



LIFE | WORK

Slide the bar to get the perfect balance.

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Free and Public Material
Members-only Material

2 million self-employed
Their interests are our interest

It's your contract: Take control of it!

We say you should control your contract. Here's how. Check for clauses that are:



Red for Stop

Amber for Caution

Green for Go

You can also make use of our Contract Template to design your contract.

Matrixes and template are available [here](#) (ICA members only). Not a member? Join [here](#) for as little as \$55.

You and Your Contract



Charter of Contractual Fairness.

Debate: Suck it up?

[Contract problems?](#)

Fixing business disputes

There's lots happening for new dispute resolution services for small business people.

Federal
The Federal government has initiated a review.
[ICA submission](#).
Dispute resolution [discussion paper](#).
Point-form [summary of discussion paper](#)

Small Business Commissioners
The Small Business Commissioner (SBC) model is being rolled out across Australia.
[Explanation of developments](#)
[Explanation of South Australia](#)
[Explanation of the politics](#)

Case Study: Guy's case
[Business Spectator article](#)
[Counterpoint interview](#)

Watching: Self-employed entrepreneurs

[Our discussion on enabling innovation](#)

Watching: The coordinated attack against self-employed in Australia

[Fiddling the tax system against self-employed people](#)

[Sham contracting campaign](#)

Watching: New Technology
[Opportunities and new threats for self-employed people](#)

Sham Contracts

Sham contracting: A small issue

19 November 2011

Background



Independent Contractors Australia has been a strong supporter of laws to stop sham contracting. The laws were introduced in 2006 in Australia as part of the legislative package associated with the *Independent Contractors Act*. ICA supported those laws then and [continues to do so now](#).

We have been [monitoring and publicising prosecutions](#) and we encourage people **NOT to engage in shams**. The Fair Work Ombudsman is the authority charged with investigating and prosecuting sham contracts. ICA was part of the FWO's 'stakeholder' consultation process.

During 2011 the FWO has conducted an intensive, targeted investigation into sham contracting in industry sectors it believes were most likely to contain sham arrangements. It released the report in November 2011.

Report Summary and ICA commentary

The report [Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries](#) is the most comprehensive report into sham contracting undertaken.

The investigation

- Audited 102 targeted enterprises with 450 working relationships in
- low paid, relatively low education required sectors of
- cleaning, hair and beauty and call centres

These were targeted because it was believed a high incidence of sham contracting was likely.

The reports says:

- 'Misclassification' of employees as contractors was found in all sectors but whether sham or not they were shams is another question.
- The FWO is interested in businesses taking greater care and being better educated on the issues.

The report makes a number of statements that set the parameters of the FWO's approach. ICA agrees with the following statements by the FWO:

- *When assessing whether a worker is a contractor or an employee, the reality is that work relationships sit on a continuum. At one end is the employee defined by notions of dependence and subordination, and at the other end is the truly entrepreneurial, autonomous independent contractor.*

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3 Govt Handbooks on Independent Contractors

ICA says "essential reading"

- [Govt guides on starting/running a business](#).
- [Contracts made simple](#).
- [The essential guide](#).



Virtual Business Providers
Click [here](#)

Contractor or Employee?

Access the ATO's new 'decision tool' (for tax/super only)



Compare with ICA's (for general law):
[Simple check list](#)
[Swinging pendulum test](#)

Got 'Grey Hair'?

Forget about trying to get a job. Learn to package your 'grey hair' skills as a SELF EMPLOYED consultant. Next 'High Income' Consulting Course STARTS SOON

Entity solutions

Save time. Save money.
Complete risk mitigation.
Your one stop engagement and management solution

Register Your Business Name

Charles Dickens on debt and misery



'Income 20 pounds; expenditure 21 pounds; result misery!'

Our Campaigning

- [We need unfair contract protections](#)
- [Stop sham contracts](#)
- [Stop phoenix companies](#)
- [Defend contractor tax laws](#)

Watching: Your Superannuation

- [Abbott says ATO to administer Super](#)
- [High Court challenge to super](#)
- [Super Review and Govt response.](#)

Watching: Work Safety Laws

[Harmonised laws have big problems.](#)



Watching Global Economies

- [Watching Global Economies](#)
- [Watching the USA](#)
- [Watching China](#)
- [Central Banks on Debt](#)
- [Watching Housing Bubbles](#)
- [Ken Phillips on the debt equation](#)

Watching: Government Contracts

- [Military Aircraft \(JSF\)](#)
- [National Broadband Network](#)

Watching: Fair Work Act

- [We're watching](#)
- [What the AIG wants](#)

Bureaucracy can be so confusing!



The perils of designing a traffic sign

Handy ATO Links

- [Filing your tax return: A member's problem](#)
- [ATO advice](#)

Handy ATO tax links:

- [ATO debt collection: overview](#)
- [ATO debt collection: 'Products'](#)
- [Guide to managing your debt](#)
- [Not-for-profit tax guide](#)
- [Lodge your BAS online](#)
- [PAYG withholding tax tables](#)
- [New tax form: Taxpayer Statement of Account](#)
- [New tax form: Notice of Assessment](#)
- [Mortgage scams](#)
- [Small business support](#)
- [Payment arrangement calculator](#)
- [Want an ATO visit?](#)
- [ATO Help for small business](#)
- [ABN eligibility rules](#)
- [Self managing your tax debt](#)

Handy Super links:

- [ATO SMSF compliance](#)
- [ATO free seminars.](#)
- [SMSF Admin advice](#)
- [New Super clearing house](#)
- [Tax on SMSF loans](#)

- *Contraventions of the 'sham arrangements' provisions of the Fair Work Act involve knowing or reckless behaviour designed to result in workers being denied employment benefits and protections.*
- *Genuine independent contracting relationships allow an enterprise to focus on its core competencies by outsourcing non-core tasks. Outsourcing can reduce the cost of performing those tasks when the contractor has developed the skills and expertise or has specialised equipment that results in efficiencies in the way those tasks are performed.*

However, the FWO has displayed an inappropriate, predetermined institutional bias when it says:

- *While caution needs to be exercised when making general statements about the application of the common law test of employment, it is difficult to see how a cleaner performing simple work for a single principle contractor, who wears their uniform, operates their equipment and accepts little or no commercial risk, can be defined as anything other than an employee.*

If the FWO is to undertake its investigations with balance it should come to the assessment of each situation with a 'blank mind', looking entirely at the facts of the engagement. Making a statement such as that above shows a bias and imbalance in its approach. There is nothing to say that a cleaner as described above is not self-employed. Such a statement displays a lack of understanding about self-employment, what the motivations are and the diversity of work engagement that occurs in society. It reflects an institution which has difficulty seeing or understanding anything beyond employment.

However, even with this display of bias, the FWO's conceptual approach to investigations is accurate:

- *Since there is no single indicator of an employment relationship over one of genuine independent contracting, the various indicia of the employment relationship must be considered in totality in order to determine whether the relationship appears overall to be one of employment or one of contracting. In any proceedings, the courts will look to the real substance of the relationship in question.*

But we disagree with the FWO including the 'integration' test in its assessment. This is a test sometimes used in European cases but has not been a feature of common-law cases in Australian jurisdictional decisions.

Prosecutions

The report provides the following statistics on successful prosecutions since 2007:

- Misclassification: 1 in the construction sector
- Shams: 1 in land development, 1 in a call centre, 2 in retail/sales
- Decisions pending: 1 in tourism, 1 in trucking, 1 in retail, 2 in call centres

Summary of findings from the report

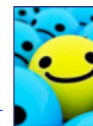
- *The audit activity found a range of outcomes across the spectrum of working relationship; from genuine independent contracting relationships to potential contraventions of the sham arrangement provisions of the Fair Work Act.*
- *In the majority of instances where enterprises engaged independent contractors they were assessed as being genuine contracting relationships. However, the misclassification of employees as independent contractors was found in some of the cases, and less commonly, in circumstances where contraventions of the sham arrangements provisions of the Fair Work Act may have occurred.*

Audit outcomes

No evidence of misclassification or sham arrangements	62	60.8%
Misclassification (according to FWO)	21	20.6%
(Being possible shams)	(7)	(6.9%)
No contractors engaged	11	10.8%
Ongoing investigations	8	7.8%

Here's how to [register your business name nationally](#).

Business getting you down? There's help! [Beyond Blue](#) for you.



Handy Business Links:

[Melbourne Hotels](#)



Govt Contracting Tips

Managing liability clauses.

[Contracting guidelines](#)
[Model clause](#)
[ICA summary](#)

Scam Alert!

A list of [scam companies](#) from the Australian business regulator.

Big Links List to Government and Other Organizations

Looking for a government or organization? Check [this link](#).

Small Business Commissioners

In place: [Victoria](#)

Plans to introduce:
[WA](#)
[SA](#)
[NSW](#)

UK National Freelancers Day

[Great small business videos](#)

Modern Awards

Here's a [list](#) of most of them. ICA Members only.



Publications

People who are Self-Employed Profile



© Roy Morgan Research



ICA comment: Low incidence of shams

The audit specifically targeted low skills, low-paid sectors on the grounds that this is where sham contracting would most likely occur. This, however, is a [low proportion of the self-employed sector](#) (see pages 3 and 4 of this research document) Most self-employed, by a wide margin, are in the high skilled and higher paid categories of work. What's interesting to observe is that, on the FWO's assessment, the incidence of possible shams is low, probably lower than expected.

On education

The FWO makes the following highly relevant observations on the need for education.

On the cleaning sector. This was

- *Mostly small businesses who were doing what others do without any proper assessment of their practices.*

Be careful over time

- *The 'morphing' of a relationship from being one of genuine independent contracting to an employment relationship can occur when a contractor becomes more integrated into an enterprise and ceases working for others. Although it can be difficult to determine at precisely what point in time a contractor becomes more like an employee, the audit activity highlighted the need for businesses to exercise diligence over the management of contracting relationships, particularly when those relationships continue for a period of time. Allowing a contracting relationship to develop into one of employment adds significant elements of risk to a business and denies the worker the entitlements and protections they ought to enjoy.*
- *Businesses that engage contractors, particular for lengthy periods of time, should periodically review the nature of the relationship to assess whether the arrangements have become more like employment. Apart from denying the worker the benefits attached to employment, the business is potentially exposed to risk arising from workplace law, taxation law, superannuation law and worker's compensation law if the worker should be considered an employee.*

ICA encourages the FWO's commitment to educating people about the correct way to engage independent contractors.



The Workforce Superhighway
[PDF]

Bob Day

ICA Small Business Videos



'Business in Crisis'
[Click here](#)



'The Early Years'
[Click here](#)



'Research & Marketing'
[Click here](#)



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