

Guidance for Managers Engaging Contractors and Consultants



**Victorian
Public Sector
Commission**

Victorian Public Service (VPS) departments determine the mix of employment arrangements to best meet their business needs. Engaging contractors and consultants, in addition to ongoing employees, gives departments the flexibility to meet immediate critical skill gaps. This guidance is for managers engaging contractors and consultants to perform a public sector function. It explains different employment arrangements and why it's important for the code of conduct to apply to anyone working in government.

Is there a difference between contractors and consultants?

Consultants are a particular type of contractor. Both consultants and contractors are engaged through a contract. Consultants are engaged primarily to provide expert analysis or advice. They might for example conduct feasibility studies and market research, or analyse and advise on a department's workforce planning requirements. In contrast other types of contractor are engaged to provide works or services. They might for example act as project or program managers or prepare guidance materials for proposed or existing processes. Contractors do not include casual, fixed-term or temporary employees directly employed by the department.

Is an on-hire worker a contractor or an employee?

The Department of Treasury and Finance is the lead agency for the mandatory State Purchase Contract for Staffing Services. When a department needs to fill a short-term vacancy they contact one of the master vendors on the contract with their requirements. The on-hire workers are the employees of the master vendors not the department.

What is the difference between contractors and employees?

There is no single difference between contractors and employees. Departments would need to look at the whole working arrangement. However some of the key differences are that contractors are capable of carrying out a business for themselves. They are paid a fixed sum or, in the case of consultants, an hourly rate for time spent providing the services. They can provide services to other businesses and are in a position to make a profit or loss. They are generally engaged because of their skills to work autonomously and unsupervised on a specific project. Employees on the other hand are supervised, use the department's resources and are paid an annual salary.

What are the risks of contractors being deemed employees?

The risk to departments of their contractors being deemed to be employees is that they will be liable for costs associated with employment including annual leave, personal leave and certain taxes. Further, a contractor of a department who falls within a 'deemed worker' category under the Accident Compensation Act 1985 may be entitled to claim compensation from the department for any illness or injury they suffer arising out of or in the course of providing the services.

Is it possible for a contractor to have significant management responsibilities?

In some circumstances it will be appropriate for a department to engage a contractor to undertake significant management responsibilities. This is particularly the case when the specialist skills or experience required are not readily available within the VPS, the project has a short duration or market rates apply. The contractors may participate in the formation of a department's business or project plans, undertake team or project leadership or be involved in a department's operational decisions.

Can contractors hold a financial delegation?

Contractors cannot be given financial delegation without the department first seeking



an exemption from the Minister for Finance. This is the case even if the contractor is performing duties that would typically be performed by a person employed in an executive role that holds a financial delegation.

Why wouldn't the department just engage someone on an executive contract?

A department may wish to engage a contractor through their company. In these situations an executive contract is not suitable. An executive is a departmental employee and a public official under the Public Administration Act 2004. The executive contract is with an individual not their company.

Does my department need to report on the contractors it engages?

Departments must disclose certain information in their annual report on operations including:

- expenditure on individual consultancies valued in excess of \$10,000 (exclusive of GST);
- the number of consultancies that are individually valued at less than \$10,000 (exclusive of GST) and their total expenditure (exclusive of GST); and
- the number of contractors undertaking significant management responsibilities and valued more than \$100,000 (exclusive of GST).

Departments also need to retain information about all the consultants and contractors they engaged, the services provided and expenditure committed. This information is available on request to Ministers, Members of Parliament and the public, subject to the provisions of the *Freedom of Information Act 1982*.

Do contractors need to comply with the code of



conduct?

The code details the high standards of integrity the Victorian community expects of government. The code is based on the [public sector values](#) and calls for behaviours such as responsiveness, openness and honesty. These are not out of the ordinary. Some of the obligations in the code are reflected in the standard forms of contract used to engage contractors and consultants, such as avoiding conflicts of interest and protecting confidentiality and privacy.

Certain contractors are required to comply with the code because they are performing a public sector function. It doesn't matter to the public whether the government service is being provided by an employee or a contractor. They expect the same high standards of integrity.

When are contractors performing a public sector function?

Contractors engaged in or by the department (including contractors engaged through an employment agency) are performing a public sector function when they:

- supervise public sector employees;
- undertake work that is of a similar nature to the work undertaken by public sector employees at a premise or location generally regarded as a public sector workplace; or
- use or have access to public sector resources or information that are not normally accessible or available to the public.

Does complying with the code mean contractors are deemed employees?

No, a contractual requirement to comply with the code in certain circumstances will not, of itself, make it more likely that a court would find that an individual is an employee rather than a contractor.



Can contractors be restricted from engaging in outside activities?

The code includes a provision that public sector employees only engage in other activities such as a second job or involvement with other organisations (paid or voluntary work) where the activity does not conflict with their public sector role. This restriction also applies to contractors performing a public sector function when compliance with the code is a term of their contract.

Where can I find out more information about engaging contractors?

There are a number of places for managers to find out more information including:

- their department's Accredited Purchasing Unit (APU) or Internal Procurement Unit (IPU) for advice on the policies and practices in place and to develop their contract management skills;
- the Victorian Government Purchasing Board for advice on procurement policies and practices and to access current state purchase contracts;
- the Department of Treasury and Finance for advice on complying with the Standing Directions of the Minister for Finance and the Financial Reporting Directions;
- the Australian Taxation Office for advice on the differences between contractors and employees; and
- the Public Sector Standards Commissioner for advice on application of the code of conduct and reporting any breaches of the code or the Victorian public sector values and employment principles.

