



# Sham Contracting: Disguised Employment Relationship

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Sham contracting is a term used to describe the situation where a worker is engaged by a company as an independent contractor when in fact, they should be engaged as an employee.

The [Australian Bureau of Statistics](#) confirmed that as at August 2018 approximately 8% of the people employed in Australia were classified as Independent Contractors.

The prevalent engagement of independent contractors in a number of industries (e.g. construction, support services, IT) means that it is now necessary for many workers to have a basic understanding of the difference between being an employee and being an independent contractor.

## Independent contractor vs employee

The determination of whether you are an employee or an independent contractor is not a straightforward matter. Rather, an assessment is to be made on an individual's circumstances. The two types of engagement are starkly different in a number of key areas, for example:

• **Control of work:**

- Independent contractors are ordinarily largely autonomous and have a high level of control in the performance of their work.
- Employees perform work under the direction and control of their employer.

• **Performance of work:**

- Independent contractors are not restricted to one engagement and have the freedom to sub-contract or delegate their work.
- Employees perform work only for their employer.
- Risk:**
  - Independent contractors assume the responsibility and risk of their own work.
- Payment:**
  - Independent contractors are often paid according to task completion and as a result of the provision of an invoice citing their ABN.
  - Employees receive wages on the basis of their time worked.

There are a number of other indicators that can be considered when assessing the employment relationship. [The Fair Work Ombudsman has helpfully set out a number of these indicators which can be accessed here.](#)

## What is sham contracting?

Sham contracting is the well-known term for the prohibitions in the *Fair Work Act 2009* (Cth). Particularly, a person or company is prohibited from:

1. misrepresenting an employment relationship as a contract for services where a person performs work as an independent contractor – section 357;
2. dismissing an employee in order to engage the person as an independent contractor to perform the same, or substantially the same, work – section 358; and
3. knowingly making a false statement to persuade or influence an employee to become an independent contractor – section 359.

## Misclassification of employees as independent contractors

Whilst the actions of an employer may not satisfy the intentional element of the 'sham contracting' prohibitions, the misclassification of employees as independent contractors can potentially lead to other contraventions of the *Fair Work Act 2009* (Cth), including contravention of the National Employment Standards, modern awards or enterprise agreements.

Misclassifications can have a significant financial impact on a person, particularly if the misclassification has occurred for a lengthy period of time. For example, loss of leave entitlements, notice of termination entitlements and a range of other benefits.

## Case study

In [Fair Work Ombudsman v Jooina \(Investment\) Pty Ltd \[2014\] FCCA 2144](#), a person was engaged to perform cleaning duties and was told that he could not be paid unless he had an ABN. The court found that the person was in an employment relationship as he:

- responded to an advertisement for a position by the company;
- had no prior experience in running his own business;
- was provided with two days on the job supervised training;
- was provided with all the products with which he was required to carry out his duties;
- was required to wear a company uniform with the company logo;
- had his work controlled by the employer who carried out on-site inspections and provided feedback; and
- was provided a wage per hour rather than a rate for completion of the work.

In addition to the court declaring that the employer had contravened section 357 of the *Fair Work Act 2009* (Cth), the court declared that the employer had:

1. contravened a modern award by failing to pay an hourly rate;
2. contravened the National Employment Standards by failing to pay accrued annual leave; and
3. contravened section 323 by not paying an amount payable in relation to the performance of work in full.

This is a useful case study to show the kind of potential remedies that are available to workers who have been wrongly engaged as independent contractors. The court will always look to the practical features of the employment relationship rather than the subjective label used by the parties.

## Get help from an employment lawyer

If you're engaged as an independent contractor but believe your circumstances mean you should be engaged as an employee, you can seek guidance and assistance from the [Hall Payne employment law team](#). Likewise, if you are being pressured or manipulated into a contractor arrangement you feel is not right, [you should seek advice from a lawyer experienced in employment law](#).

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

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