



The Fair Work Ombudsman can investigate complaints of sham contracting. Employers can be prosecuted and face penalties of up to \$33 000 per contravention for a body corporate or \$6600 for an individual if they are found to be engaging in sham contracting.

- Some employers misrepresent or disguise employment relationships as independent contracting to avoid having to give an employee their proper work entitlements, such as minimum rates of pay and leave entitlements.
- Arrangements such as these are not genuine and may be regarded as sham contracting. Sham contracting is against the law. It's also against the law to:
- dismiss or threaten to dismiss an employee to re-engage them as an independent contractor to do substantially the same work; or
- knowingly make a false statement to persuade or influence an employee to become an independent contractor.

Is my contract a sham?

If an employer dismisses or threatens to dismiss an employee to re-engage them as an independent contractor to do substantially the same work, a Fair Work Inspector can apply to the courts to:

- stop the dismissal from happening
- order the employer to give the employee their job back
- have the employer compensate the employee
- make any other order the court considers appropriate.

Also, if an employee has been dismissed, the employee (or a union that represents them) can apply to Fair Work Australia to deal with the dismissal.



- Decide how to carry out the work and what expertise is needed to do so.
- Bear the risk for making a profit or loss on each job.
- Generally pay their own superannuation and tax, including GST.
- Generally have their own insurance.
- Are contracted to work for a set period of time (e.g. two months), or to do a set task.
- Decide what hours to work to complete the job.
- Generally submit an invoice for work completed or are paid at the end of the contract or project.
- Do not get paid leave.

Independent contractors

- Perform work, under the direction and control of their employer, on an ongoing basis.
- Generally work standard or set hours.
- Bear no financial risk (this is the responsibility of their employer).
- Are entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.
- Have income tax deducted by their employer.
- Are paid regularly (e.g. weekly/fortnightly/monthly).
- Are generally entitled to get paid leave (e.g. annual leave, personal/carer's leave, long-service leave) if they are a permanent employee.

Employees

It's important to know the difference between an independent contractor and an employee to ensure they are receiving the correct entitlements. An employee will also have different rights and protections to an independent contractor. It's not always easy to tell the difference, but here are some of the indicators that make someone more likely to be an employee or an independent contractor. No single point makes a person either an employee or an independent contractor, it requires an overall assessment of all the factors.

What's the difference?

Independent contractors are self-employed and contract their services to clients, such as other businesses. Although an independent contractor may perform work for a business, they are not regarded as an employee and will generally have different rights to employees. In a practical sense, they are 'running their own business'.

Workers can be engaged in different arrangements in the cleaning industry.

The Fair Work Ombudsman can help

Need help?

Call the Independent Contractors Hotline on 1300 667 850 or visit www.fairwork.gov.au/contractors

The following Australian Government websites provide information and resources for engaging or operating as an independent contractor:

- Contracting in the building or construction industry
www.abcc.gov.au/independentcontractors
- Rights and responsibilities of contractors and information on unfair contracts
www.business.gov.au/contractors
- Tax and superannuation for contractors
www.ato.gov.au/contractors
- Having an ABN doesn't make you a contractor – are you entitled to one?
www.ato.gov.au/abnentitlement



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www.fairwork.gov.au
Fair Work Infoline 13 13 94
Mon-Fri 8.00am-6.00pm local time



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Fair work
in the
cleaning
industry

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What's the difference?

Is Gareth an independent contractor?

Gareth has just been engaged by Rani, who owns Careful Cleaners Pty Ltd, to undertake cleaning work at a nursing home.

Before he could start he was advised that he needed to have his own ABN. Gareth is supplied with a uniform that he must wear on each shift and is advised that his hours of work would be 6pm – 11pm, five days a week.

Gareth is paid a flat rate of \$11 an hour. Gareth is given instructions by Rani on how to carry out the cleaning work at the nursing home.

Gareth does not receive any annual leave, personal leave or superannuation, as Rani considers him to be an independent contractor.

Based on these facts, Gareth is more likely to be considered an employee than an independent contractor. As an employee Gareth would be entitled to the minimum terms and conditions of the relevant Modern Award and the National Employment Standards under the *Fair Work Act 2009*. Note that no single factor makes a person either an employee or independent contractor.

Depending on all the circumstances Rani, as the owner of Careful Cleaners Pty Ltd, may have contravened provisions of the *Fair Work Act 2009*, and could be exposed to court awarded penalties.



Is Phillipa an independent contractor?

Lara is the owner of Delish Restaurant and has hired Phillipa to clean the restaurant at the end of each shift. Lara has requested that Phillipa clean the kitchen, serving area and amenities.

Phillipa knows what is required by Lara and can determine how many hours it will take to complete the job. Lara and Phillipa decide on a set price to complete the job, rather than an hourly rate. Phillipa has access to the restaurant and can choose to come in and clean the restaurant at any time before it re-opens at 9am.

Phillipa uses her own cleaning products and has her own employees to help her. At the end of each month Phillipa issues an invoice to Lara which includes her ABN, days worked and usage of cleaning products.

Phillipa is not given any direct supervision and she has control over the work she does, however if she does not perform to the standard required she can be liable for any losses that are caused as a result.

Based on these facts, it appears that Phillipa is an independent contractor. Note that no single factor makes a person either an employee or independent contractor.

Lara, as the hirer of Phillipa's services, needs to ensure that she is engaging Phillipa in a genuine independent contracting arrangement to avoid any contraventions of the *Fair Work Act 2009*.



The Fair Work Ombudsman can help

The Fair Work Ombudsman can investigate these arrangements. If you think you are being treated as an independent contractor when you are in fact an employee, you may be missing out on entitlements that are required to be paid to you. Visit www.fairwork.gov.au/contractors or call the Independent Contractors Hotline on 1300 667 850.