



Australian Government

# Fair Work OMBUDSMAN

Committee Secretary  
Senate Standing Committees on Education, Employment and Workplace Relations  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Committee Secretary,

I am writing to you regarding a correction to information supplied in response to two questions taken on notice at recent Senate Estimates hearings.

On 19 October 2011, the Fair Work Ombudsman appeared before the Education, Employment and Workplace Relations Legislation Committee for the Senate Estimates hearing. Following that hearing, Senator the Hon Eric Abetz submitted a question on notice regarding the prevalence of sham contracting as an issue in the community. Please refer to question EW0496\_12.

On 15 February 2012, during the Additional Estimates hearing, Senator Abetz referred to the answer provided to that question by the Fair Work Ombudsman and asked some additional questions on this topic. Please refer to question EW1092\_12.

It has come to the attention of the Office of Fair Work Ombudsman that some of the information provided in the answers to the above questions is incorrect. This was brought about by an error in internal reporting. Please find below marked up versions of the answers with the necessary corrections.

I apologise for this error and any inconvenience caused.

If you would like to discuss this matter or require further information, please do not hesitate to contact Ms Sheridan White, Assistant Director – Government and Parliamentary Policy, on [REDACTED] or at [REDACTED]@fwo.gov.au. It would be appreciated if you could confirm with me when this correction is actioned.

Yours sincerely

Tom O'Shea  
Executive Director – Policy and Partnerships Branch  
Fair Work Ombudsman  
18 June 2012

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

**QUESTIONS ON NOTICE  
Supplementary Budget Estimates 2011-2012**

**Agency - Fair Work Ombudsman**

**DEEWR Question No. EW0496\_12**

**Senator Abetz provided in writing.**

**Question**

**Sham Contracting**

"Reference is made to the second Annual Report of the Fair Work Ombudsman. 1. What evidence is there of sham contracting being a 'growing issue' in the community? 2. Please identify the industries where sham contracting is a 'major issue'. a. For each industry, the number of complaints, contraventions, investigations and legal proceedings. 3. How many staff were involved in the National Sham Contracting Operational Intervention? a. What were the results of this project? 4. Please provide hard copies of all material that shows employers how to ensure that they are compliant with sham contracting provisions and also any materials that show employers how to correctly employ contractors should they wish to. "

**Answer**

*The Fair Work Ombudsman has provided the following response.*

**Question 1:** *What evidence is there of sham contracting being a 'growing issue' in the community?*

In the 2009-2010 financial year, the Fair Work Infoline received 320 enquiries regarding both independent contractors and/or sham contracting, compared with 379 in the 2010-2011 financial year.

The Fair Work Ombudsman completed 32 36 investigations into allegations of sham contracting in 2009-2010, this number increased to 400 104 in 2010-11.

In April and May 2011 the Fair Work Ombudsman commenced audits of trading enterprises to assess the extent to which workers engaged by independent contracts should more properly have been considered employees. In addition to enforcing compliance with the *Fair Work Act 2009*, one of the aims of the campaign was to evaluate the prevalence of the issue.

Prior to commencing the audit activity, stakeholders, including both employer and employee associations, were consulted and their views sought on the extent of sham or mistaken contracting in their respective industries. There was agreement that the practice was likely to exist to varying degrees in each of the industries nominated. The cleaning services, call centre and hair and beauty industries were selected for



audit, although our experience suggests that misclassified arrangements can exist in any industry and are not confined to these industries alone.

The audits found that of 102 enterprises audited, 21 had engaged independent contractors who the Fair Work Ombudsman assessed should more properly be considered as employees under the common law employment test.

It should be noted that the sample set was deliberately targeted towards businesses that did engage independent contractors, therefore, the data is not indicative of the prevalence of independent contracting more generally.

**Question 2:** *Please identify the industries where sham contracting is a 'major issue'. a. For each industry, the number of complaints, contraventions, investigations and legal proceedings.*

Sham contracting complaints received by the Fair Work Ombudsman have related to a variety of industries. No conclusions can be drawn from the complaints about which industries have experienced sham contracting as a 'major issue'.

Sham contracting proceedings initiated by the Fair Work Ombudsman and its predecessor, the Workplace Ombudsman, by industry, from 1 July 2008 to 30 June 2011 are as follows:

Retail	3
Hospitality	2
Call Centre	1
Financial Services	1
Telecommunications	1
Real Estate	1

**Question 3:** *How many staff were involved in the National Sham Contracting Operational Intervention? a. What were the results of this project?*

Thirty-four Fair Work Inspectors from the Fair Work Ombudsman participated in the National Sham Contracting Operational Intervention (SCOI). The involvement of these Fair Work Inspectors varied significantly, for example, some performed one audit, while others performed many.

The report on the preliminary outcomes of the National Sham Contracting Operational Intervention was released in 11 November 2011 and can be accessed on the Fair Work Ombudsman website.

**Question 4:** *Please provide hard copies of all material that shows employers how to ensure that they are compliant with sham contracting provisions and also any materials that show employers how to correctly employ contractors should they wish to.*

The Fair Work Ombudsman website has a dedicated page titled 'Independent Contractors' that provides information to employers on their obligations under the *Fair Work Act 2009* in relation to sham contracting. The page also directs visitors to [www.business.gov.au](http://www.business.gov.au) for additional tools and resources for employers and independent contractors.

The Fair Work Ombudsman has produced a number of brochures about sham contracting that can be used by employers including some specific to the call centre, hair and beauty and cleaning services industry.

The Fair Work Ombudsman is currently developing an interactive online assessment tool to assist workers and businesses in identifying whether someone is more likely to be an employee or independent contractor. The assessment tool is scheduled for release in February 2012.

The relationship between a principle and an independent contractor is governed by contracts law. Businesses looking for advice on engaging contractors should consult the relevant business chambers or employer association or seek legal advice.

Hard copies of the brochures mentioned above can be provided on request.



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

**QUESTIONS ON NOTICE  
Additional Estimates 2011-2012**

**Agency - Fair Work Ombudsman**

**DEEWR Question No. EW1092\_12**

**Senator Abetz asked on 15 February 2012 , Hansard page 52**

*Refers to previous DEEWR Question No EW0496\_12*

**Question**

**FWO - EW0496\_12 - Results from investigations into sham contracting allegations**

Senator ABETZ: If you could, it would save me a bit of homework if somebody who has that sort of information readily available could assist. I refer you to No. 496, which was a question about sham contracting. We were told in the second paragraph that the answer to question 1: The Fair Work Ombudsman completed 32 investigations into allegations 2009/10. That number increased to 100 in 2010/11. Are you in a position to tell us what happened with those investigations of the 32? Did any result in a prosecution or were you satisfied that none of them were sham contracting? Mr Wilson: I think we will have to take that on notice. Senator ABETZ: If you do not have it readily available, please take that on notice. That is for both 2009/10 and 2010/11. Mr Wilson: Right.

**Answer**

*The Fair Work Ombudsman has provided the following response*

In 2009/10, one investigation into sham contracting resulted in an enforceable undertaking being entered into with Signature Portrait Studios Pty Ltd.

The enforceable undertaking was entered into on 28 March 2011.

For the same period, one decision was handed down by the courts in relation to a litigation initiated by the Fair Work Ombudsman in respect of sham contracting.

*Fair Work Ombudsman v Land Choice Pty Ltd and Anor [2009] FMCA 1255*

In this matter, the Federal Magistrates Court found the respondent was reckless as to whether a contract was really a contract of employment rather than a contract for services. The company and its director were fined \$29,440 for contraventions of the sham arrangements provisions of the *Workplace Relations Act 1996*, as well as record keeping requirements and other associated contraventions of the applicable award provisions including pay rates and leave entitlements. The court also ordered \$15,119 in back payments to the affected employee.

In 2010/11, two decisions were handed down by the courts in relation to litigations initiated by the Fair Work Ombudsman in respect of sham contracting.

*Fair Work Ombudsman vs Contracting Plus Pty Ltd & Anor [2011] FMCA 191*  
The Federal Magistrates Court ordered penalties of \$178,750 against the company and \$35,750 against its director after the Fair Work Ombudsman filed proceedings where it alleged 116 call centre employees were underpaid almost \$46,000 and incorrectly treated as independent contractors. The court awarded penalties for contraventions of the sham arrangement provisions as well as the resulting underpayments.

*Fair Work Ombudsman v Centennial Financial Services & Ors [2011] FMCA 459 and [2010] FMCA 863*

The Federal Magistrates Court fined two company executives after a Fair Work Ombudsman investigation found they had dismissed nine sales employees and re-engaged them as independent contractors on commission-only payments. The cases saw the executives ordered to pay \$16,950 in fines to the workers after the company went into liquidation in 2009.

~~No other sham contracting investigations completed during this period sustained contraventions of the sham contracting provisions.~~

~~In 2010/2011, no investigations into sham contracting resulted in the commencement of legal action for contraventions of either the *Fair Work Act 2009* or *Workplace Relations Act 1996*.~~