



Guidance Note No.	2	Guidance Note Title	Investigative Process of the Office of the Australian Building and Construction Commissioner
Publication History		Relevant legislation or materials	<i>Building and Construction Industry Improvement Act 2005</i>
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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 and disseminates advice 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 subject matters 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**) or other matters over which it has jurisdiction (collectively referred to as **Building Industry Laws**). The general public is welcome to suggest subjects for future Guidance Notes.

2. This Guidance Note

- 2.1. This Guidance Note broadly describes the processes followed by the ABCC in the investigation of complaints in relation to a suspected contravention or threatened contravention of the Building Industry Laws. It is to be referred to as:
 - (a) Guidance Note 2; or
 - (b) the ABCC Investigative Process.
- 2.2. This Guidance Note addresses the following topics:
 - (c) The purpose of ABCC Guidance Notes (paragraph 1);



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- (d) This Guidance Note (paragraph 2);
 - (e) About the ABC Commissioner (paragraph 3);
 - (f) About ABC Inspectors (paragraph 4)
 - (g) Our investigative role (paragraph 5);
 - (h) Our process of investigation (paragraph 6);
 - (i) What parties can expect from Australian Building and Construction Inspectors (ABC Inspectors) (paragraph 7); and
 - (j) Review of decisions (paragraph 8)
- 2.3. This guidance note aims to provide the community, and building industry participants in particular, with an understanding of the manner in which the ABCC exercises its investigative function. This guidance note will be amended from time to time.
- 2.4. This Guidance Note does not have the force of statute. Accordingly, any failure by the ABC Commissioner or an ABC Inspector to act in accordance with this Guidance Note cannot affect the validity or conduct of investigations by the ABCC. In addition, nothing in this Guidance Note compels the ABC Commissioner to accept a Written Undertaking. This Guidance Note is not a direction for the purposes of subsection 57(4) of the BCII Act.
- 3. About the Australian Building and Construction 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.
- 3.4. In broad terms, the ABC Commissioner and his office:
- (a) monitors and promotes compliance with Building Industry Laws;



- (b) investigates suspected contraventions by building industry participants of Building Industry Laws;
 - (c) institutes, or intervenes in, legal proceedings; and
 - (d) provides 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);
 - (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. About ABC Inspectors

4.1. Appointment and Managerial Control

- (a) ABC Inspectors are appointed under subsection 57(1) of the BCII Act and are empowered to exercise certain powers in the performance of their functions. The functions include investigating compliance by building industry participants with Building Industry Laws.
- (b) ABC Inspectors may be persons employed directly by the ABC Commissioner within the ABCC (and are Australian Public Service employees), or may be persons employed by a State or Territory or who hold an office or appointment under a law of a State or Territory, or may be consultants engaged by the ABC Commissioner under section 25 of the BCII Act.
- (c) In all cases, ABC Inspectors are under the managerial control of the ABC Commissioner, usually through delegated authority from him to other managers. ABC Inspectors may be directed by the ABC Commissioner or his delegates in the performance of their functions, either through “general directions” (which are a legislative instrument)¹ or “particular directions” relating to individual matters, which are not legislative instruments. This managerial control and framework of directions is irrespective of whether

¹ s57(5) of the BCII Act



the ABC Inspector is an Australian Public Service employee, an employee or officer of a State or Territory, or a consultant to the ABC.

5. Our Investigative Role

5.1. Exercising Powers

- (a) ABC Inspectors are conferred with certain powers including the powers to enter certain premises or to ask for specific records or documents to be produced. These powers may be exercised for any of the compliance purposes specified by subsection 59(1) of the BCII Act, namely:
 - (i) ascertaining whether a Building Industry Law has been complied with, or is being complied with, by a building industry participant.
 - (ii) ascertaining whether a court order relating to a Building Industry Law has been complied with, or is being complied with, by a building industry participant.
 - (iii) ascertaining whether the Building Code has been complied with, or is being complied with, by a building industry participant.
- (b) Investigations conducted by the ABCC are undertaken by ABC Inspectors. An investigation is where an ABC Inspector examines the details of a specific case to determine whether there has been a contravention of Building Industry Laws. An ABC Inspector will then determine the best course of action dependent upon the specific circumstances.
- (c) As representatives of the ABCC, ABC Inspectors work with building industry participants to educate, promote fairness and ensure justice in the building industry.

5.2. How does the ABCC initiate Investigations?

- (a) The ABCC may initiate an investigation into the conduct of any building industry participant in a variety of ways, including in response to:
 - requests for information through the ABCC Hotline;



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- complaints made from members of the public, whether on their own behalf or on behalf of a relative (e.g. the parent of an apprentice). Complaints can be lodged either in person, by post or online (via the ABCC website);
 - referrals from the Fair Work Ombudsman or other agencies or departments;
 - media coverage;
 - matters raised by members of the parliaments of Australia (federal, state and territory);
 - referrals from unions and employer associations;
 - audits or education campaigns based on particular industries or occupations; and
 - of its own motion, including where no complaint has been made or received.
- (b) The ABCC does not restrict its activity only to complaints it receives and will consider for investigation all matters of public controversy that fit within its jurisdiction.
- 5.3. The ABC Commissioner independent and impartial
- (c) The ABC Commissioner is an independent statutory appointee, empowered to investigate workplace complaints and enforce compliance with Australia's workplace laws.
- (d) The BCII Act provides that the ABC Commissioner is an independent decision maker with respect to the exercise of investigatory and enforcement jurisdiction. The BCII Act provides that Minister may, by legislative instrument, give general directions to the ABC Commissioner about the performance of his or her functions. No such general directions are currently in operation.
- (e) In performing this function, the ABC Commissioner and his office is impartial, and does not represent either party to an investigation.



Employees of the ABCC are bound by the *Public Service Act 1999*. This means that the agency is bound by a strict code of conduct and APS Values that uphold the highest ethical standards, including the use of public monies and community responsibility.

- (f) ABC Inspectors abide by the principles of natural justice in the undertaking of their role. The principles of natural justice ensure that an ABC Inspector follows two important rules:

Firstly, the no bias rule, which requires that the ABC Inspector:

- has no personal interest in a matter; and
- acts only on the basis of logically probative evidence;

Secondly, the hearing rule, which requires that the ABC Inspector:

- informs interested parties of the nature of the decision to be made and the basis upon which that decision is taken; and
- allows persons about whom a decision is to be made to be heard on the relevant points.

For persons whose rights or interests may be affected by an ABC Inspector's decision or determination, natural justice means the person affected must have the opportunity to:

- show cause why a particular action should not be taken;
- put forward arguments supporting their position;
- deny any adverse allegations and provide evidence in support;
- present alternative explanations for particular matters; and
- request that a decision or determination is reviewed.

- (g) The ABCC must always act in accordance with the principles of natural justice throughout an investigation. However, those principles are not prescriptive and, as such ABC Inspectors continue to be invested with



discretion to make determinations about the process or outcome of an investigation. This may result from time to time in a recommendation that the ABC Commissioner exercises powers under section 52 to obtain information.

- (h) One of the most significant ways an ABC Inspector contributes to the proper functioning of the ABCC is by actively exercising a reasoned judgement and discretion when investigating workplace complaints and conducting audits. The use of this judgement and discretion is actively encouraged by the ABCC.

5.4. What assistance does the ABCC require from parties?

- (a) Any person may lodge a complaint with the ABCC alleging a contravention of Building Industry Laws. The ABCC may exercise discretion regarding the matters it chooses to investigate or not investigate. The ABCC's Guidance Note 1 – ABCC Litigation Policy provides an explanation of the ABCC's litigation principles and investigation priorities.
- (b) When action is initiated, the ABCC may look favourably upon a complainant (or their representative), alleged wrongdoer, and other relevant parties who actively assist the ABCC throughout the course of the investigation, when requested by an ABC Inspector.
- (c) To complete investigations promptly, the ABCC requests all parties to an investigation (including complainants or their representatives, and alleged wrongdoers) to:
 - (i) in the first instance, attempt to resolve the matter directly, at the workplace;
 - (ii) tell the truth at all times (it is an offence to knowingly provide false or misleading information to an ABC Inspector);
 - (iii) fully disclose all matters relating to the complaint from the outset of the investigation;



- (iv) provide the ABCC with any relevant information as it comes to hand, or as requested, in a timely manner and appropriate format (as determined by the ABCC); and
 - (v) respond in a timely manner to all correspondence and contact.
- (a) The ABC Inspector assigned to a specific case will contact the relevant parties with key developments and updates as necessary or at regular intervals. The ABC Inspector will also officially notify the parties, at the conclusion of an investigation, of any actions taken by the ABCC and the reasons for any decision of the ABCC to take, or not take, any action.
- (b) If a complainant does not meet their reasonable obligations to assist the ABCC in conducting an investigation, the ABCC reserves the right to exercise its discretion when deciding if, or how, a matter can be progressed. This may include no longer continuing to investigate a matter.
- (c) Where an alleged wrongdoer unreasonably delays an investigation, for example, by not providing information in a timely matter, they can expect that the complaint will be expedited through the compliance process. They will not obtain any advantage through their delay.

5.5. Confidential complaints

- (a) The general presumption in all investigations is that the identity of each party to the investigation, the fact that there is an investigation being conducted, and the material obtained in the course of the investigation will be disclosed to all parties to the investigation.
- (b) In some circumstances, a complainant may request that their identity is not revealed to the alleged wrongdoer in the course of an investigation. This may occur when a person is currently employed by the alleged wrongdoer, or if there are exceptional circumstances (for example, a threat to a person's safety).
- (c) Where it is asked to do so, the ABCC will make every attempt to keep a person's identity confidential where necessary. Often, there are compelling



reasons why a person's identity may need to be revealed, and in these circumstances, the ABCC will contact the relevant parties and discuss the issue of disclosure prior to considering their investigative options. In some instances, the principles of natural justice demand the disclosure of a complainant's identity. If a complainant does not agree to disclose their identity, then the ABCC may finalise the investigation without a final determination being able to be made.

- (d) The ABCC aspires to be an open and transparent regulator and the extent possible will provide information as requested. However, in exercising discretion to provide information or material in accordance with the principles of natural justice, an ABC Inspector must be mindful of the provisions of the BCII Act and the Privacy Act 1988.
- (e) Information or material may only be released to a party to an investigation to the extent allowed under legislation, and limited to the specific interests of the person receiving information or material in relation to that investigation.
- (f) An ABC Inspector cannot release information or material if by doing so, the integrity of an investigation is compromised. If legal proceedings have commenced relating to an investigation, the normal rules relating to disclosure (i.e. discovery of documents pursuant to the Rules of the court) will apply in relation to providing any information or material.

5.6. What factors influence investigations?

- (a) The ABCC's objective is to complete 80 per cent of investigations into complaints within 90 days.
- (b) ABC Inspectors conduct each investigation within an investigative framework, relying on the best available evidence and information. The processes involved in each investigation are executed (or not executed) at the discretion and control of the ABC Commissioner and the ABC Inspector and may be different for each investigation. ABC Inspectors exercise judgement and discretion in dealing with all matters. While the ABCC



encourages national consistency in decision making, discretion rests with the ABC Inspector to make the most appropriate decisions to deal with the factors and circumstances before them.

- (c) The investigative framework is affected by both legislated timeframes, and the requirement of the ABCC to provide all parties to an investigation procedural fairness. These factors, in addition to matters outside the control of an ABC Inspector (for example, the level of cooperation afforded by parties to the investigation) may influence the course of an investigation, and the length of time required to complete an investigation. While an ABC Inspector will attempt to complete an investigation in a timely manner, the integrity of the investigation will not be compromised to expedite finalisation.

6. Our process of investigation

6.1. Introduction

- (a) The ABCC conducts all investigations with no pre-judgement toward one form of outcome over another. The outcome of any investigation is solely determined by the facts and circumstances of the matter in question. While the framework that follows is extensive, not all steps are necessary.
- (b) If a person is a party to an investigation throughout any phase, their cooperation with the ABCC and assistance throughout the investigation process may be looked upon favourably.
- (c) ABC Inspectors decide how a complaint is progressed through the investigative process. Although an investigation is often a sequential process, there is flexibility within the process.

6.2. Investigation

- (a) Significant steps throughout the investigation phase.

A full investigation begins with complaints being lodged or referred to the ABCC. A full investigation involves ABC Inspectors obtaining, managing



and evaluating evidence in order to determine whether a contravention of Building Industry Laws has occurred. The steps that may be appropriate through the investigation phase include:

- establishing jurisdiction, administrative and threshold issues for investigation;
- identifying the applicable Building Industry Laws;
- gathering and analysing evidence, the issuing of a formal Notice including a Notice issued pursuant to section 52 of the BCII Act to give information to, produce documents to, or appear before the ABC Commissioner or an assistant to answer questions as specified in the Notice. This form of Notice must be complied with and failure to do so is an offence which may give rise to a penalty of imprisonment. Other forms of Notice are discretionary tools available to ABC Inspectors, and may be used (or not used) as they deem appropriate, considering the facts and circumstances of the matter in question;
- establishing a contravention. A contravention is established where there is sufficient evidence to prove a contravention of Building Industry Laws on the balance of probabilities. A Building Inspector does not make this determination until available evidence has been collated, assessed and tested. Stricter proof is generally required to satisfy this test in civil penalty proceedings (such as those commenced by the ABCC) than in ordinary civil cases, to take account of the gravity of the matters alleged in civil penalty cases.

It is important to note that a determination of a contravention by the ABCC is not a judicial finding, or final determination of rights. It is an administrative determination which is reviewable internally, and may ultimately be tested in court, if the ABCC commences legal proceedings alleging such a contravention.

- (b) Determining threshold issues for investigation



- (i) The ABC Inspector will assess the allegation outlined in the complaint, and information provided by the parties will identify the threshold issues which require further investigation. For example, employment status, applicable industrial instrument, etc.
- (ii) The ABC Inspector will then decide upon the most appropriate processes for determining those threshold issues. In all cases, this will involve gathering and analysing relevant evidence.
- (c) Gathering and analysing evidence
 - (i) All determinations made by ABC Inspectors should be based on the best available evidence.
 - (ii) As such, ABC Inspectors will gather evidence from a variety of sources. During this phase of the investigation, ABC Inspectors may exercise their powers under the BCII Act, including (but not limited to) the power to require the production of records or documents, the power to enter certain premises (without force) and the power to interview any person.
- (d) Determining whether a contravention has occurred
 - (i) Upon analysis of the evidence available, the ABC Inspector will determine whether a contravention of a Building Industry Law has occurred. This process is undertaken in conjunction with an interpretation of the applicable legislation and/or industrial instruments relevant to the complaint.
- (e) Communication to the investigation parties
 - (i) In all cases, the parties to an investigation will be advised in writing when the investigation is concluded, and how it has been concluded. In all cases, this correspondence will be provided to the parties within 7 working days of the ABC Inspector's decision.

6.3. What are the ABCC's possible outcomes and enforcement options?



An investigation has a range of possible outcomes that are dependent on the nature of the investigation, the particular evidence obtained and the nature of the contraventions (if any) identified.

The range of possible investigation outcomes and enforcement options include:

- no further action (including where no contraventions are sustained, or the matter is referred to another agency);
- referral to another agency;
- resolution through formal alternative dispute resolution (such as mediation);
- referral to small claims procedures;
- a Letter of Caution;
- entering into a Written Undertaking;
- publication of non-compliance with a Building Industry Law pursuant to section 67 of the BCII Act
- seeking an injunction; and
- ABC Commissioner litigation.

6.4. Explanation of Investigative Outcomes

An investigation may result in any of the above investigation outcomes or enforcement actions. The outcomes that do not require further enforcement action by the ABCC are explained further below:

(a) No Further Action

Where the ABCC has not identified a contravention of a Building Industry Law (including where evidence is insufficient to determine a contravention), or where the alleged wrongdoer has been notified of a contravention which does not necessitate further enforcement, the ABCC may finalise the matter with no further action required.

If the ABCC determines that no further action is required it does not preclude another party from seeking a remedy.



(b) Referral to another agency

In some circumstances, a complainant may lodge a complaint alleging matters which are outside the ABCC's jurisdiction. If this occurs, the ABCC will refer a complainant to the appropriate agency or authority. Generally, this will occur during the early stages of an investigation.

Furthermore, if during the course of an investigation, the ABCC identifies a matter relevant to another Commonwealth, State or Territory authority, the matter may be referred to the relevant authority.

(c) Mediation

In some instances, an ABC Inspector may recommend that parties to an investigation consider mediation to resolve a complaint. The ABCC has access to a mediation service, independent of the investigation process. Mediation is a voluntary and confidential process which can assist parties in resolving disputes in a quick and efficient manner. Both parties must agree to engage in a mediation conducted by the ABCC, before it can take place.

(d) Own-action Small Claims Court Action

If an alleged wrongdoer fails to rectify a contravention identified by an ABC Inspector, then the ABCC must determine the most efficient and appropriate means of progressing the matter.

In some circumstances, this may involve referring a complainant to initiate their own legal action, either through a small claims procedure, or at common law. This may occur in situations when the ABCC does not consider it in the public interest to pursue the matter further, or is unable to do so based on the evidence available.

Depending on the nature of the contravention, for example the amount of an underpayment of wages and entitlements calculated or owed to a complainant, the ABCC may provide some assistance to the complainant through the small claims procedure.



The FW Act has small claims procedures under which an employee can seek recovery of monies up to a maximum of \$20,000.

(e) Letter of Caution

In some instances, the ABCC may decide that further action is not necessary but that it is desirable to issue a letter of caution to the wrongdoer. The letter of caution will outline the nature of the contravention, and possible consequences if a similar contravention occurs in the future.

6.5. Enforcement Options

If a matter has not been resolved through the investigation process by way of one of the outcomes identified above, an ABC Inspector may consider whether further enforcement is required. There are a number of considerations which will determine whether enforcement is required. These may include the nature of the contravention, and consideration of the ABCC Guidance Note 1 – Litigation Policy.

An ABC Inspector will determine the most appropriate enforcement mechanism to suit the outcome of the investigation and the type of contravention. This is determined based on a number of factors, These factors are set out in paragraph 13 of Guidance Note 1 - ABCC Litigation Policy. A complainant, or party to an investigation, does not have the ability to insist that a certain enforcement mechanism be used by the ABCC.

These enforcement options are explained further below:

(a) Written Undertaking

Where the ABC Commissioner reasonably believes that a person has contravened a Building Industry Law, the ABC Commissioner may accept a Written Undertaking given by the person in relation to the contravention. A Written Undertaking takes the form of a Deed between the wrongdoer and the ABC Commissioner, as agent for the Commonwealth of Australia.



The Written Undertaking will contain an admission by the wrongdoer of the contravention. It will also specify the tasks to be carried out by the wrongdoer to remedy the contravention and/or prevent any similar contraventions in the future.

Further information about Written Undertakings can be found in the ABCC's Guidance Note 3 - ABCC Written Undertaking Policy.

(b) Publication of non-compliance under section 67 of the BCII Act

Under section 67 of the BCII Act, the ABC Commissioner may publish details of building industry participants who fail to comply with the Building Code, the BCII Act or other Building Industry Laws.

Such publication will include the names of the building industry participants who have failed to comply, details of the relevant non-compliance and the reasons for the ABC Commissioner's decision to publish details of the non-compliance.

(c) Injunctions

The ABC Commissioner may seek injunctive relief (including interim relief) to restrain a person from engaging in conduct in contravention of Building Industry Laws. When seeking such injunctive relief, the ABC Commissioner will apply the same decision making process that applies with regards to initiating other forms of litigation and which is contained in the ABCC Guidance Note 1 – Litigation Policy.

(d) ABC Commissioner Litigation

The ABC Commissioner can initiate litigation for any contraventions of a civil penalty provision. The process and decision making process with regards to initiating litigation is contained in the ABCC Guidance Note 1 – Litigation Policy.

6.6. Voluntary Compliance



In most circumstances involving underpayment of wages and conditions where an ABC Inspector identifies a contravention, the alleged wrongdoer will rectify the contravention. When an alleged wrongdoer rectifies the contravention, then the matter is considered to be resolved through voluntary compliance.

Depending on the nature of a contravention, the ABCC may still initiate legal action for any contravention, regardless of whether voluntary compliance was achieved. However, the ABCC will take into account any actions taken by an alleged wrongdoer to rectify the contravention in determining whether to initiate legal action.

7. What parties can expect from ABC Inspectors

7.1. ABC Inspector's contact with parties during an investigation

The general public, and all relevant parties to an investigation, can expect that an ABC Inspector will:

- (a) contact the parties to an investigation within ten (10) working days of receiving the file to confirm receipt of the complaint and specific details;
- (b) facilitate attempts at early resolution between the complainant and the alleged wrongdoer (where appropriate);
- (c) notify parties as soon as practicable of significant developments in the investigation;
- (d) provide written advice as to the outcome of the complaint;
- (e) provide parties with the name and details of a contact person within the ABCC and keep parties informed of the progress of the investigation;
- (f) respond to questions and enquiries and explain our decisions;
- (g) treat information with respect and in accordance with the provisions of the BCII Act and the *Privacy Act 1988*;
- (h) perform our services in a timely, accurate and professional manner; and



- (i) respond to the needs of all parties to an investigation regardless of their background, personal attributes or circumstances.

8. Review of Decisions

8.1. When parties seek a review

There are occasions when parties to an investigation are not satisfied with the service provided to them or the outcome of an investigation. In these circumstances, the ABCC provides parties to an investigation the opportunity to request a review.

To ensure impartiality and to demonstrate the ABCC's commitment to a robust review process, a tiered review process has been developed.

8.2. Review Process

Initially, review requests will be considered for a Tier 1 review. This involves an internal review of the investigation process followed and decision(s) made. If a review request cannot be resolved through the Tier 1 process, an internal Tier 2 review may be conducted separate from the Inspectorate, by a person nominated by the ABC Commissioner for that purpose.

Requests for a file review can be made, in writing, and should be addressed to:

The Australian Building and Construction Commissioner
GPO Box 9927
In your capital city

Where a person is unsatisfied with the result of the review process, it is open to them to contact the Commonwealth Ombudsman on 1300 362 072 or via the Commonwealth Ombudsman's website.

Complaints about the behaviour or actions of an ABC Inspector or another ABCC staff member should be addressed to:

The Australian Building and Construction Commissioner
GPO Box 9927
In your capital city



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Leigh Johns
Australian Building and Construction Commissioner
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