

## **What is "sham contracting" and can it affect your business?**

"Sham contracting" has been in the headlines recently. Crackdowns in the building and construction industry have resulted in additional payments, penalties and (bad) publicity. The first prosecution under the Fair Work Act's "sham contracting" provisions has recently been launched against an ACT company.

### *What is sham contracting?*

Many businesses need to engage people to provide services on a "contract" basis, such as cleaning, security and bookkeeping. It's important to determine whether they are genuine "independent contractors" (running their own business) or should be treated as employees

Employees are entitled to the protections of the Fair Work Act (paid leave or casual loadings, unfair dismissal and any applicable award conditions (e.g. in the Hospitality Industry (General) Award 2010). An employer is also obliged to pay PAYG to the ATO and the superannuation guarantee levy.

A contractor runs their own separate business and is paid a fee for their services.

Unfortunately, the distinction between 'employee' and 'contractor' is not always clear and because of the significant financial consequences of getting it wrong, there have been numerous cases, including several which have gone to the High Court.

"Sham contracting" involves pretending someone is a contractor when they really are an employee.

### *Why is it relevant to THA members?*

*The Fair Work Act 2009* contains specific prohibitions (with penalties of up to \$6,600 for an individual and \$33,000 for a body corporate for each offence). These are:

- an employer must not misrepresent employment as an independent contracting arrangement;
- an employer must not dismiss (or threaten to dismiss) an employee and engage them as a contractor to perform the same or substantially similar work; and
- an employer must not make false statements to persuade an employee to become an independent contractor.

From a practical point of view however, the more significant risk of getting it wrong is claims for paid leave entitlements, back pay for award entitlements and liability for unpaid PAYG and superannuation contributions.

So far, government and union interest in sham contracting has been focused squarely on the building and construction industry.

However, there have been increasing calls to extend this focus to other industries. Concerns have been raised by the LHMU about sham contracting in the cleaning industry. Similar issues have been raised in relation to the security industry.

For the hospitality industry, the experience of the building and construction industry should serve as a cautionary tale. For the most part, cleaning and security businesses engaged to perform services will be genuine contractors. However, it is important to remain alert to circumstances where people you regard as 'contractors' may actually be employees. The risk that a 'contractor' is actually an employee is increased where services are provided by ABN sole traders.

For example, if sole ABN trader provides cleaning services to one organisation, they may be an employee rather a contractor.

To minimise the risk, it's important to undertake a "due diligence" process when engaging the contractor in order to make a decision as to whether they can legitimately be engaged as a contractor. If you do engage a contractor, it is important that you sign a written contract with them. Many of the problems arise when there is nothing in writing to clarify the relationship. These processes are now being more thoroughly implemented in the building and construction industry, but it is prudent for any business engaging service providers such as cleaners and security personnel to implement the same process to minimise the significant financial and publicity risks.

If yo have any queries about contracting please feel free to ring the THA's Industrial Officer ben on 03 6224 7033 or email him at [ben@australianhotels.asn.au](mailto:ben@australianhotels.asn.au)

***Article courtesy of theAHA ACT Branch, written by Hugh Chalmers, Partner, Meyer Vandenberg Lawyers***