

Record \$294,000 penalty for 'shameful exploitation' at Tasmanian resort

31 May 2012

Note: This case has been the subject of an appeal. Details of the appeal decision are available [here \(www.fair-work.gov.au/about-us/news-and-media-releases/archived-media-releases/2013-media-releases/june-2013/20130607-wells-appeal\)](http://www.fair-work.gov.au/about-us/news-and-media-releases/archived-media-releases/2013-media-releases/june-2013/20130607-wells-appeal) .

The Federal Court in Melbourne today imposed a record \$294,360 penalty against the former operators of a Tasmanian resort for deliberately exploiting employees by engaging in sham contracting.

Justice Shane Marshall imposed the penalty following an investigation and prosecution by the Fair Work Ombudsman.

A fine of \$280,500 has been imposed against Maclean Bay Pty Ltd - which formerly operated the Diamond Island resort at Bicheno on Tasmania's east coast.

And Brisbane woman Wendy Ann Wells - who owned the resort with her husband - has been penalised an additional \$13,860.

The previous highest penalty achieved by the Fair Work Ombudsman was in 2009 when Adelaide-based Saya Cleaning Pty Ltd and its sole director Yousef Jelil were fined a total of \$288,000 for underpaying two staff about \$4000.

The previous highest penalty in Tasmania was \$241,000, also imposed in 2009, against TKM Investments Pty Ltd, which operated a petrol station on Tasmania's north-west coast and underpaid six employees.

Justice Marshall imposed the fines after finding that Maclean Bay had embarked on an unlawful sham contracting campaign aimed at 'converting' Diamond Island resort employees into contractors to cut costs.

Justice Marshall variously described the conduct as "a cost-cutting exercise", "exploitation", "blatant", "abhorrent", "shameful", "victimisation", "breathtaking arrogance by an uncaring employer", "an appalling abuse of power" and "conduct of a rogue employer which deserves to be met with the full force of the law".

"Maclean Bay needs to have it driven home that its conduct was unacceptable by community norms of decency and respect for fellow human beings, as well as being a breach of this country's labour laws," Justice Marshall said.

Maclean Bay's unlawful conduct - which occurred between December, 2008 and April, 2009 - affected nine employees:

- Four housekeepers were dismissed because of the entitlements they enjoyed as employees under Australia's workplace laws. One of the housekeepers subsequently struggled to find work for almost a year and Maclean Bay has failed to pay her \$22,053 in Court-ordered compensation.
- Maclean Bay breached the sham contracting provisions of workplace laws when it entered into sham contracts with a receptionist/restaurant worker and two laundry staff - including an intellectually disabled worker - who were really performing the duties of employees.
- Sham contracting laws were also breached when a gardener and a receptionist were dismissed for refusing to become purported contractors under sham arrangements. Wells was involved in the breaches relating to these two employees.
- Maclean Bay was also found to have breached workplace laws for failing to pay thousands of dollars in superannuation and annual leave entitlements to a number of employees.

Justice Marshall was particularly critical of Maclean Bay and Wells over their treatment of the receptionist, who he said was left distressed.

"Rights are a mere shell unless they are respected. Employers need to understand that they cannot, with impunity, treat their employees the way Maclean Bay treated (the receptionist)," he said.

"Her treatment by Maclean Bay was disgraceful and showed a complete lack of care for the dignity of a hard-working, loyal employee."

Justice Marshall said Wells was the "driving force and guiding hand" behind the conduct and found she had lied to workplace

inspectors investigating thematter.

"Wells' conduct was nothing short of disgraceful," Justice Marshall said.

Justice Marshall said it was a matter of great concern that the employeesaffected by Maclean Bay's conduct remain uncompensated and that the situationshould be rectified as soon as possible.

"If that is not immediately possible from the resources of Maclean Bay, thosewho stand behind it should have the decency to attempt to remedy their corporatentity's failure to comply with the law rather than cowering behind thecorporate veil," Justice Marshall said.

Fair Work Ombudsman Nicholas Wilson says the Court's decision sends apowerful message that sham contracting will not be tolerated.

Sham contracting occurs when an employer attempts to disguise an employmentrelationship as an independent contracting relationship, thereby avoidingobligatory rates of pay and other entitlements, giving it an unfair competitiveadvantage.

Under the sham contracting provisions of workplace laws, it is unlawful todismis an employee in order to engage them as an independent contractor toperform the same duties.

"Sham contracting and the misclassification of employees is a serious issuebecause it can lead to employees being denied their lawful workplace rights andentitlements," Mr Wilson said.

"Inadvertent misclassification of employees as contractors does occur - butwhen that misclassification is done deliberately or recklessly by an employer toavoid providing employees their lawful entitlements and workplace rights, thatamounts to sham contracting."

Employers and workers can obtain information abouttelling the difference between a contractor and an employee at www.fairwork.gov.au/contractors (www.fairwork.gov.au/find-help-for/independent-contractors)

Employers or workers seeking advice or assistance can also contact the FairWork Infoline on 13 13 94. A free interpreter service isavailable on 13 14 50.

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