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Building and Construction Industry Improvement Act 2005

Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry

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Summary

The *Building and Construction Industry Improvement Act 2005* (the BCII Act) contains powers that enable the Office of the Australian Building and Construction Commissioner (ABCC) to require a person to provide information, documents and/or give evidence under oath or by way of affirmation.

Section 13 of the BCII Act enables the ABC Commissioner to delegate his powers under section 52 to a Deputy ABC Commissioner.

The powers can only be exercised by the ABC Commissioner or Deputy ABC Commissioner in relation to investigations where he or she believes on reasonable grounds that a person has information, documents or evidence relevant to an investigation.

“Investigation” is defined in subsection 52(8) of the BCII Act as a contravention by a building industry participant of a designated building law.

“Designated building law” is defined in section 4 to mean the BCII Act, the Workplace Relations Act 1996 or a Commonwealth industrial instrument (an award, certified agreement or Order of the AIRC).

The BCII Act contains a penalty provision of imprisonment for six months for a person failing to comply with a notice to provide information, documents and/or give evidence under oath or by way of affirmation.

This publication provides guidance about the procedures to be followed by the ABCC in exercising the compliance powers under the BCII Act.

Introduction

1. These guidelines provide guidance on the exercise of the compliance powers by the ABC Commissioner or Deputy ABC Commissioners. The powers are broadly similar to the investigatory powers of other Commonwealth agencies, including the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. The powers are only investigative, not judicial. In formulating a “belief on reasonable grounds” of the kind described in subsection 52(1), the ABC Commissioner or Deputy ABC Commissioner is not making a determination as to the facts or applying the law to them in any way that is binding or authoritative.

2. These powers will only be exercised in relation to investigations being conducted by the ABCC. The ABCC intends to exercise the powers in an appropriate, defensible and accountable manner.

Preliminary Procedures to be satisfied before issuing a notice

3. Obtaining information voluntarily or by use of pre-existing information gathering powers given to ABC inspectors under the BCII Act are the preferred methods of obtaining information. Accordingly, the decision to exercise the compliance powers will not be taken lightly.

4. The ABCC shall not use the powers to conduct a ‘fishing expedition’ for information. A notice can only be issued if the ABC Commissioner or Deputy ABC Commissioner has the requisite ‘belief on reasonable grounds’ in relation to the matter. A mere assertion that the relevant matter constitutes or may constitute a contravention of a designated building law will not constitute “reasonable grounds”.

5. The ABC Commissioner’s directions made pursuant to subsection 13(3) of the BCII Act require a Deputy ABC Commissioner exercising the compliance powers to:

- a.) comply with these guidelines;
- b.) ensure that the preferred form of obtaining information and documentation directed at ensuring compliance with and/or investigating suspected or alleged breaches of a designated building law is the voluntary provision of information and documentation and the use of information gathering powers contained in section 59 of the BCII Act; and
- c.) advise the ABC Commissioner, prior to issuing a notice, that the Deputy ABC Commissioner proposes to exercise the power under section 52 to require a person to give information, produce documents, or attend and answer questions.

Operation of the powers

6. Notices issued under section 52 of the BCII Act will be in the form (if any) prescribed by the Building and Construction Industry Improvement Regulations made pursuant to the BCII Act.
7. The ABC Commissioner or Deputy ABC Commissioner does not have to show that there is a belief on reasonable grounds that the information, documents or evidence will establish or tend to establish a contravention of a “designated building law” (or even that they establish a prima facie case), but merely that they may be relevant to an “investigation”.

Limits on the use of powers

8. There are limitations on the use of the compliance powers.
 - a.) The power must only be used for investigation into a contravention by a building industry participant of a designated building law.
 - b.) The BCII Act provides reasonable time to comply with a notice. That reasonable time must be at least 14 days after the notice is served.
9. Further, the information or documents obtained in response to a notice cannot be used as evidence in proceedings against the person who has provided it, subject to certain exceptions in subsection 53(2) of the BCII Act. This is discussed further below.

Scope of information and documents that can be required

10. Information/documents shall not be sought that would:
 - a.) require the addressee to give an interpretation of a document, except where explanations of symbols, codes, etc. may be necessary; or
 - b.) require the addressee to seek out information or documents which are not in its possession, custody or control or to formulate an opinion on a particular matter.
11. A notice may be directed to a body corporate, but where information about awareness, knowledge or belief is required, the notice should be directed to particular persons (for example, company officers, directors or employees).

Covering letter

12. The notice will be issued with a covering letter to help people understand the formal language of the notice.

13. If the notice is to attend and answer questions relevant to an investigation, the covering letter issued with the notice will explain that the examination is about asking questions and obtaining information relevant to the investigation. The letter will outline the recipient's rights and obligations.

- a.) The letter will state that the witness may, if the person so chooses, be represented by a barrister or solicitor.
- b.) The letter will state that the witness may request a change in the time of the examination if they believe that there are exceptional circumstances to prevent or unreasonably impede attendance at the examination within business hours. The recipient must request in writing any change to the time of the examination and set out reasons for the request. The ABC Commissioner or Deputy ABC Commissioner may, at his/her discretion, reschedule the examination.

14. If the recipient of a notice requires an extension of time to provide information or documents, they must request an extension in writing setting out the reasons for the request. The ABC Commissioner or Deputy ABC Commissioner may, at his/her discretion, grant an extension of time.

15. The recipient of the notice may nominate material provided to the ABC Commissioner or Deputy ABC Commissioner as "confidential" and must provide the reasons why the material is confidential in writing.

16. The letter will state in plain English what the recipient is not liable for and will include advice that a person who, acting in good faith, gives information, produces a document or answers questions when required to do so is not liable to any proceedings for contravening any other law because of that conduct; or civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

17. The letter will advise the recipient of the penalty for a contravention of subsection 52(6) of the Act. The letter will also include a warning that it is a serious offence to knowingly give false or misleading evidence.

18. The letter will offer to discuss the matter and nominate a contact officer and telephone number for inquiries.

Variation

19. A notice may be varied where it does not relate to the core “believes on reasonable grounds” requirement, such as the time or date for compliance or the place at which documents are to be produced or an oral examination conducted. Where the variation relates to the core ‘believes on reasonable grounds’ requirements, it is preferable to issue a new notice.

20. An addressee who, for example, asks for a notice to be varied to allow for an extension of time will be advised to submit a written request outlining the reasons for the proposed variation. Addressees seeking interpretation or clarification of the notice should contact the nominated contact officer.

21. The ABC Commissioner or Deputy ABC Commissioner will give a written response.

Service of notices

22. Service of notices is governed by these guidelines and section 28A of the *Acts Interpretation Act 1901*. A notice may be served:

- a.) on a natural person:
 - (i) by delivering it to the person personally; or
 - (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or
- b.) on a body corporate—by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate.

23. While service by registered post is permitted, notices will be served personally in most circumstances. Alternatively, the ABCC will serve the notice on the addressee’s legal adviser where the adviser has instructions from the addressee to accept service on the addressee’s behalf.

Compliance with notices

24. Reasonable time, at least fourteen days after notice is given, will be allowed to comply with a notice to provide information or documents or to attend an examination. However, longer periods of time may be given in exceptional circumstances. The ABC Commissioner or Deputy ABC Commissioner shall consider requests for extension of the time limit. Any request for an extension should be made in writing before the date specified in the notice and reasons for the extension must form part of the request.

25. Usually the ABCC office in the State where the response to the notice is to be lodged will be specified in the notice. Where the addressee is remote from an ABCC

office, the notice will usually specify response by registered mail to the nearest ABCC office. In some cases a venue other than an ABCC office may be nominated. Where a person is requested to attend and answer questions the notice will specify the location where the person is required to attend. The location will be reasonable in the circumstances of each case.

26. An addressee is obliged to comply with a notice. In particular, an addressee of a notice must, where relevant:
- a.) give the required information by the time, and in the manner and form specified in the notice;
 - b.) produce the required documents by the time, and in the manner, specified in the notice;
 - c.) attend to answer questions at the time and place specified in the notice;
 - d.) take an oath or affirmation, when required to do so under subsection 52(4) of the BCII Act; and/or
 - e.) answer questions relevant to the investigation while attending as required by the notice.

A person will commit an offence under subsection 52(6) of the BCII Act if they have been given a notice and fail to comply with the above obligations, where relevant.

27. Further an addressee of a notice must not:
- a.) refuse or fail to comply with a notice to the extent that the person is capable of complying with it;
 - b.) in purported compliance with a notice, knowingly furnish information or documents or give evidence that is false or misleading; or
 - c.) obstruct, hinder, intimidate or resist a Commonwealth public official acting in the conduct of an investigation.

28. Where an addressee refuses or fails to comply with a notice, the ABC Commissioner or Deputy ABC Commissioner may write to the recipient asking them to show cause as to why he or she should not refer the matter to the Commonwealth Director of Public Prosecutions for prosecution of an offence or seek a court order requiring the addressee to comply with the notice.

29. In the case of a notice issued under paragraph 52(1)(e) of the BCII Act, the ABC Commissioner or Deputy ABC Commissioner conducting the examination may ask the examinee to show cause immediately by giving an oral explanation at the examination. The examinee will be permitted to consult with a legal adviser before answering, even if this means adjourning the examination.

Privilege against self–incrimination

30. A person is not excused from giving information, producing a document, or answering a question as required by a valid notice on the basis that to do so:
- a.) might tend to incriminate them or otherwise expose them to a penalty or other liability; or

- b.) would contravene any other law; or
- c.) would be otherwise contrary to the public interest.

31. However, neither:

- a.) the information or answer given or the document produced; nor
- b.) any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document;

is admissible in evidence against a person in proceedings, other than proceedings:

- c.) for a failure to comply with any of the obligations specified in paragraph 26 above (subsection 52(6) of the BCII Act); or
- d.) for knowingly giving information or evidence or producing a document that is false or misleading (sections 137.1 and 137.2 of the *Criminal Code*); or
- e.) for obstructing, hindering, intimidating or resisting a Commonwealth public official in the performance of the official's functions (section 149.1 of the *Criminal Code*).

32. A person who, acting in good faith, gives information, produces a document or answers questions when required to do so is not liable to:

- a.) any proceedings for contravening any other law because of that conduct; or
- b.) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

Legal professional privilege

33. Court decisions in other contexts indicate that legal professional privilege is generally available unless a contrary statutory intention is shown by express words or necessary implication.

34. Division 1 of Part 2 of the BCII Act does not expressly provide for any exemption from compliance with a notice based on legal professional privilege. However, the High Court considered the application of legal professional privilege in respect of s. 155 of the *Trade Practices Act 1974* in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, where it unanimously decided that the section 155 investigative power does not abolish the right to claim legal professional privilege.

35. Using similar reasoning, the ABC Commissioner expects that the section 52 investigative power does not abolish the right to claim legal professional privilege when responding to a notice.

36. However, this does not mean that a mere claim of legal professional privilege will be sufficient to attract the privilege. The person claiming that the communication is privileged must be able to bring it within established legal principles.

37. The High Court also acknowledged in the *Daniels* case that legal professional privilege does not apply to communications made to further a breach of the law.

Conduct of an oral examination

38. An oral examination may be conducted before the ABC Commissioner or a Deputy Commissioner. Such examinations are private.
39. Examinations will normally be conducted within standard business hours. Where an examinee explains in writing that exceptional circumstances prevent or unreasonably impede attendance within business hours the ABC Commissioner or Deputy ABC Commissioner may, at their discretion, reschedule an examination outside business hours. Examinations will, wherever possible, be held in an appropriate location in the State or Territory where the examinee resides.
40. The ABC Commissioner or Deputy ABC Commissioner conducting an examination will schedule adjournments at regular intervals and normally not proceed beyond half a day with an examinee unless there are exceptional circumstances.

Use of oath or affirmation

41. The ABC Commissioner or a Deputy ABC Commissioner may require information or evidence to be verified by, or given on, oath or affirmation. It is policy to administer an oath or affirmation as a matter of course in examinations.

Use of counsel by the ABCC

42. Counsel and/or an instructing solicitor or solicitors may assist the ABC Commissioner or the Deputy ABC Commissioner hearing the evidence. Relevant ABCC staff will also generally be present. Counsel might assist during the examination with tasks such as:
- a.) preparing a list of questions and asking questions;
 - b.) making legal submissions; and/or
 - c.) conferring with the ABC Commissioner, Deputy ABC Commissioner or other ABCC staff to determine further questions to be asked.

Examinee's legal representation

43. In an examination, an examinee may be represented by a barrister or solicitor if they so choose.
44. An examinee's legal representative will be permitted to:
- a.) object to questions as being unclear or irrelevant to the subject matter of the examination;
 - b.) re-examine the examinee to clarify any response to an earlier question; and
 - c.) make submissions at the completion of the examination

Direction to examinee not to disclose

45. The ABC Commissioner and Deputy ABC Commissioner(s) have the power to direct an examinee and their legal representative not to disclose the content of the examination, including any transcript of the examination to any person other than a legal practitioner (for the purpose of obtaining legal advice) until such time as the ABC Commissioner or the Deputy ABC Commissioner has concluded his or her inquiry or otherwise consents to disclosure (if for instance a prosecution is commenced that arises from the subject matter of the examination).

46. This direction protects the private nature of the process as far as is reasonably practicable.

47. The direction prevents examinees or their legal representative from disclosing to third parties what was said in the examination or the fact that certain kinds of information were disclosed in the examination.

48. As a general rule the delegate will send a letter to the examinee withdrawing the non-disclosure direction as soon as reasonably practicable.

Exclusion of third parties

49. Third parties, with the exception of legal representatives/advisers, are excluded from examinations notwithstanding that they may have a direct interest in the evidence to be given. For example, an employer whose company is under investigation has no right of attendance at the examination of an employee.

50. The exclusion of third parties is supported on the basis that examinations are investigative rather than judicial proceedings, so that no right of attendance arises.

51. Attendance by the ABC Commissioner or the Deputy ABC Commissioner will include only members of ABC Commissioner's staff, legal advisers directly involved in the investigation plus transcription staff.

Transcript

52. Examinations will ordinarily be tape-recorded and a full transcript of the evidence given by an examinee will normally be made available to the examinee as soon as reasonably practicable after the conclusion of the examination.

53. Transcripts made available to examinees will be accompanied by a letter inviting them to make written comments relating to corrections to the transcript by a specified date.

Use of information, documents and evidence obtained

54. In general the ABC Commissioner or a Deputy Commissioner is entitled to disclose information where it is appropriate for the exercise of the relevant statutory functions.

55. There are no particular provisions setting out how information or documents obtained in response to a notice can be used, however:

- a.) it cannot be used as evidence in proceedings against the person who has provided it, as set out in section 53 of the BCII Act (subject to the exceptions to this described in paragraph 31 above);
and
- b.) section 65 of the BCII Act (described below) protects the confidentiality of the material.

56. It is also implicit that information or documents provided in response to a notice will be used for the purposes for which the notice was issued, that purpose normally being to assist the ABC Commissioner in investigating a possible contravention by a building industry participant of a designated building law and to reach a view as to whether or not a contravention has occurred.

57. Section 55 of the BCII Act provides the ABC Commissioner (or delegate) with a right to take possession of a document produced under section 52 and keep it for as long as necessary for the purposes of the relevant investigation. The ABC Commissioner (or delegate) can also make and keep copies of any document produced under section 52 pursuant to section 56 of the BCII Act.

58. Where the ABC Commissioner (or delegate) has retained any document produced under section 52, subsection 55(2) of the BCII Act enables the provider of the document to obtain a certified copy of the document. The certified copy is taken as evidence of the original document in all courts and tribunals. The provider of the document (or a person authorised by the provider) is also entitled to inspect the document held by the ABCC and to make copies of the document prior to being given a certificate.

Disclosure and confidentiality

59. Section 65 of the BCII Act protects the confidentiality of information obtained by the ABC Commissioner or a Deputy ABC Commissioner under section 52 of the BCII Act.

60. In general, the ABC Commissioner and his office are only entitled to record and disclose information obtained under section 52 where this is done for the purposes of the BCII Act and in certain other specified circumstances.

61. It is a serious offence for the ABC Commissioner, Deputy ABC Commissioners and staff of the ABCC to record or disclose information obtained in the course of their

official employment, if this is not done in a manner permitted by section 65 of the BCII Act.

62. However, even when the ABC Commissioner, Deputy ABC Commissioners and staff of the ABCC can legally disclose information obtained under section 52 of the BCII Act, they will, in appropriate cases, consult with the provider of the information before deciding whether to disclose their confidential information to others. It is therefore important that a person providing information in response to a notice clearly identifies confidential material and the basis for the confidentiality.

63. In some situations it will not be appropriate or necessary for the ABC Commissioner, Deputy ABC Commissioners or staff of the ABCC to consult regarding the proper disclosure of information produced in response to a notice, for example:

- a.) where consultation would interfere in the proper conduct of an investigation;
and
- b.) where the material is not confidential or not confidential in relation to the person to whom it is proposed to be disclosed.

Questions

64. If the recipient of a notice has any questions about the operation of these guidelines, they are encouraged to contact the contact officer listed on the notice.