

Sham Contracting

Understanding your rights and entitlements
as an employee or contractor



Am I an employee or contractor?

Employees

Work for their boss' company.

Have legal minimum wages and other rights (**entitlements**).

Have many legal protections against unfair treatment.



Contractors

Run their own business.

Do not have minimum wages or other rights (**entitlements**).

Have limited legal protections against unfair treatment.



What is sham contracting?

If your boss tells you that you are a contractor to avoid paying you proper wages or giving you other employee rights, this is **sham contracting**.

Sham contracting is against the law.

Sometimes this can be difficult to work out. You have to look at certain factors:

Am I more likely to be an employee?

- I do not run my own business
- I wear a uniform
- My boss chooses my work days and time
- I follow my boss' rules
- My boss gives me the tools to use
- My boss chooses my pay rate
- I get paid per hour



The law says that even if you are called a contractor/ have an Australian Business Number (ABN), you may still be an employee (with extra rights).

Am I more likely to be a contractor?

- I run my own business
- I have an ABN
- I use my own tools
- I decide when and how I work
- I can pay others to do my work for me (**subcontracting**)
- I get paid per job

How much should I be paid?

All employees in Australia must be paid money (**wages**) set by law and have some other rights (**entitlements**).

The amount you should be paid (your **wages** and **entitlements**) depends on:

What type of worker you are (casual, full time, part time).

When you work.

What type of work you do.



All employees have an **employment contract**. This can be written down, or agreed in a conversation (verbal), or both.

Your boss must pay you what they promise in the contract, but it can't be less than the relevant minimum wage.



What is the minimum wage?

There are different legal documents and rules (e.g. Awards, Enterprise Agreements) that set the minimum wages for different employees.

Anything less than minimum wage is against the law (even if you agree).

All employees get at least **minimum wage** and minimum working conditions set by law (the National Employment Standards).

Most employees (who work in particular jobs or industries) have a set of rules called an **Award**. This gives them higher minimum wages and some extra entitlements.

Some employees have an **Enterprise Agreement**. This gives them higher minimum wages and some extra entitlements.



Find your pay rate here

<https://calculate.fairwork.gov.au/findyouraward>

Or call the Fair Work Ombudsman
13 13 94



How much have I been underpaid?

You need to work out:

- A** How much you were actually paid.
- B** What days/hours you worked.
- C** What you should have been paid (your **legal pay rate**).
- D** The difference between what you were paid and what you should have been paid.

What if I'm not paid correctly?



You choose what happens

It is up to you whether you want to make a claim or a complaint. There are many options to resolve the issue without having to go to court.

If you think you are a contractor

You can bring a claim in VCAT or Court for any amounts promised but not paid (for example unpaid invoices).

If you think you are an employee

There are a number of different things you can do.

You are legally protected if you complain.

Your employer is not allowed to treat you badly because you have made a complaint or inquiry about wages or entitlements.

If you are fired or some other negative action is taken against you, this is against the law. This is called **adverse action** or may be discrimination.

Unfortunately this does happen sometimes. If so, please **get legal help quickly** (ask us for another appointment).



1



Talk to your employer.

Be polite and try to speak calmly.

Explain why you are an employee and not a contractor, your legal pay rate and how much you should be paid.



Tips for talking to your employer

You can bring a support person (such as a friend, family member or union representative).

Take written notes about what was said during the conversation and send them to your employer after the meeting (by text or email).

If you reach an agreement, write down what you each agreed to.

2



Write a letter of demand to your employer.

This is a formal letter to explain:

- A** Why you are an employee and not a contractor;
- B** How much your employer owes you (including your calculations); and
- C** What the consequences will be if your employer doesn't pay you.

You can request your employment records.

An employer must keep records and give you a copy if you ask for them.

An employer must also give you **pay slips** — records to show when you worked and what you were paid.



3

Make a complaint to the Fair Work Ombudsman (FWO).

The FWO investigates complaints and sometimes will help employees who are not getting paid the right amount.

The FWO will decide whether they can help you.

The FWO may decide to:

3a



Organise a mediation.

A FWO mediator will help you and your employer to talk to try and agree to a solution. This is voluntary.

The FWO mediator does not decide your case — it is up to you and your employer to work it out.

3b



Issue a compliance notice or take action.

The FWO may give your employer a warning or tell them to pay you.



You can make an anonymous report.

You can also tell FWO about what happened without using your name, but you will not be told about what happens.

To make a report, you can complete this form: <https://tinyurl.com/isktzomp>

4

Go to Court.

It may cost you money if you go to court.

If you go to court you will need to fill out forms and prepare evidence. You will also need to follow the court rules (for example, giving a copy of the forms to the employer — this is called ‘service’).

4a



There may be a mediation first.

The mediator will help you and your employer to talk to try and agree to a solution.

The mediator does not decide your case — it is up to you and your employer to work it out.

4b



If you and your employer can't agree, the case will go to trial.

A judge will listen to you and your employer and look at the evidence (for example, bank statements, pay slips, diary records).

They will decide if you are a contractor or an employee. If you are an employee, they will decide if your employer has to pay you, and how much.

Your employer may have to pay back all or some of your wages. Your employer may also have to pay a fine (**penalty**).



Are there any time limits?

If you don't start your legal claim within the relevant time limit, you might lose your right to bring that claim.

Underpayment and sham contracting claims

You have 6 years from the date of an underpayment to bring a claim in Court.

If you are fired

You have 21 days from the date your job ended to bring a claim at the Fair Work Commission.

Discrimination claims

You have 6 months (Federal law) or 12 months (State law) from the date of the discrimination to bring a claim in the Tribunal or Court.

Adverse action claims

(If you are not fired)

You have 6 years from the date of the adverse action to bring a claim.

Questions?

WEstjustice

(Interpreters available)

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Disclaimer

This document contains general information only and is NOT legal advice. If you require advice about your specific circumstances please consult a lawyer or your union. This information is current at 16 February 2021.

