 – Witness statement of Ms Rachaele May at [94]-[97] (DJP.050.002.0001 at .0017-.0018); Exhibit 38 – Witness statement of Ms Gonul Serbest at [43] (DJP.050.009.0001 at .0010).

<sup>41</sup> T960.6-14 (Cleaves).

<sup>42</sup> T1269.2-17 (Williams).

<sup>43</sup> T1927.33, T1941.43-47 (Peake).

<sup>44</sup> T862.41 (Nagi).

## C. Selection of private security as the enforcement option

### *Decision to use private security*

- 49 Counsel Assisting submits that the weight of the evidence is such that:
- (a) the conclusion that private security would be the first tier of enforcement in the Program was not made before the SCC meeting on 27 March 2020;<sup>45</sup>
  - (b) Victoria Police’s clear position that security would be preferable was a substantial contributing factor to the “creeping assumption or default consensus reached in the State Control Centre”;<sup>46</sup> and
  - (c) it was reasonable for DJPR to have understood that it had been tasked to appoint private security after the SCC.<sup>47</sup>
- 50 DJPR submits that, having regard to the evidence before the Board:
- (a) no other finding of fact is open to be made and Counsel Assisting’s submission should be accepted; and
  - (b) having been tasked with appointing private security in the SCC meeting, it was reasonable for DJPR to then take steps to identify and engage the services of security firms to provide security services at hotels to meet the immediate needs of the Program.
- 51 Counsel Assisting further submits that no one gave proper consideration to whether it was appropriate to rely so heavily on private security for what was a detention program, rather than a sporting event or a voluntary gathering.<sup>48</sup>
- 52 Insofar as Counsel Assisting’s submission is directed to DJPR, DJPR submits that such a finding is not open on the evidence, and Counsel Assisting’s submission ought to be rejected. The evidence of Ms Febey and Mr Phemister is that DJPR did in fact consider the appropriateness of the detention model specifically,<sup>49</sup> under whose direction private security contractor personnel would operate,<sup>50</sup> and the appropriateness of having security personnel in the context of Victoria Police not being in a supervisory role. In particular, Mr Phemister’s evidence is that the evening of 27 March 2020, after DJPR had been tasked to engage private security, Mr Nolan considered what the ‘ideal

<sup>45</sup> T2265.1-3 (closing submissions of Mr Neal QC).

<sup>46</sup> T2265.5 (closing submissions of Mr Neal QC).

<sup>47</sup> T2265.12-14 (closing submissions of Mr Neal QC).

<sup>48</sup> T2265.10-12 (closing submissions of Mr Neal QC); Also see T2212.2-8 (closing submissions of Ms Ellyard).

<sup>49</sup> T1380.25-40 (Febey).

<sup>50</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [71], [135] and [137] (DJP.050.001.0001 at .0014, .0029-.0030); Exhibit 185 – Annexures to the Witness Statement of Mr Simon Phemister (DJP.101.002.1076, DJP.102.001.3598, DJP.102.001.3600, DJP.102.001.3602, DJP.102.001.3604, DJP.102.001.3605).

operating model' for the provision of security personnel might be and documented this in an email sent to the DJPR team, including Mr Phemister:

*Ideal model in my mind would be a supply of security staff from Katrina/David/Alex who work under the direction of an authorised officer in DHHS. This DHHS team would induct the security guards and provide on call advice about what to do in certain situations and determine if any incidents should be escalated to the authorised officer and/or VicPol.*<sup>51</sup>

53 Ms Febey's evidence is that she:

*... considered that the work of security should be under the direction of authorised officers, with Victoria Police there to oversee and manage escalation. I held this view for two reasons. First, it was a complex operation and not something we had delivered before. By that I mean it was such a significant undertaking to detain people in this way, and it was new to everybody, which meant the risks were unclear. Second, that was the advice that I had received from the people in my team who were doing the thinking around enforcement, informed initially by DHHS and ultimately by the form of the detention direction once finalised...*<sup>52</sup>

54 Contemporaneous communications exchanged during the initial 72 hours of the Program evidence DJPR's continued urging that DHHS as the Control Agency consider the appropriateness of the detention operating model.<sup>53</sup> For example:

- (a) On the evening of Saturday 28 March 2020, at the third SCC meeting, Ms Febey raised the need to resolve the role of Victoria Police;<sup>54</sup>
- (b) On Sunday 29 March 2020, Ms Febey requested via email to the State Controller Health, and the Deputy State Controller, that DHHS as the Control Agency, request that Victoria Police be present 24/7 at each hotel as private security contractors had no powers to exercise and had been instructed only to monitor and escalate issues to Victoria Police.<sup>55</sup> In that email Ms Febey noted that "DJPR has no powers to negotiate this so request this is urgently managed by DHHS";<sup>56</sup> and
- (c) On Monday 30 March 2020, Ms Febey requested via email to the DHHS Agency Commander that he escalate DJPR's request for a permanent police presence at each hotel and provide updated advice. The DHHS Agency Commander replied "Being discussed with VicPol by DHHS".<sup>57</sup>

<sup>51</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [71] (DJP.050.001.0001 at .0014); Exhibit 185 – Annexures to the Witness Statement of Mr Simon Phemister (DJP.101.002.1076).

<sup>52</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [56] (DJP.050.010.0001 at .0013).

<sup>53</sup> Exhibit 33 – Annexures to the witness statement Ms Claire Febey (DJP.101.002.7985 onwards).

<sup>54</sup> Exhibit 143 – Transcript of audio recording of Operation Soteria meeting 6.00 pm 28 March 2020 (from .0004); Exhibit 32 – Witness statement of Ms Claire Febey at [52] (DJP.050.010.0001 at .0013).

<sup>55</sup> Exhibit 33 – Annexures to the witness statement Claire Febey (DJP.102.007.6151).

<sup>56</sup> Ibid (DJP.102.007.6151 at .6152).

<sup>57</sup> Exhibit 150 – Annexures to witness statement of Chris Eagle (DELW.0001.0020.1967 at .1969).

*No review of the decision to use private security*

- 55 Counsel Assisting submit that the Board should make a finding that as the Program developed and the roles allocated to security companies evolved, no one turned their mind to whether they remained a suitable workforce for those roles because no one understood themselves to have been the original decision maker.<sup>58</sup>
- 56 Insofar as it may be suggested that DJPR ought to have considered whether security personnel remained a suitable workforce as their role evolved, any such submission ought to be rejected.
- 57 DJPR was not the appropriate agency to have initiated or conducted a review of whether or not private security was an appropriate workforce for the performance of the tasks they understood because:
- (a) DHHS was the Control Agency with the responsibility for ensuring any operation that was established through the SCC was “appropriately scoped, involved the right people and had appropriate operational governance within it”;<sup>59</sup>
  - (b) The evolving role of security personnel occurred to meet the needs of returned travellers, by reason of instruction from DHHS as the Control Agency to DJPR and security providers. For example, the evidence of Mr Watson, General Manager of Wilson Security, was that on 8 April 2020, his security staff at the Pan Pacific Hotel were instructed by the Authorised Officer at that hotel to escort returned travellers on a fresh air break. When those staff told the Authorised Officer that they were not cleared for that particular duty, the Authorised Officer informed them that the *Public Health and Wellbeing Act 2008* (Vic) required them to comply with all reasonable directions from an Authorised Officer or they would receive a \$20,000 fine.<sup>60</sup> Mr Watson raised this concern with DJPR on 8 April 2020. The Principal Policy Officer, DJPR informed Mr Watson that his concern had been raised with the State Controller Health and DHHS;<sup>61</sup>
  - (c) It was reasonable for DJPR to rely on assurances that in assigning tasks to security personnel beyond the static role initially envisaged, DHHS turned its mind to whether such tasks could be performed safely by relevant personnel, and were in fact, being performed;

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<sup>58</sup> T2265.24-27 (closing submissions of Mr Neal QC).

<sup>59</sup> T1905.35-36 (Peake).

<sup>60</sup> Exhibit 61 – Witness statement of Mr Greg Watson at [144b] (WILS.0001.0005.3930 at .0074); T788.1-5 (Watson).

<sup>61</sup> Exhibit 62 – Annexures to the witness statement of Mr Gregory Watson (WILS.0001.0005.3930).



- (d) At all times DJPR was reliant on DHHS as the Control Agency to provide expert advice on appropriate infection control measures applicable to the hotel quarantine environment.<sup>62</sup>
- 58 DJPR was responsible for discharging its responsibilities as Support Agency, which necessarily involved providing logistical support and escalating issues, including seeking appropriate and tailored advice on infection control procedures from DHHS. However, assessing the suitability of service providers from an infection control perspective or otherwise identifying or assessing systemic public health risks that might arise in a detention program directed to infection control by reason of the deployment of certain cohorts of workers in the Program was beyond DJPR's remit as Support Agency and outside its core expertise as a government department.
- 59 To the extent that a review of whether or not private security remained a suitable workforce for the performance of roles in the Program, responsibility for initiating and/or conducting that review sat with DHHS as the Control Agency and the organisation with the appropriate expertise. Indeed, it was not until after the Stamford outbreak in mid-June 2020 that DHHS became concerned that security personnel were not the appropriate workforce to have in place,<sup>63</sup> despite being aware that there were individual incidents that were managed locally.

## D. DJPR selection and oversight of private security companies

- 60 In their closing submissions, Counsel Assisting submitted that it was open to the Board to find that:
- (a) the initial process for identifying security contractors was flawed in that DJPR should have used the State Security Contract to identify appropriate security contractors;<sup>64</sup>
  - (b) there was insufficient due diligence undertaken by DJPR before formal contracts with security contractors were signed;<sup>65</sup>
  - (c) personal observations were permitted to override ordinary procurement practices;<sup>66</sup>

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<sup>62</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [102], [111] (DJP.050.010.0000 at .0024-.0025).

<sup>63</sup> T2002.43-46 (Peake).

<sup>64</sup> T2265.32-34 (closing submissions of Mr Neal QC).

<sup>65</sup> T2265.34-37 (closing submissions of Mr Neal QC).

<sup>66</sup> T2265.37-38 (closing submissions of Mr Neal QC).

- (d) once contracts were signed, there was insufficient supervision of those contracts to ensure compliance with the contractual terms, including as to subcontracting;<sup>67</sup> and
  - (e) decisions about how work was allocated between security contractors did not involve sufficient consideration of whether the companies could provide suitably trained and supported staff.<sup>68</sup>
- 61 DJPR submits that, on the basis of the evidence presented before the Board:
- (f) it is open to the Board to find that:
    - (i) it was not appropriate for DJPR to be contractually responsible for managing the security contracts, given the separation of operational responsibilities and contract management;
    - (ii) there was insufficient supervision of the security contracts to ensure that the security contractors complied with their contractual obligations, in the context where DJPR was not at hotels continuously and was reliant on information from other departments; and
    - (iii) there was insufficient scrutiny of the extent of subcontracting by the private security contractors engaged by DJPR, once that issue came to light;
  - (g) it is not open to the Board to find that:
    - (i) the initial process for identifying security contractors was flawed;
    - (ii) there was insufficient due diligence undertaken by DJPR before formal contracts were signed with the security contractors;
    - (iii) personal observations were permitted to override ordinary procurement practices; and
    - (iv) decisions about how work was allocated between security contractors did not involve sufficient consideration of whether the companies could provide suitably trained and supported staff.

### *The initial engagement of security contractors*

- 62 Any assessment of the adequacy of the process by which private security contractors were initially engaged must acknowledge, and take into account, the exigencies of the Program. Most pertinent of these exigencies is the significant pressure placed on DJPR staff to identify, approach and engage private security contractors within an extremely short time-frame. Whether the

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<sup>67</sup> T2265.40-41 (closing submissions of Mr Neal QC).

<sup>68</sup> T2265.42-44 (closing submissions of Mr Neal QC).

initial engagement of security contractors was appropriate must be viewed in the context of these surrounding circumstances.

- 63 In this respect, DJPR agrees with the submissions of Counsel Assisting that the engagement of the private security contractors in the weekend of 28 and 29 March 2020 is readily “explicable and understandable”<sup>69</sup> having regard to the “frenzied”<sup>70</sup> circumstances. Moreover, DJPR submits that, having regard to this context, the process by which DJPR identified and engaged the relevant contractors was reasonable. It is not open to the Board to find to the contrary for the following five reasons.
- 64 First, contrary to the premise implicit in Counsel Assisting’s submission, there is no correlation between a contractor’s membership of the Panel for the State Security Services Contract and their suitability for the provision of private security services as part of the Program. Or, to put it another way, the fact that a private security contractor was a member of the Panel does not, and did not, indicate that they would be more likely to perform services in a way that was more competent or appropriate than a private security contractor that was not a member of the Panel.
- 65 It bears recalling that two of the three private security contractors engaged by DJPR were members of the Panel for the State Security Services Contract. One of these contractors had their scope of work reduced by reason of persistent complaints as to the professionalism and conduct of their personnel.<sup>71</sup> The other contractor provided services at a hotel that experienced a COVID-19 outbreak days after a significant and large scale breach of social distancing rules by that contractor’s staff had been reported. The evidence before the Board indicates that membership of the Panel had no bearing upon the competence or capacity of a contractor to provide services as part of the Program, or the capacity of a contractor to appropriately manage the risks of infection.
- 66 Second, contrary to Counsel Assisting’s submissions, those responsible for identifying appropriate private security contractors did not overlook the capacity of those contractors “to provide frontline security services as part of a quarantine program.”<sup>72</sup> The Whatsapp messages tendered before the Board disclose that those responsible for identifying appropriate private security contractors were concerned about their status as employers, their reputation, their size and their experience with other large scale engagements.<sup>73</sup> Those responsible were considering these factors in the context of their *professional* experience with private security contractors. This was an appropriate set of

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<sup>69</sup> T2220.47 (closing submissions of Ms Ellyard).

<sup>70</sup> T2220.28 (closing submissions of Ms Ellyard).

<sup>71</sup> Exhibit 81 – Annexures to the first witness statement of Rachaele May (DJP.103.002.8888); Exhibit 60(2) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.9882, DJP.110.003.3707); Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.110.001.4771, DJP.105.004.6524).

<sup>72</sup> T2219.44-45 (closing submissions of Ms Ellyard).

<sup>73</sup> For example see Exhibit 33(1) – Annexures to witness statement of Ms Claire Febey (DJP.500.001.0001 at .0034-.0035).

criteria to apply when identifying and engaging private security contractors within a significantly compressed timeframe. While it may be accepted that job creation played some role in the discussion,<sup>74</sup> it would be erroneous to proceed on the basis that this aim underpinned, or otherwise informed, the identification of appropriate private security contractors.

- 67 Third, there is no evidence to suggest, let alone support, the proposition that the replacement of Unified with a Panel contractor would have had a material or appreciable impact on what ultimately transpired in the Program.
- 68 As explained above, membership of the Panel did not carry with it a guarantee that a private security contractor would be more competent in the provision of security services or in the management of infection risk. The evidence in relation to Wilson and MSS preclude such an assumption.
- 69 It is not true, as Counsel Assisting posits, that appointment to the Panel indicates that a contractor has “demonstrated their ability and skills.”<sup>75</sup> This is an assumption without a proper evidentiary or factual basis. That is not to say that membership of the Panel has no practical significance. Membership provides some indication that a contractor meets particular requirements but it does not provide a complete picture as to the suitability of that contractor, let alone the suitability for a bespoke public health response to a pandemic.
- 70 Moreover, the proposition that Unified should have been replaced at some subsequent point following their initial engagement ignores entirely the relevant factual circumstances. It is true, as Counsel Assisting submits, that there was an initial intention to limit the scope of Unified’s engagement.<sup>76</sup> It is not true, however, that the departure from this initial intention has remained unexplained.<sup>77</sup> To the contrary, the weight of evidence establishes that Unified was allocated more work than initially expected by reason of two factors: first, the poor performance of Wilson security guards, which led to numerous complaints including from Victoria Police, and, second, the positive feedback that DJPR was receiving in relation to Unified’s performance in the provision of private security services.<sup>78</sup>
- 71 The feedback that DJPR received was conveyed through various channels, including the daily meetings chaired by the DJPR Agency Commander which provided a useful opportunity for those on-site to provide their views as to the performance and suitability of the private security contractors. DJPR submits that it was appropriate for DJPR to rely upon this feedback in allocating work to Unified. This is particularly so in circumstances where the functions to be

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<sup>74</sup> T2214.21-25 (closing submissions of Ms Ellyard).

<sup>75</sup> T2221.44-46 (closing submissions of Ms Ellyard).

<sup>76</sup> T2221.25-28 (closing submissions of Ms Ellyard).

<sup>77</sup> T2221.28-29 (closing submissions of Ms Ellyard); Exhibit 73 – Witness statement of Ms Hayley Baxter at [71], [78], [85] (DTF.0001.0003.0001 at .0017, .0019-.0021).

<sup>78</sup> Exhibit 81 – Annexures to the first witness statement of Ms Rachaele May (DJP.103.002.8888); Exhibit 60(2) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.9882; DJP.110.003.3707; DJP.105.004.0273); Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.110.001.4771; DJP.105.004.6524).

performed by the private security contractors were being enlarged beyond static guarding to respond to additional requirements being imposed by DHHS, such as the provision of exercise breaks. Given that these functions were often new, and beyond the usual scope of private security, there was no pre-existing metric against which to judge the performance of the private security contractors. As such, it was appropriate, if not necessary, for DJPR to rely on the regular and consistent feedback it was receiving during meetings in assessing the performance of the private security contractors and in relying on that assessment in allocating work.

- 72 Further, Counsel Assisting's submissions fail to grapple with the fact that replacing Unified at a later point in time may have resulted in significant disruption and may have had deleterious consequences. This is particularly so given that, by the relevant point in time, it had been established that membership of the Panel did not have any direct bearing on the capacity or competence of a contractor.
- 73 In circumstances where there is no evidence that Unified's replacement with a Panel contractor would have had a beneficial and positive impact, it is not open to the Board to find that it was inappropriate or ill-advised for DJPR to continue to allocate work to Unified beyond their initial engagement.
- 74 Fourth, it would be erroneous to characterise Unified's engagement as involving a departure from applicable procurement policies. To the contrary, Unified's engagement as part of the Program was entirely consistent and in keeping with applicable procurement policies because those policies permitted DJPR to adopt a streamlined and flexible procurement process to facilitate an immediate response to a state of emergency.<sup>79</sup> This process permitted DJPR to engage Unified notwithstanding that Unified was not a member of the Panel for the State Security Contract. As a result, there was no need for DJPR to obtain any particular dispensation or approval in order to engage Unified and, as a matter of fact, no such dispensation or approval was ultimately sought.
- 75 Unified's engagement was consistent with applicable procurement policies. It is acknowledged that Counsel Assisting accepts as much.<sup>80</sup> The difference is that Counsel Assisting characterises the "state of emergency" as being confined to the weekend of 28 and 29 March 2020.<sup>81</sup> DJPR respectfully submits that this involves an unduly narrow characterisation of the state of emergency. The state of emergency, as it was experienced by those with responsibility for implementing the Program, extended well beyond the weekend of 28 and 29 March 2020. The planes did not stop arriving once that weekend had concluded. By 30 June 2020, in the course of just over three months some 20,092 passengers returned to Australia travelling on 342 flights into Melbourne.<sup>82</sup> The workload was urgent and significant. It extended well

<sup>79</sup> Exhibit 37 – Annexures to the witness statement of Ms Katrina Currie (DJP.006.002.0001).

<sup>80</sup> T2221.18-20 (closing submissions of Ms Ellyard).

<sup>81</sup> T2221.18-20 (closing submissions of Ms Ellyard).

<sup>82</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [6] (DJP.050.001.0001 at .0002).

beyond the initial weekend. Once this is understood, it follows that DJPR's engagement of Unified was permitted under, and consistent with, applicable procurement policies and continued to be permitted throughout the period that Unified remained engaged.

- 76 Fifth, an overly rigid approach to the engagement of security contractors may itself result in adverse consequences. An approach which permits consideration of only those contractors that are members of the Panel for the State Security Services Contract may result in the undue exclusion of other, competent contractors. As set out above, the applicable procurement policies contemplate a flexible procurement policy in times of emergency. The proposition that DJPR should be constrained only in engaging contractors that are members of the State Security Services Contract even in circumstances of emergency is both contrary to the terms of the procurement policies and reduces the capacity of the department to be flexible and agile in responding to emergency situations.
- 77 Moreover, it is important to observe that certain key rationales for the State Security Services Contract, such as standardising contractual terms and the price for services, had to be discarded in order to effectively respond to the exigencies of the Program. Thus, the terms of the standard form contracts needed to be amended to address identified risks of the Program (as they could conceivably have been known at the relevant point in time) and the pricing offered by private security contractors had to be adjusted to reflect these additional risks. To the extent that it is submitted that DJPR's failure to exclusively contract with contractors that were Panel members resulted in DJPR failing to achieve some of the intended benefits of the Panel, such a submission is inapt for these reasons. The fact whether a private security contractor was a member of the Panel for the State Security Services Contract did not affect, in any significant or appreciable way, the process by which they were contracted. Each form of contract, whether standard-form or bespoke, required amendment and re-drafting in order to reflect the particular requirements of the Program and the services to be provided by the contractors in the context of that Program.
- 78 For these reasons, DJPR respectfully submits it is not open to the Board, on the evidence before it, to find that the initial process for engaging security contractors was flawed, including by reason of the fact that DJPR did not engage contractors that were members of the Panel for the State Security Services Contract.

#### *The allegedly insufficient due diligence*

- 79 It does not follow that either because DJPR did not use the State Security Services contract to identify security contractors, or that it took an ad hoc approach to identifying security contractors, DJPR conducted insufficient due diligence. As was explained in paragraphs 74 to 75 above, Unified's

engagement as part of the Program was entirely consistent and in keeping with applicable procurement policies.

- 80 DJPR has explained the criteria that was applied in identifying appropriate private security contractors to be approached and ultimately engaged for the provision of private security services in paragraph 66 above.
- 81 DJPR has also explained the basis on which work was allocated to these contractors in paragraphs 70 to 71 above and 97 to 99 below.
- 82 These matters demonstrate that appropriate criteria were considered and applied in identifying and engaging private security contractors and in allocating work to them as part of the Program. DJPR submits that these matters preclude the Board from finding that there was insufficient due diligence undertaken by DJPR before formal contracts with security contractors were signed.

*Personal observations were permitted to override ordinary procurement practices*

- 83 With respect, DJPR submits that the precise nature of this allegedly open finding is difficult to understand. It may be understood as referring to two points in time: the point in time at which private security contractors were identified and engaged, or the points in time at which work was allocated to those contractors.
- 84 If the finding is confined to the former point in time, DJPR respectfully submits that it is not open to the Board to find that personal observations were permitted to override ordinary procurement practices at the time that the private security contractors were engaged by reason of the fact that:
- (a) appropriate criteria was applied in the identification of appropriate private security contractors for the reasons set out in paragraph 66 above;
  - (b) while that criteria was applied those responsible by reference to their personal opinion, it was an opinion derived from their professional experience with the contractors and not by reason of any personal connection or relationship;
  - (c) there was no personal or direct relationship between any person involved in identifying and engaging the private security contractors and the contractors that were ultimately engaged; and
  - (d) the engagement of the private security contractors complied with applicable procurement policies given that two of the three contractors were engaged as members of the Panel for the State Security Services Contract and the third was engaged in emergency circumstances as explained in paragraphs 74 to 75 above.
- 85 If the finding is confined to the latter points in time, DJPR respectfully submits that it is not open to the Board to find that personal observations were



permitted to override ordinary procurement practices at the time that the private security contractors were allocated work by reason of the fact that:

- (a) it is not clear what procurement policies, if any, applied to the process of allocating work as part of the Program to security contractors after they had been formally engaged and none have been identified by Counsel Assisting;
- (b) there were a range of factors that were given consideration when deciding which private security contractor was to be allocated work as explained in paragraphs 97 to 99 below;
- (c) work was allocated to private security contractors having regard to, among other things, feedback received from on-the-ground staff (including from DJPR, DHHS and Victoria Police) and from hotel staff as explained in paragraph 98 below; and
- (d) work was allocated in circumstances where there had been consistently negative feedback as to the performance and professionalism of at least one security contractor which necessarily affected the allocation of work as explained in paragraph 98 below.

86 DJPR respectfully submits that it is not apparent why a process by which work is allocated by reference to, among other considerations, the proven and historical performance of a contractor is inherently or necessarily objectionable. DJPR submits that it is logical, if not appropriate, that weight should be given to the observed performance of service providers when determining whether work should be allocated to that provider and it is difficult to understand, as a matter of logic or principle, why the views of those who work on site alongside a contractor on a day-to-day basis should be disregarded when allocating work. Taking Counsel Assisting's submission to its logical conclusion would require one to accept that behaviour and performance (and misbehaviour and incompetence) should have no bearing on the allocation of work given that these matters are commonly established by way of "personal, on-the-ground observations".<sup>83</sup>

87 For these reasons, DJPR respectfully submits that it is not open to the Board, on the evidence before it, to find that personal, on-the-ground observations were permitted to override ordinary procurement practices (noting that the ordinary practices said to have been infringed remain unidentified).

### *Supervision of security contractors*

88 DJPR accepts that, on the evidence before the Board, it is open for the Board to find that:

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<sup>83</sup> T2265.37-38 (closing submissions of Mr Neal QC).

- (a) it was not appropriate for DJPR to be contractually responsible for managing the security contracts, given the separation of operational responsibilities and contract management responsibilities;
- (b) there was insufficient supervision of the security contracts to ensure that the security contractors complied with their contractual obligations, in the context where DJPR was not at hotels continuously and was reliant on information from other departments; and
- (c) there was insufficient scrutiny of the extent of subcontracting by the private security contractors engaged by DJPR, once that issue came to light.

89 As to this last finding, DJPR submits that it was not appropriate for DJPR to remain responsible for supervising compliance with the security contracts in circumstances where:

- (a) DJPR had no control over the emergency management response;
- (b) DJPR did not hold the authority to enforce detention;
- (c) DJPR had a limited on-site presence at the hotels, and did not have any presence at the Rydges hotel (as explained later in these submissions);
- (d) DJPR's role was limited to implementing directions issued by the Control Agency; and
- (e) another department retained control of the day-to-day operation of the Program at the various hotels. In this respect, it is significant that the security contractors themselves saw DJPR's role as being confined to logistics,<sup>84</sup> while DHHS was responsible for their day to day management on site and the provision of advice in relation to infection control.<sup>85</sup> It would have been consistent with this understanding if DHHS, not DJPR, supervised the compliance of the security contractors with their obligations under the security contracts.

90 DJPR also accepts that it is open to the Board to find that DJPR was not aware of the extent to which the security services industry was reliant on subcontractors.

91 The proceedings before the Board have established that each security contractor engaged subcontractors in order to provide services as part of the Program. It is clear that there was no contractual prohibition on each of them proceeding in this way.

92 It is also clear, however, that the prospect that the security contractors would seek to provide their services by the use of subcontractors was not a matter that was raised with, or otherwise made clear to, DJPR at the time at which each contractor was engaged to provide services as part of the Program.

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<sup>84</sup> T803.10-23 (Watson); T821.35-46, T822.1 (Adams); T861.25-28 (Nagi); T877.25-38 (Coppick).

<sup>85</sup> T803.10-23 (Watson); T821.35-46, T822.1 (Adams); T877.25-38 (Coppick).

Although DJPR subsequently became aware of the use of subcontractors, the weight of the evidence supports the conclusion that the possibility of subcontracting was not a matter that was raised or canvassed with DJPR at the time that the private security contractors were engaged. Indeed, it appears to have been a matter that was largely concealed.<sup>86</sup>

- 93 The private security contractors were generally engaged in the weekend of 28 and 29 March 2020. None of the private security contractors have produced evidence of any communication between them and DJPR on each of those days in which they expressly raised the possibility that they would subcontract in order to provide services as part of the Program.<sup>87</sup> No such contemporaneous communication exists. Rather, consistently with Ms Currie's evidence, fundamental to DJPR's consideration of which private security contractors to engage was their reputation as employers, including whether they would engage staff on appropriate terms and at award rates.<sup>88</sup> These were matters that were expressly discussed with the private security contractors.<sup>89</sup> These requirements are fundamentally inconsistent with the notion that DJPR was aware that the private security contractors would subcontract the performance of their services during the Program.<sup>90</sup>
- 94 The fact that the private security contractors were aware that DJPR was concerned about their status as employers (including the terms on which they would engage staff) and minimised the possibility of subcontracting is reflected in the formal offers or quotations provided by the private security contractors to DJPR. Wilson, for example, declared that it was able to ensure a "significant deployment of personnel ... at a time when security numbers in the State are nearing depletion."<sup>91</sup> Unified was even more explicit in declaring it had been able to "recruit specifically for this task, a total of 93 recently and long-term unemployed" Victorians to support the Program.<sup>92</sup> These statements were intended to convey, and in fact conveyed, that the private security contractors had directly employed or engaged personnel in order to provide services as part of the Program. Indeed, Mr Coppick was very clear in his evidence that he never had any discussions with people within DJPR about Unified's proposed use of subcontractors and that, if approached about the potential to take on more work, he would not have raised or discussed the need for subcontractors or the availability of subcontractors with DJPR.<sup>93</sup> That Unified would seek to conceal its use of subcontractors in this way is also supported by the fact that

<sup>86</sup> T.768.1-16 (Aggarwal); T864.37 to T865.6 (Coppick).

<sup>87</sup> It is noted that, while MSS Security made general references to its subcontracting partners following its initial discussions with DJPR, it did not expressly state that it needed to, or would, engage subcontractors to provide services as part of the Program: Exhibit 66 – Annexures to witness statement of Mr Jamie Adams (MSSS.0001.0010.0017).

<sup>88</sup> Exhibit 36 – Witness statement of Ms Katrina Currie at [39] (DJP.050.005.0001 at .0012); T441.27-30, T448.23-27, T448.35-42 (Currie).

<sup>89</sup> Exhibit 36 – Witness statement of Ms Katrina Currie at [39] (DJP.050.005.0001 at .0012); T449.3-8 (Currie).

<sup>90</sup> Exhibit 36 – Witness statement of Ms Katrina Currie at [39] (DJP.050.005.0001 at .0012); T449.17-25 (Currie).

<sup>91</sup> Exhibit 37 – Annexures to the witness statement of Ms Katrina Currie (DJP.106.001.9553).

<sup>92</sup> Exhibit 37 – Annexures to the witness statement of Ms Katrina Currie (DJP.106.001.9548).

<sup>93</sup> T859.5-18 (Coppick).

Unified would refer to its subcontractors in vague terms (eg, by referring to them as the “operational support team”)<sup>94</sup> and the fact that all Unified personnel, whether directly employed or contractors, were using a Unified email address.<sup>95</sup>

- 95 It is accepted that DJPR subsequently became aware that the private security contractors were engaging subcontractors in order to provide security services as part of the Program. This possibility was not precluded by the terms of the security contract. Rather, a specific contractual mechanism was chosen in order to deal with this prospect. That mechanism required the security contractors to obtain the prior written consent of DJPR to any subcontracting arrangement. There were various degrees of compliance with this requirement and it would be a fair comment if one were to consider that DJPR took insufficient steps to require compliance with the relevant contractual mechanism once it became aware of this lack of compliance. Accordingly, as set out above, DJPR accepts that it is open to the Board to find that there was insufficient supervision of the security contracts to ensure that the security contractors complied with their contractual obligations with respect to subcontracting including by reason of the fact that DJPR was probably not the appropriate repository for this function having regards to the support role it played in the Program.

### *The allocation of work*

- 96 DJPR respectfully submits that it is not open to the Board to find that the process of allocating work among security contractors did not involve sufficient consideration of whether the contractors could provide suitably trained and supported staff. Rather, DJPR submits that an appropriate range of factors was taken into account in determining whether a particular security firm was allocated work as part of the Program.
- 97 It is plain from the evidence before the Board that the provision of private security services at hotels was initially allocated by reference to the speed at which the private security contractors could stand up personnel in order to provide such services in the weekend of 28 and 29 March 2020. As observed by Counsel Assisting, no criticism can or should be made of DJPR in proceeding in this fashion. Beyond this initial period, however, the decision whether to allocate work to a particular security contractor was made by a group generally consisting of, among others, the DJPR Agency Commander, the Principal Policy Officer, Ms Serbest and Mr Clements. The decision whether to allocate work to a private security contractor was based on a number of factors, including:

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<sup>94</sup> See for example, T864.29-35 (Coppick).

<sup>95</sup> T864.37-42 (Coppick).

- (a) the capacity of the private security contractor to provide staff at short notice;<sup>96</sup>
- (b) the feedback that had been received regarding the performance and provision of services by the private security contractor and the feedback that had been received from each hotel;
- (c) the number of other hotels at which the private security contractor was already providing services;<sup>97</sup> and
- (d) where DJPR was required to bring a hotel back online, whether the private security contractor had previously provided services at that hotel.<sup>98</sup>

98 Although these factors were generally considered equally, to the extent that one private security contractor received a greater allocation of work than another, this was generally due to the difference in the quality and nature of the feedback that was being received in relation to that firm's performance as opposed to the performance of the other firms. As set out above, for example, DJPR received a number of complaints concerning the performance of Wilson security guards at the Pan Pacific and Crowne Plaza hotels,<sup>99</sup> including from Victoria Police.<sup>100</sup> The nature and number of the complaints resulted in a decision to no longer utilise Wilson's services at those hotels, which resulted in a reduction in the scope of Wilson's engagement as part of the Program.<sup>101</sup>

99 These matters, in DJPR's submission, establish that there was considerable consideration given to the question whether a private security contractor could provide suitably trained and supported staff in deciding the allocation of work. The focus placed upon the historical performance of a contractor directed immediate focus upon the suitability of their staff for the performance of services. Likewise, the capacity of a contractor to provide staff at short notice, and their existing workload, clearly required consideration as to whether a contractor could provide suitably trained and supported staff at a particular hotel. Any finding to the contrary is not open on the evidence before the Board.

## E. Infection prevention and control

100 Counsel Assisting's submission is that the contracts with hotels and security contractors should not have placed responsibility for PPE and infection

<sup>96</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.110.002.9126).

<sup>97</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.106.004.3661, DJP.106.004.3662).

<sup>98</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.102.007.6803).

<sup>99</sup> Exhibit 81 – Annexures to the first witness statement of Rachaele May (DJP.103.002.8888); Exhibit 60(2) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.9882; DJP.110.003.3707); Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.110.001.4771; DJP.105.004.6524).

<sup>100</sup> Exhibit 60(2) – Annexures to witness statement of Principal Policy Officer (DJP.105.004.0273).

<sup>101</sup> DJP.105.005.5378.

prevention and control (**IPC**) education on those contractors, and that the decision to allocate risk in this way was determined by mid-ranking DJPR officials rather than by way of considered decision making of the Secretary or Ministerial level.

- 101 Counsel Assisting also submit that DJPR appears to have, to some extent, regarded themselves as the “passive recipient of advice from DHHS”<sup>102</sup> on infection control matters, rather than seeking out and obtaining what they required.
- 102 Finally in relation to IPC, Counsel Assisting have suggested that the expanded nature of the scope of works for security guards increased the risk of infection.
- 103 Each of these propositions ought to be rejected, save that the expanded role of security guards increased the risk of infection. In summary:
- (a) DJPR did not by its contracts seek to outsource IPC risk to contractors. The fact that contractors had contractual responsibility for IPC did not derogate from the State’s own obligations in respect of IPC, was consistent with the parties’ respective obligations under Workplace Health and Safety laws, and was entirely appropriate.
  - (b) DJPR had a specific designated role as Support Agency. This role was defined by the various Operations Plans and directions of the Control Agency, including as set out by Jason Helps, State Controller, Health in his email dated 29 March 2020 (**Health Controller Directive**).<sup>103</sup> The evidence does not suggest that DJPR ever viewed itself as “a passive recipient of advice”. Quite the contrary.
  - (c) Insofar as IPC specifically was concerned, both DJPR leads (Ms Febey and Ms May) independently identified key areas of challenge as including the difficulties DJPR had in getting DHHS to: (i) provide cleaning protocols tailored to the Program environment;<sup>104</sup> and (ii) brief contractors and other staff twice daily, including on PPE requirements and proper usage.<sup>105</sup> The evidence reveals multiple escalations seeking tailored information and responses to specific questions about cleaning, from the only body with the authority and expertise to provide this advice (DHHS),<sup>106</sup> culminating in DJPR proactively combining all of this information into a tailored protocol for DHHS to approve (which was well beyond DJPR’s remit as Support Agency).<sup>107</sup> Similarly, there are a

<sup>102</sup> T2224.36-38 (closing submissions of Ms Ellyard).

<sup>103</sup> Exhibit 33(1) – Annexures to the witness statement of Ms Claire Febey (DJP.101.004.4571).

<sup>104</sup> Exhibit 80 – Witness statement of Ms Rachaele May at [66], [155] (DJP.050.002.0001 at .0012, 00.27-.0028); Exhibit 32 – Witness statement of Ms Claire Febey at [111] (DJP.050.010.0001 at .0025); Exhibit 83(2) – Annexures to second witness statement of Ms Rachaele May (DJP.103.007.5208, DJP.103.005.9929 DJP.103.008.1083, DJP.104.008.3703, DJP.103.008.2404).

<sup>105</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [101] and [112] (DJP.050.010.0001 at .0024 and .0026); Exhibit 80 – Witness statement of Ms Rachaele May at [65], [68] and [157] (DJP.050.002.0001 at .0012, .0028).

<sup>106</sup> Exhibit 83(1) – Annexures second statement of Ms Rachaele May (DJP.104.008.3703, DJP.103.006.6922, DJP.103.008.0555, DJP.103.007.7241 at .7242-.7243, DJP.103.008.2404, DJP.103.005.4456, DJP.103.003.9405); DJP.103.007.1286 at .1287, DJP.103.008.0190.

<sup>107</sup> DJP.103.008.2404.

number of escalations about contractor briefings<sup>108</sup> when DJPR received intelligence to suggest that those briefings were not occurring as DHHS had committed to do, at DJPR's urging.

- (d) The decision to expand the role of security guards beyond that of static guarding was not made by DJPR, nor did DJPR have the authority to make any such decisions. DJPR had no decision-making power in relation to matters that bore risk, as the Health Controller Directive made clear. The contemporaneous documents bear out this truth.
- (e) DJPR (more than) discharged the responsibilities given to it as a Support Agency in relation to matters which touched on IPC. It should not now be held accountable for matters beyond its remit, authority and expertise. The submissions of Counsel Assisting are not a fair reflection of the evidence.

104 There is also no basis on the evidence before the Board to attribute liability to DJPR for any infection control breaches in the Program.

#### *Overview of contractual terms and what they required*

105 DJPR entered into a number of contracts with providers in relation to the Program, including contracts for the provision of infectious cleaning services, security services, and hotels and their associated services.

106 The contracts with hotels contemplated the prospect of hotels accommodating people with COVID-19.<sup>109</sup> They also required hotels, among other things, to:

- (a) ensure, prior to deployment, that personnel were supplied with PPE in accordance with relevant public health standards (**compliant PPE**)<sup>110</sup> and had received appropriate training including in workplace health and safety and risk management;<sup>111</sup> and
- (b) report any known COVID-19 exposures or infections among staff.<sup>112</sup>

107 Each contract for infectious cleaning and security put the provider on notice of the likelihood that contractor personnel would come into contact with people who had or may potentially have COVID-19.<sup>113</sup> These contracts also imposed

<sup>108</sup> See for example, Exhibit 33(1) – Annexures to the witness statement of Ms Claire Febey (DJP.102.001.9680, DJP.102.008.5193, DJP.102.001.9680, DJP.102.007.2382 at .2384, DJP.102.007.0062 at .0066); Exhibit 81 – Annexures to first witness statement of Ms Rachaele May (DJP.103.007.9086, DJP.103.006.1430 at 1431, DJP.119.003.1939, DJP.111.001.0547, DJP.103.005.2534, DJP.103.008.0887).

<sup>109</sup> See for example Exhibit 50 – Annexures to witness statement of Mr Unni Menon, clause 2.1(e) (DJP.104.005.9142).

<sup>110</sup> See for example Exhibit 50 – Annexures to witness statement of Mr Unni Menon, clause 2.1(g)(ii) (DJP.104.005.9142 at .9142-.9143).

<sup>111</sup> See for example of Exhibit 50 – Annexures to witness statement of Mr Unni Menon, clause 2.1(g)(i) (DJP.104.005.9142 at .9142-.9143).

<sup>112</sup> See for example Exhibit 50 – Annexures to witness statement of Mr Unni Menon, clause 2.1(j) (DJP.104.005.9142 at .9142-.9143).

<sup>113</sup> See for example, IKON cleaning contact at Exhibit 83(1) – Annexures to second witness statement of Ms Rachaele May (DJP.215.001.0430 at .0440 (clause 7.1, referring to both people and surfaces that may be



various risk management and related performance obligations on service providers having regard to the nature of the services to be provided, and associated risks.

- 108 For example, the contracts with private security contractors variously required the providers to:
- (a) provide services with due care and skill;<sup>114</sup>
  - (b) act in accordance with the standards expected of a professional provider of such services;<sup>115</sup>
  - (c) in the case of Wilson and MSS, ensure personnel wear all necessary and compliant PPE;<sup>116</sup>
  - (d) in the case of Unified, the contract required personnel to wear the necessary (and compliant) PPE and, additionally, required Unified to supply compliant PPE for its staff;<sup>117</sup>
  - (e) ensure, before personnel commence providing services to the Program, that those persons have received “adequate training in security, workplace health and safety, customer service and risk management as applicable for the provision of security services and, including but not limited to, in relation to COVID-19”, meet safety induction requirements and have undertaken the Australian Government Department of Health COVID-19 infection control training module (Commonwealth Training).<sup>118</sup>
- 109 There was no contractual obligation on either Wilson or MSS to supply PPE, but the expectation was that they were to supply PPE to their own personnel to the extent they were able to do so,<sup>119</sup> and which they did.<sup>120</sup> Provision was made in the contracts for both MSS and Unified to charge DJPR for the requisite PPE.<sup>121</sup>
- 110 The infectious cleaning contracts similarly required providers to supply all equipment necessary for the performance of the services, including compliant

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infectious)); security contracts at Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.1296 at .1359 (Wilson), DJP.105.003.1020 at .1084 (MSS), DJP.105.003.0793 at .0802 (Unified)).

<sup>114</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.1296 at .1312 (Wilson), DJP.105.003.1020 at .1037 (MSS), DJP.105.003.0793 at .0799 (Unified)).

<sup>115</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.1296 at .1312 (Wilson), DJP.105.003.1020 at .1037 (MSS), DJP.105.003.0793 at .0799 (Unified)).

<sup>116</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.1296 at .1358 (Wilson), DJP.105.003.1020 at .1083 (MSS)).

<sup>117</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.0793 at .0802 (Unified)).

<sup>118</sup> Exhibit 60(1) – Annexures to witness statement of Principal Policy Officer (DJP.105.003.1296 at .1359 (Wilson), DJP.105.003.1020 at .1084 (MSS), DJP.105.003.0793 at .0802 (Unified)).

<sup>119</sup> T449.4-11 (Currie). See also for example, Exhibit 81 – Annexures to first statement of Ms Rachaele May (DJP.103.003.8081).

<sup>120</sup> See for example, T448.16-21 (Currie), T752.7-12 (Gupta), T92.7-13 (Watson), T828.11-T829.20 (Adams), T8672.22-25 (Coppick).

<sup>121</sup> Exhibit 37 – Annexures to the witness statement of Ms Katrina Currie (DJP.110.001.4863 at .4872).

<sup>122</sup> See for example, Exhibit 83(1) – Annexures to second witness statement of Ms Rachaele May (DJP.215.001.0430 at .0440 (clause 6.1)).

PPE,<sup>122</sup> ensure that, prior to their commencement, contractor personnel receive adequate training (including in health and safety and risk management), have completed the Commonwealth Training and meet safety induction requirements.<sup>123</sup>

*It is reasonable and appropriate for contractors to have (and retain) risk management responsibilities for matters within their control*

- 111 It is reasonable and appropriate for contractors to have responsibility for matters within their control, including in the overall mitigation of risk for Program participants.
- 112 Under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**), contractors have a positive duty themselves to control risks. That does not mean they had to undertake their own IPC assessment, but they were required to source that information from the Control Agency and then follow those instructions and supervise compliance with them by their employees.
- 113 Separate to the OHS Act, each contractor had obligations in respect of the health and safety of its employees and, additionally, was required to provide the contracted services with due diligence under tort law and by terms implied by law into employment contracts, including for the protection of employee health and safety.
- 114 There were for example a number of steps taken by contractors in relation to health and safety, training and supervision of their employees and the employees of their sub-contractors,<sup>124</sup> including:
- (a) engagement with occupational health and safety advisors;<sup>125</sup>
  - (b) the employment by Wilson of an independent epidemiologist to review procedures and training;<sup>126</sup>
  - (c) the delivery of a specialised training program (beyond the requirement to complete the Commonwealth Training);<sup>127</sup>
  - (d) the introduction of on-site temperature checking and health declarations;<sup>128</sup>

<sup>122</sup> See for example, Exhibit 83(1) – Annexures to second witness statement of Ms Rachaele May (DJP.215.001.0430 at .0440 (clause 6.1)).

<sup>123</sup> See for example, Exhibit 83(1) – Annexures to second witness statement of Ms Rachaele May (DJP.215.001.0430 at .0440 (clause 7.2)).

<sup>124</sup> See for example, T794.35-39 (Watson) (Wilson subcontract workers were treated in the same way as direct employees); See also T289.18-31 (Security 1); T334.18-30 (Security 2); T820.41-43 (Adams); T750.15-27 (Gupta and Attalah); T851.26-28 (Coppick).

<sup>125</sup> T787.22-23 (Watson), T827.24-28 (Adams).

<sup>126</sup> T787.22-25 (Watson), T792.28-36 (Watson).

<sup>127</sup> T793.1-16 (Watson); T819.17-41 (Adams), T820.36-43 (Adams).

<sup>128</sup> T793.9-16 (Watson).

- (e) a shift leader for each shift, charged to DJPR and a site manager for each site.<sup>129</sup> In the case of Unified, this included an Operations Manager and Supervisor at each site for the duration of each shift.<sup>130</sup>
- 115 The terms of the service contracts appropriately reflected and/or were consistent with, the responsibilities of contractors for the health and safety of their workforces, as distinct from the State's separate obligations in respect of Program participants. Taking for example the Unified contract:
- (a) the obligation in cl 7.2(b) of the contract to *meet all relevant safety induction requirements* recognises the fact that concurrent duties exist.<sup>131</sup> The duty, on the one hand, of the State to communicate these requirements (which included the IPC requirements communicated in toolbox meetings/briefings, and in signage across the workplace) and the duty, on the other hand, of Unified, to take steps to ensure that its personnel comply with those directions. To be clear, this is not to say that the State's obligations were limited to communicating requirements. It had its own separate duties at law to ensure compliance to the extent reasonably practicable;
- (b) clauses 7.3 and 9 address various Workplace Health and Safety systems;
- (c) clause 29.1 clearly states that nothing in the contract is intended to affect or restrict in any way the obligations of the parties under any applicable laws. This expresses the intention of the parties that the contract would not disturb, among other things, the parties' respective obligations under Workplace Health and Safety laws. This sits in marked contrast to the assertion that DJPR sought to outsource the IPC risk to Unified.
- 116 Not only was it appropriate that contractor obligations of this nature be reinforced through the State's service contracts, it would be inappropriate for the State to seek to assume the contractor's own obligations in relation to its workforce, including because:
- (a) the obligations of contractors, separate and distinct from the obligations of the State, provide an extra layer of protection for workers (and others), as is uniformly recognised by Workplace Health and Safety legislation across Australian, including the OHS Act. This perhaps has even greater importance in the context of the Program, which was stood up rapidly, thereby carrying an enhanced risk that processes may be imperfect and matters overlooked, at least initially;
- (b) the obligations of both the State and its contractors arise relative to the control they exert over the relevant workers and workplaces. There are

<sup>129</sup> TT795.8-14 (Watson); See also T821.29-33 (Krikelis) (supervisors would reinforce requirements onsite).

<sup>130</sup> Exhibit 39 – Annexures to witness statement of Ms Gonul Serbest (DJP.110.004.0678).

<sup>131</sup> See also the obligation in cl. 7.2(c) on Unified Security to ensure that its relevant personnel undertake COVID-19 awareness training as directed by DJPR.

different levels of control and different operational frameworks at play. The role of contractors should not be diminished, bearing in mind factors including that the contractor has on-site supervision arrangements dedicated to its own personnel (for which the State pays),<sup>132</sup> the clear evidence that successful risk management in the case of infectious disease requires ongoing reinforcement and reminders, the contractor may be best placed to communicate effectively with its staff, and is likely to have the responsibility for imposing disciplinary action on, or counselling, its workforce where required;

- (c) the inclusion of such provisions in contracts is an appropriate measure to assist the State in discharging its own obligations to eliminate or reduce risk to the extent reasonably practicable. That is not to say that the State sought to transfer its duties to contractors but, rather, that by imposing or reinforcing such contractual duties – as part of a broader suite of measures to be implemented by the State on-site – the State best protects the health and safety of all Program participants. Certainly, the decision to include such terms in service contracts is, at the very least, an appropriate exercise of discretion.

117 These separate, but overlapping, arrangements are familiar territory for contractors, as is readily discernible from the measures that Wilson and MSS appropriately put in place. Gregory Watson, General Manager of Wilson gave evidence as to services Wilson provides in respect of a range of vulnerable individuals or those who have been detained – including in youth detention, hospitals and psychiatric detention.<sup>133</sup> When questioned about the training arrangements in respect of hospitals specifically, Mr Watson explained that training was the responsibility both of Wilson and the hospital.<sup>134</sup>

118 Additionally, it was not inappropriate to require providers to supply their own PPE (and not only because the State, at least initially, was concerned that it was unable to source sufficient PPE for its contractors as well as its employees). Indeed, the supply of equipment is a hallmark of a principal/contractor relationship, as distinct from an employment relationship. There may also be circumstances where a provider is equally or better placed than the State to supply equipment – specialised or otherwise. Again, any requirement on contractors to supply their own PPE or other equipment is an appropriate exercise of the State's discretion. Whether or not separate operational obligations may exist on the part of the State (and specifically the Control Agency), for example, in relation to quality control, is a separate issue that would require consideration of a number of factors.

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<sup>132</sup> See for example T795.8-14 (Watson); T821.29-33 (Krikelis); Exhibit 39 – Annexures to witness statement of Ms Gonul Serbest (DJP.110.004.0678).

<sup>133</sup> T778.26-779.24 (Watson).

<sup>134</sup> T779.9-24 (Watson), T792.15-21 (Watson).

- 119 The evidence generally supports the position that security contractors had access to and were able to supply appropriate PPE.<sup>135</sup> It was the evidence of Nigel Coppick that because Unified had access to significant amounts of PPE, it was able to assist in the supply of PPE to departmental staff and Victoria Police, whom he said did not initially have the necessary PPE.<sup>136</sup> Given that two of the head contractors were charging the State for PPE, there was also no incentive on their part to minimise usage.
- 120 Moreover, where contractors were unable to source the necessary PPE, the State accepted its responsibility to supply the relevant workers with PPE, and did so.<sup>137</sup>

*The State did not seek to transfer its IPC responsibilities to contractors by the service contracts*

- 121 The imposition of various contractual risk management obligations on contractors, as set out in the service contracts, was not an attempt to transfer the State's IPC responsibilities to those contractors. To the extent that Counsel Assisting's submissions suggest otherwise, they should be rejected.
- 122 The contractual obligations did not derogate from the State's own obligations in respect of the health and safety of Program participants. For example, the fact that service contracts required contractors to ensure that security guards wore PPE and had received appropriate training, did not minimise the State's obligations similarly to ensure that security guards wore PPE and were appropriately trained, so as not to present a risk to themselves and others in the workplace, to the extent reasonably practicable.
- 123 Indeed, the State cannot contract out of its obligations under the OHS Act. Moreover, the contracts did not seek to achieve this aim.
- 124 Consistent with the above, the evidence reveals that DJPR always understood that the State held separate and critical responsibilities for IPC. There is no evidence that the terms of service contracts were viewed as diminishing those responsibilities (or indeed that DHHS was even aware at all (or any) relevant times of the contractual terms in relation to security, such that it could have viewed those terms as diminishing its role).
- 125 For example:

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<sup>135</sup> See for example, T727.15-18 (Watson), T828.45 to T829.20 (Adams), T852.16-21 (Coppick).

<sup>136</sup> T728.8-14 (Adams), T829.19-20 (Adams), T852.16-27 (Coppick), T968.36-44 (May).

<sup>137</sup> See for example, T828.19-20 (Adams); Exhibit 81 – Annexures to first statement of Ms Rachaele May (DJP.103.003.8081).

- (a) it was the evidence of Mr Phemister, that the contractual obligations on contractors were “by no means an abdication by the State of its responsibilities in this regard”,<sup>138</sup>
- (b) as part of a concerted attempt by Ms Febey to ensure clarity on roles and responsibilities of agencies, Ms Febey circulated to DHHS, on 29 March 2020, a document setting out DJPR’s position on the respective roles and responsibilities in the Program of DJPR and DHHS.<sup>139</sup> This document had been developed in conjunction with Boston Consulting Group. Among other things, recognising that the State had its own IPC obligations separate and distinct from those of contractors, DHHS’s role and responsibilities as Control Agency were stated to include:
- (i) “provide PPE for hotel and security staff and brief on appropriate practices”;<sup>140</sup>
  - (ii) “holds ultimate responsibility”;<sup>141</sup>
  - (iii) “define health, physical and mental wellbeing and safety approaches”;<sup>142</sup>
  - (iv) “manage delivery of onsite health, physical and mental wellbeing and safety”.<sup>143</sup>
- (c) following the first diagnosed case of COVID-19 (information about which was not shared until the subsequent inter-agency meeting), Ms Febey escalated concerns to the Deputy State Controller Health including that “*in the absence of timely information [she] felt unable to support and manage the safety and wellbeing of our staff and contractors on the ground*”.<sup>144</sup> In light of the Deputy State Controller Health’s response that all persons in quarantine should be treated as potentially infected, it was agreed that authorised officers would brief staff and contractors at the start of each shift each day “on the appropriate use of PPE and other safe working practices”.<sup>145</sup> The Deputy State Controller Health then sought and was given confirmation, in an interagency meeting at the SCC, that the staff briefings were being delivered.<sup>146</sup>

126 The adoption by DHHS of responsibilities in relation to IPC, including contractor briefings, also supports the position that DHHS (and not only DJPR) considered that the State (and, specifically, DHHS) held key responsibilities in

<sup>138</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [144] (DJP.050.001.0001 at .0032).

<sup>139</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [121] (DJP.050.001.0001 at .0026).

<sup>140</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.101.002.0670).

<sup>141</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.101.002.0670 at .0671).

<sup>142</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.101.002.0670 at .0671).

<sup>143</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.101.002.0670 at .0671).

<sup>144</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.101.007.1921).

<sup>145</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.001.9680).

<sup>146</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.007.2382 at .2384).

relation to IPC, which it had not sought to outsource to contractors. This is further evidenced by:

- (a) the appointment by DHHS of an IPC consultant and,<sup>147</sup> ultimately, Alfred Health;
- (b) the establishment, by DHHS, of COVID-positive floors, and then COVID-positive hotels in the Program;
- (c) the arrangements that DHHS put in place at hotels, including the Rydges Hotel (which are addressed later in these submissions);
- (d) DHHS commissioning Infection Prevention Australia to complete a review of IPC compliance across the hotel network;<sup>148</sup>
- (e) the terms of the 26 May 2020 Operations Plan which provided,<sup>149</sup> among other things:
  - (i) that Enforcement and Compliance Command (DHHS) was responsible for “overall public health control of the detention of people in mandatory quarantine”.<sup>150</sup> It should be noted that neither DJPR nor any contractors are represented in the Enforcement and Compliance Command structure,<sup>151</sup> nor in the overall Operation Soteria Command structure (as distinct from support);<sup>152</sup>
  - (ii) Standard Operating Procedures outlining the powers, authority and responsibilities of the Authorised Officer to provide “safe, efficient and effective activities” at quarantine hotels;<sup>153</sup>
  - (iii) Authorised Officers are to determine when fresh air breaks are allowed and for whom, and must consider, among other thing “maintaining infection control, such as ensuring persons do not touch door handles or lift buttons”,<sup>154</sup>
  - (iv) Authorised Officers are to “provide procedural guidance to security” in respect of fresh air breaks;<sup>155</sup>
- (f) directions, including in respect of IPC, to be acted on by detainees, private security and others in relation to fresh air breaks.<sup>156</sup>

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<sup>147</sup> T1563.3-7 (Van Diemen).

<sup>148</sup> Exhibit 186 – First witness statement of Ms Kim Peake at [230] (DHS.9999.0009.0001 at .0044).

<sup>149</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245).

<sup>150</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2255).

<sup>151</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2267).

<sup>152</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2268).

<sup>153</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2256).

<sup>154</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2296).

<sup>155</sup> Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2296).

<sup>156</sup> See Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245 at .2297-.2298).

*DJPR has been unfairly criticised in respect of the performance of its role*

- 127 Counsel Assisting has expressed the view that “*what the documents suggest is that from time to time DJPR did seek or raise the question of the sufficiency of infection control training and so forth. But they appear to have to some extent regarded themselves as the passive recipient of advice from DHHS rather than seeking out and obtaining what they required*”.
- 128 This characterisation of DJPR as a passive recipient of advice has no basis in fact and is not supported by the extensive volume of evidence to the contrary before the Board. The evidence establishes:
- (a) first, that DJPR was limited in the nature of the support it could, or had the authority to provide, in light of:
    - (i) its mandate as support agency for the delivery of particular services, as set out in the various iterations of the Operations Plan, and pursuant to the Health Controller Directive;<sup>157</sup>
    - (ii) its limited site presence – generally confined to passenger entries and exits, with no on-site presence at the Rydges hotel, being a hot hotel as described later in these submissions. It is worth noting that DJPR’s contract management role was the same in respect of the hot hotels as it was in relation to all other hotels. This is because DJPR’s role was only ever to manage the contracts and not the contractors on-site provision of services;
    - (iii) the lack of any experience, expertise or authority to issue directions or guidance on matters pertaining to IPC, except on the express direction of DHHS;
  - (b) second, there is no evidence of any failure by DJPR to act on any such directions of DHHS;
  - (c) third, DJPR went over and above the requirements of its role as support agency to assist DHHS in the performance of its role of Control Agency. DJPR raised matters to which DHHS should have regard as Control Agency, it drafted policies for DHHS to authorise (in order to assist DHHS in the performance of its role as Control Agency), and DJPR repeatedly and actively raised issues of concern, including as to risk, with the Control Agency, some examples of which are included in the Escalation Table annexed as **Annexure 1** to these submissions.
- 129 Having regard to the evidence before it, the Board should find that not only did DJPR act appropriately on all directions of DHHS, but that DJPR proactively engaged in its role to assist DHHS as the Control Agency, and for the benefit of the Program as a whole.

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<sup>157</sup> See for example, Exhibit 35 – Operation Soteria Operations Plan.



*DJPR's role as support agency*

- 130 A support agency is an agency that provides essential services, personnel or material to support or assist a Control Agency or affected persons.<sup>158</sup> An agency may be requested to assist in any emergency if it has skills, expertise or resources that may contribute to the management of the emergency.<sup>159</sup>
- 131 DJPR is Victoria's lead agency for creating the conditions to lift the living standards and wellbeing of all Victorians by sustainably growing Victoria's economy and employment and by working with the private and public sectors to foster innovation, creativity, productivity, investment and trade.<sup>160</sup>
- 132 DJPR's key responsibility for emergency management is to minimise the impact of emergencies in portfolio areas through effective preparation, coordination and response.<sup>161</sup> DJPR is the Control Agency for, among other things, biosecurity incursions.<sup>162</sup> It is the lead agency for food and grocery supply logistics continuity in relief and recovery efforts.<sup>163</sup>
- 133 DJPR has substantial logistical experience, including through Global Victoria, which has a wealth of experience in the organisation and implementation of trade delegations.<sup>164</sup> Prior to the conception of the Program, DJPR had commenced processes for the procurement of hotels for voluntary isolation under various programs of the Victorian Government.<sup>165</sup>
- 134 DHHS is the Control Agency for human disease. It is required to direct the strategic health response during an emergency with major health consequences. Through the SHERP, DHHS is required to ensure a safe, effective and coordinated health and medical response to emergency incidents.<sup>166</sup>
- 135 Consistent with DJPR's logistical expertise and recent experience in the engagement of hotels for voluntary isolation purposes, DJPR's role as support agency was to supply logistical services to the Program and to provision hotels and associated contracts, and to manage those contracts.
- 136 The various Operations Plans in force during the Program<sup>167</sup> provided the following limited role for DJPR in respect of Phase 3 (accommodation) in supporting DHHS to deliver the Program:

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<sup>158</sup> Exhibit 131 – Annexures to witness statement of Ms Pam Williams (DHS.0001.0027.0108 at .0324).

<sup>159</sup> Ibid (DHS.0001.0027.0108 at .0324).

<sup>160</sup> Ibid (DHS.0001.0027.0108 at .0371).

<sup>161</sup> Ibid (DHS.0001.0027.0108 at .0371).

<sup>162</sup> Ibid (DHS.0001.0027.0108 at .0371).

<sup>163</sup> Ibid (DHS.0001.0027.0108 at .0372).

<sup>164</sup> Exhibit 38 – Witness statement of Ms Gonul Serbest at [6]-[7] (DJP.050.009.0001 at .0002).

<sup>165</sup> Exhibit 49 – Witness statement of Mr Unni Menon at [13]-[14] (DJP.050.006.0001 at .0003-0004).

<sup>166</sup> Exhibit 131 – Annexures to witness statement of Ms Pam Williams (DJP.050.006.0001 at .0368).

<sup>167</sup> Exhibit 144 – First witness statement of Commissioner Andrew Crisp at [38]-[39] (DOJ.600.002.0008 at .0024);

Exhibit 145 – Annexures to the first witness statement of Mr Andrew Crisp (DOJ.504.010.6875, DOJ.504.010.6787, DOJ.501.001.9224). More detail as to these responsibilities was prescribed in a later plan, dated 26 May 2020: Exhibit 126 – Annexures to the witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2245).

- (a) managing accommodation contracts;
- (b) managing private security contracts to enforce quarantine requirements at accommodation;
- (c) reception parties established to coordinate movement of passengers from transport into accommodation (with DHHS);
- (d) detailed identification of, capture and management of special/social needs (with DHHS) established and coordinated at all identified accommodation;
- (e) management of services for all passengers including food and amenities.

137 Appendix 4 to the Operations Plan provided that DHHS held operational command, the State Control Centre was responsible for monitoring tasks and coordinating actions, while DJPR was responsible for certain designated processes.

138 It is also the case that DJPR was to deliver the above in the context of a framework and directions that disempowered it from taking decisions or managing processes within the Program as it saw fit. DJPR actively sought out, not only guidance, but clear directions, as to the parameters of its role within the Operation Soteria when they were otherwise not forthcoming.<sup>168</sup> Ms Febey explained in oral evidence that clarity was required because:

*...in order to have an operation that was effective and safe it needed to be clear who was accountable, who was identifying and managing risk and who the decision-maker was.<sup>169</sup>*

139 On 29 March 2020 and in the few days that ensued, that clarity was provided, including through the Health Controller Directive, which was in the following terms:

*Dear Claire,*

*As you are aware The Department of Health and Human Services (DHHS) is the Control Agency for the COVID-19 Pandemic, and at this time I am the State Controller – Health appointed by the Control Agency under the Emergency Management Act. Prof Brett Sutton is the Chief Health Officer leading the Public Health response under the Public Health and Wellbeing Act.*

*As the Control Agency, DHHS has overall responsibility for all activities undertaken in response to this emergency. The response to the direction for all passengers returning to Victoria after 11.59 p.m. 28/03/20 requiring to be quarantined in approved accommodation is being led by Dep State Controller Chris Eagle as “Operation Soteria”.*

*As discussed today I am extremely grateful to the support DJPR have provided to date, your team have demonstrated flexibility, good planning and expertise which has contributed to making the first day as successful as it*

<sup>168</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [59], [63]-[68] (DJP.050.010.0001 at .0014-0017).

<sup>169</sup> T405.8-15 (Febey).

*could be. I also look forward to your team continuing to support Operation Soteria.*

*It is important however that we clarify some roles and responsibilities and work on a transition plan over the next day or so. Chris Eagle will work with you on this. Many of the roles DJPR provided in the planning, and operationally today will need to transition to the Deputy State Controller and DHHS as the Control Agency. I would like to clarify that, at a minimum, I would request DJPR continue to provide the valuable work in procurement of hotels and the services required to support people under the direction to detain, I don't underestimate the complexity of this task in the current environment. It will be vital that DHHS make the operational decisions in regards to which hotels we utilise and when, along with other decisions which require a risk assessment by the Chief Health Officer or delegated Authorised Officer.*

*It was a pleasure to discuss this with you today and I sense the value of working closely on this for both agencies.*

*Please contact me again if I can assist or if a resolution cannot be reached during the handover process.*

*Regards*

*Jason Helps*

*Deputy Director Emergency Operations and Capability | Emergency Management Branch<sup>170</sup>*

- 140 Consistent with the directive that had been issued to her, Ms Febey understood that DJPR had retained its contracting function, but that decision making functions had otherwise transferred to DHHS; with DJPR to act absolutely as a support agency – there to do whatever it could to make DHHS's role as a Control Agency easier, but acting under its direction.<sup>171</sup>
- 141 It is in the above context that DJPR's role and responsibilities must be viewed.

### *DJPR was not a passive recipient of advice*

- 142 From the very outset, DJPR was proactive in both considering issues that needed to be addressed within the Program and taking steps to have those matters addressed.
- 143 This can be seen before the Program even commenced, for example, by DJPR drafting and providing to DHHS a document for it to finalise to provide clarity on the roles and responsibilities of security guards, and seeking decisions on public health matters which were clearly within DHHS's remit and required its decision.<sup>172</sup>

<sup>170</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [63]-[64] (DJP.050.010.0001 at .0015-0016); Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.101.004.4571).

<sup>171</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [65] (DJP.050.010.0001 at .0017-.0018).

<sup>172</sup> See for example, Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.102.001.3600, DJP.102.001.3602); Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.005.9834).

- 144 As early as 29 March 2020, DJPR proactively escalated a number of issues as a matter of urgency, including a permanent on-site police presence, DHHS staffing at hotels, health support and escalations and the allocation of PPE.<sup>173</sup> Again, these were all matters within DHHS's remit.
- 145 When these matters remained unresolved, or had been insufficiently addressed, DJPR continued to escalate the issues as urgent matters, and provided ideas and draft documents to accelerate the resolution of outstanding issues.<sup>174</sup> It was Ms Febey's uncontested evidence that DJPR "sought both the provision of PPE and relevant guidance from DHHS at various stages of the Program, including in the first days".<sup>175</sup>
- 146 Similarly, when DHHS responsively informed DJPR that ordinary evacuation procedures would apply within the Program (following a number of requests by DJPR), DJPR went further and prepared additional advice for DHHS's consideration and authorisation, tailoring those existing procedures to the specific needs of the Program.<sup>176</sup>
- 147 Inconsistent with Counsel Assisting's submission that DJPR was a "passive" player is Ms Febey's uncontested evidence that:
- In the main, DHHS would address issues reactively, when raised by DJPR or others. We were entirely reliant on DHHS to set the policies and practices around IPC and PPE. Any time an issue was raised with us about these matters, we would seek DHHS's advice about what the expectations were, seeking clear instructions and advice.*
- On numerous occasions DJPR sought advice about different components of IPC – particularly around cleaning. The pattern was that we would seek advice, DHHS would provide some advice and we would then seek to clarify the advice received.*<sup>177</sup>
- 148 A number of documents support the views expressed by Ms Febey, excerpted immediately above, including emails from DJPR seeking to clarify cleaning requirements over the course of its involvement in the Program, and otherwise demonstrating its proactivity in engaging cleaning services.<sup>178</sup>
- 149 Ultimately, DJPR drafted revised cleaning instructions for DHHS to approve based on the information DHHS has provided from time to time in response to DJPR's various escalations.<sup>179</sup> That DJPR was proactive in this regard, beyond its responsibilities as Support Agency, is evident from the question

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<sup>173</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.007.6151 at .6152).

<sup>174</sup> Ibid (DJP.102.009.2694, DJP.102.009.1588, DJP.102.009.1880).

<sup>175</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [95] (DJP.050.010.0001 at .0022)

<sup>176</sup> Exhibit 227 – Bundle of documents tendered by DJPR (DJP.102.007.2054).

<sup>177</sup> Ibid at [102]-[103] (DJP.050.010.0001 at .0024).

<sup>178</sup> See for example, DJP.103.005.4456; DJP.103.003.9405; DJP.103.003.3555; Exhibit 83(1) – Annexures to second witness statement of Ms Rachaele May (DJP.104.008.3703, DJP.103.008.0555); Exhibit 82 – Second witness statement of Ms Rachaele May at [50]-[53] (DJP.050.002.0032 at .0041-0042).

<sup>179</sup> Exhibit 82 – Annexures to second witness statement of Ms Rachaele May (DJP.103.008.2404 at .2406-2407).

asked by a DHHS representative as to whether final approval of the protocol sat with DJPR, to which DJPR's Agency Commander, Ms May responded:

*Final approval of any infectious cleaning advice rests with DHHS as the infection control experts. DJPR is happy to circulate final document to all contracted cleaning companies, hotels etc. Please advise when document is finalised.*<sup>180</sup>

- 150 Similarly, as detailed at paragraphs 103(c) and 125(c) above, it was DJPR that pressed for regular briefings of all workplace participants to occur following the first identified COVID-19 infection. Despite having no background in health or matters of IPC, Ms Febey identified a risk to workplace participants, and appropriately sought that this be addressed by the DHHS. DHHS committed<sup>181</sup> to do so in the form of twice daily briefings to all staff (including of contractors) on appropriate use of PPE and other safe working practices.<sup>182</sup> DHHS confirmed at the multi-agency meeting on 1 April 2020 that these briefings had commenced.<sup>183</sup> Although the evidence suggests these briefings were generally conducted on somewhat of an ad hoc basis (contrary to DHHS's commitment), this was due to no fault of DJPR. When DJPR became aware of issues in this regard, it persisted, proactively, in escalating these to DHHS, seeking to ensure that DHHS deliver on its commitments.<sup>184</sup>
- 151 It was Ms May's evidence that DJPR was responsible for selecting the contractors used in the Program, but the processes under which those contractors worked and the procedures with which they were required to comply were the responsibility of DHHS as the Control Agency.<sup>185</sup> It was Ms May's uncontested evidence that DJPR relied on DHHS to provide onsite briefings and pressed for those to occur.<sup>186</sup> When DJPR came to understand that briefings were not occurring as had been agreed that they would, DJPR proactively raised these issues with DHHS Hotel Command,<sup>187</sup> and sought that briefings be extended beyond the security workforce (as had also previously been agreed would occur).<sup>188</sup>

<sup>180</sup> Ibid (DJP.103.008.2404).

<sup>181</sup> See for example, Exhibit 32 – Witness statement of Ms Claire Febey (DJP.102.001.9680, DJP.102.007.2382 at .2384, DJP.102.007.0062 at .0066). The evidence suggests that these occurred on an ad hoc basis – through no fault of DJPR – with a renewed vigour following the Stamford outbreak: see Exhibit 80 – Witness statement of Ms Rachaele May (DJP.050.002.0001 at .0026). DJPR was never given the direction, nor the tools, to conduct any such briefings, which sat outside its knowledge, expertise and authority/conferred role as Support Agency.

<sup>182</sup> Exhibit 33 – Annexures to witness statement of Ms Febey (DJP.102.001.9680).

<sup>183</sup> See for example, Exhibit 32 – Witness statement of Ms Claire Febey (DJP.102.001.9680, DJP.102.007.2382 at .2384, DJP.102.007.0062 at .0066). The evidence suggests that these occurred on an ad hoc basis – through no fault of DJPR – with a renewed vigour following the Stamford outbreak: see Exhibit 80 – Witness statement of Ms Rachaele May (DJP.050.002.0001 at .0026). DJPR was never given the direction, nor the tools, to conduct any such briefings, which sat outside its knowledge, expertise and authority/conferred role as Support Agency.

<sup>184</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.007.2382 at .2384).

<sup>185</sup> Exhibit 80 – First witness statement of Ms Rachaele May at [25] (DJP.050.002.0001 at .0005-.0006).

<sup>186</sup> Exhibit 80 – First witness statement of Ms Rachaele May at [30] (DJP.050.002.0001 at .0006-.0007).

<sup>187</sup> See for example, Exhibit 81 – Annexures to first witness statement of Ms Rachaele May (DJP.119.003.1939, DJP.111.001.0547); See also Exhibit 81 – Annexures to first witness statement of Ms Rachaele May (DJP.103.007.9086).

<sup>188</sup> Exhibit 81 – Annexures to first witness statement of Ms Rachaele May (DJP.103.008.0887).

*Information not provided to DJPR*

- 152 Despite commitments given to DJPR as to processes by which DHHS would notify to it COVID positive cases (following the first identified positive case which was not notified to DJPR),<sup>189</sup> it was Ms May's evidence that,<sup>190</sup> during her tenure as agency Commander:
- (a) there was no such formal notification process; and
  - (b) this information could be gleaned from the updates on rooms occupied at Rydges and the Brady hotels (where detainees were transferred following diagnosis).
- 153 On occasion, DJPR would be provided with a copy of the DHHS Operation Soteria Situation Report which contained this information.<sup>191</sup>
- 154 DJPR was also not informed as to which of the returned travellers had refused a COVID test and which were still awaiting test results.<sup>192</sup>
- 155 DJPR was not provided with the Safer Care Victoria reports, and was not made aware of their content, findings, or what steps were taken in response. In particular aspects of the report refer to security not passing on requests for medical assistance.<sup>193</sup>
- 156 DHHS did not consult DJPR on the plan to transition the Program to another department – DJPR was simply instructed to handover the Program to DHHS. That is, DJPR was treated as a passive participant by DHHS as the Control Agency, and in a way which clearly reflected the lack of decision making power on the part of DJPR.

*Victoria was the only jurisdiction that enabled fresh air breaks in hotels*

- 157 The role to be played by private security as conceived at the time of their initial engagement in the Program, was to provide static guarding services, acting under the direction of DHHS Authorised Officers who held the power to enforce the detention orders. As was noted by Counsel Assisting, the documentation prepared by DJPR over 27 and 28 March 2020 reflected that operating model.
- 158 Once it was understood that private security was to be used in the Program, DJPR's preferred model was for DHHS (through its Authorised Officers) to

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<sup>188</sup> See for example Exhibit 117– Annexures to first witness statement of Prof. Euan Wallace AM (DHS.5000.0089.5772).

<sup>189</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.007.0058).

<sup>190</sup> Exhibit 80 – First witness statement of Ms Rachael May at [137] (DJP.050.002.0001 at .0025); T979.34-980.3 (May).

<sup>191</sup> Exhibit 80 – First witness statement of Ms Rachaele May at [137] (DJP.050.002.0001 at .0025).

<sup>192</sup> T980.14-26 (May).

<sup>193</sup> See for example Exhibit 117 – Annexures to first witness statement of Prof. Euan Wallace AM (DHS.5000.0089.5772).

*“induct the security guards and provide on-call advice about what to do in certain situations and determine if any incidents should be escalated to the authorised officer and/or Vicpol”.*<sup>194</sup> In addition, Victoria Police should maintain a 24/7 presence on-site.<sup>195</sup>

- 159 It was also DJPR’s recommendation “from an operational perspective” that returned travellers not be able to leave their rooms.<sup>196</sup> DJPR did, however, recognise the health and human rights issues associated with this, and sought direction from DHHS as to whether provision could be made for movement outside of rooms. DJPR communicated that, if DHHS authorised such movement, DJPR would prepare an approach for the consideration of Mr Crisp and DHHS and, if not, DJPR would prepare advice for approval on in-room options.<sup>197</sup>
- 160 DHHS subsequently determined that the role of security was to expand beyond static guarding, including to encompass deliveries and exercise breaks. These were the decisions of DHHS as the Control Agency, which were implemented on its directions and the directions of authorised officers in whom the power was reposed to authorise the release of an individual from the confines of their hotel room, in accordance with the *Public Health and Wellbeing Act 2008* (Vic). The written contracts later reflected that expanded role, which had been determined by those with the requisite authority (not DJPR).
- 161 Fresh air breaks were to be provided, as determined by DHHS, having regard to the rights assumed to have been conferred by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**). Version 3 of the Operations Plan specifically required authorised officers to have regard to the Charter in the performance of their duties. Section 3.6 of the Operations Plan provided that:
- Department AOs are public officials under the Charter of Human Rights. This means that, in providing services and performing functions in relation to persons subject to the Direction and Detention Notice, department AOs must, at all times: act compatible with human rights; and give ‘proper consideration’ to the human rights of any person(s) affected by a department AO’s decisions.*<sup>198</sup>
- 162 Fresh air breaks were unique to the Victorian Program. This is important context for the Board to bear in mind in its overall assessment of the Program, particularly having regard to the highly infectious character of COVID-19, which has breached controls in much more specialised domains, including hospitals.
- 163 The expansion of the role of security guards from static guarding posed a substantial risk to those working at the hotel – not necessarily because it was security guards who led returned travellers on their fresh air breaks but, rather,

<sup>194</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.101.002.7985).

<sup>195</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [56]-[57] (DJP.050.010.0000 at .0013-.0014).

<sup>196</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.009.2694 at .2695).

<sup>197</sup> Exhibit 33 – Annexures to witness statement of Ms Claire Febey (DJP.102.009.2694 at .2695).

<sup>198</sup> Exhibit 126 – Annexures to witness statement of Ms Melissa Skilbeck (DHS.0001.0001.2236 at .2236).

because fresh air breaks were enabled within the Program, with the attendant risks.

## F. Rydges Hotel

164 Counsel Assisting has submitted that poor training and education of frontline staff and the delays in cleaning the common areas of the Rydges Hotel and in quarantining all staff were failures which contributed to the further proliferation of the virus into the community.

165 For the reasons set out below, and irrespective of any findings the Board ultimately makes about DJPR's role in other aspects of the Program, it is not open to the Board to find that DJPR was responsible for, or caused or contributed to any failures in the delivery of the Program at Rydges.

166 DJPR draws the following to the Board's attention, each of which is addressed in further detail below:

- (a) The decision to place COVID positive returned travellers into Rydges or subsequently to designate Rydges as a COVID positive hotel was not DJPR's decision;<sup>199</sup>
- (b) DJPR's role at Rydges was confined by DHHS such that it did not have an on-site presence, and DJPR personnel were not permitted to enter Rydges without DHHS permission;
- (c) For DJPR to address issues with contractors, it needed first to be made aware of the relevant issues, and given directions as required;
- (d) DJPR discharged its responsibility as Support Agency to:
  - (i) secure the timely provision of services at Rydges, including the cleaning of common areas after the outbreak, all in accordance with the directions of DHHS;
  - (ii) escalate issues through the chain of command as required by the Operation Soteria Commander; and
  - (iii) forward instructions received by the Operation Soteria Commander to contracted providers.

### *The designation of Rydges as a hot hotel*

167 DJPR did not make the decision to stand up Rydges as a hot hotel. It could not have made this decision because it had no power to do so, as had been emphasised just a few days earlier when DHHS made clear that DJPR should

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<sup>199</sup> T1283.14-19 (Williams); T1320.38-1321.9 (Bamert).



identify to it hotels available to participate in the Program, and DHHS alone would determine which of those hotels would be stood up and when.<sup>200</sup>

168 Although it appears from the documents that there were some early discussions between DHHS and DJPR about Rydges becoming a hot hotel,<sup>201</sup> it is readily apparent that the final decision was not made before 7 April 2020. By that time:

- (a) DHHS had made clear to DJPR, and DJPR well understood, that DHHS alone had the authority to determine which hotels would be taking returned travellers and when;<sup>202</sup>
- (b) the interagency meeting on 7 April 2020 shows further consideration being given by those present as to which hotel might be the designated hot hotel, and specifically whether the use of a smaller hotel would best maximise hotel usage;<sup>203</sup>
- (c) DHHS approached Dr Finn Romanes shortly before the interagency meeting on 7 April 2020 seeking that he approve the use of a single hotel to house COVID-19 returned travellers, which he did;<sup>204</sup>
- (d) by 9 April 2020 a decision had been made that Rydges would be the designated hot hotel, in preparation for the Greg Mortimer repatriation.<sup>205</sup>

#### *DJPR did not have an on-site presence at Rydges*

169 DJPR did not have an on-site presence at the Rydges hotel.<sup>206</sup> A separate and additional operations plan applied to the Rydges site, the approved version of which was circulated by the SCC on 11 April 2020 (**Rydges Plan**).<sup>207</sup>

170 The Rydges Plan provided that:

- (a) *“DHHS, as the Control Agency for this emergency, has responsibility for the oversight and coordination of Operation Soteria, including all operations for this specific repatriation [Greg Mortimer Cruise Ship]”*;<sup>208</sup>
- (b) DJPR’s role was confined to “responsibility for sourcing appropriate accommodation contracts...support the allocation of passengers to hotels and provide (through contractors) concierge services at the hotel – including ensuring appropriate support is provided for passenger material

<sup>200</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [77]-[88] (DJP.050.010.0001 at .0020-.0021).

<sup>201</sup> Exhibit 163 – Annexures to witness statement of Ms Andrea Spiteri (DHS.5000.0001.1240).

<sup>202</sup> Exhibit 32 – Witness statement of Ms Claire Febey at [65]-[66] (DJP.050.010.0001 at .0016-.0017).

<sup>203</sup> DJP.102.007.1339 at .1343.

<sup>204</sup> Exhibit 114 – Annexures to witness statement of Dr Finn Romanes (DHS.5000.0131.0503 at .0504-.0505).

<sup>205</sup> DJP.102.007.0967 at .0970.

<sup>206</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [94] (DJP.050.001.0001 at .0019).

<sup>207</sup> Exhibit 184 – Witness statement of Mr Simon Phemister at [95] (DJP.050.001.0001 at .0019); Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.102.007.4063).

<sup>208</sup> Exhibit 185 – Annexures to the witness statement of Mr Simon Phemister (DJP.102.007.4063 at .4065).

and food requirements”.<sup>209</sup> This differed from other sites insofar as DJPR assisted DHHS on-site, at least for entries and exits, at other quarantine hotels;

- (c) “DJPR did will not have a physical presence at Rydges.”<sup>210</sup> DHHS will (instead) support passenger check-in, including manifest reconciliation;<sup>211</sup>
- (d) Although the Rydges Plan did not make specific provision for DJPR to provision security and cleaning services, the Rydges Plan stated that it was to be read in conjunction with the Operation Soteria Operations Plan.<sup>212</sup> The Operation Soteria Operations Plan required that DJPR manage the contracts in relation to both security and cleaning. The fact that DJPR’s contract management role was the same at Rydges (where DJPR had no on-site presence) as it was at all other sites, speaks volumes as to the nature of that role. Consistent with DJPR’s understanding of its role throughout its involvement in the Program, it demonstrates that DJPR’s role beyond entries and exits was first and foremost (and in some respects, such as in relation to security, exclusively) a back-office administrative role confined to managing contracts for the provision of services, with the site management of contractors being the responsibility of the contractors themselves, DHHS as Control Agency and Authorised Officers – and not DJPR. That was the direction of DHHS to DJPR as to the parameters of DJPR’s role as Control Agency.

### *Delay in cleaning Rydges common areas following outbreak*

- 171 While Counsel Assisting has not identified the evidentiary basis in support of a finding that there was a delay in cleaning Rydges, on the face of it, the evidence of Dr McGuinness appears to support such a finding. In her statement to the Board, Dr McGuinness said that:

*Despite direction being provided by [DHHS] to clean the hotel on 26 May 2020 (clarified on 27 May 2020 to mean a full commercial bio-clean...) a full clean was not undertaken until the afternoon of 28 May 2020.*<sup>213</sup>

- 172 Should the Board seek to attribute the cause of any delay to DJPR, DJPR submits that no such finding is available on the totality of the evidence. Contemporaneous records tendered into evidence show that:
- (a) at 10.33 am on 26 May 2020, the Emergency Operations Centre of DHHS Operation Soteria was notified that a staff member at the Rydges

<sup>209</sup> Exhibit 185 – Annexures to the witness statement of Mr Simon Phemister (DJP.102.007.4063 at .4066).

<sup>210</sup> Exhibit 185 – Annexures to the witness statement of Mr Simon Phemister (DJP.102.007.4063 at .4069).

<sup>211</sup> Exhibit 185 – Annexures to the witness statement of Mr Simon Phemister (DJP.102.007.4063).

<sup>212</sup> Exhibit 185 – Annexures to witness statement of Mr Simon Phemister (DJP.102.007.4063).

<sup>213</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [49] (DHS.9999.0004.0001 at .0013).

Hotel had displayed COVID symptoms. Later that day at 1.03 pm, the Emergency Operations Centre of DHHS Operation Soteria was informed that that staff member had tested positive for COVID-19.<sup>214</sup>

- (b) that night, at 8.40 pm DHHS Case and Contact Management Lead, Public Health Operations, sent a request for further information internally within DHHS, including to the Operation Soteria Commander, asking, among other things:

*What is the cleaning regime like at the hotel? A clean of all common areas, and the cases' direct work areas will need to occur.*<sup>215</sup>

DJPR was not a recipient of this email.

- (c) Later that night, at 10.20 pm, the Operation Soteria Commander emailed the DJPR Accommodation Lead, Ms May, regarding information sought by the Contact and Tracing team:

*Rachaele*

*Below is the sort of information that the Case and Contact Management team are seeking, some of which is held by the hotel. They are likely to contact the hotel directly, but this is a heads up ...*

At point 7 of that email, she wrote:

*What is the cleaning regime like at the hotel? A clean of all common areas, and the cases' direct work areas will need to occur.*<sup>216</sup>

- (d) It is not reasonable, on any view, to interpret an email commencing with “*this is a heads up*” and continuing in the way it does, as having the character, let alone the appearance, of a direction that DJPR was to engage cleaners to perform a cleaning task that was to be performed in an undefined way. Up until that time, DJPR had been directed by DHHS to contract deep cleans of COVID positive rooms only, and not common areas.<sup>217</sup> Other cleaning was to be arranged by hotels.<sup>218</sup>
- (e) At 3.51 pm on 27 May 2020, internal DHHS communications show that the COVID Squad Coordination and Operations Director requested the DHHS Deputy Commander, Hotels, Operation Soteria to arrange:

*an immediate FULL “Bioclean” of Rydges in all common areas across the hotels (excluding quarantine / returned traveller rooms):*

*This cleaning must include:*

*Elevators*

*Stairwells*

<sup>214</sup> Exhibit 105 – Annexures to witness statement of Dr Simon Crouch (DHS.5000.0016.5475).

<sup>215</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [49] (DHS.9999.0004.0001 at .0013),; Exhibit 107 – Annexures to witness statement of Dr Sarah McGuinness (DHS.5000.0015.3873).

<sup>216</sup> DJP.103.003.7983.

<sup>217</sup> Exhibit 82 – Second witness statement of Ms Rachael May at [47] (DJP.050.002.0032 at .0040-0041).

<sup>218</sup> Exhibit 82 – Second witness statement of Ms Rachael May at [11] (DJP.050.002.0032 at .0034).

*Bannisters  
Offices  
Coffee machine  
Touch points etc. on all levels of the building*

...

*Please ensure security staff / Rydges staff are not wearing gloves and masks or using sub-optimal hand gel.*<sup>219</sup>

- (f) At 4.09 pm on 27 May 2020, the actual direction to DJPR to perform a bioclean was given when this email was forwarded to the DJPR Agency Commander.<sup>220</sup>
- (g) By 4.29 pm that same day, the DJPR Agency Commander, Ms May had spoken to a member of her team about the need to arrange a full bioclean with IKON, and had followed up that conversation by email.<sup>221</sup> Ms May passed on DHHS's requirements in full, including the need for the work to start "ASAP". IKON had by that time been the only infectious cleaner that DJPR had engaged in the Program.<sup>222</sup>
- (h) It was then relayed to Ms May by a member of her team that IKON anticipated that a full clean of common areas at Rydges would take one day, and that IKON could commence cleaning the following morning.
- (i) Once it became apparent that IKON was unable to clean that night of 27 May 2020, Ms May reverted to DHHS. The upshot was that "*we [DJPR] have reached out to another supplier, and if that is not possible, DHHS will escalate in their network*".<sup>223</sup>
- 173 DJPR is not aware of any evidence before the Board as to whether or not DHHS escalated the requirement within its network. On the evening of 27 May 2020 DJPR did however, contact five other commercial cleaning companies, none of which were able to provide their services that night.<sup>224</sup> The Deputy Chief Health Officer then advised that DJPR should proceed with IKON the following morning,<sup>225</sup> which Ms May then actioned.<sup>226</sup>
- 174 The cleaning was completed by Ikon on 28 May 2020.<sup>227</sup>

<sup>219</sup> Exhibit 107 – Annexures to witness statement of Dr Sarah McGuinness (DHS.5000.0016.5753 at .5755-.5756).

<sup>220</sup> Exhibit 107 – Annexures to witness statement of Dr Sarah McGuinness (DHS.5000.0016.5753 at .5755).

<sup>221</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.005.3053 at .3056).

<sup>222</sup> Exhibit 82 – Second witness statement of Ms Rachael May at [15]-[16] (DJP.050.002.0032 at .0034).

<sup>223</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.005.3053 at .3054).

<sup>224</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.007.5208 at .5208-5209).

<sup>225</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.005.3053).

<sup>226</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.007.5208).

<sup>227</sup> Exhibit 83(2) – Further Attachments to Second Witness Statement of Ms Rachaele May (DJP.103.005.3053).

### *Infection prevention and control*

- 175 DHHS was the agency responsible for IPC at Rydges. DHHS was the Control Agency and had not, at any material time, outsourced or otherwise allocated responsibility for site IPC to any other party (beyond a consultant who attended Rydges initially to establish the site and procedures from an IPC perspective).
- 176 It is also evident from DHHS's conduct at Rydges that it accepted that IPC responsibilities sat with it. For example:
- (a) DHHS provided written instructions, including certain IPC procedures, to Rydges on 10 April 2020, in advance of the first arrivals on 12 April 2020;<sup>228</sup>
  - (b) DHHS organised a tutorial on IPC for all hotel staff, including security;<sup>229</sup>
  - (c) DHHS provided directions in relation to PPE protocol, sanitisation and cleaning practices;<sup>230</sup>
  - (d) DHHS, together with nurses and IPC experts, had reviewed the site and established a clean zone, various other restrictions and designations and the procedures around those;<sup>231</sup>
  - (e) the DHHS Team Leader conducted twice daily site briefings, in which, among other things, measures for minimising risks of COVID-19 transmission were discussed;<sup>232</sup>
  - (f) the Rydges Plan also stated that an on-site briefing was to be provided by the DHHS Divisional Commander on Sunday 12 April 2020 ahead of the operation.<sup>233</sup>
- 177 In her statement to the Board, Dr McGuinness opined that the following factors increased or did not sufficiently guard against the risk of COVID transmission at Rydges:
- (a) Cleaning at the hotel was inadequate, general hotel staff cleaned common areas with products that were unlikely to be effective against COVID-19 and security staff were involved in cleaning;<sup>234</sup>
  - (b) The delay in cleaning until 28 May 2020;<sup>235</sup>

<sup>228</sup> Exhibit 45 – Witness statement of Mr Rosswyn Menezes at [22] (RYD.0001.0023.0001 at .0006); Exhibit 46 – Annexures to witness statement of Mr Rosswyn Menezes (RYD.0001.0012.0090).

<sup>229</sup> Exhibit 186 – First witness statement of Ms Kym Peake (DHS.9999.0009.0001 at .0044).

<sup>230</sup> Exhibit 45 – Witness statement of Mr Rosswyn Menezes at [36(b)] (RYD.0001.0023.0001 at .0010); Exhibit 46 – Annexures to witness statement of Mr Rosswyn Menezes (RYD.0001.0001.0641).

<sup>231</sup> Exhibit 45 – Witness statement of Mr Rosswyn Menezes at [25]-[26] (RYD.0001.0023.0001 at .0007-0008).

<sup>232</sup> Exhibit 45 – Witness statement of Mr Rosswyn Menezes at [27]-[28] (RYD.0001.0023.0001 at .0008).

<sup>233</sup> Exhibit 185 – Annexures to the witness statement of Mr Simon Phemister (DJP.102.007.4063 at .4066).

<sup>234</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [48] (DHS.9999.0004.0001 at .0013).

<sup>235</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [49] (DHS.9999.0004.0001 at .0013). Dr McGuinness says that the full clean was not undertaken until the afternoon. The documentation referred to above suggests that the clean commenced in the morning, but was not completed until the afternoon.

- (c) Security staff were not wearing effective PPE, for example, observations were reported that security were using vinyl gloves and unapproved masks;<sup>236</sup>
  - (d) Hotel and security staff's comprehension about hand hygiene, PPE and IPC was poor;<sup>237</sup> and
  - (e) There were difficulties obtaining reliable and timely information about the infected guard and other staff movements within the hotel.<sup>238</sup>
- 178 In response to each of the above, DJPR notes, first, DHHS's direction to DJPR at all times prior to the Rydges outbreak was to organise infectious cleans for COVID-positive rooms. Hotels were to clean/arrange cleaning of non-infected rooms, pursuant to their contracts with DJPR (which had been provided to DHHS).<sup>239</sup> DJPR had sought, and DHHS had provided directions to hotels in relation to their (non-infectious) cleaning requirements.<sup>240</sup>
- 179 As further noted above, it was only after the Rydges outbreak that DHHS directed that common areas be deep cleaned.
- 180 Both Ms Febey<sup>241</sup> and Ms May<sup>242</sup> gave evidence of escalating issues on multiple occasions in respect of cleaning processes and procedures, in the hope of receiving directions tailored to the Program which could be easily understood and applied.
- 181 Only following the outbreak did DHHS finally provide such a procedure, which DJPR had "*been asking for since March*".<sup>243</sup> DJPR then wrote to the Operation Soteria Commander, Ms Williams to say that, while DJPR had distributed the procedure to all hotels, only one had received a briefing by DHHS and expectations remained unclear.<sup>244</sup> DJPR sought that further action be taken by DHHS.
- 182 In relation to Rydges specifically, there is no evidence that DJPR had any knowledge that either hotel staff or security had been cleaning potentially infectious common areas, and that they were doing so with inappropriate cleaning materials or with deficient PPE. DJPR was not on-site, it did not have on-site IPC responsibilities nor, indeed, any oversight of what was occurring on the ground. DJPR did what it could by including appropriate terms in the contracts it entered and escalating and/or acting on issues communicated to it, as they arose.

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<sup>236</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [50] (DHS.9999.0004.0001 at .0014).

<sup>237</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [51] (DHS.9999.0004.0001 at .0014).

<sup>238</sup> Exhibit 106 – Witness statement of Dr Sarah McGuinness at [52] (DHS.9999.0004.0001 at .0014).

<sup>239</sup> Exhibit 49 – Witness statement of Mr Unni Menon (DJP.102.009.3461).

<sup>240</sup> Exhibit 82 – Second witness statement of Ms Rachael May at [74] (DJP.050.002.0032 at .0046).

<sup>241</sup> See for example, Exhibit 32 – Witness statement of Ms Claire Febey at [113] (DJP.050.010.0001 at .0013).

<sup>242</sup> See for example, Exhibit 82 – Second witness statement of Ms Rachael May at [81] (DJP.050.002.0032 at .0047); T985.23-37 (May).

<sup>243</sup> Exhibit 83(1) – Annexures to second witness statement of Ms Rachael May (DJP.103.008.1083).

<sup>244</sup> Exhibit 83(1) – Annexures to second witness statement of Ms Rachael May (DJP.103.007.7241).

- 183 As to paragraph 177(b) above, for reasons already detailed, the delay in cleaning was not caused or contributed to by DJPR.
- 184 As to paragraph 177(c) the same issues arise because, again, there is no evidence that DJPR had any knowledge that security was using non-compliant PPE – in contravention of contractual requirements.
- 185 To the extent that DJPR had been informed of non-compliance with IPC measures, including generally within the Program, it escalated its concerns and requests for briefings (including in relation to PPE and other IPC measures), including as referenced at paragraphs 103(c) and 125(c) above.
- 186 As to paragraph 177(d), clearly DJPR had no involvement or accountability for any record keeping failures in relation to guard movements.
- 187 It is apparent from the submissions of Counsel Assisting that there is a temptation to hold DJPR accountable for matters well beyond its remit, for reasons which presumably include that DJPR held the relevant contracts. The fact that DJPR held these contracts led to inefficiencies. It led to cumbersome escalation processes. It arguably created some confusion on the part of DHHS as to the remit of its own role as Control Agency. These are matters that can more clearly be seen with hindsight. While this issue created additional complexity in the Program, it did not alter the responsibilities of DHHS as the Control Agency – including to act proactively, and also reactively, for example, when issues were raised with it by DJPR.
- 188 The documents reveal that there never was, in fact, any confusion – on the part of DHHS, DJPR or others – that DHHS was the agency with responsibility from the State’s perspective, for IPC measures across the Program and accountability for the Program as a whole. The documents bear this out. The responsibilities that DHHS took upon itself (proactively or reactively) reveal that this was the case.
- 189 DJPR most certainly had its own responsibilities as Support Agency, as did contractors for their operations. The inadequate focus on IPC in the Program was not, however, on any view, the responsibility of DJPR.

## G. Stamford Hotel

- 190 Counsel Assisting submits that the evidence before the Board does not permit a finding that the transmission event at the Stamford was environmental over the equal possibility that it resulted from person-to-person contact.<sup>245</sup> Notwithstanding, Counsel Assisting submit that hotel and security staff were not adequately trained in hand hygiene and PPE, and their work was not visibly zoned for safe containment of COVID-19 cases, suspected cases and quarantine close contact.<sup>246</sup>

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<sup>245</sup> T2267.17-20 (closing submissions of Mr Neal QC)

<sup>246</sup> T2235.15-18 (closing submissions of Mr Ihle)

- 191 DJPR submits that none of these alleged deficiencies concern contractual performance; rather they are clearly matters of infection control. As is set out in detail in the preceding sections of these submissions, DJPR's role as a Support Agency was confined to the provision of logistical support and contracting providers as described earlier in these submissions.<sup>247</sup> The processes under which those contractors worked and the procedures with which they were required to comply were the responsibility of DHHS as the Control Agency, as described earlier in these submissions.<sup>248</sup>
- 192 Like Rydges, DJPR's responsibility as Support Agency at Stamford and other hotels included:
- (a) securing the timely provision of services in accordance with the directions of DHHS;
  - (b) escalating issues through the chain of command as required by the Operation Soteria Commander;
  - (c) forwarding instructions received by the Operation Soteria Commander to contracted providers.
- 193 Unlike Rydges however, DJPR deployed a site manager to Stamford and other hotels. To the extent that it could be put against DJPR that its deployment of a site manager to the Stamford or any other hotel meant that DJPR assumed responsibility for matters other than its confined logistical role as Support Agency, any such proposition is not available on the evidence and ought to be rejected, for the following reasons.
- 194 First, the evidence of DJPR's site manager at the Stamford regarding his principal responsibilities did not include any responsibility for implementing or supervising infection control practices or procedures of contracted service providers.<sup>249</sup>
- 195 Second, consistent with practices at Rydges, DHHS Team Leaders conducted the daily briefings. At Stamford, these were attended by DJPR, DHHS, security and hotel staff;<sup>250</sup> and
- 196 Third, save for the Stamford site manager, whose presence was generally daily, the presence of site managers at other hotels (save for Rydges where DJPR had no presence) was limited to tasks associated with entries and exits of returned travellers<sup>251</sup> and they had no continuous on site presence.<sup>252</sup>

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<sup>247</sup> See for example, Exhibit 184 – Witness statement of Mr Simon Phemister at [84]-[91] (DJP.050.001.0001 at .0017-.0019); Exhibit 32 – Witness statement of Ms Claire Febey at [67]-[68] (DJP.050.010.0001 at .0017); T405.27 to T406.5 (Febey); Exhibit 38 – Witness statement of Ms Gonul Serbest at [11]-[14] (DJP.050.009.0001 at .0003-.0004); T485.21-24, T494.34-39 (Serbest); See also emails between Ms Febey and Mr Helps dated 29 March 2020 (DJP.101.004.4571); Draft Site Manager Job Card (DJP.131.004.2631)

<sup>248</sup> Exhibit 80 – First witness statement of Ms Rachaele May at [25] (DJP.050.002.0001 at .0005-.0006).

<sup>249</sup> Exhibit 84 Witness statement of 'Operations Coordinator' DJP.050.007.0001 at [9]

<sup>250</sup> Exhibit 84 Witness statement of 'Operations Coordinator' DJP.050.007.0001 at [15]

<sup>251</sup> Witness statement of Ms Gonul Serbest at, [44]

<sup>252</sup> Witness statement of Ms Gonul Serbest at [43].



## H. Impact on returned travellers

- 197 In discussing the objectives of the Program, Counsel Assisting noted that one of the objectives was to meet the physical and mental health needs of quarantined travellers.<sup>253</sup> This was of particular importance because quarantined travellers were at the mercy of the government to provide for their basic needs while in quarantine.
- 198 Counsel Assisting submitted that the Program did not meet that objective for the following reasons:
- (a) there was a failure to meet the healthcare needs of certain quarantined travellers, including inappropriate responses to requests for assistance;<sup>254</sup>
  - (b) there was a failure to meet the special needs of vulnerable returned travellers;<sup>255</sup>
  - (c) the Program's response to individual returned travellers' needs was uneven across the hotels;<sup>256</sup>
  - (d) following the initial set up of the Program, DHHS did not take stock and assess the psychological impact of detention and seek to address those issues;<sup>257</sup> and
  - (e) there was a failure to properly consider and balance the rights of quarantined travellers under the Charter of Human Rights and Responsibilities Act 2006 (Vic) and in particular DHHS did not give consideration to the individual circumstances of individuals.<sup>258</sup>

### *DJPR's role*

- 199 As these submissions have set out in paragraphs 47, 48 and 130 to 141 above, DJPR's role was primarily to support the Control Agency, DHHS, with the provision of logistical support such as procurement of security and hotels, organising movement of returned travellers from the airport to hotels and assisting in the entry and exit of quarantined travellers.
- 200 This division is aptly reflected in the differing role of DHHS and DJPR personnel at hotels. DJPR Site Managers<sup>259</sup> were responsible for issues such as managing arrivals, acting as a liaison point between hotels and DJPR, and,

<sup>253</sup> T2251.3-4 (closing submissions of Mr Ihle).

<sup>254</sup> T2251.16-33 (closing submissions of Mr Ihle).

<sup>255</sup> T2252.2-6 (closing submissions of Mr Ihle).

<sup>256</sup> T2252.1-2 (closing submissions of Mr Ihle).

<sup>257</sup> T2252.32-42 (closing submissions of Mr Ihle).

<sup>258</sup> T2252.44-2253.38 (closing submissions of Mr Ihle).

<sup>259</sup> DJPR Site Managers were on site at hotels during entries and exits and did not have a 24 hour presence.

Exhibit 80 – First witness statement of Ms Rachaele May at [94]-[97] (DJP.050.002.0001 at .0017); Exhibit 38 – Witness statement of Ms Gonul Serbest at [43] (DJP.050.009.0001 at .0010).

escalating issues with hotels to senior staff.<sup>260</sup> On the other hand, a DHHS Team Leader was primarily focused on the welfare of quarantined travellers,<sup>261</sup> and coordinating onsite personnel such as nursing staff and Authorised Officers.<sup>262</sup>

- 201 DJPR did, however, play a role in assisting quarantined travellers who had specific needs or made requests of DJPR staff. DJPR staff approached the performance of their roles with empathy and compassion, recognising the needs of different cultures and cohorts. They set up a 24/7 Government Support Service call centre (including interpreters), arranged supermarket deliveries, and bought onsite comfort items and cleaning products as part of DJPR's logistical response.<sup>263</sup>
- 202 Ms Serbest also noted that where individual returned travellers alerted her of certain issues, she would pass on those enquiries to DHHS staff.<sup>264</sup> This evidence is consistent with other DJPR staff who noted that they would pass on queries or requests to DHHS staff.<sup>265</sup>
- 203 DJPR submits, therefore, that while it is open for the Board to make a finding regarding the lack of attention to the health and wellbeing of returned travellers, such a finding cannot be made against DJPR. DJPR submits that the evidence is clear that it was not tasked with looking after the health and welfare of returned travellers and when it was presented with opportunities to assist vulnerable quarantined travellers it took appropriate steps to either assist where it could or escalate the issues to DHHS.

### *The Charter and decision-making*

- 204 Counsel Assisting submitted that the failure to meet quarantined travellers' health and wellbeing needs was linked to the fact that decision-makers did not adequately consider the rights of quarantined travellers under the Charter.<sup>266</sup> DJPR does not seek to make submission as to that contention, but seeks to outline one issue with the role of the Charter and the decision to allow exercise breaks.
- 205 There has been consistent evidence from DHHS witnesses about the role that the Charter played in determining whether to allow quarantined travellers to have fresh air breaks. Ms Williams noted that the Charter was the determinative factor in the decision to allow quarantined travellers to have fresh

<sup>260</sup> Exhibit 84 – Witness statement of 'Operations Coordinator' at [9] (DJP.050.007.0001 at .0003).

<sup>261</sup> Exhibit 23 – Witness statement of Mr Luke Ashford at [31] (WIT.0001.0006.0001 at .0005).

<sup>262</sup> Exhibit 205 – Witness statement of Senior Project Officer DHHS at [13] (DHS.9999.0019.0001 at .0002).

<sup>263</sup> Exhibit 38 – Witness statement of Ms Gonul Serbest at [30], [33], [35(d)] (DJP.050.009.0001 at .0007-.0008); T490.25-29 (Serbest); Exhibit 39 – Annexures to witness statement of Ms Gonul Serbest (DJP.138.006.6831, DJP.104.009.0990 at .0900).

<sup>264</sup> Exhibit 38 – Witness statement of Ms Gonul Serbest at [31] (DJP.050.009.0001 at .0007).

<sup>265</sup> Exhibit 84 – Witness statement of 'Operations Coordinator' at [9(b)] and [13] (DJP.050.007.0001 at .0003).

<sup>266</sup> T2552.44-2553.5 (closing submissions of Mr Ihle).

air breaks.<sup>267</sup> Ms Peake noted the role the Charter played in determining the condition of detention and noted that Victoria was the only jurisdiction with a Charter<sup>268</sup> and the only jurisdiction that allowed exercise breaks.<sup>269</sup>

- 206 DJPR submits that the Board, in coming to a finding on this issue, should take into account the complex considerations that the State must balance in such a Program when making decisions that are consistent with the Charter.<sup>270</sup> The decision to allow exercise breaks undoubtedly increased the risk of transmission,<sup>271</sup> and Victoria was the only jurisdiction that allowed quarantined travellers to take such exercise breaks.
- 207 In our submission, we would caution against the suggestion that more decisions of the DHHS should have been dictated by Charter rights of quarantined travellers, considering the decision to allow exercise breaks increased the risk of transmitting the virus.

5 October 2020

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<sup>267</sup> Exhibit 130 – Witness statement of Ms Pam Williams at [22(c)] (DHS.9999.0016.0001 at .0008-0009); T1272.27-34 (Williams).

<sup>268</sup> This is not correct, see the *Human Rights Act 2019* (Qld).

<sup>269</sup> T1974.9-23 (Peake), T2005.3-17 (Peake).

<sup>270</sup> See, for example the requirements of proportion and balancing in s 7 of the Charter.

<sup>271</sup> See T1270.45 (Williams).

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