

**Senate Standing Committee on Education Employment and Workplace  
Relations**

**QUESTIONS ON NOTICE  
Budget Estimates 2010-2011**

**Agency - Fair Work Ombudsman**

**DEEWR Question No.EW0265\_11**

**Senator Cameron asked on 1/06/2010, Hansard page 69.**

**Question**

**DIFFICULTY IN SHAM CONTRACTING**

Mr Johns—I can inform you that we have commenced four matters involving sham contracting. The difficulty in these matters is the assessment that needs to be made as to whether or not the defence that is available in section 900(2) might be available to the alleged wrongdoer. We have to make an assessment about whether or not that defence would be available to them. Senator CAMERON—I am happy for you to provide on notice the details of why it is so difficult for you. I am happy to come back and have a look at that at the next estimates. For the purposes of the time limits that I have at the moment, I cannot go through every individual case and look at the arguments in that case. If you want to give the committee that on notice, I am happy to have a look at that and then I might be in a position to come back and take up further questions with you next round. I would ask if you could do that. Mr Johns—I am very happy to do that.

**Answer**

The Fair Work Ombudsman has provided the following response.  
Section 900(2) of the *Workplace Relations Act 1996* is now replicated in section 357(2) of the *Fair Work Act 2009*.

Relevantly, section 357(2) provides that:

*Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:*

- (a) did not know; and*
- (b) was not reckless as to whether;*

*the contract was a contract of employment rather than a contract for services.*

The decision of the Federal Magistrates' Court in the matter of *CFMEU v Nubrick Pty Ltd* [2009] FMCA 981 (7 October 2009) provides guidance about the operation of section 900(2) (as it then was).

Having regard to the judicial interpretation in the *Nubrick* matter (of the concepts of the “did not know” and “was not reckless”), the subsection (2) defence has broad application and is readily available.