

Department's budget-saving recruitment strategy risks breaching workplace laws

3 March 2015

A Victorian Government department's employment practices risk breaching federal workplace laws, a Fair Work Ombudsman inquiry has revealed.

Fair Work inspectors investigated the Department of State Development and Business Innovation (DSDBI) after a major union alleged that it was involved in sham contracting.

While a detailed examination has found no evidence of sham contracting, it has identified a "heightened risk" that in seeking to achieve financial savings, the department may contravene the Fair Work Act.

If found guilty, the department could face fines of up to \$51,000 per breach and individual managers could be liable for penalties of up to \$10,200 per breach.

As a consequence, the Fair Work Ombudsman has urged DSDBI to conduct an urgent, comprehensive review of its policies and processes.

DSDBI has been asked to report back within six months.

A Statement of Findings released today says the Fair Work Ombudsman expects DSDBI, as a large employer with a high degree of sophistication and resources, to take the necessary action to reduce its risk of non-compliance with federal workplace laws.

The 22-page report follows allegations raised in November, 2013, by the Victorian branch of the Community and Public Sector Union (CPSU).

The Fair Work Ombudsman began an inquiry in December, 2013, focused primarily on whether DSDBI had breached Section 357 of the Fair Work Act by misrepresenting employment as independent contracting.

The inquiry included a review of key departmental policies, procedures and contracts and face-to-face interviews with managers, workers and union representatives.

While there was no evidence of sham contracting, the inquiry found:

- The way in which DSDBI proposed to engage certain workers as independent contractors increased its risk of non-compliance with workplace law;
- Some workers may not be receiving their correct entitlements if they are characterised as independent contractors instead of employees,
- The department's workforce was reticent to complain publicly, and
- DSDBI had not responded to or acted upon recommendations made previously by the Victorian Auditor-General's Office about its procurement of labor.

Preliminary findings were sent to DSDBI for review and comment on August 12 last year and it provided a submission on September 30.

Following consideration of the department's feedback, the Fair Work Ombudsman has now finalised its position and publicly released its findings today.

It recommends DSDBI:

- Conduct a comprehensive review of its labor engagement policies and processes to ensure they comply with federal workplace law,
- Audit all independent contractors recruited through labor-hire agencies who undertake work traditionally performed by public service employees,
- Ensure all workers are receiving their correct wages and entitlements and back-pay any outstanding entitlements it identifies, and
- Obtain legal advice regarding the use of independent contractors for work traditionally performed by public servants.

The Victorian Government's decision some years ago to refer most of its industrial relations powers to the Commonwealth provided jurisdiction for the Fair Work Ombudsman to scrutinise DSDBI's employment practices.

The Statement of Findings details how Fair Work inspectors looked specifically at five of the department's procurement processes, raising concerns about three that could potentially result in the misclassification of employees.

During their investigation, Fair Work inspectors noted that Victorian public service employees were "fearful of reporting their concerns, except on a strictly confidential basis."

The Fair Work Ombudsman found "a connection" between various Victorian Budget announcements dating back to 2011 and DSDBI's labor procurement practices in 2013.

"In particular, in seeking to achieve savings required by the various budget announcements, DSDBI had commenced experimenting with a changing operating model characterised by heightened risk and non-traditional forms of labor engagement," the report says.

The Fair Work Ombudsman also refers to a Victorian Auditor-General's Office (VAGO) report tabled in the State Parliament on November 27, 2013, which examined the use of "contract" and "temporary" staff across 11 departments, including DSDBI.

VAGO concluded that extended periods of engagement suggested "these resources were being used to fill permanent roles" and cautioned the departments about their engagement practices, stating that "it is unclear whether individuals employed as contract staff for extended periods are legally 'employees' entitled to accrue employee benefits".

The Fair Work Ombudsman report notes that while all departments had an opportunity to respond to VAGO's report, DSDBI did not do so.

The Fair Work Ombudsman considered this failure to respond as unusual, given the DSDBI's declared strategic intent to decrease reliance upon labor sourced from on-hire (labor-hire) agencies and "pursue innovation and value as it sees fit", including "engaging consultants and others conducting their own business".

According to the Australian Bureau of Statistics, there were 986,400 people working as independent contractors in their main job in November, 2013 – about 28 per cent of them in Victoria.

The Fair Work Ombudsman supports independent contractors by providing tools and resources on its website at www.fairwork.gov.au to assist them understand how they, or those who they engage for work, can be correctly classified.

Deputy Fair Work Ombudsman (Operations), Michael Campbell, says 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 when they should instead be an employee, but there is no evidence it was deliberate," Mr Campbell says.

"Sham arrangements provide a business with an unfair competitive advantage against employers who are complying with their legal obligations.

"By disguising employment as independent contract work, employers avoid their responsibility to provide employees with their correct minimum entitlements, such as ordinary hour wages, overtime, penalties, allowances, leave payments, superannuation and possible tax exemptions."

It is the second time in months that the Fair Work Ombudsman has had to remind a State Government department of its obligations under federal workplace law.

In December, the Agency cautioned the South Australian Department of Education and Child Development (DECD) about a lack of corporate governance over transport services for children with special needs and urged it to take immediate steps to rectify the deficiencies.

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 lacked basic, quality governance features, the Fair Work Ombudsman found.

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

Mr Campbell says federal, state and local government all have a key role in setting prices in labor-supply chains and it is important that they, along with private businesses, recognise their obligations under federal workplace laws.

"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," he said.

Mr Campbell says the Fair Work Ombudsman is making compliance easier for employers, large and small, by continually building on the information available on its website.

"We aim to provide practical advice that is easy to access, understand and apply," he says.

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.

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- [Inquiry findings - Victorian Department of State Development and Business Innovation labour hire and independent contractor arrangements \(DOCX 184.9KB\)](http://www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-victorian-department-of-state-development-and-business-innovations-labour-hire-and-contractor-arrangements.docx.aspx) (www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-victorian-department-of-state-development-and-business-innovations-labour-hire-and-contractor-arrangements.docx.aspx) (PDF 361KB) (www.fairwork.gov.au/ArticleDocuments/763/statement-of-findings-inquiry-into-victorian-department-of-state-development-and-business-innovations-labour-hire-and-contractor-arrangements.pdf.aspx)

Media inquiries:

Tom McPherson, Media Adviser

Mobile: 0439 835 855

tom.mcpherson@fwo.gov.au (mailto:tom.mcpherson@fwo.gov.au)

Page reference No: 5217

Contact us

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