

State education department cautioned over lack of corporate governance on transport contracts

9 December 2014

The Fair Work Ombudsman has cautioned a State Government department about a lack of corporate governance over transport services for children with special needs – reminding it of its key role in setting prices in the labour supply chain.

The South Australian Department of Education and Child Development (DECD) has been urged to take immediate steps to rectify the deficiencies – or risk being in breach of federal workplace law.

DECD spends more than \$11 million a year on school bus services for students with special needs, but its procurement arrangements relating to mini-bus operators have lacked basic, quality governance features, a special investigation has revealed.

Nine of 13 South Australian mini-bus operators recently audited by Fair Work inspectors have received Letters of Caution from the Fair Work Ombudsman for misclassifying their drivers as sub-contractors instead of employees.

The Fair Work Ombudsman has advised DECD that unless its procurement practices are addressed promptly, it risks exposing itself to contraventions under Section 550 of the Fair Work Act for accessorial liability.

The Agency has asked the Department to report back within 12 months on actions taken to ensure ongoing compliance with Commonwealth workplace laws.

A 20-page Statement of Findings was released today following a comprehensive inquiry by the Fair Work Ombudsman into allegations of sham contracting among transport operators engaged by DECD to transport special needs school students.

The Fair Work Ombudsman found DECD failed to:

- Undertake periodic reviews, audits and self-audits of all operators to ensure they meet minimum State and Commonwealth legislative requirements,
- Prohibit unlawful sub-contracting,
- Align its contracts with the terms of the Passenger Vehicle Transportation Award 2010, and
- Provide ongoing adjustments for cost increases (eg wages, CPI, fuel, safety enhancements) for all operators over the life of the contract.

The inquiry was sparked by a complaint received from an operator in September, 2012, who alleged that he had lost contracts to a competitor who was undercutting employee entitlements by engaging in sham arrangements.

A Letter of Caution was subsequently issued to the second operator in December, 2012, after inquiries revealed the competitor business had characterised its drivers as independent contractors, when in fact they were employees.

In response, the second operator raised further allegations about other businesses and asked the Fair Work Ombudsman to conduct further investigations “to ensure a level playing field” for all industry participants.

Fair Work inspectors later broadened the scope of their inquiry and found the sector was highly-competitive with low-entry barriers for new competitors and no specific technical qualifications required.

They found a number of operators had moved across from the taxi industry and had introduced unlawful sub-contracting arrangements.

During the course of the investigation, nine of 13 operators scrutinised were found to be engaging in unlawful independent contracting arrangements.

A lack of periodic inspections by DECD of its operators resulted in a failure to detect that some operators had sub-contracted their driving services and that some drivers were working as independent contractors at rates below the minimum stipulated in the Award.

Four converted their purported independent contractors to employees during the inquiry before being issued a Letter of Caution requiring them to comply with the Fair Work Act.

“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,”

according to the Statement of Findings.

The Fair Work Ombudsman has made a number of recommendations as a result of its findings, including the need for:

- DECD to review its current contract governance arrangements to ensure contractual requirements drive compliance with all applicable legislation (including Modern Awards) throughout the tender process,
- Transport operators to exercise a greater degree of care in assessing the cost to deliver their services and to seek professional advice on their contracting arrangements, and
- Drivers who claim to be independent contractors to be fully aware of the risks of enforcement action by other Commonwealth departments for any failure to properly disclose their income and WorkCover or public liability status.

Further, the Fair Work Ombudsman has announced it will conduct follow-up checks of the nine operators it audited next year to ensure they are complying with their obligations under the Fair Work Act and not ignoring advice provided to them.

It will also survey transport operators to assess whether DECD has amended its governance arrangements as requested.

In response, DECD has advised the Fair Work Ombudsman in writing that it will call public tenders to establish a new panel of providers from the beginning of 2015 and that it will review its tender documents and develop a contract management plan.

Further, the Department has indicated it will liaise with the SA Department of Planning, Transport and Infrastructure on the need for more rigorous operator accreditation standards.

Fair Work Ombudsman Natalie James says federal, state and local government all have a key role in setting prices in labour supply chains and it is important that they, along with private businesses, recognise they cannot enter contracts without ensuring that suppliers are able to meet their minimum obligations towards their employees.

“We are happy to provide assistance where we can, but when we find instances of agencies or businesses abrogating their responsibilities, we will take action to rectify the matter,” she said.

According to the Australian Bureau of Statistics, almost 990,000 Australian workers are classified as independent contractors – about 8.5 per cent of the workforce.

The Fair Work Ombudsman supports independent contractors operating businesses by providing tools and resources to assist them to understand how they, or those they engage for work, should be classified.

Sham contracting occurs when an employer deliberately attempts to disguise an employee/employer relationship as an independent contracting relationship.

By disguising employment as independent contract work, employers avoid their obligation to provide entitlements such as minimum hourly rates, overtime, penalties and other allowances, giving them an unfair competitive advantage.

Misclassification occurs when an employer inadvertently engages a worker as an independent contractor.

Ms James says the Fair Work Ombudsman is making compliance easier for small business by continually building on the information available on its website.

“We know workplace laws can be complicated for the uninitiated, and for those who are not industrial experts, the margin for error is high,” she said.

While most small businesses wanted to do the right thing, Ms James acknowledged that for employers faced with “a whole pile of rules you have to follow about all sorts of things, it is possible to get things wrong.”

“So here is our deal. We ask that you engage with us honestly and openly. That you use the tools and resources we provide and inform yourself,” she said.

“In return, you will be able to act with confidence. This protects you. It means that if a problem arises down the track, you can demonstrate your intention to do the right thing.”

Ms James said small business had nothing to fear from the Fair Work Ombudsman “unless you deliberately exploit your employees or take advantage of those who are vulnerable.”

But she would frown upon employers who refuse to fix problems or continually ignore advice so they have a competitive advantage over others doing the right thing.

Ms James debunked perceptions in some quarters that the Fair Work Ombudsman was heavy-handed, revealing that only one in every 500 matters investigated ended up in Court.

“We have thousands of interactions with business owners every day, and yet very few issues see us reach for enforcement tools,” she said.

Anyone seeking assistance with workplace issues can visit the Fair Work Ombudsman website at www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94. An interpreter service is available on 13 14 50.

Follow Fair Work Ombudsman Natalie James on Twitter [@NatJamesFWO](https://twitter.com/NatJamesFWO) (<http://twitter.com/NatJamesFWO>), the Fair Work Ombudsman [@fairwork_gov_au](https://twitter.com/fairwork_gov_au) (http://twitter.com/fairwork_gov_au) or find us on Facebook www.facebook.com/fairwork.gov.au (<http://www.facebook.com/fairwork.gov.au>).

Download:

- [Statement of Findings - Inquiry into misclassification of drivers - DECD - Final Version \(DOCX 132.9KB\)](http://www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-misclassification-of-drivers-decd-final-version.docx.aspx) (www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-misclassification-of-drivers-decd-final-version.docx.aspx) (PDF 257.7KB) (www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-misclassification-of-drivers-decd-final-version.pdf.aspx)

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