

# Horticulture No Place For Shams

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In 2013 the Fair Work Ombudsman commenced its three (3) year Harvest Trail campaign to help employers and employees working in the horticultural industry to understand their rights and obligations.

An aspect of the Harvest Trail campaign was educating growers about the risks of labour hire through a third party, including the risk of engaging in sham contracting arrangements.

The Fair Work Ombudsman describes a sham contracting arrangement as where an employer attempts to disguise an employment relationship as an independent contracting arrangement. Under the *Fair Work Act 2009* (Cth), an employer must not:

- misrepresent an employment relationship as an independent contracting arrangement;
- dismiss an employee for the purpose of engaging the person as an independent contractor; or
- make a knowingly false statement to persuade or influence an employee to become an independent contractor.

The High Court of Australia has recently considered sham contracting arrangements in the case of *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* [2015] HCA 45. The situation before the High Court involved a “triangular contracting” arrangement between the employer, two (2) employees and a labour hire company.

It was held by the High Court that the employer had breached the *Fair Work Act 2009* (Cth) by misrepresenting to the employees that they were independent contractors, notwithstanding the fact that the employees were contracted by a third party labour hire company. The decision makes it clear that the use of third party labour hire contracts will not absolve employers of liability under the sham contracting provisions of the *Fair Work Act 2009* (Cth).

As the Justices of the High Court reiterated, parties “cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck”.

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