



**Australian Government**

**Australian Building and  
Construction Commissioner**

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25 February 2011

Ken Phillips  
Executive Director  
Independent Contractors Australia  
PO Box 143  
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Dear Mr Phillips,

**Re: "Warning: ABCC and shams"**

I refer to the article of 16 February 2011, *Warning: ABCC inquiry and shams*, and the modified version of the article that appeared on the *Business Spectator* website on 22 February 2011.

The premise of the articles is false, and does not provide a fair account of the Terms of Use for the Sham Contracting Website. I would like to address the following key concerns you have raised.

**Claim one: No protection from litigation of participants**

I do not accept the premise that Sham Contracting Inquiry & Roundtable has lesser legal protection than other government inquiries. However, I have been very open about the fact that,

*"should any material come to light during the Round-table conference or in responses received to a Discussion Paper then an investigation into possible contraventions of Division 6 of Part 3-1 of the FW Act might occur."* (see speech to ALLA conference on 19 November 2010).

Notwithstanding, I then went on to say "[h]owever, participants should not expect that the ABCC will investigate every allegation of contravention that comes before it."

The ABCC has an existing policy which addresses your claim.

People who are concerned that they may have committed a breach could request a type of immunity from suit in exchange for providing that information. They could approach my office directly or do so through their solicitor to make a request in relation to the same.

The ABCC's Litigation Policy — which I released on 3 November 2010 — makes clear that one of the relevant considerations in deciding whether to commence litigation is the extent to which the wrong-doer has been prepared to assist the ABCC in its investigations and other mitigating factors.

One mitigating factor would be where the wrong-doer has approached the ABCC to make admissions of a contravention and worked with the ABCC to readily rectify the contravention, made good the wrong doing and put in place systems to ensure that no contraventions will occur in the future.

Further, the Litigation Policy contemplates alternatives to litigation like letters of caution or undertakings.

Where building participants have inadvertently been engaged in sham contracting arrangements and are willing to regularise employment arrangements, then these less punitive compliance options would be considered as alternatives to litigation.

**Claim Two: Open-ended and unclear inquiry rules leading to potential risk exposure**

You claim that,

*"When making a submission, participants are required to enter into an agreement with the ABCC concerning the inquiry."*

This claim is wrong.

The opening paragraph of the Terms of Use (“Terms”), as well as clause three state that the Terms provide the standard legal conditions for the use of the website.

They are not terms about participation in the Inquiry.

If this was not apparent to you then you could have availed yourself of the invitation, made in the opening paragraph of the Terms, to contact the ABCC to discuss “any questions about the Terms.”

It would have been more prudent for you to do so before publishing the articles.

### **Claim Three: Silencing online debate of participants**

The articles claim that the Terms contain clauses that make it a breach of ABCC copyright to reproduce online anything that appears on the inquiry’s website. This is false.

Clause seven of the Terms states:

*7. Subject to these Terms, you are permitted to download, display, print and reproduce content on this Website in unaltered form only for your personal, non-commercial use, or for your non-commercial use within your organisation, provided that you keep intact all copyright, trade mark and other proprietary notices and acknowledge that the content is provided by us.*

Rather than fairly report upon the Terms the articles sequentially quoted clauses six, eight and nine and deliberately omitting the clause that nullified the concern.

Furthermore, you failed to fairly report that clause eleven states that permission may be given for use outside of the Terms. Application need only made to the ABCC.

### **Additional Concerns**

Further into the article you write “The inquiry lacks a clear focus”. You then go on to legality of labour hire. What is apparent from your criticism is that you have not fully read the Discussion Paper.

The very point that you make about “Labour hire serves important economic and social purposes”, is dealt with in paragraph 6.2 of the Discussion Paper under the heading “benefits of labour hire arrangements”.

I have noted your additional concerns, and I reject any claims that I have pre-judged the outcome of this Inquiry or that it is beyond my legislative jurisdiction.

Notwithstanding my rejection of your concerns, if they persist for you, I encourage you to make a submission to the Inquiry. In particular I would welcome receiving a submission which supports your assertion that it is,

*common and normal for 'labour-only plasters' to be self-employed. It is common and normal for hundreds of thousands of other people in the community to also work as 'labour-only' in thousands of different occupations and be self-employed. This is what the changing world of work is all about.*

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In the spirit of online debate, I have submitted a modified version of this letter in the comments section of *Business Spectator*.

Given the potential harm your claims may cause this important Inquiry I urge you to correct the record on your website. If you are not prepared to do so, then, at the very least, I invite you to upload this correspondence to the relevant webpage carrying the article.

Yours sincerely



**Leigh Johns**  
**Australian Building and Construction Commissioner**

cc. Business Spectator