



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 2011

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Executive Summary

This is the eleventh report on the exercise of the ABCC's compliance powers. This report updates the information and statistical data provided in the April 2011 report. Since that report, one examination has been conducted.

This report provides an analysis as to the reason for the peak in examinations conducted from 1 July 2007 to 30 June 2010. This peak is explained by the fact that at that time some large investigations required that multiple witnesses be examined. For example, two investigations in Victoria required that eight and ten witnesses be examined, respectively; whilst one investigation in Perth required that 15 witnesses be examined.

This report concludes that the ABCC will continue to use its compliance powers in circumstances where it is warranted to do so in order to fulfil its mandate as far as possible.

Background

This is the eleventh report relating to the exercise of compliance powers by the Office of the Australian Building and Construction Commissioner (ABCC). Other reports relating to the ABCC's compliance powers may be found on the ABCC's website at www.abcc.gov.au

The ABCC is a Commonwealth statutory body whose mandate is to ensure building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

The ABCC's compliance powers are set out at section 52 of the *Building and Construction Industry Improvement Act 2005 (BCII Act)*. The compliance powers allow the Australian Building and Construction Commissioner (ABC Commissioner) to compel a person, where the ABC Commissioner reasonably believes that the person has evidence or information relevant to an ABCC investigation, to provide that evidence.

Use of the ABCC's Compliance Powers

The compliance powers will only ever be used as a last resort. That is, Australian Building and Construction Inspectors (ABC Inspectors) will pursue all other means of voluntary information gathering powers available to them before the compliance powers will be considered. Only when a witness refuses to cooperate with an ABC Inspector on a voluntary basis will the compliance powers be exercised by the ABC Commissioner.

Persons who are subject to the compliance powers will be made aware that there may be significant penalties for disregarding the requirements of the compliance powers, including up to six months imprisonment. 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 Crimes Act 1914.

When a person is subject to the compliance powers they will be served with a notice. There are three types of notices a person may receive:

1. *Notice requiring the production of information* (as per section 52(1)(c) of the BCII Act)
2. *Notice requiring to production of documents* (as per section 52(1)(d) of the BCII Act)
3. *Notice to attend and answer questions* (as per section 52(1)(e) of the BCII Act)

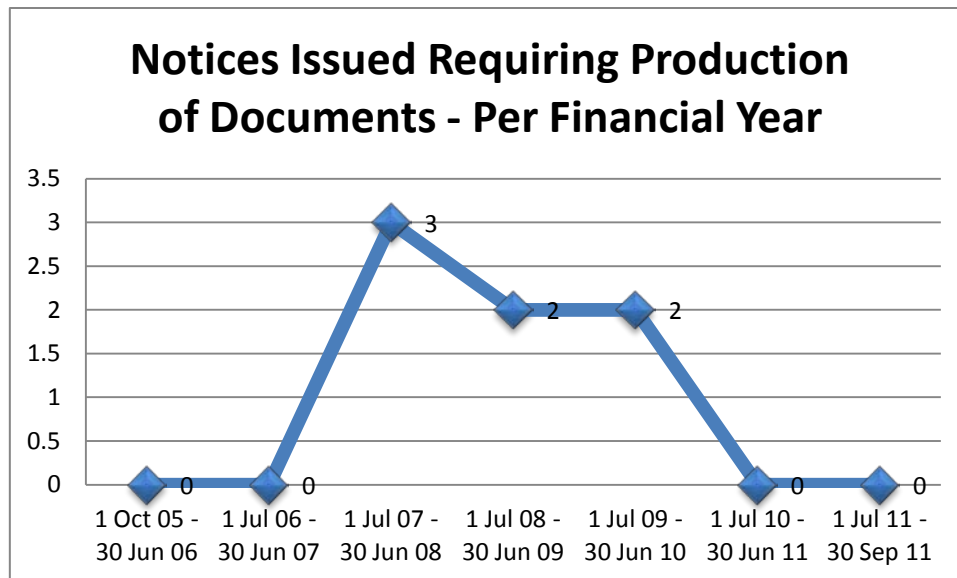
The statistical data, to date, in relation to the abovementioned notices is as follows:

- No witness has been served with a *Notice requiring the production of information*;
- Seven witnesses have been served with a *Notice requiring production of documents*; and
- 205 witnesses have been served with a *Notice to attend and answer questions*.

Notices Requiring Production of Documents

As mentioned above, a total of seven witnesses have been issues with a *Notice requiring the production of documents*, however, no witness has been issued with such a notice since the ABCC reported on this figure in the 30 June 2010 report. The number of notices requiring the production

of documents has largely risen and declined in line with the number of examinations being conducted. The period during which examinations were at their peak was the same period that notices requiring the production of documents were being issued. The explanation for this peak is explained later in this report (see 'Notices requiring a Witness to attend an Examination').



Notices requiring a Witness to attend an Examination

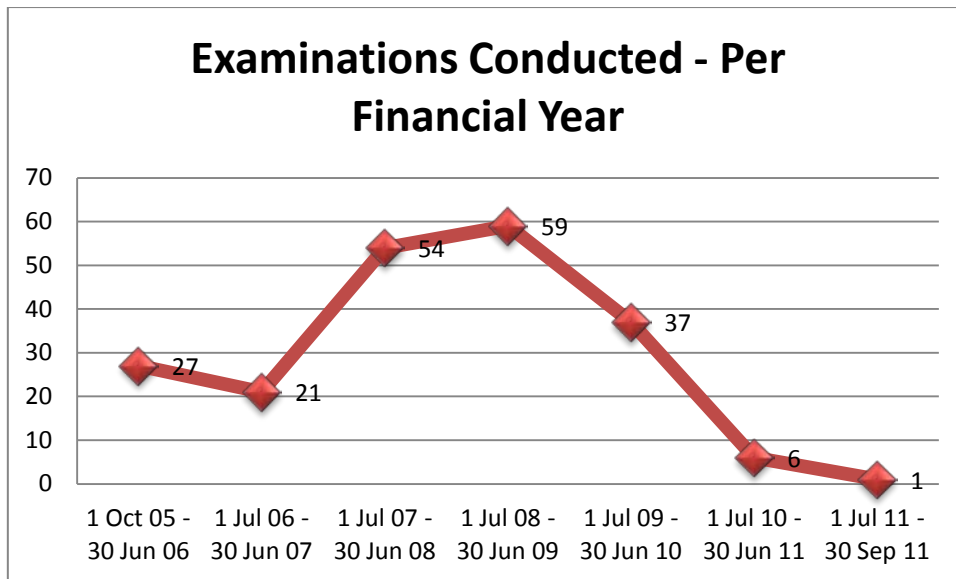
When a witness is served with a *Notice to attend and answer questions*, they are required to attend an examination, at a time and place specified by the ABCC.

The ABC Commissioner will preside over the examination¹ and will be assisted by Counsel who will ask questions on behalf of the ABC Commissioner. The ABC Commissioner may also ask questions.

At an examination a witness will be required to give his or her evidence on Oath or affirmation. Providing false or misleading information is a serious offence and will result in serious ramifications.

The ABC Commissioner may direct at the end of an examination that the contents of the examination including and documents or other such things raised in that examination remain undisclosed to any person outside of the examination. This is referred to as a non-disclosure order. The non-disclosure order does not preclude the witness from seeking legal advice, nor does it preclude their legal representative, should they choose to have one, from providing legal advice to the witness. The ABC Commissioner will notify the witness that the non-disclosure order has been lifted once the investigation has been closed or litigation arising from that investigation has been filed in court. At that point, but not before, the witness is free to discuss the examination.

¹ On 22 February 2011, ABC Commissioner Johns announced that he would personally preside over all examinations.



The large peak in the number of examinations conducted from 1 July 2007 to 30 June 2010 is due to multiple witnesses being required to attend examinations in relation to single investigations. For example:

- two investigations into alleged unlawful industrial action in Victoria required that eight and ten witnesses attend examinations, respectively; and
- one investigation into alleged unlawful industrial action at Perth required that 15 witnesses attend examinations.

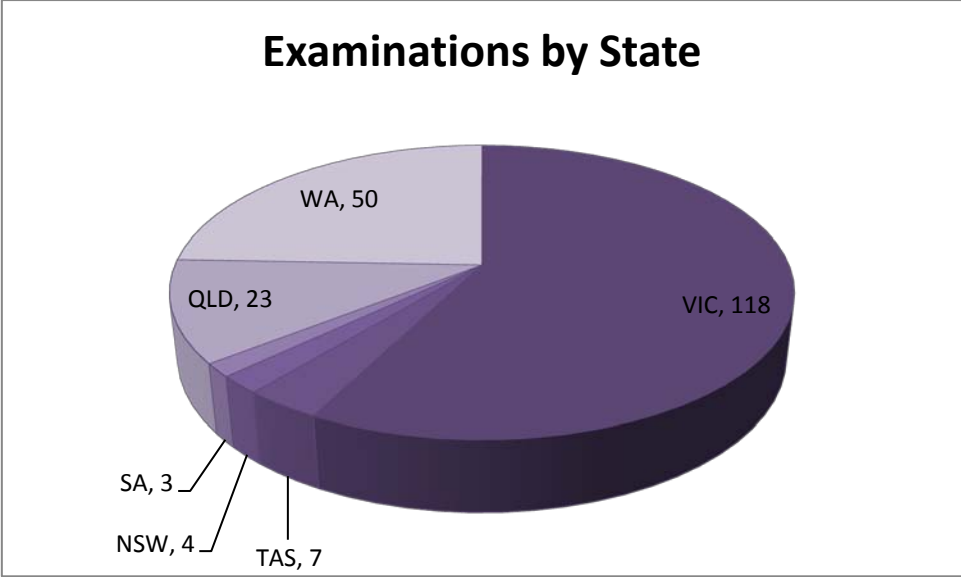
Examinations by State

Victoria continues to see the highest number of examinations conducted with a total of 58 percent of examinations conducted to date.

The figures relating to South Australia, Tasmania, New South Wales and Western Australian have remained steady at two percent, three percent, four percent and 24 percent, respectively, since the ABCC released its report on the exercise of compliance powers at 31 March 2010. This demonstrates an increase in cooperation from building industry participants in these states, particularly in relation to Western Australia, where prior to March 2010 the compliance powers were required to be used more commonly.

To date, the ABCC's compliance powers have not been exercised in the Australian Capital Territory or the Northern Territory. The ABCC has recently² expanded its geographic reach into these two Territories.

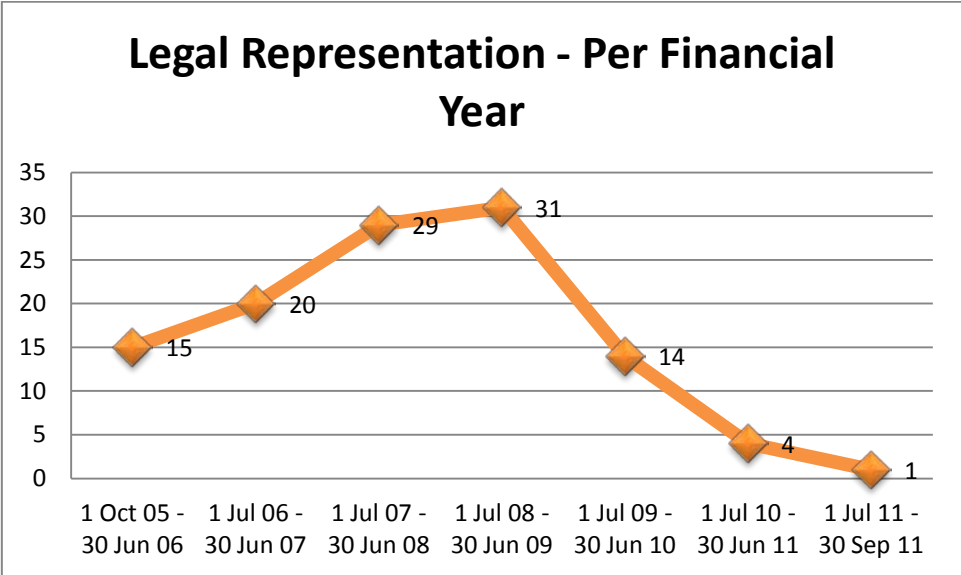
² The ABCC's Canberra Office was opened on 23 February 2011 and the ABCC's Darwin Office was opened on 28 July 2011.



Legal Representation

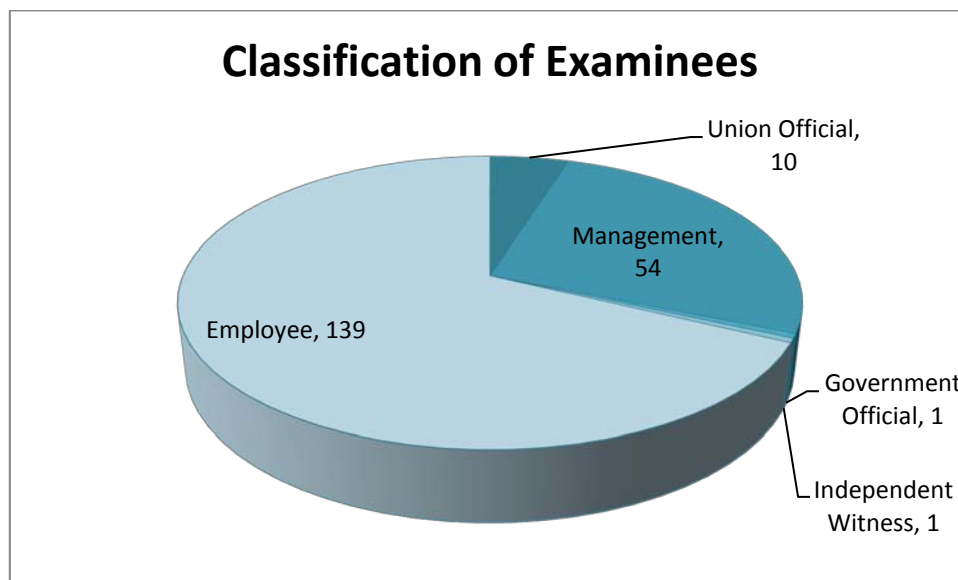
Every witness who is subject to the compliance powers is provided with the opportunity to seek legal representation. The ABCC consistent with its legislation allows at least 14 clear days after it have served the witness with a notice before that witness is required to provide documents, information or answers at an examination.

To date, approximately 56 percent of witnesses have chosen to be legally represented at examinations.



Classification of Examinees

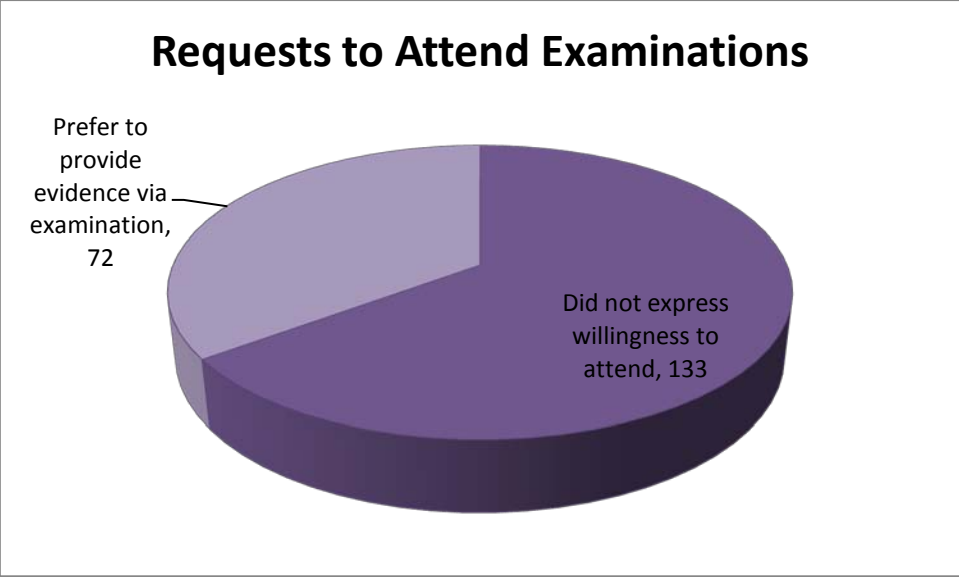
The majority of witnesses examined continue to be employees. This number would reduce significantly if employees were more willing to cooperate with ABC Inspectors through voluntary means. Persons in employee positions are the most fearful of potential retribution if they are seen to be assisting the ABCC.



Requests to Attend Examinations

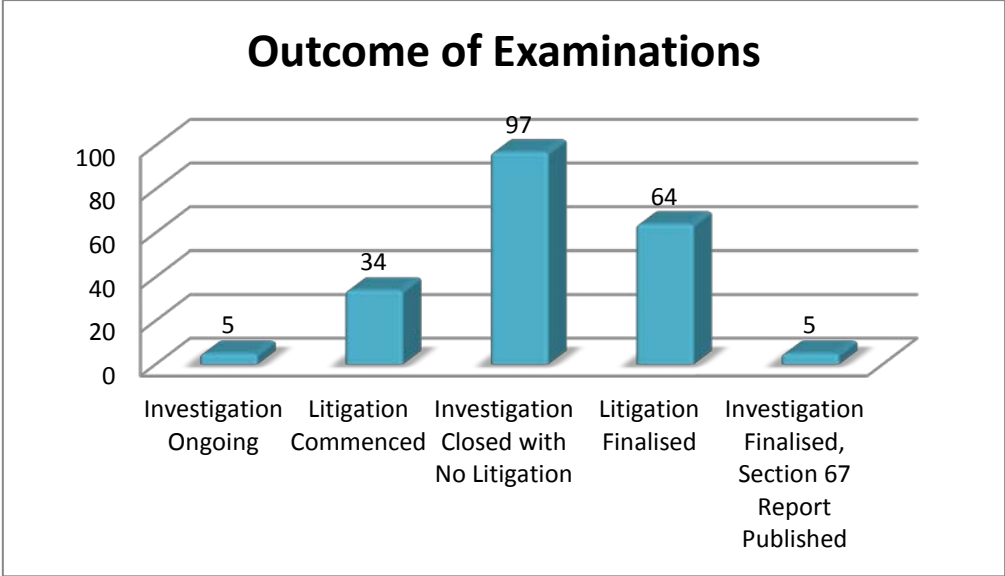
Thirty-five percent of witnesses who have attended an examination have requested that they be compelled to do so. As mentioned above, the reason for this is often that the witness is fearful of retribution if they are seen to be cooperating with the ABCC.

The number of instances where the ABCC is required to use the compliance powers would be significantly reduced if witnesses were more willing to cooperate with ABC Inspectors through voluntary means.



Outcome of Examinations

Of the 205 examinations conducted to date, 48 percent of investigations where compliance powers were used as part of the investigatory process have resulted in litigation being commenced. Two percent have resulted in a section 67 report³ being published, and a further two percent of investigations are still ongoing. The remaining 48 percent of investigations closed with no litigation instituted.



³ Section 67 of the BCII Act allows the ABC Commissioner, when he considers that it is in the public interest to do so, to publish details of non-compliance, including the names of persons and participants who have failed to comply, with the *Building Code*, the BCII Act, the *Independent Contractors Act 2006* and the *Fair Work Act 2009* or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Conclusion

This report details the continuing decline in the use of section 52 since the height of its use in the financial year 2008/2009. The decline in the use is consistent with the ABCC's stated object to only use section 52 as a last resort investigative tool.

In the most recent period the decline in the use of section 52 has not coincided with a decline in investigative effort. In the last financial year the ABCC:

- undertook 30% more investigations;
- initiated 47% more investigations;
- finalised 32% more investigations.

All this was done, with a lesser reliance on section 52 compulsory powers. It is evidence that the 'culture of silence', while still prevalent in pockets of the industry, is being broken down over time.

The ABCC prefers to obtain evidence by voluntary means and the evidence is that more often building industry participants are doing so. The reduced use of section 52 is also evidence of the increased skill of ABC Inspectors in being able to obtain evidence voluntarily.

The vast majority of the remaining use of section 52, in recent times, occurs when the witness has requested a section 52 notice be issued to them. In those cases it is the practice of the ABC Commissioner to oblige in issuing the notice.

Notwithstanding the above analysis, the ABC Commissioner will not hesitate to use section 52 in a truly compulsory way where:

- the ABC Commissioner (or his delegate) 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.