



## Compliance and enforcement: Civil penalties and sham contracting

The Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023 (the Bill) amends the civil penalties regime in the *Fair Work Act 2009* (the Act) to provide for a graduated scale of penalties and enforcement tools and reform the defence to sham contracting.

### What is proposed?

#### Increasing civil penalties

The proposed amendments will increase the maximum civil penalties for standard civil breaches and serious contraventions of civil remedy provisions, in line with the Australian Government's election commitment to implement the recommendations of the Migrant Workers' Taskforce Report (2019).

The proposed amendments also change the threshold for what will constitute a serious contravention, from one that is done knowingly and systematically, to one that is done either *knowingly* or *recklessly*. This ensures serious civil contraventions apply to mid-tier contraventions and will also operate sensibly alongside the wage theft criminal offence introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

For civil contraventions related to underpayment (including sham contracting, unlawful job advertisements and employee records misconduct), maximum penalties will increase fivefold. Maximum penalties for these provisions will be the greater of:

- 300 penalty units (\$93,900) for individuals (currently 60 penalty units or \$18,780), or 1,500 penalty units (\$469,500) for bodies corporate (currently 300 penalty units or \$93,900)
- three times the amount of any associated underpayment, if the applicant seeks this kind of penalty.

For serious contraventions, maximum penalties will increase to the greater of:

- 3,000 penalty units (\$939,000) for individuals (currently 600 penalty units or \$187,800), or 15,000 penalty units (\$4,695,000) for bodies corporate (currently 3,000 penalty units or \$939,000)
- three times the amount of any associated underpayment, if the applicant seeks this kind of penalty.

## Sham contracting

The proposed amendment will change the defence to misrepresenting employment as an independent contractor arrangement, known as ‘sham contracting’, in subsection 357(2) of the Act.

Employers will only be able to successfully establish the defence if they can show that they *reasonably believed* the contract was a contract for services. This is a more objective test than the current defence, which is that the employer *did not know* and *was not reckless* as to whether the contract was for employment rather than services.

This change implements the recommendations of the Post Implementation Review of the *Fair Work Act 2009*, the Productivity Commission’s Report on the Workplace Relations Framework, and the Black Economy Taskforce Final Report. These reports identified that the sham contracting provision is not an effective deterrent because the current defence of ‘recklessness’ is too easy for an employer to meet.

## What will it mean?

Reckless civil breaches of prescribed provisions may be treated as serious contraventions, with increased maximum penalties. There will no longer be a legislative requirement for the breach to be systematic in nature.

Employers who have allegedly misrepresented employment as an independent contractor arrangement will now need to show that they reasonably believed they were correct in classifying a worker as an independent contractor. An employer’s ignorance or unreasonable mistake will no longer allow them to make out the defence and avoid liability for sham contracting.

## When will it come into effect?

The proposal is subject to the passage of legislation.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>