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**Australian Building and
Construction Commissioner**

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ABCC Litigation Policy

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1. The purpose of ABCC Guidance Notes

- 1.1. Guidance Notes are a means by which the Office of the Australian Building and Construction Commissioner (**ABCC**) publishes information on the interpretation of the laws it enforces or about its internal policies and procedures.
- 1.2. The ABCC will publish Guidance Notes from time to time on a range of subjects concerning the *Building and Construction Industry Improvement Act 2005 (BCII Act)*, the *Independent Contractors Act 2006 (IC Act)*, the *Fair Work Act 2009 (FW Act)*, a Commonwealth industrial instrument and any building code issued under section 27 of the BCII Act (**Building Code**)² or other matters over which it has jurisdiction (collectively referred to as **Building Industry Laws**). The general public are welcome to suggest subjects for future Guidance Notes.

2. This Guidance Note

- 2.1. This Guidance Note sets out guidelines to be followed by the ABCC in deciding whether to commence proceedings in relation to a contravention or threatened

¹ This Guidance Note 1 ("ABCC Litigation Policy") is substantially based upon the *Prosecution Policy of the Commonwealth 2nd Edition (1990)* ("Commonwealth Prosecution Policy") and, to the extent relevant, having regard to the different objects of the ABC Commissioner, seeks to be consistent with the Litigation Policy of the Fair Work Ombudsman. In many parts it draws upon the policies of those agencies. However, the ABCC does not prosecute under the criminal law and is not bound by the policies of those other agencies.

² To date, no Building Code has been made under section 27 of the BCII Act. The National Code of Practice for the Construction Industry (National Code) and the Implementation Guidelines for the National Code (Guidelines) operate by virtue of contractual agreements and not under the BCII Act.



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contravention of Building Industry Laws. It is to be referred to as:

- (a) Guidance Note 1; or
- (b) The ABCC Litigation Policy.

2.2. This Guidance Note addresses the following topics:

- (a) The purpose of ABCC Guidance Notes (paragraph 1);
- (b) This Guidance Note (paragraph 2);
- (c) About the ABC Commissioner (paragraph 3);
- (d) Litigation as a compliance tool (paragraph 4);
- (e) Nature of contraventions (paragraph 5);
- (f) Persons involved in contraventions (paragraph 6);
- (g) Direction to Inspectors and Consent to Litigation (paragraph 7);
- (h) Australian Building and Construction Commissioner's independence and discretion unfettered (paragraph 8);
- (i) Consideration of provisions of the *Civil Dispute Resolution Act 2011* (paragraph 9);
- (j) The decision to commence proceedings – the two step process (paragraph 10);
- (k) Sufficient evidence (paragraph 11);
- (l) Public interest (paragraph 12);
- (m) Relevant public interest factors (paragraph 13);
- (n) Determination of appropriate enforcement related option (paragraph 14);
- (o) The commencement and conduct of ABCC proceedings (paragraph 15);
- (p) Breach bargaining (paragraph 16);
- (q) Discontinuance of proceedings (paragraph 17);
- (r) Submissions on penalty (paragraph 18);



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- (s) Notification of decision in relation to enforcement activity (paragraph 19);
 - (t) Publishing and utilising enforcement activity (paragraph 20); and
 - (u) Intervention in Court and Fair Work Australia proceedings (paragraph 21).
- 2.3. The purpose of this Guidance Note is two-fold. First, it operates as a guide for Australian Building and Construction Inspectors (**ABC Inspectors**) and staff of the ABCC in the performance of their duties and, in particular, in assisting the Australian Building and Construction Commissioner (**ABC Commissioner**) exercise his function to commence, or intervene in, proceedings in accordance with the Building Industry Laws.
- 2.4. Secondly, it aims to provide the community, and building industry participants in particular, with a better understanding of the manner in which the ABC Commissioner exercises that function.
- 2.5. This Guidance Note sets out the general guidelines under which decisions about the commencement of litigation by the ABCC will be made. It does not prescribe mandatory requirements to be followed in every case. In particular, the contents of this Guidance Note are not directions for the purposes of subsection 57(4) of the BCII Act. The contents of this Guidance Note are necessarily subject to various legal obligations or requirements that apply to the ABCC, including:
- (a) the BCII Act and other Building Industry Laws;
 - (b) the Legal Services Directions 2005 (including Appendix B: obligation to act as a model litigant); and
 - (c) any directions made under subsection 57(4).
- 3. About the ABC Commissioner**
- 3.1. The ABC Commissioner is a statutory office holder pursuant to section 9 of the BCII Act.
- 3.2. The ABCC is a statutory agency pursuant to section 26 of the BCII Act. It is not a separate legal entity.
- 3.3. The ABCC commenced on 1 October 2005.



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- 3.4. In broad terms, the ABC Commissioner and his office:
- (a) monitor and promote compliance with Building Industry Laws;
 - (b) investigate suspected contraventions by building industry participants of Building Industry Laws;
 - (c) institute, or intervenes in, legal proceedings; and
 - (d) provide assistance, advice, information and representation to building industry participants.
- 3.5. The ABC Commissioner appoints ABC Inspectors who are empowered to investigate compliance by building industry participants with Building Industry Laws, including:
- (a) provisions of the BCII Act, including:
 - (i) unlawful industrial action, being building industrial action that is industrially-motivated, constitutionally-connected, and not protected;
 - (ii) coercion to employ or not employ particular workers or to engage or not engage particular contractors;
 - (iii) coercion in relation to agreement making;
 - (iv) discrimination against an employer in relation to industrial instruments;
 - (b) provisions of the FW Act, including:
 - (i) general protections, including workplace rights, freedom of association and discrimination;
 - (ii) right of entry by permit holders;
 - (iii) underpayment of wages and entitlements;
 - (iv) coercion in relation to a workplace right;
 - (v) sham contracting arrangements (misrepresentations that an employee is an independent contractor);



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- (vi) unprotected industrial action during the currency of an agreement;
 - (vii) payments in relation to periods of unlawful industrial action; and
 - (viii) employee records and pay slip requirements.
- (c) enterprise agreements (including agreement-based transitional instruments such as pre-reform certified agreements, pre-reform Australian Workplace Agreements and workplace agreements made prior to 1 July 2009);
- (d) federal awards (including modern awards, division 2B state awards and award-based transitional instruments); and
- (e) minimum pay and conditions standards, such as the National Employment Standards.

4. Litigation as a compliance tool

- 4.1. The enforcement of Building Industry Laws is a means by which the BCII Act aims to achieve its main object, namely to provide an improved workplace relations framework for building work to ensure that work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
- 4.2. The functions of the ABC Commissioner are specified in section 10 of the BCII Act and include:
- (a) monitoring and promoting appropriate standards of conduct by building industry participants;
 - (b) investigating suspected contraventions by building industry participants ;
 - (c) instituting, or intervening in, proceedings or making submissions in accordance with the BCII Act;
 - (d) providing assistance and advice to building industry participants regarding their rights and obligations;
 - (e) providing representation to a building industry participant who is, or might become, a party to a proceeding under the BCII Act or the FW Act, if the ABC Commissioner considers that providing the representation would



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promote the enforcement of that legislation³; and

(f) disseminating information.

4.3. Litigation by the ABC Commissioner is part of a regulatory system to bring about compliance with Building Industry Laws. Litigation may also be appropriate when there is a need for judicial clarification of a Building Industry Law.

4.4. As a part of the ABCC's regulatory system the ABCC offers advice, information and education to encourage voluntary compliance with Building Industry Laws. If compliance is not obtained through such means (or voluntary compliance is not possible having regard to the nature of the suspected contraventions), the ABCC may commence a formal investigation of suspected contraventions and will consider commencing proceedings to enforce the law where the investigation provides sufficient evidence.

4.5. Proceedings might be commenced if the ABC Commissioner considers such proceedings to be the appropriate means of dealing with the alleged contravention or deterring others from contravening Building Industry Laws. This may occur even if there has been subsequent voluntary compliance.

5. Criminal Offences and Civil Liability

5.1. The BCII Act includes both civil penalty provisions and criminal offences. The BCII Act identifies whether a contravention gives rise to civil penalty or is a criminal offence. Civil penalty provisions are identified by legislative note at the foot of the section as either Grade A civil penalties or Grade B civil penalties (see, for example, section 38, which prescribes a Grade A civil penalty).

5.2. In this context "offence" means criminal offence and is to be distinguished from civil penalty liability⁴. Criminal prosecutions are generally initiated by the Commonwealth Director of Public Prosecutions (CDPP). Where the ABCC believes an offence has occurred under the BCII Act it will, in the ordinary course,

³ Without limiting the operation of the function, a matter such as the financial capacity of the building industry participant would be a consideration that the ABC Commissioner will have regard to in determining whether to provide representation.

⁴ Examples of criminal penalty matters in the BCII Act include section 52(6) (failure in relation to a section 52 notice) and section 65(2) (recording or disclosing protected information).



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refer a brief of evidence to the CDPP. The CDPP decides whether to commence or not commence a prosecution, and has the conduct of any resulting prosecution.

- 5.3. For example failure to comply with a notice served under section 52 of the BCII Act to:
- (a) give information to the ABC Commissioner or an assistant;
 - (b) produce documents to the ABC Commissioner or an assistant; or
 - (c) attend before the ABC Commissioner or an assistant to answer questions as specified in the notice,

is an offence and may give rise to a penalty of imprisonment.

- 5.4. Failure to:
- (a) take an oath or affirmation to verify information or answers given to the ABC Commissioner under section 52 of the BCII Act; or
 - (b) answer questions relevant to an investigation while attending as required before the ABC Commissioner or an assistant,

is also an offence may also give rise to a penalty of imprisonment.

- 5.5. However, a court can, if it considered it appropriate, instead of, or in addition to imprisonment, impose a maximum \$3 300 fine for breaches, and five times that for a body corporate convicted of an offence. This is provided for under subsection 4B(2) of the *Crimes Act 1914*.

- 5.6. In a criminal case, the prosecution must prove each element of the offence "beyond reasonable doubt". However, the elements of a civil contravention need only be proved "on the balance of probabilities": see section 140 of the *Evidence Act 1995*. Stricter proof is generally required to satisfy this test in civil penalty proceedings (such as those commenced by the ABC Commissioner) than in ordinary civil cases, to take account of the gravity of the matters alleged in civil penalty cases.

- 5.7. Injunctive relief (including interim relief) may be sought to restrain a person from



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engaging in conduct in contravention of the BCII Act or other applicable Building Industry Laws.

6. Persons involved in contraventions

6.1. Both subsection 48(2) of the BCII Act and section 550 of the FW Act provide that:

a person who is involved in a contravention of a civil penalty provision is treated as having contravened that provision.

6.2. The term "involved in"⁵ requires that a person has:

- (a) aided, abetted, counselled or procured the contravention; or
- (b) induced the contravention, whether by threats or promises or otherwise; or
- (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) conspired with others to bring about the contravention.

6.3. Section 69 of the BCII Act provides that building associations are responsible for the conduct of their officers who act in that capacity.

6.4. The ABCC takes seriously the need to enforce Building Industry Laws. Accordingly, holding individuals and building associations accountable for acts that they are involved in or responsible for is an appropriate compliance tool.

6.5. Therefore, in each instance of a suspected contravention of a civil penalty provision of the BCII Act or the FW Act, the ABCC will consider whether any other person should be proceeded against as an accessory or an association. The ABCC then applies the two-step process described in paragraph 9 below in determining whether to commence such a proceeding.

7. Direction to Inspectors

7.1. The ABC Commissioner, acting under subsection 57(4) of the BCII Act, may issue directions to ABC Inspectors which sets out the process of making a

⁵ Guidance as to the operation of s.48(2) BCII Act and s.550 of the FW Act (previously s.728 of the Workplace Relations Act 1996), can be taken from s.74B of the Trade Practices Act 1974 which contains a similar provision. Usually the conduct of the individual will require "actual knowledge" of the contravention and to be involved in a contravention, a person needs to be "linked in purpose" with those directly engaged in the contravention.



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decision to commence legal proceedings.

8. ABC Commissioner's independence and discretion

- 8.1. Section 11 of the BCII Act provides that the Minister may give written directions to the ABC Commissioner in relation to the performance of his powers and functions.
- 8.2. However, any direction given by the Minister under subsection 11(1) of the BCII Act must not relate to a particular case (subsection 11(2) BCII Act).
- 8.3. In this respect the independence of the ABC Commissioner in the exercise of his discretion to commence a proceeding is unfettered.

9. Consideration of provisions of the *Civil Dispute Resolution Act 2011*

- 9.1. The *Civil Dispute Resolution Act 2011* (CDR Act) and Civil Dispute Resolution Regulations 2011 commenced on 1 August 2011.
- 9.2. Litigation issued by the ABCC for a civil remedy provision or penalty, or litigation arising from the use of compliance powers, are excluded from the provisions of the CDR Act. The FW Act is also expressly excluded.
- 9.3. Although it is unlikely that any litigation issued by the ABCC will be subject to the provisions of the CDR Act, the Acts' encouragement of genuine steps to resolve disputes is consistent with the approach of this guidance Note 1.

10. The decision to commence proceedings - the two-step process

- 10.1. Effective law enforcement is a key means by which the ABCC aims to achieve the main object of the BCII Act. The key aim of the ABCC's enforcement proceedings is to achieve compliance with Building Industry Laws.
- 10.2. A decision by the ABC Commissioner to commence (or not commence) a proceeding is an important one. Great care is taken in making the decision to commence proceedings. A wrong decision about whether or not to commence a proceeding may undermine the confidence of the building industry participants in the Australian Government's workplace relations system and in the ABCC as the national regulator of Building Industry Laws.



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- 10.3. All ABCC litigation should be lawful, accountable, constructive and effective. In addition, all ABCC litigation should be targeted, proportionate, consistent and fair, and commenced and conducted in accordance with the requirements of the Legal Service Directions, and, if appropriate, the *Civil Dispute Resolution Act 2011*.
- 10.4. Decisions to commence a proceeding should satisfy a two-step test:
- (a) first, there must be sufficient evidence to prosecute the case; and
 - (b) secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing the proceeding would be in the public interest.
- 10.5. The two-step process should also be applied to decisions the ABCC makes about the institution of appeals in the sense that the ABCC will consider:
- (a) the merits of; and
 - (b) the public interest in pursuing,
an appeal.

11. Sufficient evidence

- 11.1. In determining whether there is sufficient evidence to commence a proceeding the ABCC will consider if there:
- (a) is admissible, substantial and reliable evidence of a contravention of Building Industry Laws;
 - (b) are available, competent and credible witnesses (where relevant);
 - (c) are admissions made by the alleged wrongdoer;
 - (d) are any lines of defence which are plainly open to, or have been indicated by, the alleged wrongdoer; and
 - (e) are any other factor which could affect the likelihood or otherwise of success.
- 11.2. Having regard to the evidentiary considerations the ABCC will consider whether there:



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- (a) is a prima facie case against the alleged wrongdoer; and
- (b) are reasonable prospects of an order being made that the alleged wrongdoer contravened Building Industry Laws.

11.3. Under the Legal Services Directions, the ABCC must not (except in urgent circumstances, for example, when an application is made for an interlocutory injunction) commence a proceeding unless it has received written legal advice from an external legal provider indicating that there are reasonable grounds for starting the proceedings. Legal advice of this nature is covered by legal professional privilege.

12. Public Interest

12.1. Once satisfied that the evidence justifies the commencement of a proceeding, the ABC Commissioner will usually proceed to litigation unless, having regard to the whole of the circumstances, the public interest dictates that litigation should not be commenced.

12.2. It is not the rule that all contraventions brought to the attention of the ABCC must be the subject of litigation.

12.3. Generally speaking, the more serious the civil penalty provision alleged to have been contravened:

- (a) the more likely it will be that the public interest will require that a proceeding be commenced; and
- (b) the more compelling the reasons would have to be for a proceeding not to be pursued if the evidence is strong and the prospects good.

12.4. Although there may be mitigating factors in a particular case, often the proper decision will be to commence a proceeding and for those factors to be put to the court in mitigation, if and when penalty is considered.

12.5. The factors which can properly be taken into account in deciding whether the public interest requires that a proceeding be commenced will vary from case to case.

12.6. However, a decision whether or not to commence a proceeding should not be



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influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged wrongdoer or any other person involved;
- (b) personal feelings concerning the alleged wrongdoer or the victim;
- (c) possible political advantage or disadvantage to the Government or any political group or party;
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision to commence litigation;
- (e) whether there has been or will be media attention (except to the extent that it is relevant to general deterrence); or
- (f) possible advantage or disadvantage to any individual, employer, employer group, industrial or other association or union, or an office holder or member of such a group or any other building industry participant.

12.7. Further, the comments of Justice Le Miere in *Leighton Contractors* (2006) 164 IR 375; [2006] WASC 317 at [58] are to be considered carefully:

"Contraventions of the Act, whether by individuals or organisations, are always to be treated as a serious matter. The main object of the Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, effectively and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole."

13. Relevant public interest factors

Factors which may arise in considering whether the public interest dictates that a proceeding not be commenced include the following:

13.1. Nature and circumstances of the alleged contravention

- (a) the seriousness of the alleged contravention or, conversely, the triviality of the alleged contravention, including whether it is of a "technical nature" only.



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It would only be in the most unusual circumstances that allegations of coercion in relation to making a workplace agreement, unlawful industrial action, payment during periods of unlawful industrial action or allegations of contraventions of the general protections in relation to freedom of association would be trivial or technical allegations.

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing a proceeding seeking a civil penalty in respect of:

1. any allegation of coercion under section 43 or 44 of the BCII Act; and
 2. any allegation of unlawful industrial action under section 38 of the BCII Act or a breach of orders made by Fair Work Australia or a court in respect of unlawful industrial action.
- (b) the actual or potential consequence of the alleged contravention;
- (c) the prevalence within the industry of the alleged contravention;
- (d) mitigating or aggravating circumstances.

For example:

- (i) mitigating factors might include where:
1. there is evidence that the building industry participant had a genuine misunderstanding (having made reasonable attempts to understand its legal obligations) and, when it was brought to the building industry participant's attention, the building industry participant readily rectified the contravention and put in place systems to ensure that no contraventions will occur in the future;
 2. the building industry participant has approached the ABCC to make admissions of contraventions and worked with the ABCC to readily rectify the contraventions and put in place systems to ensure that no contraventions will occur in the



future;

- (ii) an aggravating circumstance might be that the alleged wrongdoer refused or impeded attempts at voluntary compliance, such as ignoring a prior warning; and
- (e) any other relevant circumstances. For example, it would be relevant if the offending conduct can more appropriately be dealt with by another agency, such as the police⁶.

13.2. Characteristics of the alleged wrongdoer

- (a) the degree of culpability of the alleged wrongdoer in connection with the alleged contravention;

For example:

- (i) the relevant compliance history of the alleged wrongdoer; and
- (ii) the attitude of the alleged wrongdoer to future compliance (including any relevant proactive measures taken to comply with Building Industry Laws).
- (b) relevant personal history and other relevant characteristics of the alleged wrongdoer (e.g. age, intelligence, physical health, mental health, special infirmity, etc);
- (c) whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so;
- (d) the level of contrition demonstrated by the alleged wrongdoer; and
- (e) the degree of involvement of senior management in the alleged contravention, or the degree of involvement by office holders or members of a registered organisation or other association.

⁶ In these circumstances the ABCC will liaise with the police about the intent of their investigation. Involvement by the police is not an automatic bar to the continuation of an ABCC investigation. However, the ABCC will be mindful of the need to ensure that its civil investigation does not compromise any criminal investigation. The ABCC will assist the police with any of their inquiries.



13.3. Level of industry or public concern

- (a) whether the nature of the alleged contravention is of considerable industry or public concern. The ABCC assumes that, in all cases, the public and the industry is concerned about compliance with Building Industry Laws. However, there will be circumstances in which the level of such concern is of heightened importance.

13.4. Impact of the alleged contravention

- (a) the attitude to the commencement of a proceeding which is held by the person who was injured or otherwise adversely affected by the alleged contravention;
- (b) the impact of the alleged contravention on such persons;
- (c) the impact of the alleged contravention on any other relevant persons (e.g. family members); and
- (d) any other relevant impact of the alleged contravention.

13.5. Deterrence

- (a) the likely impact of proceedings on:
 - (i) general deterrence (i.e. reducing the likelihood that other building industry participants will commit similar contraventions or otherwise contravene Building Industry Laws); and
 - (ii) specific deterrence (i.e. reducing the likelihood that the alleged wrongdoer will commit a further contravention of such laws).

13.6. Effect of litigation

- (a) the likely outcome in the event of a finding of a contravention, having regard to the penalty options available to the court;
- (b) the availability and efficacy of any alternative to litigation; and
- (c) whether the consequences of a finding of contravention would be unduly harsh and oppressive.



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13.7. Public Administration considerations

- (a) the necessity to maintain public confidence in the administration of Building Industry Laws;
- (b) the likely length and expense of litigation, having regard to the ABCC's available budget⁷;
- (c) whether the commencement of a proceeding would be perceived as counter-productive, for example, by bringing the law into disrepute; and
- (d) the staleness of the alleged contravention.

14. Determination of appropriate enforcement related option

14.1. Options

After consideration of all the relevant criteria (i.e. sufficient evidence and public interest), an ABCC investigation will result in:

- (a) the commencement of a proceeding; or
- (b) the giving of an undertaking by the wrongdoer (as defined below); or
- (c) the issuing of a letter of caution (as defined below); or
- (d) no further action; or
- (e) publication of non-compliance by the ABC Commissioner under section 67 of the BCII Act.

14.2. Commencement of litigation

Where sufficient admissible evidence exists of a contravention, and the commencement of a proceeding is in the public interest, the ABCC will commence a proceeding.

14.3. Undertaking

Where it is in the public interest, a written undertaking (in the form of a Deed

⁷ While likely length and expense of litigation are relevant considerations they are not determinative of the ABC Commissioner's discretion. In some circumstances the cost of legal proceedings will exceed any likely penalty, however, the public interest considerations may justify that expenditure.



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between the wrongdoer and the ABC Commissioner as agent of the Commonwealth of Australia) may be accepted by the ABCC in lieu of commencing a proceeding for a contravention of Building Industry Laws. Undertakings will be published on the ABCC website.

As part of the undertaking, the wrongdoer must admit the contravention, remedy the contravention in the manner specified, (where appropriate) acknowledge that application may be made to the court for orders against them if they fail to comply with the undertaking and take any other action agreed to in the undertaking.

For example, the undertaking might contain a broad range of commitments, including regular audits and compliance plans, training for managers and staff, management plans for work systems and keeping the ABCC informed of ongoing steps taken to ensure compliance with Building Industry Laws. The undertaking may require a public notice by the wrongdoer about the contraventions and the remedial action they have agreed to carry out.

A written undertaking is an alternative to litigation. Its purpose is to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention and prevent a similar contravention of Building Industry Laws in the future.

However, if the undertaking is not complied with, the ABC Commissioner may apply to the court for an order directing the wrongdoer to comply with the terms of the undertaking and such other orders as the court considers appropriate.

Contravention of an undertaking may also result in the ABC Commissioner initiating proceedings for a contravention of Building Industry Laws seeking penalties and remedies. It will also be a factor taken into account in any future dealing with that party.

Further information in relation to written undertakings can be found in Guidance Note 3 – The ABCC Written Undertaking Policy.

14.4. Letter of caution

Where it is in the public interest (in limited circumstances for relatively minor contraventions) a letter of caution may be issued as an alternative to litigation.



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14.5. No further action

No further action will be taken, where:

- (a) external legal advice is that proceedings would not have a reasonable prospect of success; or
- (b) it would not be in the public interest to commence a proceeding, accept a written undertaking, or issue a letter of caution.

14.6. Publicise non-compliance

Under section 67 of the BCII Act, the ABC Commissioner may, if he considers it to be in the public interest to do so, publish details of non-compliance with a Building Industry Law.

15. The commencement and conduct of ABCC litigation

- 15.1. In many cases the evidence will disclose a number of potential contraventions of Building Industry Laws. The ABC Commissioner will take steps to ensure that care is taken to identify contraventions which adequately reflect the nature and extent of the offending conduct and which will provide the court with an appropriate basis for deciding upon a penalty.
- 15.2. The contraventions proceeded against will be those disclosed by the admissible evidence. Consequently, there may be cases where there is public interest in pleading a number of contraventions, including alternative contraventions. However, under no circumstances will the ABCC assert contraventions (make "ambit" claims) with the intention of providing scope for subsequent "breach bargaining".
- 15.3. All litigation commenced by the ABC Commissioner will be conducted honestly, fairly, consistently and in accordance with The Commonwealth's Obligation to Act as a Model Litigant (Appendix B to the Legal Service Directions).

16. Breach bargaining

- 16.1. Breach bargaining involves negotiations between the ABC Commissioner (or their agent) and the respondent/s to a proceeding commenced by the ABC Commissioner in relation to the contraventions alleged in that proceeding. A



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- breach bargaining decision may only be made with the consent of the ABC Commissioner, a Deputy ABC Commissioner or an authorised SES officer.
- 16.2. While the ABCC must demonstrate care and consideration in identifying the contraventions that will be alleged, circumstances may make it appropriate to proceed on fewer contraventions or to accept an admission of only some of the contraventions. It may be in the interests of justice or in the public interest that the ABC Commissioner accepts an offer by a respondent to admit some of the alleged contraventions, if others are discontinued.
- 16.3. Before such an agreement is reached, the ABCC needs to be satisfied that:
- (a) the contraventions to be proceeded against bear a reasonable relationship to the nature of the offending conduct of the wrongdoer;
 - (b) the contraventions provide an adequate basis for an appropriate penalty in all the circumstances of the case; and
 - (c) there is evidence to support the contraventions alleged.
- 16.4. In many cases, the interests of justice will be served if a respondent admits to contraventions in the circumstances described above and the community is not put to the burden of funding a long and expensive hearing.
- 16.5. Accordingly, in appropriate circumstances, the ABCC will promptly consider any proposal and put its position to the respondent. The ABC Commissioner is concerned with appropriately reflecting its perception of the public interest and its position in relation to disposition of the matter generally.
- 16.6. A proposal by a respondent to admit particular contraventions may include a request that the ABC Commissioner not oppose a submission made by the respondent to the court that the penalty falls within a nominated range or where they do not admit the behaviour but will not oppose evidence being led by the ABC Commissioner. The ABCC will consider such a request provided the range of penalty nominated is considered to be within acceptable limits having regard to the ABCC's desire to balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.



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- 16.7. Under no circumstances will the ABC Commissioner entertain a breach bargaining proposal if the respondent maintains innocence with respect to the alleged contraventions. The respondent must genuinely accept wrongdoing and be prepared to admit that publicly and to the court.
- 16.8. If the breach bargaining might affect the substantive interests of the person who was injured or otherwise affected by the contravention, then, where practicable, they will be advised about any breach bargaining decision.

17. Discontinuance of proceedings

- 17.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, the ABC Commissioner will discontinue a proceeding if appropriate.
- 17.2. The decision whether or not to discontinue a proceeding rests with the ABC Commissioner, a Deputy ABC Commissioner or an authorised SES officer.
- 17.3. Where practicable the person who was injured or otherwise affected by the contravention will be advised before any decision is made to discontinue a proceeding. Complainants will be able to seek information from the ABCC about any alternative action available to them.

18. Submissions on penalty, costs and compensation

- 18.1. Where a proceeding results in a finding that a respondent has contravened a Building Industry Law the court will move to consider what penalty, if any, should be imposed and, in appropriate cases, what legal costs follow the event.
- 18.2. Where appropriate, the ABC Commissioner will seek penalties that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations. The ABC Commissioner will also, where allowed, seek to recover legal costs.
- 18.3. In this context, the comments of Justice Tracey in *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at 58 are to be noted:

"... in light of the statutory purposes of the BCII Act, the need for general



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deterrence for contraventions of the BCII Act is particularly strong. Penalties must be imposed at a meaningful level if they are to serve as a general deterrent to others who may be disposed to engage in proscribed conduct."

- 18.4. The ABC Commissioner may make submissions for a range of penalties (i.e. be prepared to indicate to the court that a "Low", "Middle" or "High" range penalty should be ordered) or, in appropriate cases, it may reach agreement with the respondents about the exact penalty to be imposed and legal costs to be awarded in favour of the ABC Commissioner.
- 18.5. Respondents should note that an eligible court will be guided, but not bound, by any submission or agreement the ABCC makes in relation to penalty.
- 18.6. Paragraph 49(1)(b) of the BCII Act also provides that an appropriate court may, where a respondent has contravened a civil penalty provision, make an order requiring the respondent to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention.
- 18.7. The ABCC will, prior to commencing any proceeding, liaise with those persons who were injured or otherwise affected by the contravention to, where practicable, determine the damage they suffered as a result of the contravention. Where such damages can be determined, the ABCC will seek the making of orders by the court requiring the respondent to pay compensation to the affected persons.

19. Notification of enforcement activity

- 19.1. When a decision is made by the ABCC as to what, if any, action will be taken following an investigation (i.e. litigation, undertaking, letter of caution or no further action) the following persons will (where practicable and subject to paragraph 18.2 below), be notified in writing of the decision:
 - (a) the alleged wrongdoer, and their representative(s);
 - (b) any person who was injured or otherwise affected by the contravention;
 - (c) witnesses who have provided formal statements or been the subject of a



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subpoena to give evidence; and

(d) any other interested party whom it is appropriate to notify.

- 19.2. Disclosure to the persons referred to in paragraph 18.1(b), (c) and (d) will not occur where, in the opinion of the ABC Commissioner, an ABC Deputy Commissioner or an authorised SES officer, disclosure is not appropriate, taking into account privacy considerations, confidentiality obligations or other relevant matters.

20. Publishing and utilising enforcement activity

- 20.1. Fairly publishing the nature and outcome of enforcement activities (whether litigation, undertakings, or letters of caution) draws attention to the possible consequences of contravening Building Industry Laws. It is a valuable tool both for educating building industry participants and deterring non-compliance.
- 20.2. Under section 67 of the BCII Act, if the ABC Commissioner considers it is in the public interest, the ABC Commissioner may publish details of non-compliance, including the names of the participants who have failed to comply
- 20.3. The ABCC may publish (including on its website) and use information about its enforcement activities including litigation.

For example, the ABCC may:

- (a) in respect of a litigation matter, publicise the decision to commence a proceeding, the lodgement of court processes, directions hearings, decisions, penalty hearings and the final penalty, if the ABCC determines that publicising any (or all) of these stages will support compliance with Building Industry Laws; and
- (b) publish information about its enforcement activities to enhance specific and general deterrence.

21. Intervention in proceedings by the ABC Commissioner

- 21.1. Under section 71 of the BCII Act, the ABC Commissioner may intervene in the public interest in a civil proceeding before a court that arises under the BCII Act, the IC Act or the FW Act and involves a building industry participant or building



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work.

- 21.2. Under section 72 of the BCII Act, the ABC Commissioner may, following the giving of written notice, make submissions in a matter before Fair Work Australia that arises under the FW Act and involves a building industry participant or building work.
- 21.3. The public interest considerations referred to in this ABCC Litigation Policy are equally applicable to the decision to intervene in proceedings.

A handwritten signature in black ink, appearing to read 'L. Johns', written over a horizontal line.

Leigh Johns
Australian Building and Construction Commissioner
19 January 2012