



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
August 2007**

Workplace relations laws are enforced in building and construction industry workplaces

Background

1. This report is the third on the exercise of the ABCC's Compliance Powers pursuant to section 52 of the *Building and Construction Industry Improvement Act 2005* ("BCII Act"). Previous reports were published in July 2005 and December 2006. The Reports can be found on the ABCC website at www.abcc.gov.au
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.
3. The Guidelines are available on the ABCC website.
4. For detailed information on the following topics, please refer to the appropriate reports as listed below:

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

December 2006 Report:

- When will compliance powers be exercised?
- Why does the ABCC have compliance powers?
- How is this problem addressed in the BCII Act?

ABCC Examination Statistics

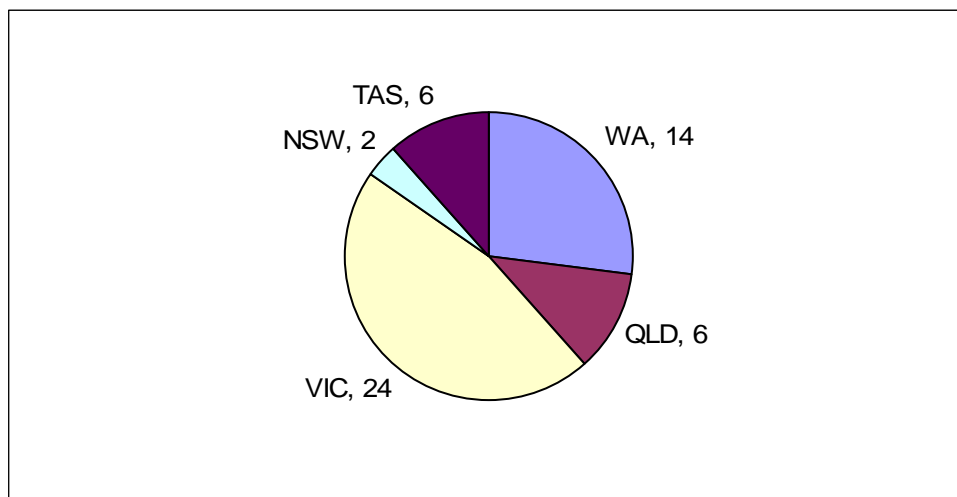
5. From 1 October 2005 to 31 August 2007:

- Number of *Notices to attend and answer questions* issued:
61
- Examinations conducted:
52

6. Proposed examinations for three witnesses did not proceed. One of the witnesses provided a comprehensive statement after being served with a Notice. The Deputy ABC Commissioner considered the content of the statement and decided that there was no longer a need for the examination to proceed. The second witness was seriously injured in an accident. The Deputy ABC Commissioner decided that in the circumstances the examination should not proceed.

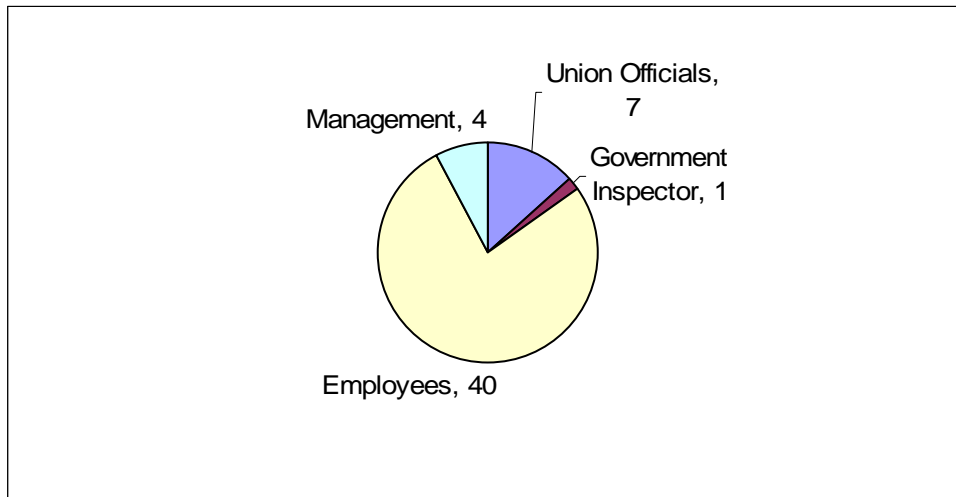
Examinations by State

7. The majority of examinations have been conducted in Victoria and Western Australia. This reflects the lack of cooperation with ABCC investigations by relevant witnesses in those states.



Classification of Examinees

8. The majority of witnesses who have attended examinations have been employees.



Why are employees the subject of the majority of ABCC examinations?

9. Every attempt is made by ABC Inspectors to obtain information from witnesses voluntarily before a Notice is issued. This is a requirement of the Guidelines. However, some witnesses refuse to cooperate with an investigation and it is necessary to serve a Notice on them in order to ascertain what they can say about the subject of investigation.
10. Any information provided by a witness at an examination cannot be used against that witness. This is an important protection provided by subsection 53(2) of the BCII Act. Because of this protection, a witness may elect to answer questions at an examination as opposed to participating in a voluntary interview. A refusal by a witness to cooperate can potentially result in the use of the compliance powers, if there is reason to believe that the witness can give evidence relevant to the investigation. Unfortunately some unions have advised their members not to co-operate with ABCC investigations. This has, on occasions, resulted in workers having to attend a compulsory examination.
11. The ABCC has identified two primary reasons for employees refusing to attend for voluntary interviews:
- advice from unions to refuse to cooperate with ABCC enquiries, regardless of whether the witness has been involved in any contravention; and
 - fear of repercussions and intimidation for being seen to cooperate with the ABCC.

12. It appears employees have been subject to misinformation from union organisers and legal advisers. Employees have consistently refused to attend voluntary interviews even in circumstances where they have not committed any contravention.
13. A number of employees who have appeared as witnesses have complained to the presiding Deputy ABC Commissioner about having to attend an examination. When these employees were advised that the examination resulted from their previous refusal to cooperate, one witness went so far as to say on oath that they refused to cooperate on advice from the union or their legal representative, and would have preferred to provide the information voluntarily in a less formal setting.
14. In two investigations, employees confirmed under oath that they were the subject of a combined briefing, organised by their union, and designed to prepare them jointly for the giving of evidence at forthcoming examinations. While such a practice is not unlawful, this conduct, and the involvement of legal representatives in such conduct, is a significant cause for concern. The ABCC uses its compliance powers for one purpose only, that being to obtain evidence relevant to an investigation. Such actions can only serve to undermine the ABCC investigation.
15. In other cases, legal representatives have confused their role by seeking to represent and advance the interests of the union over and above, and at times to the detriment of, the witness. This often puts the legal representative in a position of conflict, therefore the interests of the witness are jeopardised. Appropriately managing that conflict presents a challenge for legal practitioners to carefully address.
16. Whether the Deputy ABC Commissioner will permit single legal representation for multiple witnesses is determined on a case by case basis. The approach of the Deputy ABC Commissioners has been to assess each investigation on its merits, and provide rulings and guidance to legal representatives when these issues arise. The Deputy ABC Commissioners have permitted multiple representation in some instances, and have also permitted in-house union lawyers to represent witnesses. However, if evidence emerges of witness collusion or union attempts to undermine the ABCC investigation, appropriate rulings and exclusions will be made.
17. It is important that legal representatives advise witnesses of their rights and obligations under the Act and appropriately deal with questions of conflict that might arise when seeking to represent the interests of both the union and employees.
18. The ABCC has a statutory function to advise building industry participants of their rights and obligations. The ABCC has produced a suite of fact sheets for the industry. These are freely available on the website. Included is a fact sheet on 'Compliance Powers of the

Australian Building and Construction Commissioner'. The ABCC is committed to its education function and ensuring the industry is accurately informed on matters such as its compliance powers.

19. Legal practitioners are encouraged to contact the ABCC about the procedures that apply for the conduct of examinations.

Penalty Proceedings

20. Penalty proceedings have commenced in respect of 17 examinations into suspected breaches of the BCII Act and/or the *Workplace Relations Act 1996* ("WR Act"). The suspected breaches under investigation have involved:

- unlawful industrial action;
- coercion;
- false and misleading representations about the obligation to join a union;
- freedom of association; and
- discrimination.

21. In one investigation that involved use of compliance powers, the ABC Commissioner subsequently decided that the public interest was better served by making a report under section 67 of the BCII Act instead of commencing penalty proceedings. Section 67 of the BCII Act permits the ABC Commissioner to publish details of non-compliance by a building industry participant with the BCII Act, the WR Act or the *Independent Contractors Act 2006* where he considers it to be in the public interest to do so.

22. In having regard to the circumstances of this case and whether the public interest would be served by putting the matter before the courts, it was decided that penalty proceedings would not be instituted against the workers, Mr McDonald (a CFMEU official), the CFMEU or the CFMEUW. This decision was made after taking into account the following factors:

- a) the time elapsed since the matter was under investigation;
- b) the public interest would not be served by putting workers before the Court in this case. The workers were poorly advised by the CFMEU;
- c) the strong public reaction against the "blue flu" tactic and no evidence of it being repeated in the industry since July 2005; and
- d) the fact that the unlawful conduct pre-dated some, but not all, of the operative provisions of the BCII Act.

23. In one examination, after finding out the true facts relevant to the investigation, the ABCC found there was no breach of the law. This was considered an important outcome as it avoided the

commencement of penalty proceedings in circumstances where there was a likelihood the Court would dismiss the case.

24. To date, three matters in which compliance powers have been exercised as part of the investigation have been finalised before the court. The investigations involved a total of 10 witnesses. The outcome of those matters is as follows:

a) *Lovewell v Clarke & CFMEU* -

Proceedings commenced in the Federal Court in Brisbane on 28 June 2006. On 17 November 2006, parties filed a notice of discontinuance with no order as to costs.

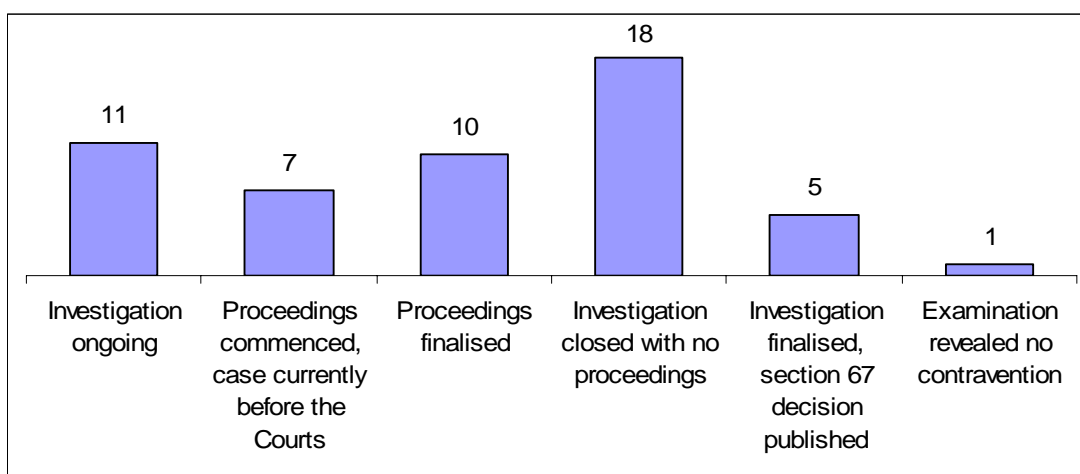
b) *Furlong v Australian Workers Union & Others* -

Proceedings commenced in the Federal Magistrates Court in Melbourne on 20 October 2006. The AWU, an AWU Organiser and 3 AWU officials admitted to contravening section 38 of the BCII Act and section 178 of the WR Act. On 19 April 2007, Federal Magistrate Burchardt imposed a penalty of \$40,000 on the AWU (of which \$20,000 was suspended) and \$4,000 on the individuals respectively.

c) *Carr v CEPU & Kevin Harkins* -

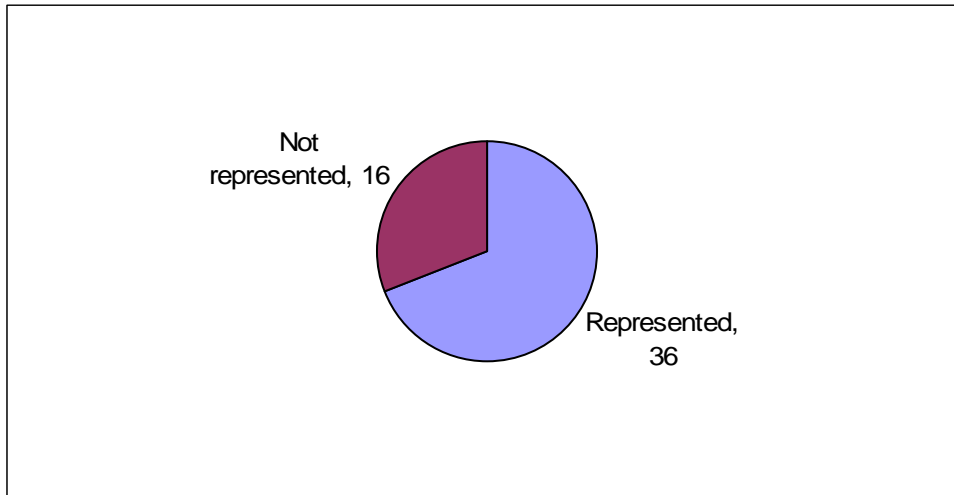
Proceedings commenced on 18 July 2007 in the Federal Magistrates Court in Hobart. The CEPU and Harkins admitted to contravening section 38 of the BCII Act. On 4 September 2007 Federal Magistrate Lucev imposed a penalty of \$11,000 on the CEPU and \$8,800 on Harkins respectively.

25. The outcomes of examinations conducted to date are represented in the table below.



Legal Representation

26. Under section 52 of the BCII Act, a witness is entitled to legal representation. The majority of witnesses at ABCC examinations have been legally represented.



Bonan v Hadgkiss

27. Since the commencement of the ABCC, there has been one challenge to the Federal Court about the exercise of compliance powers. That was in the matter of *Bonan v Hadgkiss*, when a decision was made by the Deputy ABC Commissioner to exclude a legal representative from an examination. The legal representative had appeared at an earlier examination for another witness in the same investigation. The examination of the applicant was to be on virtually identical subject matter as the earlier witness. In these circumstances, the Deputy ABC Commissioner ruled that to permit the same legal representative to appear would or may have prejudiced the investigation by the ABCC.

28. On 12 October 2006, Justice Besanko of the Federal Court delivered judgement and made the following rulings:

- section 52 examinations are to be held in private;
- the Deputy ABC Commissioner has the power to make a non-disclosure direction;
- the Deputy Commissioner must have the power to regulate and control the conduct of proceedings before him and make orders to ensure the integrity of the investigation;
- the Deputy ABC Commissioner has the power to exclude a particular legal practitioner; and
- there was a proper basis for the exercise of the discretion to exclude the solicitor concerned.

29. Further details of the case are contained in the December 2006 Report.

30. On 16 May 2007, the decision of Justice Besanko was the subject of a further appeal to the Full Court of the Federal Court. The ABCC filed a motion contesting the appeal and argued that the Court should not entertain a hypothetical case for an appeal point that had become moot. The ABCC submitted that, in circumstances where the applicant has been examined and discharged by the ABCC, there was no utility in proceeding to determine the matter.
31. On 27 July 2007, the Full Court of the Federal Court ruled that Mr Bonan's appeal be permanently stayed.
32. The Full Court noted the CFMEU (for Mr Bonan) argued the decision would have practical ramifications for its members who may have to engage different legal representatives at ABCC examinations. In its decision, the Full Court observed that the same limitations apply to other statutory investigative bodies, such as ASIC.
33. The Full Court accepted the ABCC's argument that it should not entertain a hypothetical case. The Full Court concluded that this was not an appropriate case for hearing and determining the wider issues arising from the construction of the BCII Act. Nor was it an appropriate case to determine the limits of the power of the ABCC to interfere in the right of a witness to select a legal representative of his or her choice.
34. The earlier Federal Court decision of Justice Besanko therefore stands. The Full Court made orders that the appellant pay the ABCC's legal costs.

Compliance with ABCC examinations

35. On all 57 occasions where a witness has been served with a Notice to attend, the witness has complied with that Notice. Specifically:
 - 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.

Conclusion

36. The use of compliance powers continues to offer an effective means for the ABCC to determine whether or not prosecution is warranted arising from ABCC investigations. The evidence provided at examinations can be extremely valuable to the investigation. It allows the ABCC to fully understand the factual circumstances of matters

which would otherwise have stalled because of lack of cooperation from relevant witnesses.

37. The ABCC will continue to work with building industry participants to educate all potential witnesses concerning their rights and obligations under the BCII Act. The ABCC would welcome a more cooperative approach with some unions to avoid unnecessary formality and having to resort to the use of compliance powers. In the absence of voluntary cooperation with its investigations, particularly from the CFMEU, it is anticipated the ABCC will continue to need to resort to use of its compliance powers.