



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 2009



Report on the exercise of compliance powers by the ABCC from 1 October 2005 to 30 September 2009.

Background

1. This is the seventh report relating to the exercise of compliance powers by the Office of the Australian Building and Construction Commissioner (ABCC).
2. All reports can be found on the ABCC website at www.abcc.gov.au
3. This report updates the previous report with information from the inception of the ABCC on 1 October 2005 through to 30 September 2009.

The ABCC's compliance powers

4. The ABCC's compliance powers are set out in ss.52-56 of the *Building and Construction Industry Improvement Act 2005* (BCII Act).
5. The ABCC uses its compliance powers in accordance with the *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry*. A copy of the guidelines can be obtained from the ABCC website.
6. Section 52 of the BCII Act gives power to the ABC Commissioner to issue a notice to a person where it is believed on reasonable grounds that the person has information relevant to an investigation. The notice may require the person to:
 - attend an examination to answer questions
 - provide documents to the ABCC, or
 - provide information to the ABCC.
7. This power is not exercised lightly. The ABC Commissioner or Deputy Commissioner will issue a notice only after all avenues of obtaining information on a voluntary basis have been exhausted.
8. In some cases, a person may prefer to be served with a notice, which compels them to assist the ABCC in its investigation. Persons who take this approach generally have a concern about reprisals if seen to be cooperating with the ABCC.

Requirement to produce information

9. Section 52(1)(c) of the BCII Act provides that a person may be served with a 'Notice requiring information'. To date, no notice under this provision has been issued.

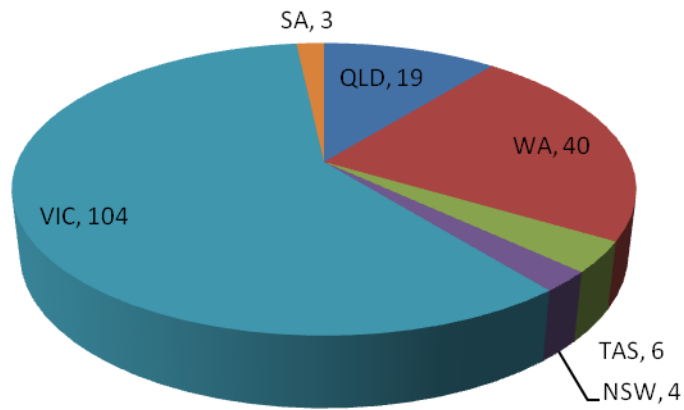
Requirement to produce documents

10. Section 52(1)(d) of the BCII Act provides that a witness may be served with a 'Notice requiring production of documents'. This provision has been used on seven occasions relating to six separate investigations.
11. Documents are normally obtained by the ABCC pursuant to requirements under s.59(5)(e) of the BCII Act. If such a requirement is not complied with, an ABC Inspector may serve a notice under s.59(6) of the BCII Act, which requires the recipient to produce documents at a specified time and place. In circumstances where recipients are uncooperative and refuse to produce documents under s.59, notices under s.52 have been issued. Such notices are rarely issued, as they confer on the recipient the 'use' indemnity set out in s.53(2) of the BCII Act. This means the documents cannot later be used in evidence against the person who produced them.
12. On each occasion on which a person has been required to produce documents under a s.52 notice, that requirement has been met.

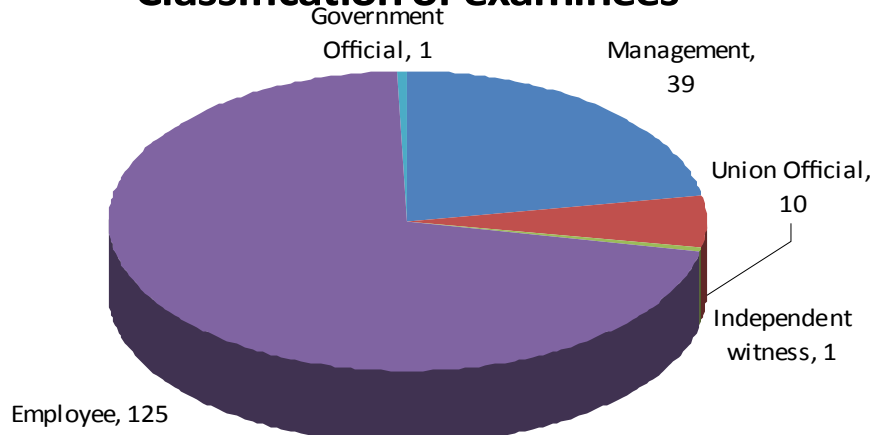
Requirement to attend and answer questions

13. Section 52(1)(e) of the BCII Act provides that a witness may be served with a 'Notice to attend and answer questions'. Under this provision, a witness is required to attend an examination at a specified time and place, before a Deputy or Assistant ABC Commissioner, to answer questions relevant to a specified investigation.
14. As at 30 September 2009 the ABCC has conducted 176 examinations of witnesses.
15. The following charts demonstrate the comparative use of the ABCC's compliance powers to date. They cover location of examinations, types of examinees, legal representation at examinations and the results of investigations after examinations have been conducted.

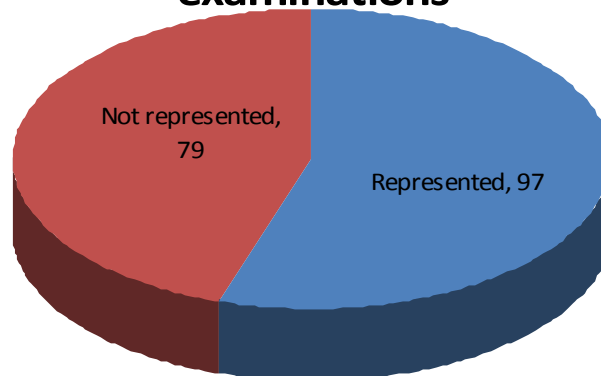
Examinations by state

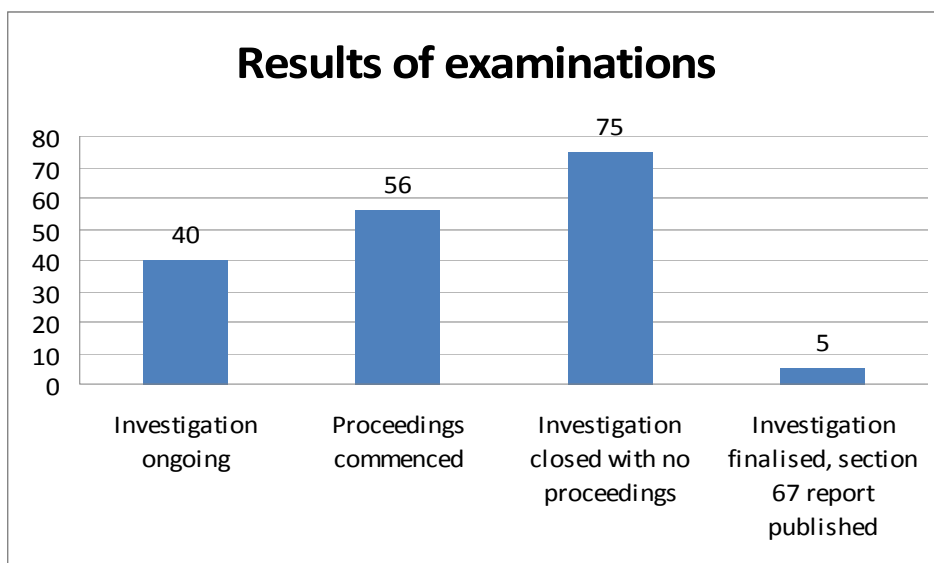


Classification of examinees



Legal representation at examinations





16. Twenty-six proceedings have been commenced before the courts in which examinations were used as part of the investigatory process. In respect of these 26 proceedings, 56 examinations were conducted.

Non-attendance at an ABCC examination

17. If a witness has been served with a 'Notice to attend and answer questions' under s.52 of the BCII Act, the witness is required by law to attend an examination at the time and place specified in the notice. Non-attendance at an examination is a criminal offence carrying a maximum penalty of six months imprisonment.

18. Witnesses have failed to attend examinations on four occasions.

19. In the first instance of non-attendance, the proposed witness was provided with an opportunity to explain his non-attendance and asked why the ABCC should not refer the matter to the Commonwealth Director of Public Prosecutions (CDPP). After no satisfactory explanation was received from the proposed witness, the ABCC referred a brief to the CDPP, which instituted proceedings in the Magistrates' Court in Victoria. However, those proceedings were later withdrawn. Further details of this matter can be found in the March 2009 report.

20. The second instance of non-attendance was similar to the first. The CDPP has commenced proceedings in the Adelaide Magistrates Court, which are listed for pre-hearing conference on 30 October 2009.

21. Following the third instance of non-attendance, the proposed witness said he had made a mistake as to the date of the examination. The person subsequently provided an ABC Inspector with a witness statement, obviating the need for an examination.

22. On the fourth occasion, non-attendance was for a valid personal reason. The examination was re-scheduled for the following day, when the witness attended.

Federal Court challenges to the use of the ABCC's compliance powers

23. Since the ABCC's inception on 1 October 2005, the compliance powers have been used a total of 183 times. This involves 176 examinations and 7 notices to produce documents. On two occasions the powers have been challenged in the Federal Court of Australia.
24. The first challenge was in *Bonan v Hadgkiss [2006] FCA 1334; [2007] FCFCA 113*. This challenge resulted from a particular legal representative not being allowed to appear for a witness at an examination after having already appeared for a previous witness in the same investigation. Details of this challenge are set out in previous reports (December 2006 to September 2008).
25. The second challenge was in the matter of *Washington & Ors v Hadgkiss [2008] FCA 28*. This challenge claimed that the ABCC was conducting the investigation for an improper purpose. Details of this challenge are set out in previous reports (March 2008 to September 2008).
26. Both challenges were unsuccessful.

Matters commenced before the courts resulting from examinations

27. The following proceedings have been filed in court since the last report. All of these proceedings involved the use of compliance powers.

Stuart v AWU and Lee

28. On 30 March 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
29. On 24 July 2007 Terry Lee, organiser for the AWU, held a meeting with employees of BMC Welding and Construction Pty Ltd in the crib room at the Australian Paper site at Maryvale. The meeting ran over the authorised time and subsequently the BMC employees who had attended the meeting failed to return to work for the remainder of the day.
30. It was admitted that the industrial action was unlawful.
31. On 25 August 2009 the AWU was penalised \$6,700 and Lee was penalised \$1,300 for taking unlawful industrial action.

Wotherspoon v Brown

32. On 3 April 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
33. The ABCC alleges that on 14 February 2008 at a construction site in Flemington, Victoria, Robert Brown, an employee of the head contractor and OHS representative,

told two workers that they were required to be members of the CFMEU before they could commence work at the site.

34. The ABCC alleges that Brown contravened the freedom of association provisions of the *Workplace Relations Act 1996* (WR Act).
35. The proceedings were settled at mediation, subject to the court's approval. The parties filed a statement of agreed facts with the court on 10 August 2009. A penalty hearing has been scheduled for 5 November 2009.

Dux v Bradley and AMWU

36. On 21 April 2009 proceedings were filed in the Federal Magistrates Court in Brisbane.
37. The ABCC alleges that on 18 September 2008 AMWU organiser Terrence Bradley spoke at a meeting at the Darling Downs Power Station site in Queensland. Following the meeting 98 employees left the site and failed to return to work until 21 September 2008.
38. It is alleged that the action was in support of a claim for paid travel time, which was not provided for in the workplace agreement.
39. The ABCC alleges involvement in unlawful industrial action under s.38 of the BCII Act.
40. The matter is listed for trial commencing 16 November 2009.

Cozadinos v CFMEU and Salta

41. On 5 May 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
42. The ABCC alleges that on 12 March 2008 Nick Salta, OHS representative of the CFMEU on the Westfield Doncaster Shoppingtown Project in Doncaster, told two employees they had to become members of the CFMEU before they could use the site amenities, including the rest area and the toilets. Mr Salta also allegedly told the two employees that they would receive a higher rate of pay if they joined the CFMEU.
43. The ABCC alleges that Mr Salta and the CFMEU contravened the freedom of association provisions of the WR Act.
44. A mediation was held on 9 October 2009.

Wotherspoon v CFMEU, Stephenson and Slater

45. On 19 May 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.

46. The ABCC alleges that on 30 April 2008 CFMEU organiser Gareth Stephenson and Harry Slater, a CFMEU representative employed by Fulton Hogan, addressed two meetings at the road-widening project on the Monash Freeway in south-east Melbourne. The meetings were attended by Fulton Hogan employees as well as employees of contractors engaged by Fulton Hogan.
47. At the conclusion of the second meeting at about 10am, all or most of the employees left the site and failed to work on the site for the remainder of the day.
48. The ABCC alleges that the CFMEU, Stephenson and Slater engaged in or were involved in unlawful industrial action.
49. The ABCC and the respondents have agreed to proceed on the basis of admitted contraventions and agreed penalties. A statement of agreed facts is to be filed by 20 November 2009. A penalty hearing is scheduled for 10 February 2010.

Gregor v CFMEU and Berardi

50. On 20 May 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
51. The ABCC alleges that on 19 July 2007 CFMEU organiser Daniel Berardi held a stop-work meeting at the Bialik College site in Hawthorn, Victoria, and directed employees to cease work for the remainder of the day. It is alleged that Berardi engaged in the unlawful conduct because Masbuild was not a party to a collective agreement with the CFMEU.
52. Settlement was reached at mediation on 10 August 2009. A statement of agreed facts is to be filed. A penalty hearing is scheduled for 16 December 2009.

Cozadinos v CFMEU and Ioannidis

53. On 27 May 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
54. The ABCC alleges that on 3 March 2008 CFMEU organiser Tony Ioannidis told two employees at the Westfield Doncaster Shoppingtown site in Victoria that he was going to stop them working at the site because they were not members of the CFMEU.
55. The ABCC alleges that the CFMEU and Ioannidis contravened the freedom of association provisions of the WR Act.
56. A mediation is scheduled for 29 October 2009.

Flynn v CFMEU and Feehan

57. On 27 May 2009 proceedings were filed in the Federal Magistrates Court in Adelaide.

58. The ABCC alleges that on 30 May 2008 CFMEU organiser Justin Feehan met with the head contractor at the Flinders University site in Adelaide and made several demands, including that union officials should be allowed unrestricted access to the site and should be allowed to conduct meetings with union members at any time of their choosing. Later, Feehan allegedly organised a meeting outside the entrance to the site with employees of several contractors and encouraged them not to return to work at the conclusion of the meeting. Subsequently, the employees did not work at the site for the remainder of the day.
59. The ABCC alleges that the CFMEU and Feehan were involved in two instances of unlawful industrial action.
60. The matter is scheduled for a directions hearing on 16 December 2009.

Gregor v Setka

61. On 26 June 2009 proceedings were filed in the Federal Magistrates Court in Melbourne.
62. The ABCC alleges that on 6 March 2008 CFMEU Assistant Secretary John Setka entered a site at North Wharf Road, Docklands, Victoria, under the *Occupational Health and Safety Act 2004* (Vic) and while at the site made a serious threat to the personal safety of Bovis Lend Lease's construction manager and general foreman.
63. The ABCC alleges that Setka acted in an improper manner while exercising his rights as a permit holder, in contravention of s.767(1) of the WR Act.
64. A hearing is scheduled for 1 February 2010.

Stuart v AMWU and Dodd

65. On 29 June 2009 proceedings were filed in the Federal Court in Melbourne.
66. In early 2008 Australian Paper Pty Ltd was expanding the Maryvale Pulp Mill site that it owned at Morwell, Victoria. At the time, Sandvik Mining and Construction Australia Pty Ltd was seeking to enter into a contract with Australian Paper Pty Ltd to carry out building work on the site.
67. On 26 February 2008 AMWU organiser Steven Dodd told Australian Paper that Sandvik would need to get their site agreement right before they could start work and threatened to organise industrial action if they did not do so.
68. The threatened action would, if carried out, have been unlawful and constituted a contravention of s.44(1)(a) of the BCII Act.
69. The conduct of Dodd is treated as conduct of the AMWU for the purposes of the BCII Act. Hence, the AMWU also contravened s.44(1)(a) of the BCII Act.

70. On 28 August 2009 the Federal Court imposed a penalty of \$25,000 on the AMWU and \$5,000 on Dodd for placing undue pressure on a building contractor to make an industrial agreement.

White v CFMEU and McLoughlin

71. On 13 July 2009 proceedings were filed in the Federal Court in Melbourne.

72. The ABCC alleges that on 19 February 2008 CFMEU organiser Adrian McLoughlin attended the Alto Apartments site on St Kilda Road, Melbourne, and directed employees of a contractor not to work on a concrete pour. The concrete pour that was scheduled to take place was disrupted as a result.

73. The ABCC alleges that the CFMEU and McLoughlin engaged in unlawful industrial action by imposing a ban, limitation or restriction on building work in contravention of s.38 of the BCII Act.

74. The matter is listed for trial from 16-19 December 2009.

Radisich v CFMEU, CFMEUW and McDonald

75. On 11 September 2009 proceedings were filed in the Federal Magistrates Court in Perth.

76. The ABCC alleges that on 12 September 2008 CFMEU and CFMEUW officer Joseph McDonald attended the Peninsula Project in Western Australia and convened an unauthorised stop-work meeting with employees. At the conclusion of the meeting, approximately 125 employees left the site and failed to work for the remainder of the day.

77. The ABCC alleges that the CFMEU, the CFMEUW and McDonald contravened the unlawful industrial action provisions of the BCII Act and the WR Act.

78. The matter is listed for mediation on a date to be fixed after 13 November 2009.

Shepherd v CFMEU and Bell

79. On 22 September 2009 proceedings were filed in the Federal Court in Melbourne.

80. The ABCC alleges that on 23 June 2008 CFMEU organiser Jason Bell told the director of Bendigo Scaffolding it could not start work at the Epsom Village Centre building site in Victoria until it made an enterprise bargaining agreement with the CFMEU and all its employees became CFMEU members. The following day it is alleged that Bell told the head contractor's site foreman the same and that on 25 June 2009 he told the head contractor's project manager not to engage Bendigo Scaffolding.

81. The ABCC alleges that Bell and the CFMEU contravened the BCII Act by acting with intent to coerce or apply undue pressure to Bendigo Scaffolding so that it would make

an agreement with the CFMEU and by discriminating against the subcontractor for not having such an agreement.

82. A directions hearing is scheduled for 1 December 2009.

Wotherspoon v CFMEU and Stephenson

83. On 30 September 2009 proceedings were filed in the Federal Court in Melbourne.

84. The ABCC alleges that on 10 September 2008 CFMEU organiser Gareth Stephenson attended a road widening project at Clyde in Victoria and threatened to shut the site down because a subcontractor, Labcon Industries, did not have a workplace agreement with the CFMEU.

85. On 12 September 2008 Stephenson entered the site at 10.30 am and allegedly told a Labcon employee no concrete would be poured that day. As a result, a concrete delivery truck was turned away. Stephenson served what purported to be a Notice of Suspected Contravention under the *Victorian Occupational Health and Safety Act* on Labcon and Fulton Hogan, the head contractor on the site. As a result, Labcon employees left the site for the rest of the day.

86. It is alleged that Stephenson and the CFMEU contravened s.44 of the BCII Act by making threats with intent to coerce, or apply undue pressure to, Labcon to make an agreement with the CFMEU. It is also alleged that the respondents engaged in unlawful industrial action under s.38 of the BCII Act and discriminated against Labcon because it did not have an agreement with the CFMEU.

87. The first directions hearing is scheduled for 23 October 2009.