A council was investigated in 2011 for failure to comply with the *Local Government Act 1993* when engaging consultants and labour hire personnel.

Key findings:

- between 2007 and 2010, the council engaged temporary contract personnel under 68 “labour hire” contracts involving total expenditure in excess of $17M.

- 34 of these involved expenditure that exceeded 150K and were therefore subject to the requirement to tender (3 were exempt because the contractors were members of a NSW Procurement Board prequalification scheme).
Key investigation findings

– in the case of a number of contracts where expenditure did not exceed $150K, the contracts formed part of a single seamless engagement and had been “split” thereby avoiding any single transaction that exceeded $150K.

– The council also failed to comply with its own policy and procedural requirements in relation to the procurement and management of “labour hire” contracts.

– Many engagements appeared to have been made on the basis that the contractor was previously or currently engaged by the council or had been recommended by another contractor engaged by the council - the 68 “labour hire” contracts were shared among a total of 26 contractors.
Key investigation findings

• 7 of the contracts were awarded to 4 former employees of the council - in one case the employee was still working for the council at the time the contract was awarded to them.

• In 2 cases, temporary contract personnel were appointed to positions in the council’s organisational structure and held those positions for a period exceeding 12 months without the positions being advertised and an appointment being made on merit as required under the Act.

• The council’s failure to comply with its statutory obligations and the requirements of its own procurement policy and associated procedures with respect to “labour hire” contracts was informed by the misconception that they were “employment” contracts and thereby exempt from these requirements.
Key requirements - Tendering

• Section 55 of the LGA – councils must invite tenders before entering into contracts to perform works or services for or on behalf of the council or to provide services to the council

• Exemptions:
  – Contracts involving estimated expenditure under $150K (section 55(3)(n) and clause 163(2) of the Regulation)
  – Contracts for the purchase of goods, materials or services with a person specified under a prequalification scheme administered by NSW Procurement Board, Commonwealth Department of Administrative Services, Local Government Procurement or Procurement Australia (section 55(3)(a) and (g))
  – A contract for the employment of a person as an employee of the council (section 55(3)(h))
• Section 348 of the LGA - Where it is proposed to make an appointment to a position within the organisation structure of a council, the position must be advertised in a manner sufficient to enable suitably qualified persons to apply for the position.

• Exemptions:
  – re-appointment, under a new contract, of senior staff
  – appointments where the term of employment is for:
    • not more than 12 months, or
    • two or more periods that together do not exceed 12 months in any 2 year period

• Section 349 of the LGA - Appointments must be made on merit from among the applicants for the advertised role.
Lessons learned 1: Status of temporary contract personnel

• The question of whether a contract is an employment contract or a contract for services is often a difficult one to determine.

• Key indicia of an employment relationship include:
  – the level of control and authority exercised
  – whether the services are provided exclusively
  – whether the principal/employer dictates the place and hours of work
  – whether the worker is in business on their own account
  – whether workers compensation payments are made
  – whether income tax is withheld
Lessons learned 1:
Status of temporary contract personnel

• The investigation found that the “labour hire” contracts the council entered into were not “employment contracts” as the council believed but “contracts for services” and therefore subject to the requirement to tender under section 55.

• Key considerations included:
  – The contractual relationships were not with the persons supplying their labour to the council but with third parties and payments for the workers’ labour were made to those third parties
  – The council made no superannuation contributions with respect to the worker, paid no workers’ compensation premiums with respect to them and did not withhold income tax
Lessons learned 1: Status of temporary contract personnel

- Councils should have appropriate systems for determining the nature of the relationship they have with the person or entity they have entered into the contract with and for ensuring the council complies with its statutory and other obligations arising from the relationship.

- **Remember** – even where on such an assessment it is determined that the contract in question is an employment one and therefore exempt from the requirement to tender, the council may still be required under sections 348 and 349 to first “test the market” in certain circumstances by advertising the position and making an appointment on merit.
Lessons learned 2: Variation of labour hire contracts

- The council’s failure to comply with the tendering requirements arose in part from its practice of entering into contracts with an approved value under the $150K tendering threshold and allowing expenditure under the contracts to escalate above the threshold.
- The council’s practice of routinely extending or varying “labour hire” contracts could be attributed to poor or non-existent planning or scoping of engagements, open-ended arrangements with undefined or poorly defined deliverables, poor cost controls and the ready availability of the option to extend or vary engagements.
Lessons learned 2:
Variation of labour hire contracts

• Councils’ processes should ensure adequate initial scoping of engagements, ongoing monitoring and management of the services provided and appropriate controls over the extension or variation of engagements.

• Councils should also ensure that staff delegations to approve the extension or variation of labour hire contracts are defined by reference to the total value of expenditure under the contract (inclusive of all variations) and not just the value of the variation being approved.
Lessons learned 3: Appointment of temporary contract personnel to positions in a council’s organisational structure

• In two cases, temporary contract personnel were appointed to positions in the council’s organisational structure and held those positions for a period exceeding 12 months without the position first being advertised contrary to sections 348 and 349.

• Where it is proposed to appoint a contractor to a position in a council’s organisation structure for a period exceeding 12 months, regardless of the status of the contractor, councils are still required to comply with the requirements of sections 348 and 349 with respect to that appointment.
Any Questions?