

# Statement of Findings

Inquiry into misclassification of drivers for special needs school transport runs for the Government of South Australia.

November 2014

A report by the Fair Work Ombudsman under the *Fair Work Act 2009*

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# 1. Executive Summary

- 1.1 The Fair Work Ombudsman has conducted an inquiry (the **Inquiry**) into allegations of sham arrangements by businesses providing special needs school transport runs for the South Australian Department for Education and Child Development [**DECD**].
- 1.2 In its Inquiry, the Fair Work Ombudsman found **69%** of operators (**9 out of 13**) were or recently had engaged in some form of 'misclassification' of contracts of employment. As a result, the 9 Operators were issued with a Letter of Caution by the Fair Work Ombudsman.
- 1.3 More particularly, the Fair Work Ombudsman found DECD's procurement arrangements relating to minibus operators lacked basic quality governance features such as failing to:
  - a) undertake periodic reviews, audits and self-audits of all operators to ensure they meet minimum state and Commonwealth legislative requirements;
  - b) prohibit unlawful sub-contracting;
  - c) align contracts with terms of the *Passenger Vehicle Transportation Award 2010* [MA000063]<sup>1</sup> (the **Modern Award**);
  - d) provide ongoing adjustments for the cost increases of doing business (e.g. wages, CPI, fuel, safety enhancements) for all operators over the lifecycle of the contract.
- 1.4 The findings of the Inquiry have led the Fair Work Ombudsman to make a number of recommendations to the sub-sector, including:
  - a) DECD review the current contract governance arrangements to ensure the contractual requirements drive compliance with all applicable legislation throughout the tender process;
  - b) Operators exercise a greater degree of care in assessing the cost to deliver the services offered and seek professional advice whether their engagement practices constitute lawful independent contracting;
  - c) Operators which outsource bus services to other Operators review their governance arrangements similar to that recommended for DECD;
  - d) Drivers who claim to be independent contractors needing to be aware of the risks including enforcement action by other Commonwealth Government departments

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<sup>1</sup> Modern Award link: <https://extranet.deewr.gov.au/ccmsv8/ViewKBInstrument.aspx?Code=MA000063>

(e.g. Australian Taxation Office, Centrelink) for any failure to properly disclose income; non-protection by WorkCover; non-protection from public liability claims taken against them.

1.5 The Fair Work Ombudsman will:

- i. conduct a follow up inspection within twelve (**12**) months of the 9 operators who had misclassified their employees as independent contractors;
- ii. request operators to implement the Fair Work Ombudsman's compliance commitment and audit reporting form, and provide a copy of that report annually to the Fair Work Ombudsman for the first three (**3**) years;
- iii. request DECD to review their corporate governance framework for the special needs school transport runs within twelve (**12**) months;
- iv. request DECD to provide the Fair Work Ombudsman with a report on the improvements made to their corporate governance framework and procedures for the special needs school transport runs within twelve (**12**) months;
- v. assess the report provided by DECD to ensure sustainable compliance with Commonwealth workplace law; and
- vi. survey operators and assess whether DECD has amended its governance arrangements.

## **2. Background**

2.1 On 11 September 2012, a medium sized operator who at the time was providing services to the DECD for special needs school transport runs contacted the Fair Work Ombudsman alleging its competitors were undercutting employee entitlements by engaging in sham arrangements.

2.2 More specifically, that operator alleged:

- a number of operators were managing operations similar to that of the taxi industry through provision of a percentage of the income generated to their drivers – typically 40%, resulting in a lesser amount of income (e.g. overtime, penalty rates and superannuation contributions) for these workers in comparison to that of employees employed under the Modern Award;
- it had lost multiple contracts and services with the DECD as a consequence of those operators potentially operating unlawful labour arrangements.

- 2.3 Relying upon a list of businesses provided by that operator, the Fair Work Ombudsman commenced an initial inquiry into the activities of one of those businesses who was a key competitor. Evidence of ‘misclassification’ was found where workers were characterised by a business as an independent contractor but they are in fact an employee. This operator received a Letter of Caution in December 2012<sup>2</sup>.
- 2.4 The operator responded to the Letter of Caution alleging that its competitors were also involved in misclassification and requested the Fair Work Ombudsman to conduct an audit of the key operators offering services to DECD to ensure a level playing field.
- 2.5 Upon an assessment of intelligence sourced from various industry participants the Fair Work Ombudsman broadened the scope of its inquiry in July 2013 to determine the drivers of non-compliance within this sub-sector.
- 2.6 The purpose of this document is to provide a report of the findings of this Inquiry.

### **3. Who is the subject of this Inquiry?**

- 3.1 The Fair Work Ombudsman’s Inquiry involved the DECD, the activities of thirteen (**13**) operators [the **Operators**] providing transport services to the DECD (directly or indirectly) and the drivers engaged by those Operators.
- 3.2 The DECD (ABN: 60 168 401 578) is a department of the Government of South Australia and its key functions are to oversee early childhood care and services for South Australian families; provide services that benefit children and families; lead and manage South Australia’s education system<sup>3</sup>. The DECD and its employees are generally outside the scope of the *Fair Work Act 2009* (Cth)<sup>4</sup> [**FW Act**] as the DECD is not a national system employer<sup>5</sup>. As at the last pay day in June 2012, the DECD had 28,401 employees<sup>6</sup>.

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<sup>2</sup> A Letter of Caution is used by the Fair Work Ombudsman to identify wrongdoing by employers, encourage voluntary compliance and to ensure the activities of these employers are monitored in the event of subsequent non-compliance.

<sup>3</sup> <http://www.decd.sa.gov.au/portal/aboutdept.asp>

<sup>4</sup> Section 550 of the FW Act regarding accessorial liability also remains applicable to a *person* of a non-national system employer.

<sup>5</sup> A *national system employer* is defined in section 14 of the FW Act.

<sup>6</sup> [Department for Education and Child Development Annual Report 2012:](http://www.decd.sa.gov.au/docs/documents/1/DECDAnnualReport2012.pdf)  
<http://www.decd.sa.gov.au/docs/documents/1/DECDAnnualReport2012.pdf>

3.3 The Inquiry focussed specifically on the industry sub-sector involving the transportation<sup>7</sup> of special needs school students to/from school in metropolitan Adelaide, namely:

- students with a disability [**SWAD**]; and/or
- Intensive English Language Centre students [**IELC**].

3.4 The names of the Operators and drivers as well as officers of the DECD have been withheld from the report for privacy reasons. The Operators were within the scope of the FW Act as they fell within the definition of a national system employer<sup>8</sup>.

#### 4. What is the nature of the industry sub-sector involved in this Inquiry?

4.1 For the 2012/13 financial year, the DECD's expenditure for this sub-sector (metropolitan and regional) was as follows:

Run	Expenditure	Number of Runs <sup>9</sup>	Number of Contracts
IELC	\$1,956,584	6	48
SWAD	\$10,303,420	42	409

4.2 For the 2013/14 financial year, DECD's expenditure for this sub-sector (metropolitan and regional) was as follows:

Run	Expenditure	Number of Runs	Number of Contracts
IELC	\$1,822,073	5	53
SWAD	\$10,729,099	41	410

4.3 At the time of the Inquiry, the DECD had over 470 school bus services across South Australia, including SWAD and IELC runs. Those runs collectively serviced sixteen thousand (16,000) students per day<sup>10</sup>.

4.4 The Inquiry focussed on 13 Operators who were of varying size and scale as follows:

- Three (**3**) micro businesses (1-4 workers);

<sup>7</sup> Excluding any multi-seater taxis operating under a taxi license with taxi plates.

<sup>8</sup> A *national system employer* is defined in section 14 of the FW Act.

<sup>9</sup> For the purposes of this Report, a 'run' is defined as special needs transport route.

<sup>10</sup> School runs involving general bus services did not form part of this Inquiry

- b) Five (5) small businesses (5-19 workers);
- c) Five (5) medium businesses (20-199 workers).
- 4.5 Eight (8) of the 13 Operators were incorporated, two (2) were sole traders and three (3) were family partnerships.
- 4.6 The range of runs performed by Operators spread from two (2) to thirty-six (36).
- 4.7 The pricing units in the DECD contracts for the special needs runs ranged from \$2.50 for cost per kilometre for vehicle to \$370.00 fee per school day and included the following methodologies:
- fixed fee per school day;
  - variable fee per school day;
  - fee per school day for vehicle;
  - cost per kilometre for vehicle;
  - fee per day;
  - fee per run;
  - fee per additional kilometre;
  - flag fall for each leg;
  - pick up fee;
  - distance per kilometre travelled;
  - set minimum daily rate;
  - administration fee.
- 4.8 DECD informed the FWO that it calculates a daily rate from its panel of providers (i.e. Operators providing services direct to the DECD) derived from the various pricing unit methodologies used by the Operators to quantify their tender costs.
- 4.9 The sub-sector is highly competitive with low barriers to entry for new competitors.
- 4.10 There is no specific technical qualification required to work in the sub-sector.
- 4.11 The sub-sector contains a number of operators who have originated from the taxi sub-sector and have introduced a business operating model including bailment<sup>11</sup> agreements and unlawful sub-contracting arrangements. These agreements included drivers who had agreed to receive a percentage of the fare received by the Operator.

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<sup>11</sup> A bailment occurs where a bailor delivers possession of goods to a bailee and the bailor has the right to receive the goods back when the bailment comes to an end.

Reference: *Compania Portoraffi Commerciale SA v Ultramar Panama Inc (The Captain Gregos) (No 2)* [1990] 2 Lloyd's Rep 395; *Chapman Bros v Verco Bros and Co Ltd* (1933) 49 CLR 306.

4.12 Bailment arrangements were found to be an influential factor in Operators in engaging drivers.

### **Case Study**

Bill had been running a taxi business for 10 years using bailment arrangements for his taxi drivers. Last year, Bill tendered for and was awarded 4 SWAD school runs. He uses the bailment arrangement for the SWAD drivers who were not driving taxis. Bill does not pay superannuation or workers compensation levy for his drivers, but does pay for their public liability. Bill did not get any advice about the engagement of the drivers.

4.13 Contracting arrangements are often agreed upon to reflect the business requirement to 'work around' the Modern Award and a driver's preference to mitigate any adverse impact on a Government benefit or allowance they may receive.

4.14 Drivers are generally unaware of the risks faced in the sub-sector including the potential for underpayment of wages and conditions; enforcement action by other Commonwealth Government departments (e.g. Australian Taxation Office, Centrelink) for any failure to properly disclose income; non-protection by WorkCover and non-protection from public liability claims taken against them.

4.15 Due to the nature of the industry and the typical hours of work performed the sub-sector attracts workers who could be classified as 'vulnerable' including but not limited to: mature aged, invalid pensioners and self-funded retirees. The vulnerability is such that those participants may find it more difficult than others to source work or maintain a connection with the workforce.

4.16 The relevant industry associations include:

- Transport Workers Union SA/NT Branch [**TWU**];
- Bus and Coach Association of South Australia [**BCASA**].

4.17 The TWU informed the FWO that it was not aware of any members existing in the sub-sector.

4.18 The BCASA informed the FWO that it has a low level of membership in the sub-sector which inhibits its ability to provide influential representation on behalf of the operators. The cost of membership is also a barrier for the smaller operators.

4.19 Accountancy firms play an important part in providing advice to businesses in the sub-sector, including advice on workplace laws.

- 4.20 Schools make their own excursion arrangements directly with operators of their own choice.

## **5. How was the Inquiry conducted?**

- 5.1 The Fair Work Ombudsman obtained a list of operators from the DECD who had provided SWAD and IELC run services to it between 1 July 2011 and 13 August 2013.
- 5.2 The Fair Work Ombudsman exercised several of its statutory functions, including those set out in subsections 682(1)(a), 1(b) and 1(c) of the FW Act to inquire into the Industry.
- 5.3 The Fair Work Ombudsman met with senior representatives of the DECD to gain an understanding of its procurement practices and advise it of the Inquiry.
- 5.4 In September 2013 the Fair Work Ombudsman wrote to metropolitan operators who were providing passenger transport services advising that it would be commencing a future Inquiry in this area.
- 5.5 In February/March 2014 the Fair Work Ombudsman wrote to twelve (12) of the Operators<sup>12</sup> to notify them that they had been selected to participate in the Inquiry.
- 5.6 Between February and April 2014 the Fair Work Ombudsman conducted site visits to 12 metropolitan Operators. This involved the exercise of Inspector powers found in sections 708 and 709 of the FW Act regarding the entry to premises and conduct inspectorate duties. In accordance with section 712 of the FW Act a Notice to Produce Records and/or Documents was served on some of the Operators, where they did not voluntarily provide records, requiring the production of specific records including contracts held with DECD and drivers, invoices and employee/driver time and wages records for a defined period.
- 5.7 In May 2014 the Fair Work Ombudsman undertook consultation with the TWU and the BCASA.
- 5.8 The Fair Work Ombudsman assessed the information, facts and evidence available, applied the multi-factor test<sup>13</sup> and made a determination on the balance of probability as to whether the drivers were employees or contractors.

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<sup>12</sup> The thirteenth operator was the subject of the original investigation and Letter of Caution in December 2012.

<sup>13</sup> The 'multi-factor' test is the examination and weighting of multiple criteria within a labour relationship to determine whether a person is an employee or independent contractor.

Further information about independent contracting is available at: <http://www.fairwork.gov.au/find-help-for/independent-contractors>

- 5.9 In August 2014 the Fair Work Ombudsman provided a copy of its Statement of Preliminary Findings to DECD, Operators, TWU and BCASA and invited their response.
- 5.10 The Fair Work Ombudsman received a telephone response from one Operator and written responses from the BCASA and the DECD.
- 5.11 In its response, the BCASA raised a variety of issues and options which the Fair Work Ombudsman has encouraged BCASA to pursue directly with DECD and other industry stakeholders.
- 5.12 In its response, DECD acknowledged it needed to improve its governance practices and has committed to implementing greater accountability in the procurement of bus services by:
- calling for public tenders to establish a new panel of providers beginning in 2015;
  - reviewing tender documents, panel deeds and contractual documents in order to determine service cost benchmarks; and
  - developing a contract management plan which will include regular periodic inspections of contractual requirements and verification of Modern Award compliance.
- 5.13 The Fair Work Ombudsman has considered the feedback provided by industry stakeholders and duly amended its findings prior to making its final report available on [www.fairwork.gov.au](http://www.fairwork.gov.au).

## **6. Sham Arrangements or Misclassification – Why does it matter?**

- 6.1 According to the Australian Bureau of Statistics (reported in May 2014), in November 2013 nearly 990,000 Australian workers were independent contractors, representing 8.5% of all workers<sup>14</sup>. The relevant Australia, New Zealand, Standard Industrial Classification (ANZSIC) code for the industry is: 46220 '*Charter bus service (short distance)*'.
- 6.2 The Fair Work Ombudsman supports independent contractors operating businesses in the community by providing a series of tools and resources to help workplace participants understand what they, or those they engage for work, should be correctly

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<sup>14</sup> ABS Report: '6359.0 - Forms of Employment, Australia, November 2013'

classified. This in turn assists workplace participants to ensure entitlements, tax, insurance, workcover etc. are appropriately provided or obtained.

- 6.3 'Sham contracting' occurs when an employer **deliberately** attempts to disguise an employee / employer relationship as an independent contracting relationship. 'Misclassification' occurs when an employer engages a worker as an independent contractor who is at law an employee but there is no evidence the engagement involved any deliberate intent to circumvent the existence of an employment relationship<sup>15</sup>.
- 6.4 By disguising employment as independent contract work, employers avoid their obligation to provide employees with their correct entitlements such as minimum ordinary hour entitlements, overtime, penalty and other allowances. Employees may also have been denied access to leave payments, superannuation and tax exemptions.
- 6.5 Contraventions of the sham arrangements provisions of the FW Act involve knowing or reckless behaviour designed to result in workers being denied employment benefits and protections.
- Sham arrangements give the employer an unfair competitive advantage. Such contraventions are treated seriously and the Fair Work Ombudsman has instituted proceedings against several enterprises for engaging in this type of behaviour<sup>16</sup>.
- 6.6 Misclassification of an employment relationship can result in a business being found to have contravened the National Employment Standards (NES), minimum wage orders, a modern award or enterprise agreement as provided for in the FW Act.
- 6.7 Although not deliberate, in some instances, employers may still be required to take corrective action and rectify underpayments resulting from any contravention.
- 6.8 Misclassification and sham contracting can also result in contraventions of employer obligations to provide employee records and pay slips, and may expose employers to an infringement notice<sup>17</sup>.

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<sup>15</sup> In November 2011, the Fair Work Ombudsman released its report into sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries <http://www.fairwork.gov.au/ArticleDocuments/763/Report-on-the-preliminary-outcomes-of-the-Fair-Work-Ombudsman-Sham-Contracting-Operational-Intervention.pdf.aspx>. The Report highlighted the need to use different language when describing contracted workers who are in fact as employees but there is no evidence that such characterisation was either deliberate or reckless (referred to as '**misclassification**'), as opposed to intentional efforts to deny workers employment benefits by treating them as contractors (referred to as '**sham arrangement(s)**').

<sup>16</sup> On 26 July 2013, the Federal Circuit Court of Australia handed down its decision in the matter of *Fair Work Ombudsman v Happy Cabby Pty Ltd & Anor* (SYG1141/2012) ordering substantial penalties totalling **\$286,704** in respect of contraventions relating to sham contracting, underpayments, failure to make and keep employee records and failure to issue payslips.

- 6.9 Where an employee / employer relationship is identified, the employer will also be required to ensure they met their legal obligations in relation to taxation, superannuation and workers compensation, where applicable.
- 6.10 Employers need to be aware of the provisions of section 550 of the FW Act which creates liability for persons who are involved in a contravention. If a person is found to be “involved in” a contravention, then they are liable to be treated as having contravened the relevant provision in their individual personal capacity<sup>18</sup> (i.e. accessorially liable). Such a provision also covers, for example, individual procurement officers engaged by DECD.

## 7. What part of the FW Act has this Inquiry concentrated on?

- 7.1 The FW Act provides three ‘sham arrangements’ contraventions and these are contained in Part 3-1 – General Protections provisions of the FW Act. They are:
- section 357 – Misrepresenting Employment as Independent Contracting Arrangement;
  - section 358 – Dismissing to Engage as Independent Contractor; and
  - section 359 – Misrepresentation to Engage as Independent Contractor.
- 7.2 This Inquiry has primarily focussed on issues related to section 357 - Misrepresenting Employment as Independent Contracting Arrangement.
- 7.3 Subsection 357(1) of the FW Act relates to misrepresenting employment as an independent contracting arrangement and provides for the following:

*A person (the **employer**) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.*

- 7.4 However, a defence applies to a person (the employer) who has contravened subsection 357(1). Subsection 357(2) provides that subsection 357(1) does not apply where the employer proves that, when the representation (referred to in subsection 357(1)) was made, the employer:

- (a) *did not know; and*
- (b) *was not reckless as to whether;*

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<sup>17</sup> As provided in subsection 558(1) FW Act.

<sup>18</sup> Section 550 of the FW Act concerns the ‘Involvement in contravention treated in same way as actual contravention’ and is often referred to as accessorial liability.

*the contract was a contract of employment rather than a contract for services.*

- 7.5 Knowingly or recklessly misrepresenting a contract of employment as a contract for services performed by an independent contractor is a contravention of subsection 357(1) of the FW Act, and can result in the imposition of penalties. The fact that a worker might prefer to be engaged as an independent contractor is not a defence to a 'sham arrangements' contravention under the FW Act.
- 7.6 Importantly, section 361 of the FW Act contains a reverse onus of proof for allegations falling within Part 3-1 of the FW Act which includes section 357.
- 7.7 A person or body found to be in contravention of a civil remedy within the FW Act is liable to a maximum penalty of up to \$10,200 for an individual and \$51,000 for a corporation, for each contravention.

## **8. Statement of key findings**

8.1 Following consideration of all the evidence, the Fair Work Ombudsman concluded the total cost of an employee<sup>19</sup> was greater than a total cost of a contractor<sup>20</sup> and makes the following findings derived from this Inquiry:

### **8.1.1 The Operators**

a) That of the Operators:

- i. Two (2) were found to have engaged in lawful independent contracting arrangements with their drivers (some of these also employed drivers);
- ii. Four (4) of the Operators converted their purported independent contractors to employees during the Inquiry, prior to being issued a Letter of Caution, to rectify any non-compliance with the FW Act;
- iii. Five (5) others were found to be engaging in unlawful independent contracting arrangements with their drivers (all of whom were issued with Letters of Caution). These Operators had 'misclassified' their drivers as opposed to having deliberately engaged in 'sham arrangements';
- iv. Two (2) were found to be engaging drivers correctly as employees.

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<sup>19</sup> [Pay Guide for the Modern Award effective from 1 July 2014:](http://www.fairwork.gov.au/ArticleDocuments/712/passenger-vehicle-transportation-award-2010-[MA000063]-pay-guide.rtf.aspx)

[http://www.fairwork.gov.au/ArticleDocuments/712/passenger-vehicle-transportation-award-2010-\[MA000063\]-pay-guide.rtf.aspx](http://www.fairwork.gov.au/ArticleDocuments/712/passenger-vehicle-transportation-award-2010-[MA000063]-pay-guide.rtf.aspx)

<sup>20</sup> 'On costs' are factored in as around 30-35% as they include uniforms, equipment, superannuation, tax, workcover insurance etc. As a guide, the minimum hourly rate of pay under the Modern Award for an Adult Grade 2 Driver (passenger vehicle with a carrying capacity of less than 25 school children) effective from 1 July 2014 is: \$18.64 (Full-time & part-time) or \$23.30 (Casual).

### **Case Study**

Early in the Inquiry, the FWO had attempted unsuccessfully to personally meet with David to discuss his business' circumstances. During the final stages of the Inquiry, David communicated that his medium sized business had recently changed its engagement of drivers undertaking IELC runs from independent contractors to employees. This change also resulted in David's business voluntarily making rectification payments of around \$100,000 to its drivers.

- b) Seven (7) of the Operators who had entered into independent contracting arrangements with drivers maintained a significant degree of control over the drivers (e.g. unilateral wage setting, designation of runs, unable to set price of job).
- c) Three (3) of the Operators were reluctant to raise issues relating to 'contract funding' with DECD for fear of losing current / future contracts.
- d) One (1) of the Operators contacted DECD to request an increase in contract rates as it was losing money due to increases in the cost of fuel and driver pay. The Operator reported that DECD would not consider an increase in the rates as the tender figures had already been set. Notwithstanding this, DECD has informed the FWO that it seeks regular quotes from its panel of providers on an annual basis (in most cases) and when routes change.
- e) Six (6) of the Operators that engaged drivers who performed simple work for a single enterprise, wore a uniform and operated equipment (e.g. a vehicle) provided by the Operator, accepted little or no commercial risk, and had an expectation of continuing work, were not able to define their drivers as anything other than employees.

### **Case Study**

Graham has a medium size business with IELC runs. Graham was engaging his drivers as independent contractors, even though the drivers:

- drove vehicles that were owned by Graham;
- had worked for years for Graham;
- worked only for Graham and did not advertise their driving services in any other way;
- wore shirts with the business logo;
- not liable for providing refunds to customer.

**Graham's drivers were employees who had missed out on their legal minimum entitlements such as minimum wages, entitlement and superannuation.**

- f) One (1) Operator who failed to receive timely payments from DECD had to use a brokerage company in relation to these delayed payments to ensure the business could make payments to its drivers. DECD informed the FWO that timely payment of invoices and delays are typically attributable to invoicing errors.
- g) Two (2) of the Operators had a lack of understanding of the application of the Modern Award provisions; in particular the minimum engagement period for casual employees.

### **Case Study**

John used to have 11 SWAD school runs, however in the new tender he incorrectly interpreted the Modern Award minimum engagement for casual employees when transporting children to and from school. John tendered on the basis of 4 hours each engagement, instead of 2 hours each engagement. John did not seek any advice about the interpretation of the Modern Award. John now only has 2 SWAD school runs.

**By John not getting advice on the Modern Award he now has less SWAD runs.**

- h) One (1) of the Operators had received incorrect advice from its accountant regarding how to engage drivers. Since workplace law is quite different to taxation law and financial accounting practices, the FWO found the legality or appropriateness of the arrangements under relevant workplace laws was not considered.

- i) One (1) of the Operators complained that the monies made available to it by the DECD compared to that for the same services rendered in previous years had reduced.
- j) Three (3) of the Operators had implemented similar contractual arrangements to which they were familiar themselves having been former taxi drivers or an extension of their taxi business. Some of these practices included purported bailment agreements without having sought advice as to whether those arrangements were appropriate.
- k) The majority of Operations did not have any dedicated human resource management function.

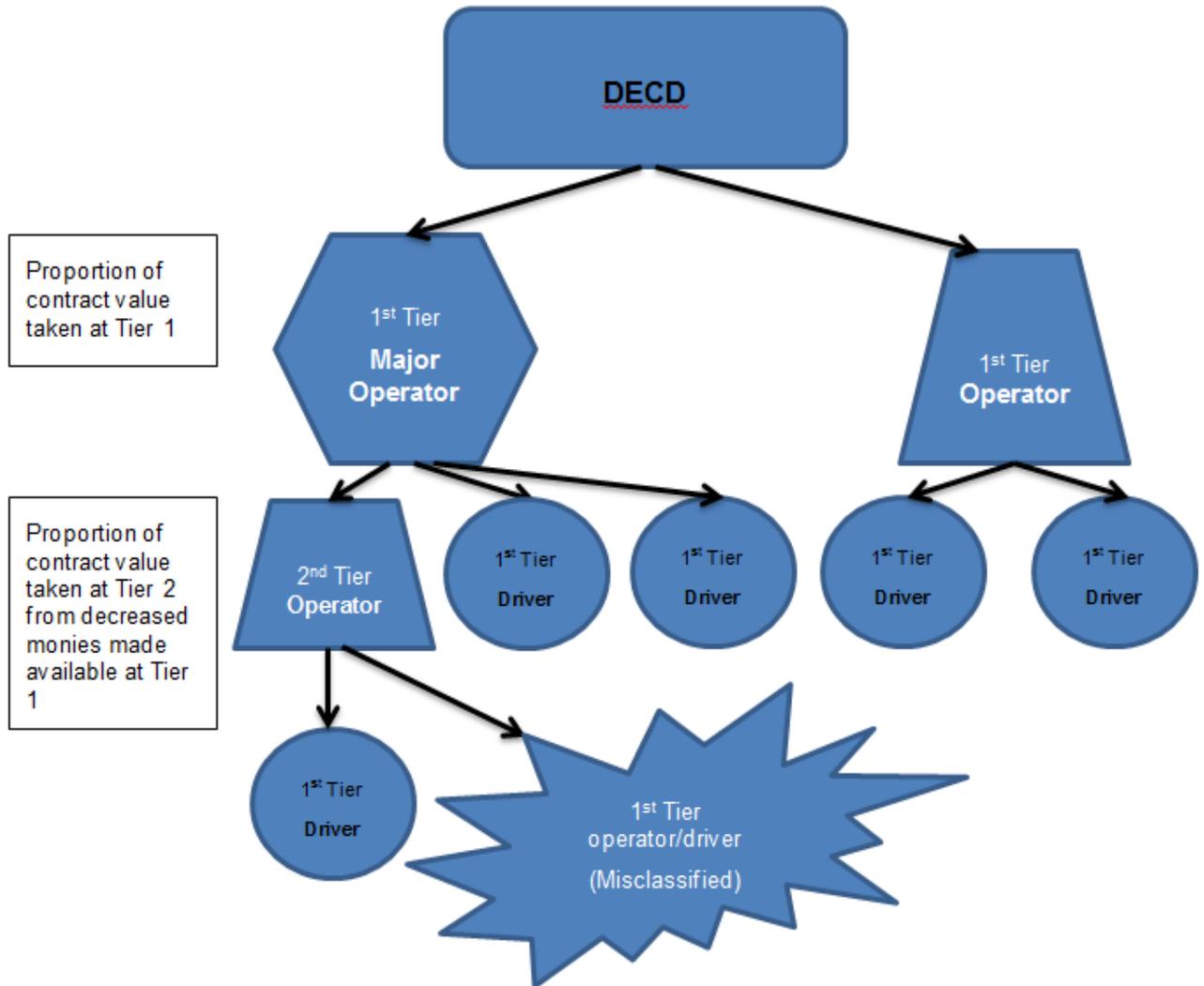
**Case Study**

Tim's medium size business no longer has any IELC contracts with the DECD. Tim's business is now subcontracting with a larger operator that had won a majority of contracts. Tim was servicing 6 runs for the larger operator as the latter did not have capacity to fulfil all of its contracts. Tim is now receiving less money under the subcontracting arrangement with the larger operator than when his business had the contracts directly with the DECD.

**Tim expressed his view that there may be a monopoly within the industry and was considering closing his business due to the reduction in work and contract income.**

- l) One (1) of the Operators had multi-tier contracting arrangements where a principal Operator subcontracted services to another Operator, exacerbating the potential for drivers to receive less than the statutory minimum payable to employees.

Diagram of multi-tier contracting arrangements in the supply chain



8.1.2 DECD

The DECD applies its departmental procurement practices in accordance the Government of South Australia State Procurement Board Policy Framework issued in January 2014. The policy includes ‘... cost is not the only determining factor in assessing value for money. Value for money is a combination of whole of life costs and the ability of the goods/services to meet the worksite’s requirements.’

- a) The DECD applies a rating assessment to the procurement needs for Operators services which includes consideration to:
  - i. *mandatory requirements* of the Operator (such as driver accreditation, police checks etc);
  - ii. *qualitative aspects* of the Operator’s service (such as vehicle type, vehicle features etc) and applies a qualitative rating;

- iii. *price* of the Operator's service (tendered price or otherwise);
  - iv. multiplying ii) and iii) above to reach an *overall rating* to determine which Operators were of better value to the DECD than others;
- b) The DECD procurement arrangements relating to Operators lacked basic quality governance features, including:
- i. procurement practices that acknowledge the importance of compliance with the FW Act in its tender and contract documentation.

### **Case Study**

Sally has had a contract with DECD for the last 4 years. As part of the current contract Sally has had to install security cameras and GPS into each of her minibuses which added substantial additional to her small business. Sally also believes that she is one of the only operators who has abided by the requirement of the new contract. Sally is not aware of any auditing to ensure that operators' vehicles are meeting the contract requirements.

**Sally believes that there is not enough auditing by DECD to ensure all operators are meeting their contract requirements.**

- ii. DECD places greater emphasis on requirements such as OHS, driver accreditation and insurance risk liability than ensuring sufficient funds within the contracts to enable Operators to comply with the Modern Award and related employment legislation;
- iii. Failure of DECD to conduct periodic inspections of its Operators (accordingly, DECD had not detected that some Operators had subcontracted their driving services - this is at odds with the DECD requirement under the contractual conditions that require the Operator to first seek permission from the DECD / Minister to do so);
- iv. Failure of DECD to concern itself with Operators sub-contracting to workers operating as independent contractors who are working at charge rates that are below award rates of pay;
- v. Failure of DECD to factor in the minimum engagement period in the Modern Award to the overall price considered.

### **Case Study**

Humphrey employs 5 casual employees for IELC school runs. For 2 drivers their morning IELC runs only takes 1.5 hours so Humphrey only pays those drivers 1.5 hours for those runs. The Modern Award has a minimum payment of 2 hours for each run for casual employees employed for the purpose of transportation of children to and from school.

**Humphrey is getting an unfair cost advantage over other businesses by not paying the required minimum engagement to all his drivers.**

- c) The Fair Work Ombudsman has written to DECD regarding section 550 of the FW Act and DECD's potential for involvement in those contraventions committed by various Operators identified by the Fair Work Ombudsman.

#### 8.1.3 The BCASA

The BCASA raised its concern to the Fair Work Ombudsman that the South Australian bus operators are not working under the same level of accreditation to that of other states.

## **9. Recommendations**

9.1 The FWO makes the following recommendations arising from this Inquiry:

9.1.1 That DECD:

- a) Adopt a strong culture of governance to ensure that contracts with operators provide sufficient funds to enable compliance with Modern Award entitlements;
- b) Apply service cost benchmarks (as applied in the large school bus runs);
- c) Review the current contract governance arrangements to ensure the contractual requirements drive compliance with all applicable legislation throughout the tender process;
- d) Conduct regular periodic inspections of the contractual requirements for the life of the contracts;
- e) Allow for cost increases incurred by the operator over the life of the contract;
- f) Align terms of the contracts with terms of the Modern Award;
- g) Provide the Fair Work Ombudsman with a report on the improvements made to their corporate governance framework and procedures for the special needs school transport runs within twelve (12) months;
- h) Consider engaging with the South Australian Department of Planning, Transport and Infrastructure on adopting more rigorous accreditation standards.

### 9.1.2 That Operators:

- a) Seek independent workplace relations advice as to whether their labour engagement arrangements are lawful;
- b) Routinely monitor and review driver arrangements to ensure compliance with DECD contractual arrangements;
- c) Ensure compliance with the FW Act and Modern Award including wages and entitlements, employee records and payslips;
- d) Apply similar governance principals to that referred to in 9.1.1 a) to f) above if that Operator outsources its bus services to another Operator / provider;
- e) Implement the Fair Work Ombudsman's compliance commitment and audit reporting form, and provide a copy of that report annually to the Fair Work Ombudsman for the first three (3) years.

## 10. Next Steps

### 10.1 The FWO will:

- 10.1.1 Conduct a follow-up inspection of the Operators who received a Letter of Caution in the next twelve (12) months to ensure the entity is complying with the FW Act and the *Fair Work Regulations 2009* (Cth);
- 10.1.2 Survey the Operators and assess whether DECD has amended its governance arrangements;
- 10.1.3 Request Operators who received a Letter of Caution to implement the Fair Work Ombudsman's compliance commitment and audit reporting form, and provide a copy of that report annually to the Fair Work Ombudsman for three (3) years;
- 10.1.4 Request the DECD to review its corporate governance framework for the special needs school transport runs within twelve (12) months;
- 10.1.5 Request the DECD to provide the Fair Work Ombudsman with a report on the improvements made to their corporate governance framework and procedures for the special needs school transport runs within twelve (12) months;
- 10.1.6 Assess the report provided by the DECD to ensure sustainable compliance with Commonwealth workplace law.

**Steven Ronson**

**Executive Director – Dispute Resolution and Compliance**

**Fair Work Ombudsman**

## About the Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory agency, created by the FW Act on 1 July 2009.

Our vision is fair Australian workplaces, and our mission is to work with Australians to educate, promote fairness and ensure justice in the workplace. We promote harmonious, productive and cooperative workplace relations and ensure compliance with Australia's workplace laws by:

- offering people a single point of contact for them to receive accurate and timely advice and information about Australia's workplace relations system
- educating people working in Australia about their workplace rights and obligations
- monitoring compliance with, inquiring into and, investigating any act or practice that may be contrary to workplace laws, awards and agreements
- litigating to enforce workplace laws and to deter people from not complying with their workplace responsibilities.

The Fair Work Ombudsman employs a range of strategies to achieve compliance with national workplace laws. This includes working with enterprises in a positive and constructive manner to ensure the duty holder is:

- meeting its obligations under the FW Act;
- identifying and minimising business risks with respect to its employees;
- addressing potential areas of non-compliance with the FW Act.

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

If you would like further information about the Fair Work Ombudsman's Compliance and Enforcement policies and processes please contact Steven Ronson, Executive Director – Dispute Resolution and Compliance, Operations Group ([steven.ronson@fwo.gov.au](mailto:steven.ronson@fwo.gov.au)).