



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 31 December 2006

**Workplace relations laws are enforced in building and
construction industry workplaces**

Background

1. This report is the second report on the exercise of the ABCC's Compliance Powers. This report updates the first report titled '*Report on the exercise of Compliance Powers by the ABCC for the period of 1 October 2005 to 30 June 2006*' ("the July 2006 Report"). The July 2006 Report can be found on the ABCC website at www.abcc.gov.au
2. For detailed information on the following topics, please refer to the July 2006 Report:
 - Background
 - Delegation of Compliance Powers
 - Offence Provisions
 - Compliance with ABCC Examinations
 - Covering Letter
 - Confidentiality
 - Transcript
 - Use of Interpreters
 - Privilege against Self-incrimination

When will compliance powers be exercised?

3. Compliance powers will only be used as a last resort. Obtaining information voluntarily or by use of pre-existing information gathering powers given to ABC inspectors under the *Building and Construction Industry Improvement Act 2005* ("BCII Act") are the preferred methods of obtaining information.
4. The ABC Commissioner or Deputy ABC Commissioner must have belief on reasonable grounds that a person issued with a notice has information relevant to an ongoing investigation.

Why does the ABCC have compliance powers?

5. The compliance powers entrusted to the ABCC by the BCII Act need to be understood against the background of the Cole Royal Commission into the building and construction industry. The relevant findings are summarised in the *Revised Explanatory Memorandum* for the BCII Act. It stated:

"The Royal Commission was established to conduct an inquiry into unlawful or otherwise inappropriate conduct in the building and construction industry.

According to the final report, the industry's lawlessness is manifested as criminal conduct, unlawful conduct, including breaches of the WR Act and OHS legislation, and a disregard for revenue statutes. The report concludes that at the root of this lawlessness is a reality that "those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties or for loss occasioned to others by unlawful conduct."

The findings demonstrate "an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. The findings indicate an urgent need for structural and cultural reform."

6. The *Revised Explanatory Memorandum* went on to summarise the experience of the Building Industry Taskforce ("the Taskforce"). One of the challenges encountered by the Taskforce was lack of cooperation with its investigations brought about by the prevailing culture of lawlessness, fear and intimidation on building and construction sites.
7. In its report entitled 'Upholding the Law – Findings of the Building Industry Taskforce', the Taskforce experience without compliance powers was explained. The report stated:

"A survey conducted on a number of clients who withdrew their complaint found that 52% has done so for fear of the ramifications they may face should they pursue the matter. In many instances, this involved withdrawing due to 'commercial reality' – where the punitive cost of pursuing the matter with the Taskforce was greater than the perceived future benefit. The 'commercial reality' was due to either potential industrial action and/or potential loss of contracts, both current and future."

How is this problem addressed in the BCII Act?

8. Section 52 of the BCII Act provides compliance powers to the ABCC to compel production of information, documents and evidence. These powers are exercisable only by the ABC Commissioner or a Deputy ABC Commissioner¹. The compliance powers cannot be exercised by an Inspector. Furthermore, they can only be exercised where the delegate holds a belief on reasonable grounds that a person has information, documents or evidence relevant to an investigation.
9. The exercise of compliance powers also needs to be read in light of the main object of the BCII Act, that being to "provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building

¹ See subsection 13(2) of the BCII Act.

industry participants and for the benefit of the Australian economy as a whole.”²

10. Set out below are important statistics relating to the exercise of compliance powers by the ABCC to date.

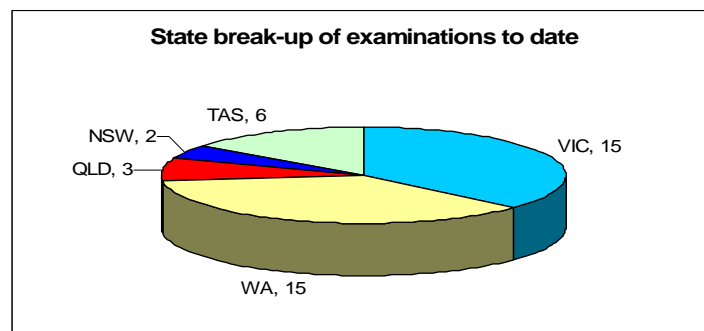
ABCC Examination Statistics

11. From 1 October 2005 to 31 December 2006:

- Number of *Notices to attend and answer questions* issued: 44³
- Number of persons served with a *Notice to attend and answer questions*: 44⁴
- Examinations conducted: 41

Examinations by State

12. The majority of examinations have arisen as a result of investigations conducted in Victoria and Western Australia.



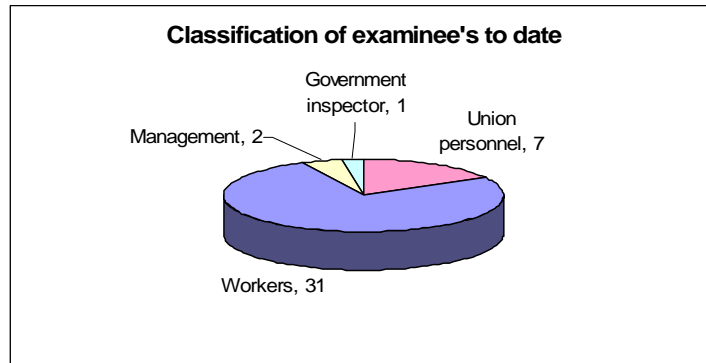
² See subsection 3(1) of the BCII Act.

³ One *Notice to attend and answer questions* issued twice.

⁴ Two witnesses were served with a *Notice to attend and answer questions* twice.

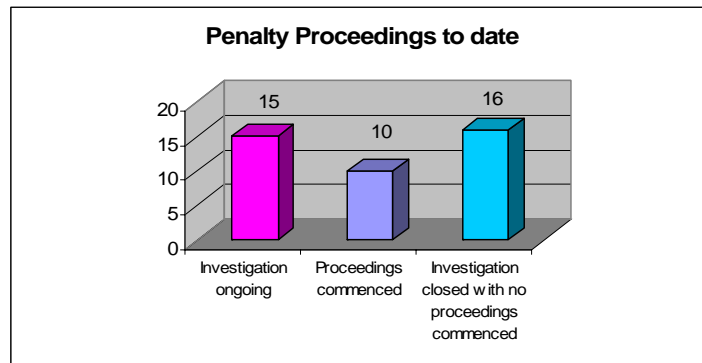
Classification of Examinees

13. Since the commencement of the ABCC on 1 October 2005, the majority of *Notices to attend and answer questions* have been served on individual workers.



Penalty Proceedings

14. Since the July 2006 Report, there has been a significant increase in the number of proceedings commenced as a result of information obtained from witnesses at examinations.
15. In total, penalty proceedings have commenced in respect of ten examinations into alleged breaches of the BCII Act and the *Workplace Relations Act* 1996. The breaches under investigation involved:
- unlawful industrial action;
 - coercion; and
 - false and misleading representations about the obligations to join a union.
16. A further 15 examinations are the subject of ongoing investigations, with penalty proceedings likely to commence in 2007 once those investigations are concluded.
17. In some cases the evidence obtained from witnesses at examinations has resulted in no further action as the evidence has revealed no breach of the law. Examinations in this respect are a very useful tool in establishing whether or not contraventions have occurred. Without the use of compliance powers there is higher potential for court cases to be initiated in circumstances where the ABCC has been unable to fully investigate contraventions owing to a lack of cooperation by building industry participants. The evidence obtained at examinations can save considerably on legal costs and inconvenience for all parties by refining the cases that are to proceed to prosecution.



Legal Representation

18. Of the 41 examinations conducted to date, witnesses have exercised their right to legal representation on 28 occasions. There has been 1 Federal Court challenge to the ABCC's compliance powers.
19. Details of this challenge and the decision of the Federal Court are summarised at Appendix 1 to this report. A full copy of the decision can be found on the Federal Court website at <http://esearch.fedcourt.gov.au>

Compliance with ABCC examinations

20. The details of compliance by building industry participants with examinations conducted by the ABCC to date are as follows:
 - No person has failed to attend ABCC examinations;
 - No person has refused to take the oath or affirmation;
 - No person has refused to answer questions asked of them;
 - No person has been charged with giving false or misleading evidence;
 - No person has been imprisoned as a result of the exercise of compliance powers by the ABCC; and
 - One person has exercised his right to challenge a ruling of the Deputy ABC Commissioner in the Federal Court. This matter is discussed below (see *Bonan v Hadgkiss*).
21. Where a person refuses or fails to comply with a notice, the Deputy ABC Commissioner is required to write asking the person to show cause as to why he should not refer the matter to the Commonwealth Director of Public Prosecutions (DPP) for prosecution of an offence or seek a court order requiring the person to comply with the notice. To date, the ABCC has not sent any show cause letters for failure to comply with the compliance powers.

Conclusion

22. The compliance powers have proven to be an effective method of obtaining information from reluctant witnesses. The use of these powers has assisted investigations which would otherwise have stalled. It enables the ABCC to make fully informed decisions as to whether or not the evidence in any particular investigation warrants prosecution.

Appendix I

Federal Court Challenge: *Bonan v Hadgkiss* [2006] FCA 1334

Background

1. On 21 June 2006, the Federal Court heard argument concerning a challenge to a ruling made at an examination by Deputy ABC Commissioner Hadgkiss. The applicant to this proceeding was Mr Bonan. Mr Bonan had been served with a *Notice to attend and answer questions* an examination pursuant to section 52 of the BCII Act.
2. The application arose from an examination conducted on 24 January 2006 where the Deputy ABC Commissioner ruled that Mr Bonan's solicitor, Ms Boots, was not permitted to represent Mr Bonan at the examination. This ruling was made owing to the fact that Boots had represented a witness in an earlier examination in the same investigation. The Deputy ABC Commissioner identified grounds for concluding that the representation in this specific circumstance either would, or may prejudice the investigation.
3. The Court was asked to determine:
 - whether the Deputy ABC Commissioner has the power to exclude a legal practitioner from an examination;
 - whether, if he does have the power, he exercised his discretion lawfully, and with reasonable cause, in this case; and
 - whether the Deputy ABC Commissioner had reasonable grounds to conclude that the Applicant being represented by Ms Boots would or was likely to prejudice the investigation.

Decision

4. The Federal Court decision and reasons were handed down by His Honour Mr Justice Besanko on 12 October 2006. His Honour dismissed the application as to the first two grounds set out above and instead ruled that the Deputy ABC Commissioner:
 - has an implied power to regulate and control the conduct of proceedings before him to ensure the integrity and efficacy of the investigation;
 - has the power to exclude a particular legal practitioner from acting or appearing for an examinee at an examination (*National Crime Authority v A, B, and D* (1988) 18 FCR 439; and
 - properly and in good faith based the direction to exclude Ms Boots from acting for or appearing at the examination on the reasonable grounds that her representation either "will or may" prejudice the investigation.

5. His Honour also ruled that the wording of the exclusion was beyond power as it prevented Ms Boots acting for Mr Bonan outside the examination itself. His Honour considered that the direction to exclude Ms Boots “at, and in respect of, an examination” was too broad. The ABCC subsequently submitted a revised ruling to the Court that removed the words “in respect of”.
6. The Federal Court published final orders on 13 November 2006. The court ordered that:
 - “the respondent, ...be restrained from giving effect to the direction made by the respondent on 30 January 2006 save and except to the extent that the direction provides that Ms Joanne Boots of Boots & Co, Lawyers, is not permitted to legally represent Mr Michael Bonan at an examination relevant to the investigation to be conducted before the respondent;” and
 - there be no order as to costs.
7. Further, His Honour confirmed that examinations under section 52 of the BCII Act are to be conducted in private.
8. Finally, His Honour confirmed that the ABC Commissioner has the power to make a non-disclosure direction (whereby the witness and legal representative cannot disclose the contents of the examination to third parties until such time as the non-disclosure direction is withdrawn).

An Appeal of this decision was filed on behalf of Mr Bonan on 4 December 2006. The appeal is expected to be heard before the Full Court in 2007.