



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 April 2011

Report on the exercise of compliance powers by the ABCC from 1 October 2005 to 30 April 2011.

Background

1. This is the tenth report relating to the exercise of compliance powers by the Australian Building and Construction Commissioner (ABCC).
2. All reports relating to the ABCC's compliance powers are published on the ABCC website at www.abcc.gov.au
3. This report provides information relating to the use of compliance powers by the ABCC from its inception on 1 October 2005 to 30 April 2011.

Legislative and policy requirements in relation to the exercise of compliance powers

4. The ABCC's compliance powers are governed by section 52 of the *Building and Construction Industry Improvement Act 2005 (BCII Act)*.
5. Section 52 of the BCII Act provides the ABC Commissioner with certain powers to compel a person to assist with an ongoing investigation. In order for the ABC Commissioner to use these powers he must have a reasonable belief that the person whom is compelled has relevant information.
6. The ABC Commissioner will exercise his discretion to utilise the compliance powers in circumstances where:
 - the ABCC has commenced an investigation;
 - there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation;
 - it is likely to be important to the progress of the investigation that this information or evidence be obtained; and
 - it is reasonable to require the attendance, having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact on the person being required to do so.
7. There are three separate elements that the powers pursuant to section 52 of the BCII Act provides. That is:
 - Section 52(1)(c) of the BCII Act allows for the ABC Commissioner to require a person to provide information;
 - Section 52(1)(d) of the BCII Act allows for the ABC Commissioner to require a person to provide documents; and
 - Section 52(1)(e) of the BCII Act allows for the ABC Commissioner to require a person to attend at a specified place and time to answer questions, otherwise known as attending an 'examination'.

8. The ABCC exercises its use of compliance in accordance with the *Guidelines in relation to the exercise of compliance powers in the Building and Construction Industry (the Guidelines)*. The Guidelines are broadly similar to those of other government agencies with information gathering powers such as the Australian Competition and Consumer Commissioner and Australian Securities and Investments Commission.

9. The Guidelines are based on similar Guidelines that applied to the ABCC's predecessor, the Building Industry Taskforce, which were approved by the Federal Parliament in June 2005.

10. A copy of the Guidelines may be obtained from the ABCC's website.

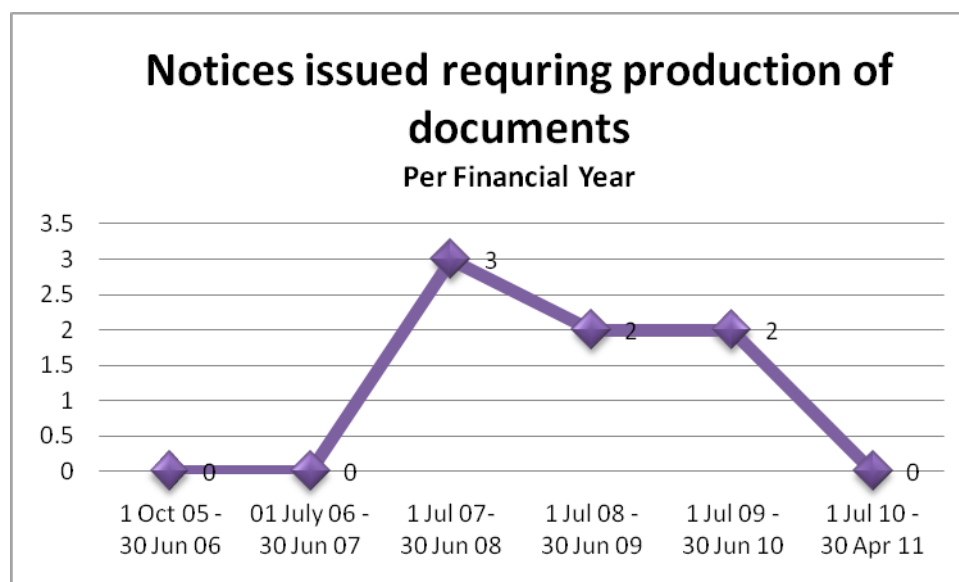
Compliance powers statistics

11. The ABCC continues to use its compliance powers in instances where they are required.

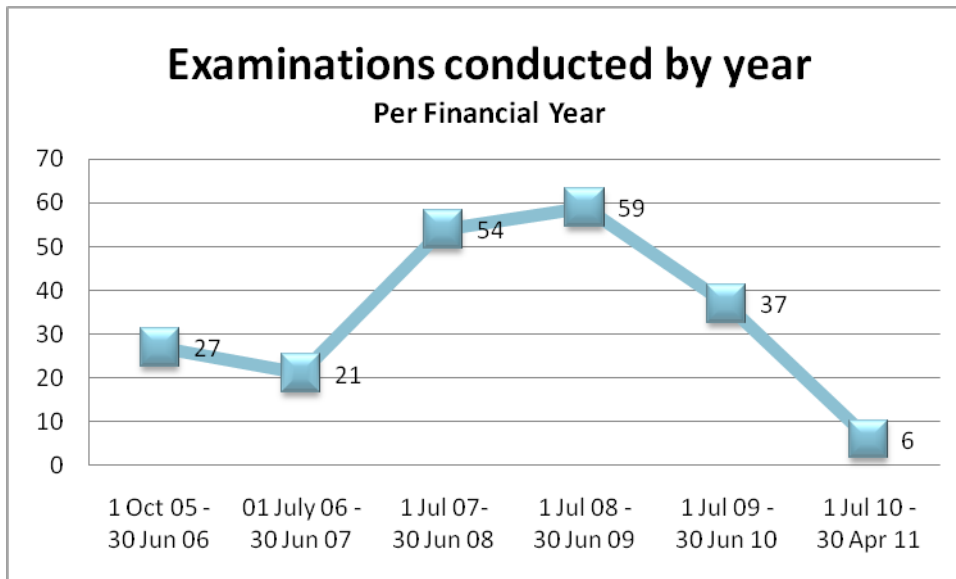
12. The number of instances where the compliance powers have been required as an investigatory tool has declined largely since the ABCC released its last report on the use of the compliance powers as at 30 September 2010 (**the September 2010 report**).

13. From 1 October 2005 to 30 April 2011 no witness has been required to provide information pursuant to section 52(1)(c) of the BCII Act.

14. From 1 October 2005 to 30 April 2011 seven witnesses have been required to produce documents pursuant to section 52(1)(d) of the BCII Act.

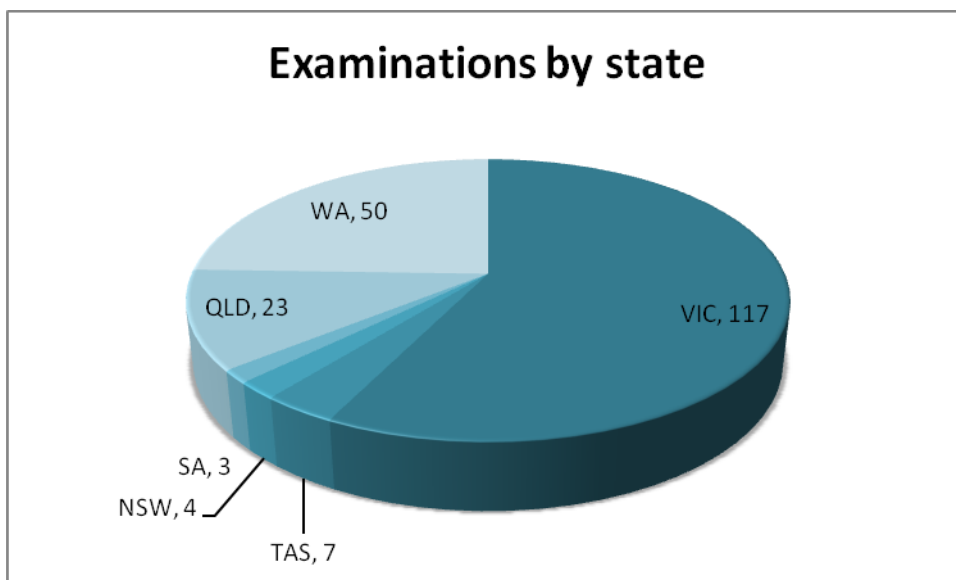


15. From 1 October 2005 to 30 April 2011 204 examinations have been conducted pursuant to section 52(1)(e) of the BCII Act.



16. Since the September 2010 report four examinations have been conducted. A further three notices to attend and answer questions were issued, however the addressees of those notices provided voluntary statements after they were served with their notices, despite their earlier refusal to do so. The notices were withdrawn accordingly.

17. As has been the trend since the inception of the ABCC, the majority of examinations have been conducted in Victoria and Western Australia. This is largely reflective of the culture of the building industry in those states.

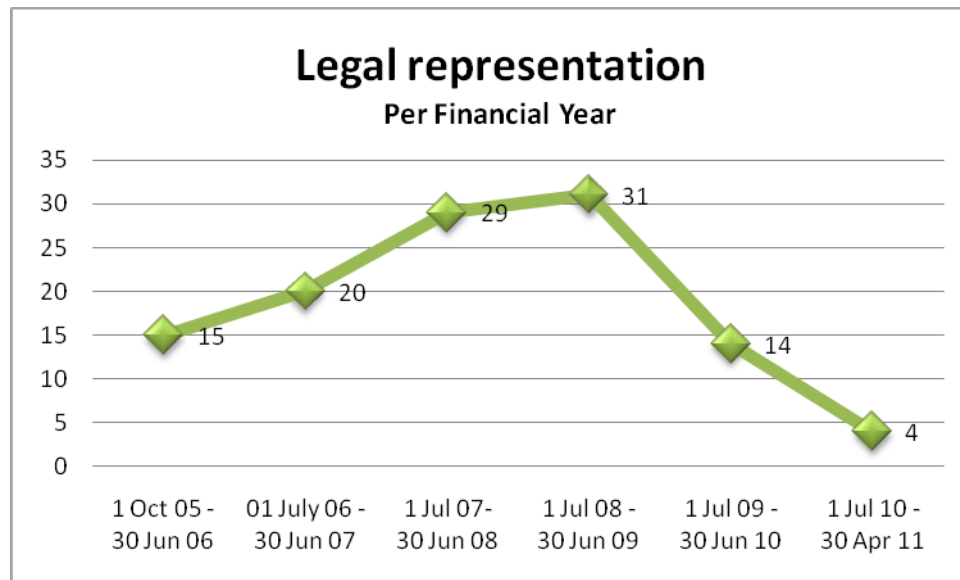


18. All witnesses have the right to legal representation at examinations. Witnesses are given a minimum of 14 days from the date they are served with the notice to the date that they are

required to attend an examination. This timeframe allows the witness sufficient time to source a legal representative should they so choose.

19. Witnesses may choose their own legal representation. Only in exceptional circumstances will a particular representative be disallowed. See *Bonan v Hadgkiss* [2006] FCA 1334; [2007] FCFCFA 113.

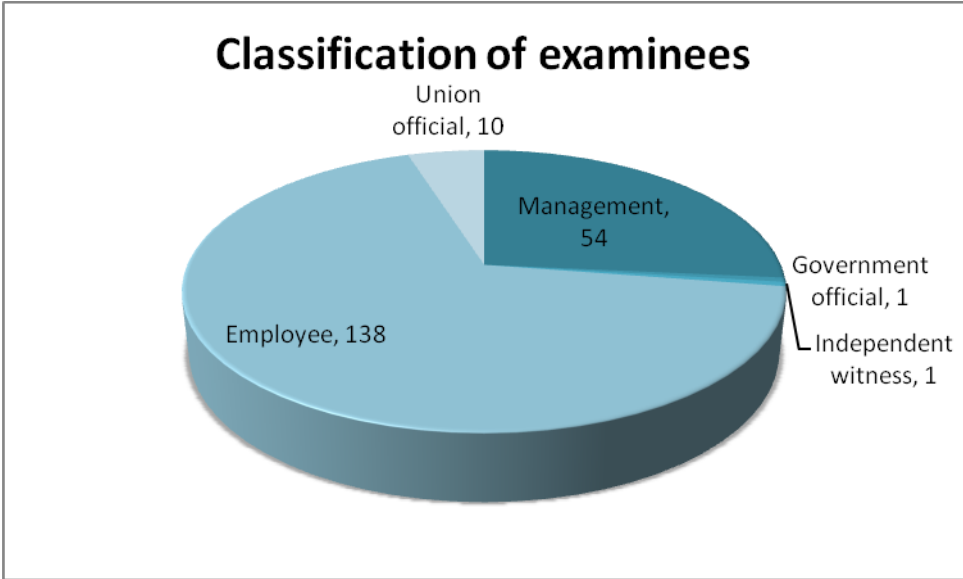
20. To date, 113 witnesses have chosen to be legally represented at examinations.



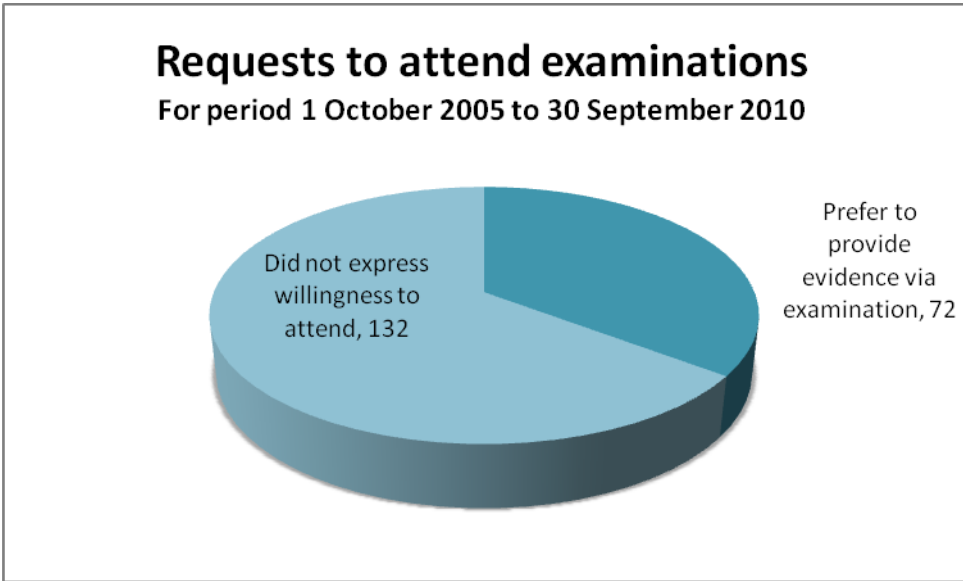
21. Section 53(2) of the BCII Act protects witnesses in respect to answers that they give. This means that witnesses are immune from prosecution where information is obtained either directly or indirectly as a result of that witness attending the examination. However, there are four exceptions to this rule. The immunity from prosecution does not apply if a witness:

- Fails to answer a question;
- Knowingly provides false or misleading information;
- Knowingly produces a false or misleading document; or
- Hinders or obstructs a Commonwealth Public Official.

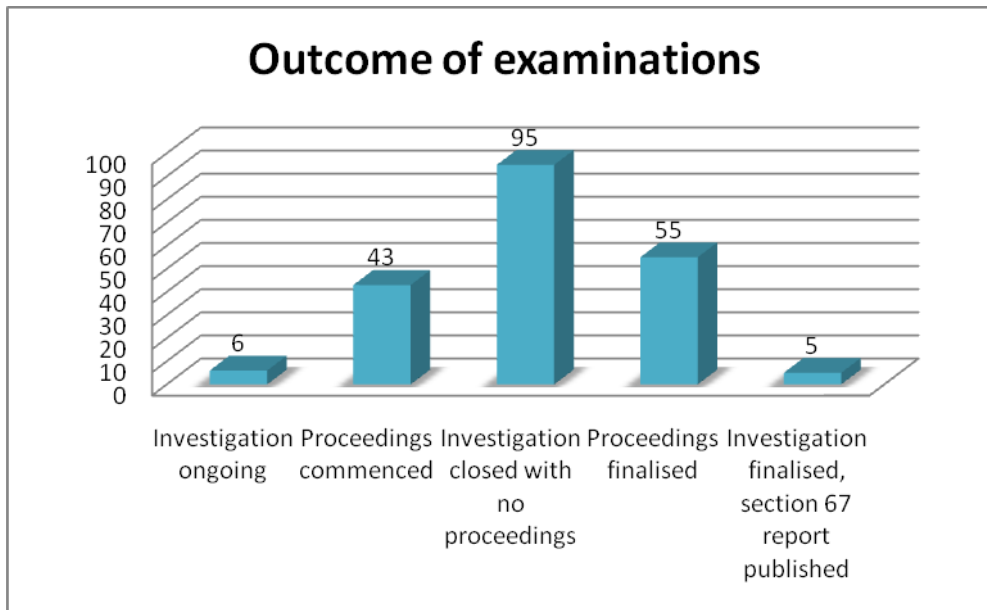
22. Due to the protection that section 53(2) provides, it is unlikely that a witness attending an examination would be suspected to have contravened any law. Therefore, it is not surprising that a large number of witnesses who attend examination are employees.



23. To date 31 percent of witnesses prefer to give evidence via the compulsory means of a section 52 notice. Once witnesses are served with a notice they are obliged to give evidence by law. Witnesses often prefer this option when they are fearful of possible repercussions that may result if they are seen to be assisting the ABCC on a voluntarily basis.



24. To date, over half of the examinations attended by witnesses have been in relation to investigations that have ultimately proceeded to court. Of those investigations which have proceeded to court, witnesses provided evidence on 43 occasions where the matter is a current legal proceeding and on 55 occasions where the matter has been finalised.



Non-compliance with section 52 powers

25. A person who receives a notice pursuant to section 52 of the BCII Act is obligated to comply with that notice. Non-compliance may be a criminal offence carrying a maximum penalty of six months imprisonment.

26. Since the ABCC's inception, there have been five instances of non-compliance with notices. All of these instances have been in respect to notices issued pursuant to section 52(1)(e) of the BCII Act where witnesses were required to attend examinations.

27. Information relating to the circumstances of non-attendance on those occasions is set out in previous reports.

28. This report provides further detail in relation to two matters of non-attendance being the non-attendance of Mr Ark Tribe in Adelaide (the second occasion of non-attendance) and the non-attendance of an unnamed witness in Brisbane (the fifth occasion of non-attendance).

Non-attendance in Adelaide - *Commonwealth Director of Public Prosecutions v Tribe*

29. In October 2008 Mr Ark Tribe, an employee of a construction company, failed to attend an examination.

30. Following his non-attendance, Mr Tribe was provided with an opportunity to speak with the ABCC regarding his reasons for non-attendance. The ABCC did not receive a response from Mr Tribe and as so was required to refer a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP).

31. The CDPP filed proceedings in February 2009 in the Magistrates Court of South Australia in the matter of *Commonwealth Director of Public Prosecutions v Tribe*.

32. On 18, 20 and 21 July and 13 September 2010 the court heard evidence in relation to the matter. Written submissions were also received. The evidence largely centred on whether the notice that was served on Mr Tribe was a valid notice.

33. On 24 November 2010 the court handed down its decision (**the Tribe decision**). The court found that the notice was invalid.

34. The court provided in its reasoning that the then ABC Commissioner had properly delegated his section 52 function under the BCII Act to the Deputy ABC Commissioner who had issued the notice to Mr Tribe, but had not delegated his investigation function under section 10 of the BCII Act.

35. The court also found the notice issued to Mr Tribe did not strictly comply with the legislative requirements, though he decided that this issue would not itself mean the Notice was invalid.

36. Following this decision, ABC Commissioner Johns undertook a review of practice and procedure in relation to the ABCC's compliance powers. Information and outcomes of this review are set out later in this report.

Non-attendance in Brisbane

37. The September 2010 report set out that in August 2010 a witness failed to attend an examination in Brisbane. Subsequently, a brief was prepared and sent to the CDPP.

38. After the Tribe decision was handed down the ABCC withdrew its claim against this witness. The claim was withdrawn on the basis that the then ABC Commissioner had not delegated his functions under section 10(b) of the BCII Act at the time of issuing the notice to this witness; therefore the notice may be deemed as invalid.

Review of practice and procedure in relation to the ABCC's compliance powers

39. On 11 October 2010 Leigh Johns was appointed as the ABC Commissioner. Shortly after his commencement, ABC Commissioner Johns undertook a review of the practice and procedures relating to the exercise of compliance powers by the ABCC.

40. As part of that review, ABC Commissioner Johns considered the report prepared by the Honourable Murray Wilcox QC in March 2009 (**the Wilcox Report**) and the Tribe Decision.

The Wilcox Inquiry and Report

41. In June 2008 the Honourable Murray Wilcox QC was appointed to undertake consultations concerning the creation of a specialist division for building and construction

within Fair Work Australia. The Wilcox Report, delivered in late March 2009 examines the possibility of conferring powers to compel evidence on a specialist division of the FWA, similar to the ABC Commissioner's powers. The Wilcox Report recommends a specialist division be given similar powers but suggests a number of safeguards to be put in place that do not currently exist in relation to the ABC Commissioner's powers.

42. ABC Commissioner Johns has, to the extent possible and within his discretion, voluntarily adopted the recommendations of the Wilcox Report that relate to compliance powers.

Summary of considerations

43. ABC Commissioner Johns considered the following questions to determine how he will exercise the compliance powers:

a) Could the ABC Commissioner formalise the criteria for use of the section 52 powers recommended in the Wilcox Report as part of the existing 'Statement in Support' process carried out when using the powers?

44. Wilcox QC recommended that an Administrative Appeals Tribunal (AAT) presidential member be charged with the duty of determining whether a person should be required to attend an examination. Under the Wilcox recommendations, the AAT member would need to be satisfied on the basis of written material that there were reasonable grounds to believe not only that a particular person had information or documents relevant to an investigation, but that the person was 'likely to be important in the process of the investigation' and that the exercise of the power is reasonable 'having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person being required to attend and answer questions.'

45. ABC Commissioner Johns' decision to exercise section 52 powers is informed by a Statement in Support of the exercise of the powers prepared by ABC Inspectors and reviewed by ABCC legal officers. ABC Commissioner Johns has determined that there is no impediment to him requiring those statements in support to address the criteria proposed in the Wilcox Report, including a more detailed 'threshold test'.

46. ABC Commissioner Johns notes that he cannot substitute the Wilcox criteria for the test established at section 52(1) of the BCII Act when it comes to deciding whether to exercise his powers. ABC Commissioner Johns will exercise section 52 powers when the test established at section 52(1) of the BCII Act is met and when he is satisfied that the use of the power is reasonable against the considerations referred to by Wilcox QC.

47. Accordingly, the ABC Commissioner has voluntarily adopted the criteria for use of section 52 powers recommended by the Wilcox Report by requesting they be addressed in a Statement of Support before using the powers.

b) Could the ABCC approach an AAT Presidential Member (acting in their personal capacity) to receive reports from the ABC Commissioner about proposed uses of section 52

(unless the industry participant requested a section 52 notice) and take advice from the AAT Presidential member about exercising the powers?

48. ABC Commissioner Johns has formed the view that an AAT presidential member could not currently perform this role in their capacity as a member of the AAT. The powers and functions conferred on members of the AAT by the AAT Act relate to the constitution of the AAT as a tribunal to review administrative decisions, where jurisdiction to review those decisions is conferred by statute. The AAT does not have a role in reviewing decisions by the ABC Commissioner to exercise statutory powers.

49. However, a presidential member who was not a Federal Court judge could agree to perform this function in their personal capacity. The ABC Commissioner could approach the AAT with a view to seeking expressions of interest from presidential members of the AAT who would make themselves available, separate from their role as AAT members, to provide advice to the Commissioner about the proposed use of section 52 powers.

50. There is a risk that, by disclosing information to a member of the AAT for the purposes of obtaining advice, the ABC Commissioner may be in breach of the secrecy provisions in section 651 of the BCII Act.

51. Accordingly, the ABC Commissioner is considering the mechanisms by which it may be feasible to consult with a member of the AAT before exercising the compliance powers.

c) If an examination is to be conducted in private, could the ABC Commissioner notify the Commonwealth Ombudsman of the intended examination and provide an opportunity for the Commonwealth Ombudsman to monitor proceedings? Could the ABC Commissioner provide the Commonwealth Ombudsman with a transcript of all examinations?

52. The role of the Commonwealth Ombudsman is to investigate complaints about matters of administration, rather than take an active role in monitoring administrative actions as they take place. For this reason, it is unlikely to be within the scope of the Ombudsman's functions to attend examinations conducted under section 52 for the purposes of monitoring the conduct of these examinations. The ABC Commissioner had formed the view that the Commonwealth Ombudsman's power to investigate 'actions' that relate to a matter of administration is limited to actions that have been taken and completed, and may not extend to actions that are currently being taken by a prescribed authority.

53. Unless the Commonwealth Ombudsman initiated its own motion investigation or received a complaint about a particular action related to the exercise of the section 52 powers, there is limited scope for the Ombudsman to be given transcripts of examinations.

54. On 3 May 2011 ABC Commissioner Johns met with the Office of the Commonwealth Ombudsman to discuss options for the Commonwealth Ombudsman to perform post-examination conduct oversight of the use of the section 52 compliance power.

¹ Section 65 of the BCII Act relates to the protection of confidentiality of information and restricts what a person may do with that information.

55. The ABCC and the Commonwealth Ombudsman are continuing dialogue around options for the proposed oversight.

d) Is there any impediment to implementing the proposal to conduct all future section 52 examinations at the ABC Commissioner level?

56. ABC Commissioner Johns has previously announced his intention to personally conduct all section 52 examinations for the foreseeable future.

57. The fact that the ABC Commissioner may delegate the section 52 powers or may appoint 'assistants' to assist in the exercise of the powers, does not mean the Commissioner is obliged to do so. The ABC Commissioner has the discretion whether to involve others in the exercise of section 52 powers.

58. ABC Commissioner Johns confirms his decision to personally issue all notices under section 52 and preside over all examinations.

e) Are there impediments to reimbursing reasonable expenses of those summonsed to attend an examination?

59. ABC Commissioner Johns has decided to adopt the recommendation of the Hon. Mr Wilcox QC to reimburse section 52 examinees the reasonable cost of travel, accommodation and other associated losses or expenses (including, in appropriate cases, lost wages) caused in responding to a section 52 Notice.

60. The BCII Act does not provide for the payment of travel and other associated expenses incurred by individuals required to attend before the ABC Commissioner to answer questions.

61. Commissioner Johns considers that funds allocated to the ABCC can be used to meet the reasonable travel expenses of people that are required to attend a particular place for questioning under section 52.

f) Could the ABC Commissioner ask the Administrative Review Council (ARC) to review and report on the use of section 52 powers against the 20 best practice principles contained in its Report, 'The Coercive Information Gathering Powers of Government Agencies' (May 2008, Report No. 48).

62. The ABC Commissioner has decided to invite the ARC to review the way in which the ABC Commissioner intends to use his section 52 powers. Although requesting external review of the ABC Commissioner's exercise of his or her powers does not fall expressly within the functions and powers of the ABC Commissioner under the BCII Act, the ABC Commissioner has determined that it is appropriate given the nature of the section 52 powers. Accordingly, he will be writing to the ARC to invite it to conduct a review of the ABCC's use of section 52.

g) *Should the ABC Commissioner reconsider the need to conduct examinations in-private and to make confidentiality directions?*

63. There is an implicit requirement in the BCII Act that examinations under section 52 be conducted in private. Without an amendment to the BCII Act it is unlikely that the ABC Commissioner could conduct any section 52 examinations in public.

64. However, the Commissioner is not obliged to issue a non-disclosure direction in relation to each examination.

65. Non-disclosure directions have routinely been made in previous uses of the section 52 powers requiring an examinee from disclosing the nature of the questions asked at the examination until the investigation has concluded or the direction lifted.

66. As part of this review the ABC Commissioner has decided that, when presiding over section 52 examinations, he will only make a similar direction where it is particularly necessary to protect the integrity of the investigation.

Delegation and legislative requirements when exercising section 52 powers

67. In dealing with the issues raised by the Tribe Decision, Commissioner Johns has also:

a) Formally delegated his investigation function under section 10(b) of the BCII Act to all ABCC Inspectors.

b) Decided to take over those investigations that are currently being conducted by ABC Inspectors, where it is proposed to exercise the section 52 powers.

c) Asked the Government to amend the Schedule 7.7 (Regulation 7.10) form to deal with the failure noted by Whittle SM of the section 52 notice form provided in the BCII Regulations to state the person before whom the intended examinee is required to appear.

68. In relation to point (c) above, the Government released an amended the *Building and Construction Industry Improvement Regulations 2011* at Schedule 7.7 (Regulation 7.10), operative from 28 April 2011. The amended Schedule 7.7 (Regulation 7.10) is at **Appendix A**.

69. The Explanatory Statement in relation to the amendment of Schedule 7.7 (Regulation 7.10), issued by the authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations, is at **Appendix B**.

Impact of the Tribe Decision on current compliance activities

70. ABC Commissioner Johns conducted an extensive review of investigations that were active at the time of the Tribe Decision where section 52 had been used.

71. Of the 17 ongoing investigations 12 were the subject of litigation and five were still in the investigation phase. On review it was determined that the Tribe Decision did not impact upon any of the five investigations.

Litigation commenced in court as a result of the compliance powers

72. Since the September 2010 report, the ABCC has filed proceedings in relation to the following matters where compliance powers were used as part of the investigatory process.

ABCC v CFMEU & Hudson

73. This matter involved the examination of five witnesses.

74. Proceedings were filed on 16 November 2010 in the Federal Magistrates' Court at Melbourne.

75. The ABCC alleges Matt Hudson and the CFMEU engaged in unlawful industrial action on 13 March 2009 at the Rosso Apartment project in Carlton, Victoria.

76. It is alleged that Mr Hudson directed all workers at the site to attend a meeting and then gave them a direction to take strike action.

77. The ABCC alleges that the CFMEU and Mr Hudson engaged in unlawful industrial action in contravention of section 38 of the BCII Act.

78. A directions hearing is scheduled for 1 June 2011.

ABCC v Gray & CEPU

79. This matter involved the examination of three witnesses.

80. Proceedings were filed on 14 February 2011 in the Federal Magistrates' Court at Melbourne.

81. Bovis Lend Lease was the head contactor engaged to construct a new business centre for the ANZ bank with an estimated value of \$501 million, located at Docklands, Victoria.

82. The ABCC alleges CEPU official Troy Gray attended the site on several occasions and asked workers if they were members of the union.

83. It is alleged that on 23 September 2009 Mr Gray attended the site and organised and conducted a stop-work meeting of in excess of 100 workers. The ABCC alleges Mr Gray took this action because some employees at the site were not CEPU members.

84. The ABCC alleges Mr Gray and the CEPU contravened:

- section 346 of the Fair Work Act 2009 (**FW Act**) by taking adverse action against another person because they were not a member of an industrial association; and
- section 348 of the FW Act by threatening to organise or take industrial action with intent to coerce another person to become a member of an industrial association.

85. Directions were given on 15 March 2011. A further directions hearing is to be scheduled on a date to be fixed.

Continued use of compliance powers

86. Despite the fact that there has been a decline in the number of instances where the compliance powers have been used in the past seven months, the compliance powers will continue to be used in circumstances where they are warranted. Before compliance powers are considered however; it remains the priority of the ABCC to receive information from witnesses on a voluntary basis.

87. Voluntary information gathering powers are available to ABC Inspectors under section 59 of the BCII Act.

88. As previously mentioned in this report, ABC Commissioner Johns adopted the recommendations of Wilcox QC in relation to the exercise of compliance powers, including taking into account, “*any alternative method of obtaining the information, evidence or documents and the likely impact upon the person being required to attend and answer questions.*”

89. Only after all voluntary methods of information gathering powers have been exhausted will the compliance powers be considered. The ABCC will continue working towards achieving this voluntary compliance.



Australian Government
Office of the Australian Building and
Construction Commissioner

ABCC00 /2011

Schedule 7.7 Notice to attend and answer questions
(regulation 7.10)

COMMONWEALTH OF AUSTRALIA

Building and Construction Industry Improvement Act 2005

NOTICE TO ATTEND AND ANSWER QUESTIONS

I, [name], [position], acting under paragraph 52 (1) (e) of the *Building and Construction Industry Improvement Act 2005*, and regulation 7.10 of the *Building and Construction Industry Improvement Regulations 2005*, require you to attend before [person] at:

[time] on [date] at [place] or such later time and date as notified to you in writing to answer questions that are relevant to an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law.

Note 1 The information relating to the investigation is specified in Parts 1 to 4 of the Schedule to this notice.

Note 2 **Investigation** is defined in subsection 52 (8) of the *Building and Construction Industry Improvement Act 2005*.

WARNING — Under subsection 52 (6) of the *Building and Construction Industry Improvement Act 2005* you will commit an offence if you have been given this notice and fail:

- to attend to answer questions at the time and place specified in this notice; or
- to take an oath or make an affirmation, when required to do so under subsection 52 (4) of the *Building and Construction Industry Improvement Act 2005*; or
- to answer questions relevant to the investigation while attending as required by this notice.

PENALTY: Imprisonment for 6 months

Dated 2011.

NOTICE GIVEN TO *[name]*

SCHEDULE

Part 1

[address (if any) to which the contravention relates]

Part 2

[building industry participant or kind of building industry participant]

Part 3

[contravention and designated building law]

Part 4

[period during which the contravention took place]

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 56

Issued by the authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Building and Construction Industry Improvement Act 2005

Building and Construction Industry Improvement Amendment Regulations 2011 (No. 1)

The *Building and Construction Industry Improvement Act 2005* (the Act) permits the Australian Building and Construction Commissioner (the Commissioner) to issue a notice requiring a person to appear before the Commissioner, or an assistant, and answer questions relevant to an investigation. Schedule 7.7 to the *Building and Construction Industry Improvement Regulations 2005* (the Principal Regulations) provides a template for the notice.

Subsection 78(1) of the Act provides that the Governor-General may make regulations prescribing matters either required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Paragraph 78(2)(c) of the Act provides that the Governor-General may make regulations which make provision for the form of notices that are required or permitted to be given under the Act.

These Regulations make a minor amendment to address a criticism from the South Australian Magistrates Court in *Commonwealth Director of Public Prosecutions v Ark Tribe* (24 November 2010) that a notice issued in the form specified by Schedule 7.7 to the Principal Regulations did not meet the requirements of paragraph 52(1)(e) of the Act which provides that a notice include the person before whom the recipient must appear.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. They commence on the day after they are registered on the Federal Register of Legislative Instruments.

The Regulations have no compliance cost to business or impact on business and individuals or the economy.

Australian Building and Construction Commissioner was consulted during the development of these Regulations.