

ALERT

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Cracking down on sham contracting

A director and HR manager are facing penalties for their role in sham contracting arrangements between six employees and Centennial Financial Services Pty Ltd (**Company**), now in liquidation. Sham contracting involves an attempt to disguise an employment relationship as an independent contracting relationship.

Having struck financial difficulties, the Company sought to re-engage the employees as independent contractors and avoid the need to pay employment entitlements such as annual leave and superannuation.

Federal Magistrate Robert Cameron found the director (and sole shareholder) of the Company was the driving force behind the imposition of the sham contracting arrangements, and therefore an accessory to the Company's unlawful conduct. Pursuant to s728 of the Workplace Relations Act 1996 (Cth) (**WR Act**), now s550 the Fair Work Act 2009 (Cth) (**FW Act**), the director was held personally liable.

FM Cameron acknowledged that the HR manager was in a different category because he had simply followed the instructions given to him by the director without any reason to question them. However, his Honour held it was irrelevant whether the manager 'subjectively appreciated' that the events in which he participated contravened the law; it was sufficient that he knew the essential facts making up the Company's contravention.

Thus, the HR manager was also found to be an accessory to and personally liable for each of the breaches.

His Honour also found that the Company, the director and the HR manager had breached s902 of the WR Act, now s358 of the FW Act, in having dismissed the employees for the purpose of engaging them as independent contractors.

The matter was stood down for a further hearing on penalties. The Company, because it is in liquidation, cannot be penalised.

For employers:

The Bill removes:

- Sham contracting occurs when an employer tries to disguise an employment relationship as an independent contracting relationship and is **ILLEGAL**.
- Employers involved in sham contracting arrangements are liable for penalties of up to \$33,000 per contravention for a body corporate and \$6,600 for an individual. If the employer is involved in more than one sham contracting arrangement they may have to pay a penalty for **EACH** arrangement.



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- Where an individual is involved in the contravention, he or she can be liable as accessories and personally exposed to penalties.
- It can be difficult to clearly identify whether a worker is properly classified as an employee or an independent contractor. However it is important to make this distinction and ensure your contracts reflect the true relationship between the parties to avoid contraventions of the FW Act.
- In addition to breaches of the employment legislation, sham contracting arrangements can expose an employer to penalties and damages under superannuation, taxation and workers' compensation legislation where the employer treats a worker as a contractor, when she or he is in fact an employee.

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