



<b>Guidance Note No.</b>	3	<b>Guidance Note Title</b>	ABCC Written Undertakings Policy
<b>Publication History</b>		<b>Relevant legislation or materials</b>	<i>Building and Construction Industry Improvement Act 2005</i> <i>GN3: ABCC Written Undertakings Policy, 1<sup>st</sup> Edition</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 or 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**), Commonwealth industrial instruments 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**).
- 1.3. The general public are welcome to suggest subject matter for future Guidance Notes.

## **2. This Guidance Note**

- 2.1. This Guidance Note sets out guidelines to be followed by the ABCC in the making of decisions relating to Written Undertakings under the BCII Act, and the use of such Written Undertakings. It is to be referred to as:
  - (a) Guidance Note 3; or
  - (b) the ABCC Written Undertakings Policy.
- 2.2. This Guidance Note is to be read in conjunction with Guidance Note 1 - ABCC Litigation Policy and Guidance Note 2 – ABCC Investigative Processes Policy.



- 2.3. This Guidance Note addresses the following topics:
- (a) The purpose of the ABCC Guidance Notes (paragraph 1);
  - (b) This Guidance Note (paragraph 2);
  - (c) About the ABC Commissioner (paragraph 3);
  - (d) Written Undertakings as a compliance tool (paragraph 4);
  - (e) When the ABC Commissioner will accept a Written Undertaking (paragraph 5);
  - (f) Contents of a Written Undertaking (paragraph 6);
  - (g) Variation or withdrawal of a Written Undertaking (paragraph 7);
  - (h) Failure to comply with a Written Undertaking (paragraph 8);
  - (i) Written Undertakings and ABCC Litigation (paragraph 9);
  - (j) Publishing and using information about enforcement activities (paragraph 10).
- 2.4. The purpose of this Guidance Note is two-fold. First, it operates as a guide for the ABC Commissioner in the exercise of his functions relating to Written Undertakings. Secondly, it aims to provide the community with a better understanding of the manner in which the ABC Commissioner exercises those functions.
- 2.5. This Guidance Note does not have the force of statute. Accordingly, nothing in this Guidance Note compels the ABC Commissioner to accept a Written Undertaking or to refuse to accept a Written Undertaking. The validity of any action in relation to Written Undertakings is not affected by any failure of the ABC Commissioner or the ABCC to act in accordance with this Guidance Note. 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 Australian Building and Construction Commissioner (**ABC Commissioner**) is a statutory office holder pursuant to section 15 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.
  - (e) represents workers who are, or might become, a party to proceedings.
  - (f) disseminates information about Building Industry Laws to building industry participants.
- 3.5. The ABC Commission appoints Australian Building and Construction Inspectors (**ABC inspectors**) who are empowered to investigate and enforce 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 than 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 pre-reform certified agreements, pre-reform Australian Workplace agreements and workplace agreements made prior to 1 July 2009);
- (d) federal awards; and,
- (e) minimum pay and conditions standards.

#### **4. Written Undertakings as a compliance tool**

- 4.1. A Written Undertaking is an enforcement mechanism available to the ABCC where the ABC Commissioner reasonably believes that a person has contravened a civil penalty provision.
- 4.2. The acceptance of a Written Undertaking is an alternative to the ABC Commissioner commencing proceedings (see Guidance Note 1). It may also be a method of formalising an arrangement where a wrongdoer has voluntarily complied with the law after an investigation by an ABC Inspector.
- 4.3. The ABC Commissioner's capacity to accept Written Undertakings forms part of a broader compliance system comprising a combination of positive motivators and deterrents aimed at bringing about compliance with Building Industry Laws.
- 4.4. As part of the ABCC's compliance system the ABCC provides information and education to encourage voluntary compliance with Building Industry Laws. Where appropriate the ABCC will investigate alleged contraventions of Building Industry Laws. Where a contravention is identified enforcement measures (including in appropriate cases, the acceptance of Written Undertakings or the commencement of proceedings) may be used to secure compliance.



**5. When the ABC Commissioner will accept a Written Undertaking**

- 5.1. The ABC Commissioner may accept a Written Undertaking where the ABC Commissioner reasonably believes that a building industry participant has contravened a Building Industry Law. Written Undertakings are accepted as an alternative to other enforcement measures including a proceeding for a contravention of Building Industry Laws. Their purpose is to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention, and/or prevent a similar contravention of the Building Industry Laws in the future.
- 5.2. The Written Undertaking must be in the form of a Deed between the wrongdoer and the ABC Commissioner as agent of the Commonwealth of Australia.
- 5.3. The ABC Commissioner will consider acceptance of a Written Undertaking where:
  - the ABC Commissioner reasonably believes the person has contravened a Building Industry Law;
  - it is in the public interest and appropriate in all the circumstances to resolve the matter through a formal enforcement outcome; and
  - the contravention is admitted and the alleged wrongdoer is willing to cooperate with the ABCC.
- 5.4. A relevant consideration in determining the public interest will be whether or not the objectives of other compliance tools (namely rectification of the contravention, general and specific deterrence) can be achieved through the acceptance of a Written Undertaking, without, for example, the expense and delay associated with litigation. Factors relevant to determining public interest are dealt with in detail in Guidance Note 1 - ABCC Litigation Policy.
- 5.5. A Written Undertaking will not be accepted by the ABC Commissioner where it does not offer a more effective regulatory outcome. A Written Undertaking is considered to be a more effective regulatory outcome where it produces an efficient result that compensates those persons who have suffered loss or damage as a result of the contravention or where it offers opportunities to ensure continuing compliance that may not be available via an order from a court. A Written Undertaking may provide the most effective and flexible enforcement



mechanism as a range of compliance outcomes can be achieved. Written Undertakings are not considered an appropriate enforcement mechanism to deal with trivial matters.

- 5.6. A person wishing to enter into a Written Undertaking with the ABC Commissioner should first discuss it with the ABC Inspector assigned to the investigation. Once the offer has been made and the terms of any Written Undertakings discussed, the decision to accept or reject the offer is a formal decision made by the ABC Commissioner or his approved delegate. In making the decision the ABC Commissioner, or his approved delegate, will have regard to whether the Written Undertaking provides the more effective regulatory outcome.
- 5.7. A decision by the ABC Commissioner or his approved delegate to accept any Written Undertaking does not create a precedent binding on the ABC Commissioner. The ABC Commissioner will not accept a Written Undertaking merely because it has previously accepted a Written Undertaking from the same person or another person in relation to a similar contravention.
- 5.8. The ABC Commissioner will not accept a Written Undertaking in relation to any conduct that gives rise to a criminal offence under a Building Industry Law.

## **6. Contents of a Written Undertaking**

- 6.1. A Written Undertaking takes the form of a written deed executed by both the alleged wrongdoer and the ABC Commissioner.
- 6.2. In a Written Undertaking the wrongdoer must:
  - admit the contravention, which must be described in detail in the Written Undertaking;
  - agree to remedy the contravention in the manner specified (where the contravention is an underpayment the wrongdoer must agree to make payment(s) to rectify the underpayment) and identify the timeframe within which the contravention will be remedied;
  - specify any other actions which the wrongdoer agrees to undertake and the timeframe within which those actions will be taken; and
  - acknowledge that:



- application may be made to a court by the ABC Commissioner for orders against the wrongdoer if the wrongdoer fails to comply with the Written Undertaking; and
  - in the event that the ABCC makes such an application, any admissions or statements made by the wrongdoer in the Written Undertaking may be relied upon by the ABCC as evidence of the truth of those admissions or statements.
- 6.3. A Written Undertaking may contain a broad range of commitments on the part of the wrongdoer, including, for example, participation in an ABCC education program, the provision of training for managers and staff, completion of regular audits and compliance plans, management plans for work systems and/or keeping the ABCC informed of ongoing steps taken to ensure compliance with Building Industry laws. The Written Undertaking may also require the wrongdoer to publish a public notice about the contraventions and the remedial action they have undertaken to carry out.
- 6.4. Written Undertakings will include an acknowledgment that the ABCC may publish and utilise Written Undertakings in this way. The ABC Commissioner will not accept a Written Undertaking that contains a clause requiring the Written Undertaking to be kept confidential from any person.
- 6.5. The ABC Commissioner will not accept a Written Undertaking that either fails to admit the contravention or contains a clause denying (whether expressly or by implication) the contravention.

## **7. Variation or withdrawal of a Written Undertaking**

- 7.1. Once a Written Undertaking has been entered into, a person who has given the Written Undertaking may only withdraw or vary the Written Undertaking with the ABC Commissioner's consent. The ABC Commissioner's consent will only be given in writing. The ABC Commissioner will only consent to vary or withdraw a Written Undertaking where the wrongdoer can demonstrate:
- compliance with the Written Undertaking is impractical or ineffective; or
  - there has been a relevant material change which renders variation or withdrawal of the Written Undertaking appropriate in all the circumstances.



- 7.2. The ABC Commissioner will not consent to the variation or withdrawal of a Written Undertaking where the ABC Commissioner considers that doing so could undermine the stated objects of the BCII Act.
- 7.3. A Written Undertaking will not be withdrawn merely because the wrongdoer has complied with the Written Undertaking.
- 7.4. The ABC Commissioner will not usually consent to the variation of a Written Undertaking to extend the period of time by which the wrongdoer is required to comply with the Written Undertaking. However, if a person requests an extension of time and the ABC Commissioner considers that the wrongdoer has genuine and compelling reasons for their failure to comply with the specified time limits, the ABC Commissioner may consent to the variation.

#### **8. Failure to comply with a Written Undertaking**

- 8.1. In the event of non-compliance with a Written Undertaking the ABC Commissioner may apply to the Federal Court, the Federal Magistrates' Court or an eligible State or Territory Court for an order directing the wrongdoer to comply with the terms of the Written Undertaking. The court may also make an order directing the wrongdoer to pay compensation to a person who has suffered loss because of the contravention of the Written Undertaking, and any other orders that the court considers appropriate.
- 8.2. Non-compliance with a Written Undertaking does not itself attract a civil penalty.
- 8.3. Non-compliance with a Written Undertaking allows the ABC Commissioner to commence civil penalty proceedings in relation to any contraventions referred to in the Written Undertaking and to rely on any admissions or statements made in the Written Undertaking as evidence of the truth of those admissions or statements.
- 8.4. If the ABCC considers that a Written Undertaking has been breached, the ABCC will write to the wrongdoer about the breach and provide the wrongdoer with a limited time to rectify the breach. If the breach is not rectified within the specified period, the ABC Commissioner will proceed as though there has been non-compliance with the Written Undertaking.

#### **9. Written Undertakings and ABCC Litigation**



- 9.1. The ABC Commissioner will not commence proceedings against a person for contravention of a civil penalty provision where the person has given a Written Undertaking in relation to the contravention, unless the Written Undertaking has been withdrawn, or the Written Undertaking has been breached by the wrongdoer and the wrongdoer has failed to rectify that breach in accordance with paragraph 8.4. This ensures that multiple enforcement mechanisms are not pursued by the ABCC in relation to the same contravention.
- 9.2. If the Written Undertaking is withdrawn, or has been breached by the wrongdoer and the wrongdoer has failed to rectify that breach in accordance with paragraph 8.4, the ABC Commissioner may commence proceedings in relation to the contraventions admitted in the Written Undertaking, use the admissions made in the Written Undertaking in evidence against the wrongdoer and seek penalties against the wrongdoer.
- 9.3. The ABC Commissioner's acceptance of a Written Undertaking in no way impedes the ability of another party with standing to bring proceedings in relation to the contravention. For example, an employer affected by a contravention could apply under section 49 of the BCII Act for orders in relation to the contravention. This means that pecuniary penalties may be imposed by a court on a wrongdoer even where the ABC Commissioner has accepted a Written Undertaking.
- 9.4. An ABC Inspector may continue investigations and, where appropriate, commence proceedings at any stage in relation to any matter that lies outside the scope of the Written Undertaking.

#### **10. Publishing and using information about enforcement activities**

- 10.1. All parties affected by a contravention of a civil penalty provision will be informed of the ABC Commissioner's acceptance of a Written Undertaking and any subsequent variation or withdrawal.
- 10.2. Publishing the nature and outcome of enforcement activities (including Written Undertakings) draws attention to the consequences of contravening Building Industry Laws. It is a valuable tool both for educating building industry participants and deterring non-compliance.



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- 10.3. Accordingly, the ABC Commissioner may decide to publish (including on the ABCC website) and use information about the ABCC's enforcement activities to increase the impact of inspection and enforcement activities, including Written Undertakings.
- 10.4. For example, the ABCC may:
- (a) publish information about its enforcement activities to enhance specific and general deterrence;
  - (b) inform building industry participants in the same and similar industries of the nature and outcome of enforcement activities and provide advice in relation to how to prevent similar contraventions;
  - (c) utilise information from enforcement activities to inform future inspection activity particularly on a systemic level; and
  - (d) make all Written Undertakings available for public inspection on the ABCC's website.
- 10.5. Paragraph 6.4 does not prevent the person giving the Written Undertaking making a request that certain information contained in the Written Undertaking is not made publicly available. The ABCC will consider such a request where the information is commercial in confidence; consists of personal details of an individual; or disclosure is otherwise contrary to the public interest.

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