



ABCC Compulsory Examination Power – Frequently Asked Questions

Section 52 of the *Building and Construction Industry Improvement Act 2005 (BCII Act)* allows the ABC Commissioner to require a person to attend before him (or an assistant) to answer questions relevant to an investigation.

This is known as the ‘compulsory examination’ power.

It is a power modelled on those used by the Australian Competition and Consumer Commission (ACCC) and similar to those used by the Australian Securities and Investments Commission (ASIC).

Importantly, it is a power that is used rarely and as a last resort. In the five years since the ABCC commenced operation on 1 October 2005, the ABCC has undertaken 1176 investigations. However, the compulsory examination power has only been used in around 5% of all ABCC investigations.


The ABCC’s compulsory examination power is frequently the subject of public discussion and debate, often generating questions as to the purpose of the powers and how they are used.

This FAQ aims to answer some of those questions, and other questions that are often asked of the ABCC.

Question	Answer
When can the compulsory examination power be used?	The compulsory examination power can only be used when there is a belief on reasonable grounds that the person: <ul style="list-style-type: none">• has information or documents relevant to an investigation; or• is capable of giving evidence that is relevant to an investigation.
So it can’t be used by the ABCC to go on a ‘fishing expedition’?	Correct. There must be an actual investigation being conducted into an alleged contravention of a Commonwealth workplace law before section 52 can be used.
Is the ABCC keen to use section 52?	No. We would prefer to receive information about alleged contraventions of a Commonwealth workplace law on a voluntary basis. Every effort is made to first obtain the information voluntarily. Section 52 is only used as a last resort.
Is there any guide to how the ABCC uses the compulsory examination power?	Yes. We published <i>Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry</i> which detail the procedures the ABCC must follow when using its compulsive examination powers. The guidelines are available to the public on the ABCC website .



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Does the ABCC make public its use of section 52?	<p>Yes. While the actual proceedings during an examination remain confidential, we release compliance powers reports every six months.</p> <p>These reports, in addition to reports provided to Parliament through the annual report, are placed on our website.</p> <p>They provide a snapshot of how many times we have used compliance powers, the classification of the examinee, the outcome of the examination, and other relevant information.</p>
I hear the examinations are conducted in a 'star chamber', is that correct?	<p>No. The examinations are conducted in purpose built facilities in Sydney, Melbourne and Perth and (when necessary) in hired premises in other states.</p> <p>Here is a picture of the Melbourne examination room.</p> 
Why are the proceedings confidential?	<p>Examinations under section 52 are conducted as a part of an investigation into an alleged contravention of a Commonwealth workplace law.</p> <p>Accordingly, it is appropriate that the information that is received is kept confidential while the investigation is ongoing.</p> <p>If the investigation leads to litigation, the information received during the section 52 examination may be made available in open court.</p> <p>Usually, witnesses are required to keep the details of their examination confidential while we complete our investigation.</p> <p>If the investigation does not lead to litigation, then we will release the witness from their obligation of confidentiality.</p>
Can the person attending the examination refuse to answer questions?	<p>No. A person attending a section 52 examination must answer the questions asked of them that are relevant to our investigation and do not require the disclosure of information</p>



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	<p>that is otherwise privileged.</p> <p>However, it is not an excuse not to answer a question on the basis that it may incriminate the witness or expose the witness to a penalty.</p>
<p>I have heard that the person giving information to the ABCC compulsorily under section 52 can have it used against them in legal proceedings.</p> <p>Is that true?</p>	<p>No, this is incorrect. It would be unfair and cannot happen unless the information given is false or misleading.</p> <p>None of the information provided by the person during a section 52 examination is admissible in evidence against the person in any proceedings other than a proceeding that the information provided was false or misleading.</p>
<p>I've also heard that workers can be 'dragged off' building sites and brought before the ABCC. Is that true?</p>	<p>No. Any person who receives a section 52 notice is given 14 days notice in writing of the proposed examination.</p> <p>The notice includes details of the matter under investigation. A covering letter outlines their rights and obligations under the BCII Act and provides contact details to enable them to speak with one of our staff members.</p>
<p>Can they bring a lawyer?</p>	<p>Yes. Every person attending a section 52 examination has a legal right to be represented by a lawyer.</p>
<p>What happens if the person refuses to attend the section 52 examination?</p>	<p>It is an offence to refuse to attend an ABCC examination.</p> <p>The ABC Commissioner can refer this to the Commonwealth Department of Public Prosecutions (CDPP). If the CDPP chooses to prosecute, the matter would then be before a court and subject to any penalty it determines. The maximum penalty is six months imprisonment.</p> <p>However, a court may 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 <i>Crimes Act 1914</i></p>
<p>Is the ABCC the only agency with these powers?</p>	<p>No. Our powers are modelled on those used by the Australian Competition and Consumer Commission (ACCC) and similar to those used by the Australian Securities and Investments Commission (ASIC).</p>
<p>Why was the ABCC given these powers?</p>	<p>In 2001 the Government established the Cole Royal Commission into the Building and Construction industry.</p> <p>The final report of the Commission found the building and construction industry was characterised by widespread disregard for the law, cataloguing over 100 types of unlawful and inappropriate conduct.</p> <p>The Royal Commission also found that existing regulatory</p>



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	<p>bodies had insufficient powers and resources to enforce the law.</p> <p>In October 2002 the interim Building Industry Taskforce (BIT) was established to regulate the industry prior to the establishment of the national agency envisaged by Commissioner Cole.</p> <p>The BIT enforced workplace laws in the building and construction through voluntary compliance.</p> <p>The BIT found that 52 per cent of its investigations could not proceed because of fear, intimidation and lack of cooperation from witnesses.</p> <p>This is why the Hon. Murray Wilcox QC's report, the Wilcox Report, recommended that the compulsory examination powers be retained.</p> <p>The Wilcox report suggested some changes to the use of the powers, and ABC Commissioner Leigh Johns has voluntarily implemented these recommendations.</p>
Has there ever been a legal challenge to the section 52 powers?	<p>Yes. The compliance powers have been subject to two unsuccessful legal challenges in 2006 and 2007.</p> <p>More information on that case can be found on the ABCC website under Bonan v Hadgkiss and Washington & Ors v Hadgkiss.</p> <p>In a third case in 2010, the CDPP prosecuted Mr Ark Tribe for a failure to attend a compulsory examination. The case was dismissed, the court finding the ABC Commissioner's functions under section 52 had not been properly delegated. Further information on this case, CDPP v Tribe, is on the ABCC website</p>
Has there been any external review of the need for section 52?	<p>Yes. In April 2009 retired Federal Court Judge, the Hon. Murray Wilcox QC considered whether there was a continuing need for section 52 powers.</p> <p>His Honour recommended the continuation of the compliance power with additional administrative oversight and a sunset clause.</p> <p>The government adopted the essence of the Wilcox report and introduced a Bill into the parliament that retains the compliance power.</p> <p>The Bill had not been passed when the parliament was prorogued on 17 July 2010.</p> <p>The Government has committed to re-introduce the Bill.</p>
Does the ABCC operate a 'secret police force'?	<p>No. The ABCC employs Australian Building and Construction Industry Inspectors (ABC Inspectors), and their role is quite different from that of a police officer.</p>



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	<p>Unlike police, an ABC Inspector cannot obtain a warrant, cannot enter a premises using force, and may only investigate civil matters related to a Commonwealth workplace law.</p> <p>Far from being secret, ABC Inspectors must carry an identity card while performing their duties. ABC Inspectors must show this card if the occupier of a premises is present.</p> <p>ABC Inspectors also perform other functions, such as giving presentations to inform people of their rights and responsibilities as building and construction industry participants.</p>
I've heard the ABCC is biased against construction workers. Is that true?	<p>No. Workers are in a clear minority as respondents in our cases.</p> <p>The majority of cases involve unions, union officials and contractors.</p> <p>We do not operate with bias in any way.</p>

Information correct as at 16 December 2010