

Factsheet No. 1

Identifying and Responding to “Sham Contracting”



This fact sheet provides you with some basic information about sham contracting - what it means, how you can identify if you are in that situation, and what you can do about it.

- **What is sham contracting?**
- **Employee vs Independent Contractor – what am I?**
- **What do I do if I think that I am a victim of sham contracting?**
- **How do I decide which option is best for me?**

Has your employer asked you to get an ABN? Being asked by an employer to get an ABN is one sign that you may be a victim of sham contracting.

What is sham contracting?

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Sham contracting occurs when an employer attempts to disguise an employment relationship as an independent contracting arrangement. This is usually done to avoid responsibility for employee entitlements, such as paid leave and superannuation contributions.

Under the law (*Fair Work Act 2009* (Cth) ss 357 – 359), it is illegal for an employer to:

- misrepresent an employment relationship as an independent contracting arrangement;
- dismiss (or threaten to dismiss) an employee for the purpose of engaging them as an independent contractor; or
- make a knowingly false statement to

persuade or influence an employee to become an independent contractor.

Employers who do these things may be prosecuted for breaching the Fair Work Act. Employers who are found to have breached the Fair Work Act may be ordered to pay substantial fines (*Fair Work Act* s 539).

Employee vs Independent Contractor – What am I?

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The table at the end of this factsheet (in Annexure 1) is designed to provide you with some guidance as to whether you are an employee or an independent contractor.

What do I do if I think that I am a victim of sham contracting?

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There are a number of steps that you can take if you think that you have been a victim of sham contracting. They are:

Step 1: Raise the Issue with your Employer

If you suspect that you are a victim of sham contracting, approach your employer to discuss your concerns. It is best to do this in writing, either by sending a letter or an email to your employer. It is also a good idea to keep notes about any discussions that you have with your employer about this issue.

Sometimes breaches of the law occur when the

employer is not aware of their legal requirements. Raising the issue with your employer can sometimes be sufficient to resolve it. If the issue is not resolved, you should consider taking Steps 2 and 3.

Step 2: Report the problem to the Australian Tax Office

An employer who is engaging in sham contracting will not only be failing to meet their obligations to their employees, but will most likely to also not be meeting their obligation to pay superannuation and tax.

The Australian Tax Office accepts complaints over the phone and in writing. You can choose to make the complaint confidentially. More information about making a complaint to the Australian Tax Office can be found here

<https://www.ato.gov.au/Business/Employee-or-contractor/In-detail/Report-a-business-incorrectly-treating-employees-as-contractors/How-to-report-a-business-incorrectly-treating-employees-as-contractors/>.

Step 3: Raise the Issue with the Fair Work Ombudsman

The Fair Work Ombudsman can deal with complaints about sham contracting. The Fair Work Ombudsman's complaint form can be found at this address: <http://www.fairwork.gov.au/How-we-will-help/How-we-help-you/help-resolving-workplace-issues>.

Once it receives a complaint, the Fair Work Ombudsman may allocate a Workplace Inspector to investigate. If the investigation indicates that sham contracting is occurring, the Fair Work Ombudsman may take a number of steps including:

- I. Providing your employer with information

and education about sham contracting, its obligations under the law and its responsibilities as an employer;

2. Taking legal action against your employer in the Federal Circuit Court or Federal Court for breaching the *Fair Work Act* by engaging in sham contracting.

If the Fair Work Ombudsman is unable to assist you, another option may be to bring a general protections claim under the *Fair Work Act 2009* (Cth). More information about this option is set out below.

Another Option – Making a General Protections Claim under the Fair Work Act 2009 (Cth)

If your employer has misrepresented your employment as a contracting arrangement, dismissed or threatened to dismiss you to re-engage you as an independent contractor or knowingly made a false statement to induce you to enter into a contracting arrangement, another action which you can take is to bring a general protections claim under the *Fair Work Act*, to the Fair Work Commission.

IMPORTANT: If you have not been dismissed, you have **6 years** from the date you entered into a sham contract to take action for a general protections claim.

If you have been dismissed, you have **21 days** from the date you have been dismissed to make a general protections claim.

If you have been dismissed:

- The Fair Work Commission will convene a private conference to deal with the dismissal.
- If the dispute was not resolved in the conference and the Fair Work Commission believes that all attempts to resolve the dispute have been or will likely be unsuccessful, it will issue a certificate to that effect.
- The parties can ask the Fair Work Commission to arbitrate and finally determine the matter. However this requires consent from both parties.
- If you and your employer do not consent to arbitration, then you can make a separate application to the Federal Circuit Court or the Federal Court.

If you haven't been dismissed:

- The Fair Work Commission will convene a private conference if both you and your employer agree to participate.
- If you and/or your employer don't agree to participate in the conference, then you may choose to make an application to the Federal Circuit Court or the Federal Court to deal with the matter.

It is important to know that, while the Fair Work Commission can assist in resolving disputes about sham contracting, it cannot investigate claims of sham contracting or prosecute employers engaged in sham contracting. That is the role of the Fair Work Ombudsman. If you would like your employer to be investigated for engaging in sham contracting, making a complaint to the Fair Work Ombudsman (as explained above) may be a better option for you.

How do I decide which option is best for me?

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The information contained in this fact sheet is basic and general information only. It cannot be relied upon as legal advice. If you have read through the information in this sheet and believe that you have been the victim of sham contracting, it is a good idea to read some more detailed information. We also strongly recommend that you seek legal advice. Getting legal advice will help you to identify the best action to take in your particular situation.

More detailed information about sham contracting can be found on the Fair Work Ombudsman website, at www.fairwork.gov.au. You can also call the Fair Work Ombudsman for information on 13 13 94.

Additional contacts for legal information or access to legal advice:

- Community Legal Centres NSW. Go to www.clcnsw.org.au/ or call 02 9212 7333
- Legal Aid NSW. Go to www.legalaid.nsw.gov.au/ to you're your local office.
- LawAccess NSW. Go to www.lawaccess.nsw.gov.au/ or call 1300 888 529
- Law Society of NSW Solicitor Referral Scheme, for a referral to a private lawyer. Go to www.lawsociety.com.au/community/finding-alawyer/probono or call 02 9926 0333

Produced by Redfern Legal Centre.

This factsheet is no substitute for legal advice. If you have a problem please seek legal advice from your local community legal centre

Annexure I. Employee vs Independent Contractor – What am I?

Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work under the direction and control of their employer on an ongoing basis.	Has a high level of control in how the work is done.
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary).	Under agreement, decides what hours to work to complete the specific task.
Expectation of work	Usually has an ongoing expectation of work.	Usually engaged for a specific task.
Risk	Bears no financial risk (the employer bears the risk).	Bears the risk for making a profit or loss on each task. Including responsibility for poor work or injury sustained. As such, contractors generally have their own insurance policy.
Superannuation	Entitled to be paid superannuation contributions by the employer.	Pays their own superannuation. (Note: in some circumstances, independent contractors may be entitled to be paid superannuation contributions).
Tools and equipment	Tools and equipment are generally provided by the employer, or an allowance is provided	Generally uses their own tools and equipment.
Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Method of payment	Paid regularly (e.g. on a weekly, fortnightly, monthly basis).	Has an ABN and submits an invoice for work completed.
Leave	Entitled to receive paid leave (e.g. annual leave, personal leave, long service leave) or receive a loading in lieu of leave in the case of casual employees.	Does not receive paid leave.