



Australian Government

**Office of the Australian Building and
Construction Commissioner**

Report on the Exercise of Compliance Powers by the ABCC

For the period 1 October 2005 to
30 September 2008



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Background

1. This is the fifth report on the exercise of the ABCC's Compliance Powers pursuant to section 52 of the *Building and Construction Industry Improvement Act 2005* ("BCII Act"). Previous reports were published in July 2005, December 2006, August 2007 and March 2008. All reports can be found on the ABCC website at www.abcc.gov.au. The previous reports provide information on the rationale and use of the compliance powers.
2. This report provides up to date figures on the use of compliance powers by the ABCC and discusses recent developments.

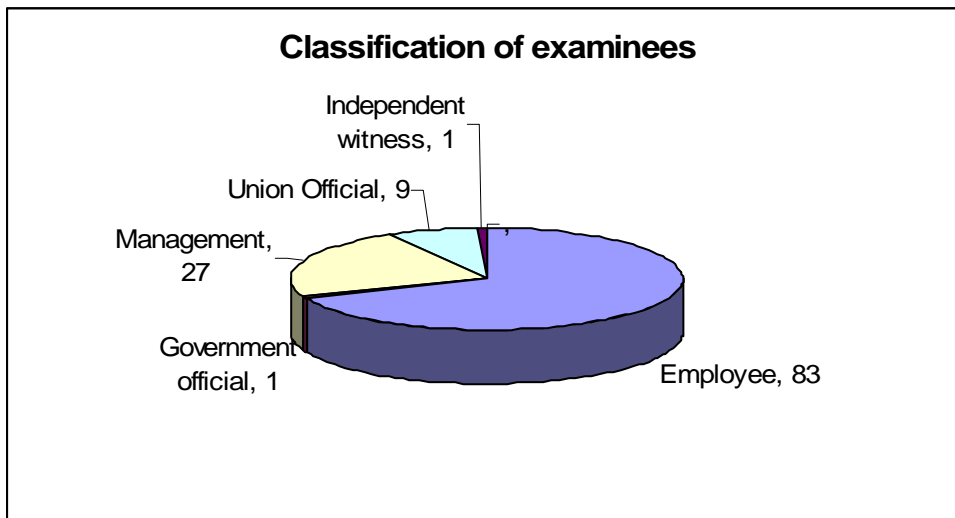
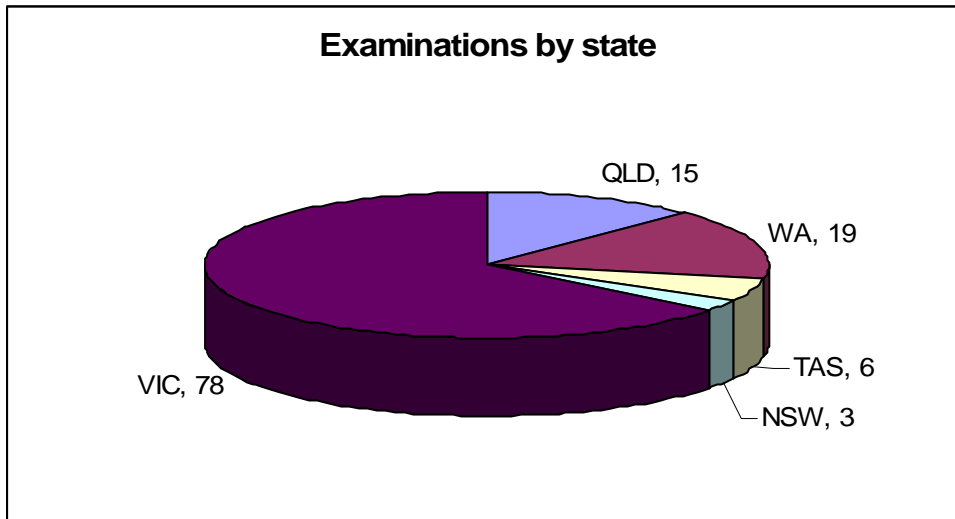
ABCC compliance powers statistics

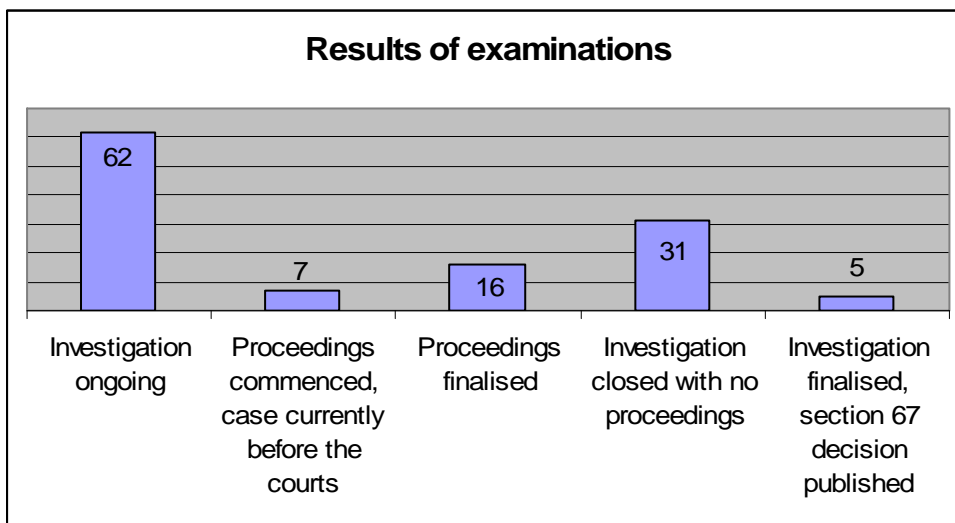
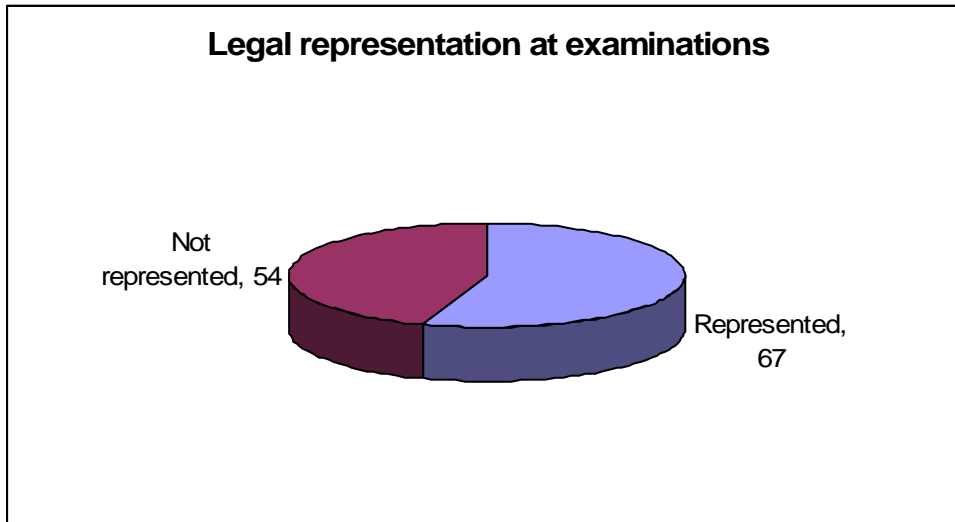
3. The following statistics apply for the period 1 October 2005 to 30 September 2008:

	Notice to attend and answer questions	Notice requiring production of documents	Notice requiring information
Number of notices issued	142	4	0
Examinations conducted or documents produced	121	4	0

4. Twenty-one more notices were issued than examinations conducted. This is explained by the following:
 - 4 notices were withdrawn after service:
 - 2 witnesses provided voluntary statements. The Deputy Commissioner decided, after considering the content of the statements, that there was no longer a need for these witnesses to attend examinations;
 - 1 witness was seriously injured;
 - 1 witness requested more time to prepare for the examination;
 - 1 witness had moved overseas and was unable to be served;
 - 2 notices were re-issued;

- 1 witness did not attend and the matter has been referred to the Commonwealth Director of Public Prosecutions; and
 - 13 examinations are yet to be conducted as at 30 September 2008.
5. The charts below set out information on the location of examinations to date, the classification of examinees, the extent to which witnesses have been legally represented, and the penalty proceedings that have resulted from examinations.





6. Nine proceedings have been commenced in respect of investigations which have included examinations. Those nine investigations included the examination of 23 witnesses.

Documents produced under section 52

7. The ABCC has issued and served a *Notice to produce documents* under section 52(1)(d) of the BCII Act on four occasions. On each occasion, the recipient had previously been served with a *Requirement to produce documents* under section 59(5)(e) of the BCII Act but had failed to fulfil that requirement.

Federal Court challenges

8. Since 1 October 2005, two challenges to the exercise of ABCC's compliance powers have been heard by the Federal Court.

Bonan v Hadgkiss [2006] FCA 1334; [2007] FCFCFA 113

9. The first challenge in *Bonan v Hadgkiss* was heard and determined by Besanko J in the Federal Court on 12 October 2006. The decision of the Court is summarised in the December 2006 report.
10. Mr Bonan appealed against the decision of Besanko J. On 27 July 2007, the Full Court of the Federal Court ruled that Mr Bonan's appeal be permanently stayed.

Washington v Hadgkiss [2008] FCA 28

11. On 19 November 2007, Noel Washington, CFMEU Victorian Senior Vice President, John Setka, CFMEU official, Ivan Balta, CEPU official, and David Mier, ETU official, (jointly referred to as the applicants) filed an application in the Federal Court of Australia in Melbourne alleging that the ABCC had issued notices under s.52 for an improper purpose.
12. Mr Washington and Mr Balta had previously been served with notices to attend and answer questions in relation to an ABCC investigation. The investigation related to alleged threats and intimidation of a witness who gave evidence against a CFMEU official at a proceeding in the Australian Industrial Relations Commission in Melbourne.
13. On 11 December 2007 the challenge was heard before Marshall J.
14. On 29 January 2008 Marshall J dismissed the application.
15. Further information relating to this matter, including His Honour's reasons for the dismissal of the application, is detailed in the March 2008 report.

Non-attendance at an ABCC examination

16. On 30 October 2007 Mr Washington was served with a *Notice to attend and answer questions*.
17. On 18 March 2008 Mr Washington failed to attend the examination. A letter was sent to Mr Washington asking him to show cause as to why the ABCC should not refer the matter to the Commonwealth Director of Public Prosecutions (CDPP) regarding his failure to attend the examination.
18. In April 2008, the ABCC referred the matter to the CDPP who decided to commence proceedings on 28 May 2008 in the Magistrates Court in Victoria. Those proceedings allege an offence under s.52(6) of the BCII Act and are listed for hearing on 2 December 2008.
19. Mr Washington is the first witness not to attend an ABCC examination to answer questions relevant to an investigation.

20. The BCII Act provides a maximum penalty for non-attendance at an ABCC examination of six months' imprisonment. However, a Court has a discretion to impose a monetary or other penalty.

Matters commenced before the Courts resulting from examinations

21. The following matters which have been the subject of the use of compliance powers have been filed in the courts since 31 March 2008.
22. In each of the matters set out below, the information that was obtained through the use of compliance powers enabled the ABCC to be in a position where it could institute penalty proceedings.

Cozadinos v CFMEU & Johnston

23. This matter relates to an alleged contravention of section 38 of the BCII Act, involving unlawful industrial action by CFMEU shop steward, Craig Johnston, and the CFMEU, through the conduct of Mr Johnston.
24. In 2007, Wycombe Constructions Pty Ltd (Wycombe) was the head contractor on the Deakin University Medical School Refurbishment Project in Waurn Ponds, Geelong, in Victoria.
25. From early 2007, Mr Johnston had allegedly pressured the directors of a subcontractor of Wycombe to employ a particular labourer on the site.
26. On 19 March 2007, a load of building materials was delivered to the site. The ABCC alleges that Mr Johnston told a labourer not to unload the materials, despite the direction to do so from Wycombe.
27. Subsequently the truck left the site without being unloaded.
28. The hearing of this matter in the Federal Magistrates Court is to commence on 6 October 2008.

Stuart v Pitt Mates & CFMEU

29. This matter relates to an alleged contravention of section 790 of the *Workplace Relations Act 1996*, involving false and misleading statements by organisers of the CFMEU, namely Brendan Pitt and Robert Mates, and the CFMEU, through the conduct of its organisers.
30. On or about 14 May 2007, a subcontractor was employed to perform earthworks at the Austin Hospital site in Heidelberg, Victoria.
31. On 15 May 2007, the subcontractor attended the site to be inducted. At the induction it became evident that the subcontractor was not a member of a union.
32. The ABCC alleges that once the subcontractor commenced working on the site, Mr Pitt and Mr Mates approached the subcontractor and enquired whether

he was considering becoming a member of the CFMEU. The subcontractor stated that he did not intend to join the union.

33. Allegedly Mr Pitt and Mr Mates told the subcontractor that in order to keep working on the site he needed to pay union membership fees immediately or he could no longer continue to work on the site and would be required to leave immediately.
34. It is further alleged that Mr Pitt and Mr Mates told the subcontractor that if he did pay union membership fees he would be free to work on any building site.

Cozadinos v Dempster and Henry

35. This matter relates to alleged contraventions of sections 789 and 790 of the WR Act, involving coercion and false and misleading statements about a person's obligation to join the CFMEU by Michael Dempster and Richard Henry.
36. Merkon Constructions (Merkon) was engaged to manage the refurbishment of the World Trade Centre site at Siddley Street, Melbourne. Merkon hired AAA Passive Fire Services (AAA Passive) to carry out the fire spraying of beams at the site.
37. On 27 July 2007, two employees of AAA Passive met with Mr Dempster to take part in a site induction. When it became evident that neither of the employees was a union member, it is alleged that Mr Dempster took action against them with intent to coerce them to become members of the CFMEU and made false and misleading representations about their obligation to be or become members of the CFMEU.
38. On 3 August 2007, a further two employees attended the site and met with Mr Henry to take part in a site induction. One of these employees was not a member of the CFMEU. It is alleged that Mr Henry made false and misleading representations to this employee that he had an obligation to be or become a member of the CFMEU.

Conclusion

39. The ABCC continues to use its compliance powers in order to obtain information from witnesses who are unwilling to cooperate with ABC Inspectors in regard to investigations.
40. The number of witnesses that have been required to attend examinations has increased in 2008. In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.

41. The use of compliance powers is an effective tool in establishing the facts in relation to incidents within the building industry and determining which cases do or do not warrant prosecution.