



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 June 2006

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

Background

1. The *Building and Construction Industry Improvement Act 2005* (“the BCII Act”) contains powers in sections 52 – 56 that enable the Office of the Australian Building and Construction Commissioner (“ABCC”) to require a person to provide information, documents and/or give evidence under oath or by way of affirmation. These “compliance powers” have been in effect since 1 October 2005.
2. The ABCC has published *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry* (“the Guidelines”). The Guidelines provide guidance on the exercise of the compliance powers by the ABC Commissioner or Deputy ABC Commissioners. The powers are broadly similar to the investigatory powers of other Commonwealth agencies, including the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission.
3. Obtaining information voluntarily or by use of pre-existing information gathering powers given to ABC inspectors under the BCII Act are the preferred methods of obtaining information. Accordingly, the decision to exercise the compliance powers will not be taken lightly.
4. The Guidelines are based on the former guidelines that applied to the Building Industry Taskforce that were approved by the Federal Parliament in June 2005. The Guidelines are available on the ABCC website at www.abcc.gov.au
5. Section 59 of the BCII Act allows ABC Inspectors to use investigative powers to obtain information voluntarily. However, in many cases, a person refuses to provide information voluntarily. Such a refusal is generally attributable to one of the following reasons:
 - the person does not want to be seen to be cooperating with the ABCC;
 - the person is reluctant to cooperate voluntarily for fear of repercussions.
6. Use of investigative powers is the preferred method of obtaining information. Compliance powers are only used as a last resort and only when the Deputy ABC Commissioner believes on reasonable grounds that a person has information, documents or evidence relevant to an investigation.

Delegation of Compliance Powers

7. Section 13 of the BCII Act enables the ABC Commissioner to delegate his powers under section 52 to a Deputy ABC Commissioner.
8. On 24 October 2005, the ABC Commissioner delegated to Deputy ABC Commissioner Hadgkiss his powers under section 52. On 7 November 2005, the ABC Commissioner delegated to Deputy ABC Commissioner Dalgleish his powers under section 52. Both instruments of delegation are available on the ABCC website.
9. The compliance powers can only be exercised by the ABC Commissioner or Deputy ABC Commissioner in relation to investigations where he or she believes on reasonable grounds that a person has information, documents or evidence relevant to an investigation.

ABCC Examination Statistics

10. From 1 October 2005 until 30 June 2006, 29 notices to attend and answer questions have been served.

| <u>Section 52 Notices</u> | Notice to attend and answer questions | Notice requiring production of documents | Notice requiring information |
|---------------------------|---------------------------------------|--|------------------------------|
| Number of notices issued | 29 | 0 | 0 |
| Number of persons served | 28 | 0 | 0 |
| Examinations conducted | 27 | 0 | 0 |

11. A breakdown of examinations by state is shown at Chart 1. A breakdown of classifications of examinees is shown at Chart 2. Please note some examinees fall into more than one classification.

Chart 1 (right): Chart shows the number of examinations held in Victoria, Queensland, Western Australia and New South Wales since the commencement of ABCC.

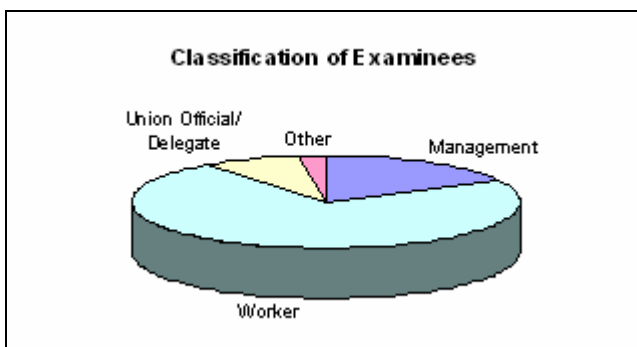
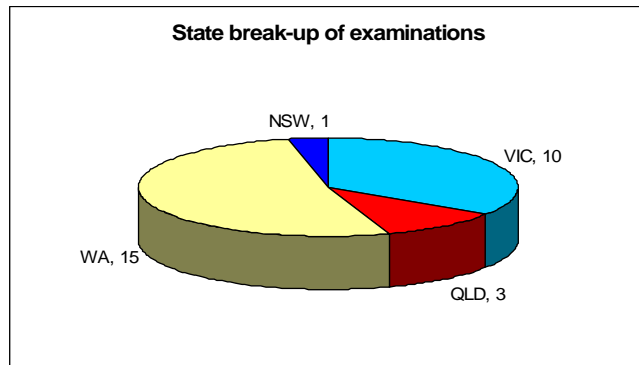


Chart 2 (left): Chart shows numbers of the varying classifications of persons who have been served with a notice to attend an examination.

12. A person who has been served with a notice is given reasonable time to comply being at least 14 days after service of the notice. A person served with a notice must:

- (a) give the required information by the time, and in the manner and form specified in the notice;
- (b) produce the required documents by the time, and in the manner, specified in the notice;
- (c) attend to answer questions at the time and place specified in the notice;
- (d) take an oath or affirmation, when required to do so under subsection 52(4) of the BCII Act; and/or
- (e) answer questions relevant to the investigation while attending as required by the notice.

Offence Provisions

13. Non-compliance is a serious offence under subsection 52(6) of the BCII Act. Section 52(6) of the BCII Act provides:

A person commits an offence if:

- (a) the person has been given a notice under subsection (1); and
- (b) the person fails:
 - (i) to give the required information by the time, and in the manner and form, specified in the notice; or
 - (ii) to produce the required documents by the time, and in the manner, specified in the notice; or
 - (iii) to attend to answer questions at the time and place specified in the notice; or
 - (iv) to take an oath or make an affirmation, when required to do so under subsection (4); or
 - (v) to answer questions relevant to the investigation while attending as required by the notice.

Penalty: Imprisonment for 6 months.

Compliance with ABCC Examinations

14. 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; 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*).

15. Where a person refuses or fails to comply with a notice, the Deputy ABC Commissioner may 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.

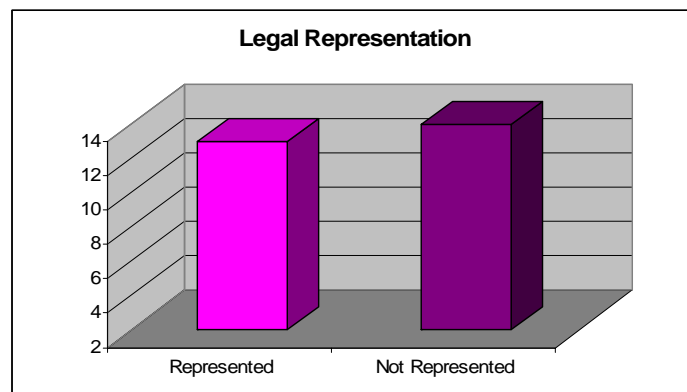
16. To date, the ABCC has not needed to ask any person to show cause as to why the Deputy ABC Commissioner should not refer the matter to the Commonwealth DPP.

17. In other words, there has been universal compliance to date by building industry participants with the ABCC's use of its compliance powers.

Covering Letter

18. All notices issued by the ABCC are accompanied by a covering letter to help people understand the formal language of the notice.
19. The covering letter explains that the hearing is about asking questions and obtaining information relevant to the investigation. The letter states that the witness may, if the person so chooses, be represented by a barrister or solicitor.
20. So far, 48% of persons served with a notice to attend have chosen to be legally represented at examinations. This is set out in Chart 3 below.

Chart 3 (right): Graph shows the proportion of witnesses who have been legally represented at examinations since 1 October 2005 as opposed to those who have chosen to have no legal representation.



Confidentiality

21. Examinations conducted by the ABCC are private. There are important confidentiality provisions contained in section 65 of the BCII Act. ABCC staff who contravene section 65 by making an unauthorised disclosure of "protected information" face a maximum penalty of 12 months' imprisonment.

Transcript

22. Examinations will ordinarily be tape-recorded and a full transcript of the evidence given by a person will normally be made available to the person as soon as reasonably practicable after the conclusion of the examination.

23. Transcripts made available to persons are accompanied by a letter inviting them to make written requests for corrections to the transcript by a specified date.

Federal Court Challenge: Bonan v Hadgkiss

24. On 21 June 2006, the Federal Court sitting in Perth heard argument concerning a challenge to a ruling made by Deputy ABC Commissioner Hadgkiss. The applicant to this proceeding was Mr Bonan, a person who had been served with a notice to attend an examination pursuant to section 52 of the BCII Act. His Honour Mr Justice Besanko heard the case in the Federal Court sitting at Perth and has reserved his decision.
25. The application arose from an examination that was conducted on 24 January 2006 where the Deputy ABC Commissioner ruled that the Applicant's solicitor (Ms Boots) was not permitted to represent the Applicant at the examination owing to the fact that she 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.
26. A decision will be handed down on a date to be fixed. The decision will determine:
 - (a) Whether the Deputy ABC Commissioner has the power to exclude a legal practitioner from an examination;
 - (b) Whether, if he does have the power, he exercised his discretion lawfully, and with reasonable cause, in this case; and
 - (c) 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.

Use of Interpreters

27. In the 27 examinations conducted to date, there have been two instances where an interpreter was required. The ABCC arranged for and paid for the interpreters in both cases.

Privilege against Self-incrimination

28. A person is not excused from giving information, producing a document, or answering a question as required by a valid notice on the basis that to do so:
- (a) might tend to incriminate them or otherwise expose them to a penalty or other liability; or
 - (b) would contravene any other law; or
 - (c) would be otherwise contrary to the public interest.
- a) However, neither:
- (a) the information or answer given or the document produced; nor
 - (b) any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document;
- b) is admissible in evidence against a person in proceedings, other than proceedings:
- (d) for a failure to comply with any of the obligations specified in paragraph 13 above (subsection 52(6) of the BCII Act); or
 - (e) for knowingly giving information or evidence or producing a document that is false or misleading (sections 137.1 and 137.2 of the *Criminal Code*); or
 - (f) for obstructing, hindering, intimidating or resisting a Commonwealth public official in the performance of the official's functions (section 149.1 of the *Criminal Code*).
29. Because of the protection offered in (a) and (b) above, the compliance powers have generally not been used in respect of persons suspected to have contravened the law. The powers have been used to ascertain what reluctant witnesses will say if ultimately called to give evidence in a court.
30. A person who, acting in good faith, gives information, produces a document or answers questions when required to do so is not liable to:
- (a) any proceedings for contravening any other law because of that conduct; or
 - (b) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

31. The vast majority of examinations conducted to date relate to ongoing investigations being conducted by the ABCC. This is set out in chart 4 below.

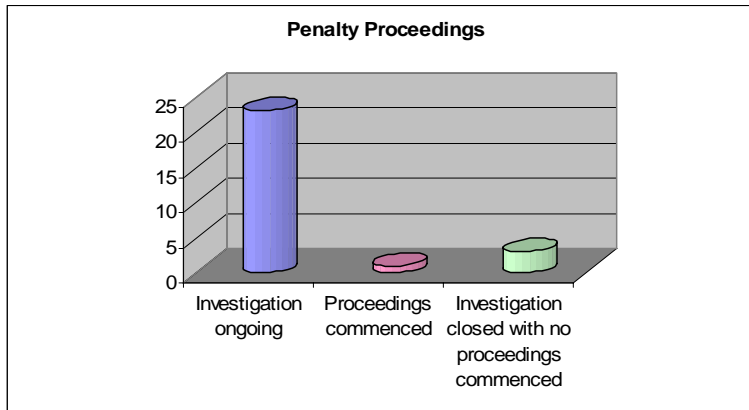


Chart 4 (left): The chart shows the results of examinations conducted to date by the ABCC.

32. In time, it is expected that the majority of ongoing investigations will result in proceedings being commenced.
33. In June 2006 a hearing room was purposely built in the head office of the ABCC in Victoria. The hearing room has been designed specifically for the circumstances faced by persons attending examinations conducted by the ABCC. It is a compromise model that is not as formal and structured as a court room, but not as informal as a conference room. The hearing room is fitted out with state of the art technology and has appropriate security.





34. Compliance Powers have proven to be a particularly effective method of gathering information and have further enabled the ABCC to contribute to securing lawful conduct and bringing about long term cultural change in the building and construction industry. In all cases, witnesses have been fully cooperative in complying with the notice served upon them. All witnesses have attended the examination at the time and date specified, taken an oath or affirmation when required to do so and answered questions relevant to the investigation.
35. Use of compliance powers is particularly effective in obtaining the required information to complete investigations.