



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 2010

Report on the exercise of compliance powers by the ABCC from 1 October 2005 to 30 September 2010.

Background

1. This is the ninth report relating to the exercise of compliance powers by the Australian Building and Construction Commissioner (ABCC).
2. All reports relating to the ABCC's compliance powers are published on the ABCC website at www.abcc.gov.au
3. This report provides information relating to the use of compliance powers from 1 October 2005, when the ABCC commenced operations, through to 30 September 2010.

The ABCC's compliance powers

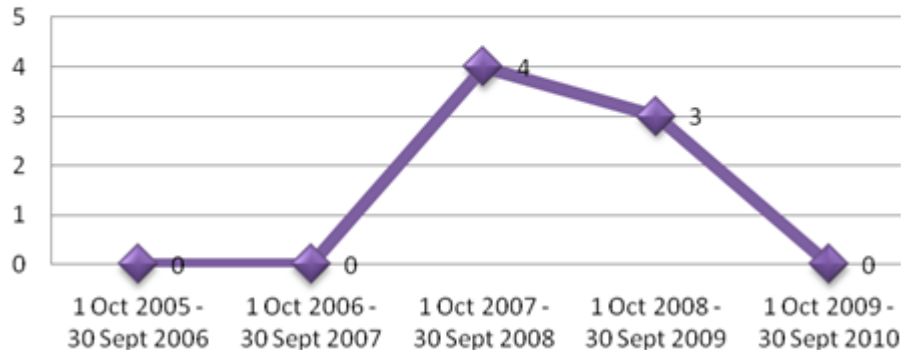
4. The ABCC's compliance powers are set out in section 52 of the *Building and Construction Industry Improvement Act 2005* (BCII Act).
5. The *Guidelines in relation to the exercise of compliance powers in the Building and Construction Industry* provide further information in relation to the use of the compliance powers. A copy of the Guidelines is available on the ABCC's website.
6. The compliance powers will only be used as a last resort. Voluntary provision of information must have been sought unsuccessfully before an application for the use of compliance powers will be considered. Further, the compliance powers may only be utilised if the ABC Commissioner believes on reasonable grounds that a person is capable of giving evidence that is relevant to an ongoing ABCC investigation.
7. Non-compliance with a notice issued under section 52 of the BCII Act is a criminal offence which carries a penalty of up to six months' imprisonment. However, a court can, if it considers it appropriate, 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*.

Use of the compliance powers

8. Section 52(1)(c) of the BCII Act provides for a notice requiring a person to give information. To date this provision has not been utilised by the ABCC.
9. Section 52(1)(d) of the BCII Act allows for a notice requiring the production of documents. On **seven** occasions, notices have been issued under this provision.

Notice issued requiring production of documents

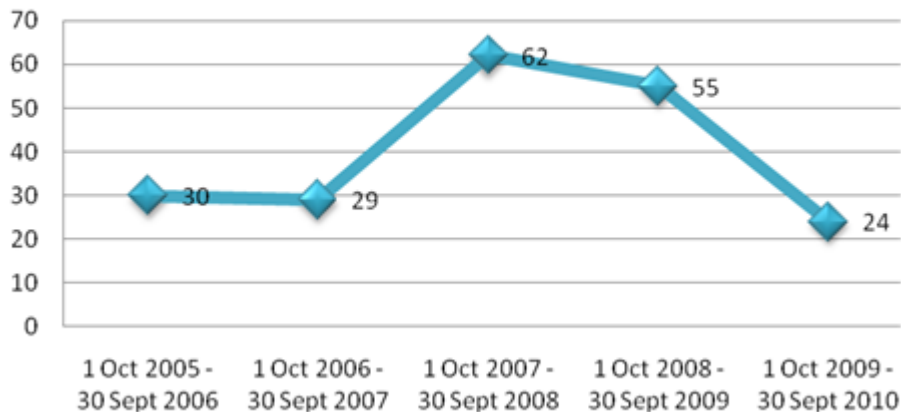
For the period 1 October 2005 to 30 September 2010



10. The most utilised aspect of the ABCC's compliance powers is set out in section 52(1)(e) of the BCII Act. This provision empowers the ABC Commissioner (or pursuant to a delegation, a Deputy ABC Commissioner) to issue a notice to a person requiring that person to attend an 'examination' at a specified time and place to answer questions. Witnesses have attended examinations on **200** occasions.

Examinations conducted by year

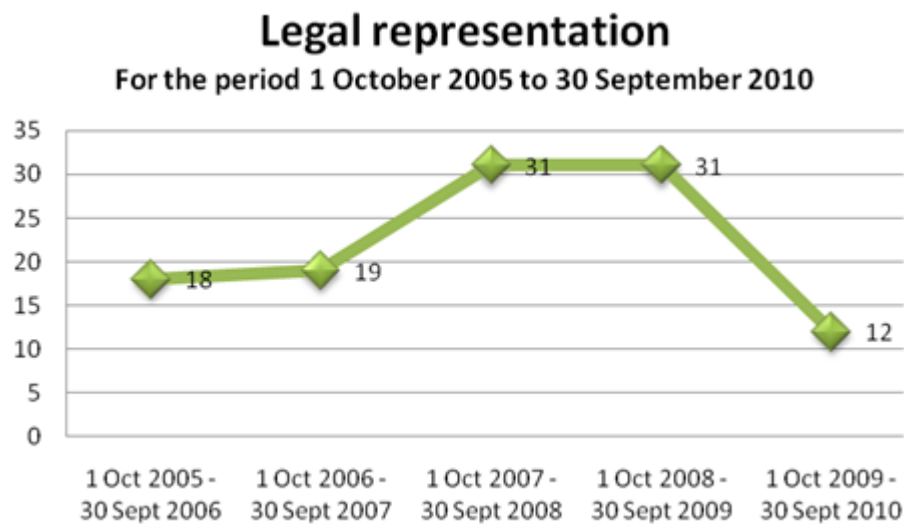
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11. Witnesses will always be made fully aware of their rights and obligations at least 14 days before they are required to attend an examination. Every witness receives a covering letter (see Annexure 1) at the time they are served with the notice. The covering letter sets out information relating to the process, their right to legal representation and details of a contact officer at the Office of the ABCC should they have any questions.

Examinations

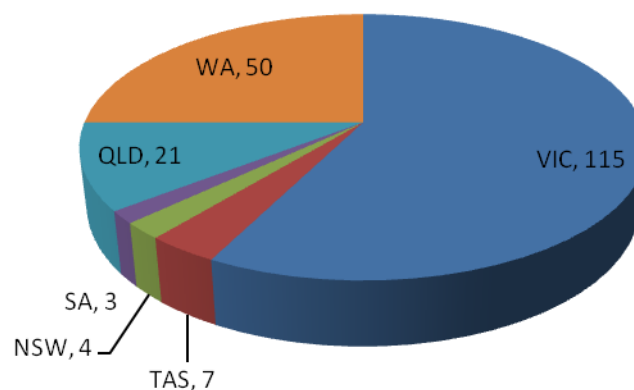
12. Witnesses who are required to attend examinations are obliged to provide truthful answers to all questions asked of them. Witnesses are required to take an oath or affirmation at the beginning of the examination that their evidence will be true.
13. Witnesses are welcome to have their own legal representation at examinations. Only in exceptional circumstances will a particular lawyer not be allowed to represent multiple witnesses in the same investigation. To date, **111** witnesses who have attended examinations have chosen to be legally represented.



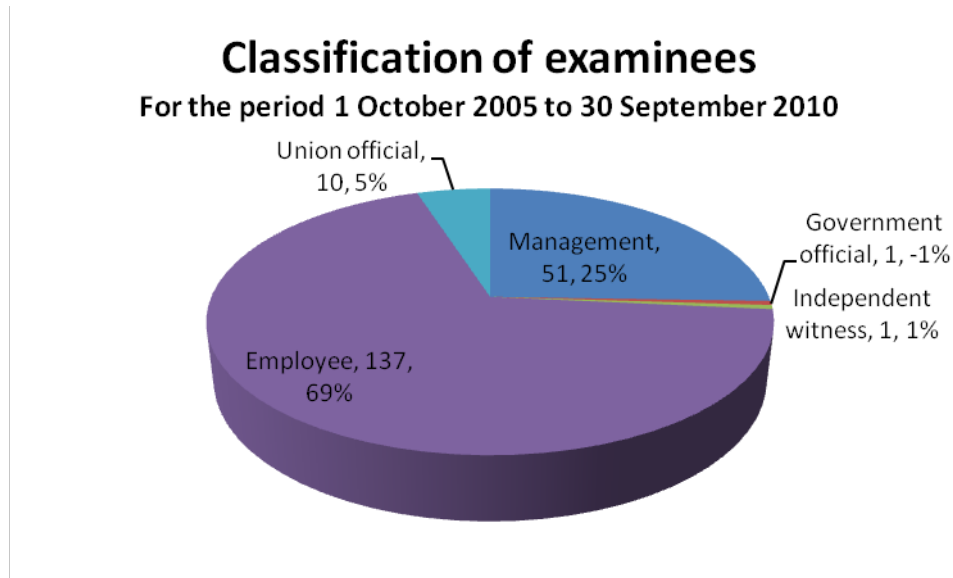
14. Since 30 March 2010, the date the last report was published, 12 notices have been issued to witnesses requiring them to attend examinations. Three examinations have been conducted.
15. The majority of examinations take place in Victoria (57%) and Western Australia (25%).

Examinations by state

For the period 1 October 2005 to 30 September 2010



16. The majority of witnesses who attend examinations are employees (69%).
17. Because of the use immunity that protects a witness in respect of evidence under section 52 of the BCII Act (see 'Use immunity for witnesses' below), the ABC Commissioner has never used the powers against a person who it was thought might be the subject of a later proceeding.



Use immunity for witnesses

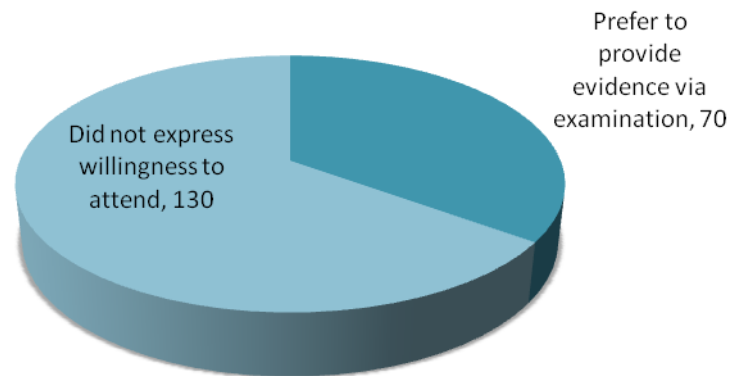
18. Section 53(2) of the BCII Act provides some protection for witnesses who are subject to the compliance powers. Evidence provided under section 52 of the BCII Act cannot be used against the witness in later proceedings. Further, no evidence that is obtained directly or indirectly as a result of a witness complying with a section 52 notice can later be used against the witness. However, there are four exceptions to this general rule. Evidence of a witness at an examination can be used against the witness in a prosecution for:

- failure to answer a question;
- knowingly giving false or misleading information;
- knowingly producing a false or misleading document;
- obstructing or hindering a Commonwealth public official.

19. To date, the ABCC has not relied upon these exceptions to the general rule.
20. Thirty-five percent of witnesses who have wanted to assist the ABCC have preferred to be subject to the compliance powers. In these cases the witnesses were usually fearful of the retribution that they may encounter if seen to be assisting the ABCC voluntarily. When these witnesses are served with notices under section 52 of the BCII Act they are then legally obliged to cooperate with the ABCC.

Requests to attend examinations

For period 1 October 2005 to 30 September 2010

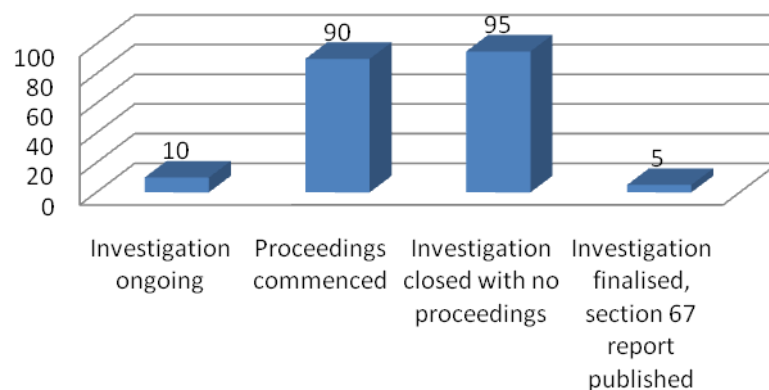


Matters commenced before the courts resulting from examinations

21. Thirty-four proceedings have been commenced in the courts after examinations have been conducted. In respect of these 34 proceedings, 90 examinations were conducted. Each of the examinations provided valuable information that contributed to the matters being filed in court.

Outcome of examinations

For the period 1 October 2005 to 30 September 2010



22. A recent stark example of the usefulness of section 52 powers was the case of unlawful industrial action at the City Square site in the Perth CBD: *ABCC v CFMEU* [FCA 784]. The only reason the ABCC prosecution was successful was because a witness to what was said by Joe McDonald at a meeting (“stand up for yourselves!”) was compelled to give this evidence at a section 52 examination. The transcript of that examination was then tendered as evidence-in-chief in the Federal Court proceedings.

23. Since 31 March 2010, when the previous compliance powers report was published, two matters have been filed in court where the compliance powers were used as part of the investigatory process. Summaries of both matters follow.

Gregor v CFMEU, Christopher, Hudson, Reardon, Setka, Spervasilis & Washington

24. This matter was filed in the Federal Court at Melbourne on 28 April 2010.
25. Bovis Lend Lease (BLL) engaged Caelli Constructions (Vic) Pty Ltd (Caelli) to perform building work at the New Royal Children's Hospital (RCH) site in Parkville, Olsen site in South Yarra and the ANZ, Merchant, Montage, Myer and Robin sites in Docklands, Victoria.
26. On 11 December 2008, Caelli directed CFMEU shop steward and OHS representative at the RCH site, Joe Angelino, to stop working at the site and start working at another Caelli site in Craigieburn.
27. The ABCC alleges that between 12 December 2008 and 2 March 2009 the respondents engaged in an industrial campaign on all of the abovementioned BLL sites. It is alleged that the aim of the campaign was to have Mr Angelino reinstated to his original position. The ABCC alleges that the campaign included strikes and blockades and with intent to coerce or apply undue pressure to the head contractor to allocate particular responsibilities to Mr Angelino and make a workplace agreement with the CFMEU.
28. Directions were given on 16 September 2010 and a further directions hearing is scheduled for 20 December 2010.

Helal v Brookfield Multiplex, CFMEU & Mates

29. This matter was filed in the Federal Court in Melbourne on 16 June 2010.
30. Brookfield Multiplex was the head contractor on the Southbank One apartment project in Southbank, Victoria.
31. Brookfield Multiplex engaged Permark Group Pty Ltd to undertake fit-out work.
32. The ABCC alleges that on 16 July 2009 CFMEU shop steward Robert Mates told Permark's general manager that Permark had to employ eight people who had worked for Sky High Carpentry Pty Ltd. It is alleged that Mr Mates threatened to disrupt or prevent Permark's work on the site if they did not meet his demands. Mr Mates was employed by Multiplex.
33. It is alleged that on 1 August 2009 Mr Mates demanded that Permark re-employ two employees who had been terminated or he would disrupt or prevent Permark's work on the site.

34. It is alleged that on 18 or 19 August 2009, Mr Mates threatened the same action if Permark did not credit entitlements that the eight employees had accrued during their employment with Sky High Carpentry on the Southbank One project.
35. It is further alleged that on 20 August 2009, Mr Mates convened an unauthorised stop-work meeting with the Permark employees and then demanded that Permark pay the employees for the time they were off work.
36. Directions were made on 15 September 2010 and a further directions hearing will be scheduled on a date after 5 November 2010.

Non-compliance with ABCC's compliance powers

37. Witnesses have failed to attend examinations on five occasions.
38. The first occasion of non-attendance was in Melbourne by Mr Noel Washington, CFMEU Victorian Vice President.
39. In November 2007 Mr Washington, along with three others, applied to the Federal Court at Melbourne to have the notice set aside on the grounds that it has been issued for an improper purpose. In anticipation of the court proceedings, the Office of the ABCC wrote to Mr Washington and advised him that he was not required to attend the scheduled examination until after the court proceedings had been heard.
40. In January 2008 the Federal Court dismissed Mr Washington's application. The ABCC then wrote to Mr Washington advising of the new date for his examination. Mr Washington failed to attend that examination.
41. A brief was forwarded to the Commonwealth Director of Public Prosecutions (CDPP) who lodged proceedings in the Magistrates Court at Melbourne. In November 2008 the CDPP withdrew the proceedings.
42. The second occasion of non-attendance was in Adelaide by Mr Ark Tribe, a construction employee. Mr Tribe was served with a notice pursuant to section 52(1)(e) of the BCII Act but subsequently failed to attend the examination. Mr Tribe was provided with an opportunity to explain his reasons for non-attendance. No response was received from Mr Tribe. In February 2009 the CDPP filed proceedings in the Magistrates Court at Adelaide. The hearing has been completed. The decision as to whether the notice was valid and hence whether a criminal offence was committed is scheduled to be handed down on 3 November 2010.
43. The third and fourth occasions of non-attendance, both in Melbourne, were resolved administratively. One witness was examined the following day and the other witness provided a voluntary statement despite his earlier refusal to do so.
44. The fifth occasion of non-attendance was in Brisbane. The witness was provided with an opportunity to explain his non-attendance. No response was received from the witness. A brief is currently being prepared by the ABCC to be sent to the CDPP for consideration of potential prosecution.

Value of compliance powers

45. The compliance powers are a valuable tool for the ABCC which allow investigations to progress where they would otherwise stall.

46. The Honourable Murray Wilcox QC reported that:

“... I have reached the opinion that it would be unwise not to endow [the Government’s proposed ABCC equivalent agency] (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done. ... Any tough regulator in the building and construction industry will need a power of coercive investigation; at least under present conditions.”

47. The decision to exercise the compliance powers is not taken lightly.

48. The compliance powers are an important investigatory tool necessary for the ABCC to provide effective law enforcement in the building and construction industry.



Australian Government

Office of the Australian Building and
Construction Commissioner

ANNEXURE 1

GPO BOX 9927
Melbourne VIC 3001
Operations Telephone: 03 8509 3010
Operations Fax: 03 8509 3023

ABCC[Notice number]

[Date]

[Details of witness]

Contact Officer: [Contact Officer's name and telephone number]

Dear [witness]

Notice issued under section 52(1)(e) of the *Building and Construction Industry Improvement Act 2005*

You have been served with a notice (**the notice**) to attend before me at the Office of the Australian Building and Construction Commissioner (**ABCC**) to answer questions relevant to an investigation pursuant to section 52(1)(e) of the *Building and Construction Industry Improvement Act 2005* (**BCII Act**).

You should read the notice accompanying this letter carefully. You will see that it requires you to attend at [**address**] on [**time**] on [**date**], or such later time and date as notified to you in writing. When you attend you will be asked to answer questions relevant to an investigation being conducted by the ABCC (**the investigation**). Details of the investigation are included in the notice.

I have been given a delegation by the ABC Commissioner to exercise his powers under section 52 of the BCII Act. You have been served with this notice because I believe on reasonable grounds that you are capable of giving evidence that is relevant to the investigation.

The examination will be conducted by me. I will be assisted by counsel. Other ABCC staff will also be present, as will a monitor for the purpose of sound recording the examination.

If you have any concern or question about your rights under this notice it is recommended that you obtain your own legal advice.

You may be represented by a barrister or solicitor at the examination if you so choose, subject to any reasonable condition I may impose. For example, I may direct that your legal

representative keep the contents of the examination confidential until the investigation has been completed.

If you choose to have legal representation at the examination, your representative may:

- (a) object to questions if they are unclear or irrelevant to the subject matter of the investigation or if legal professional privilege is claimed;
- (b) ask you further questions to clarify your response to an earlier question;
- (c) make submissions at the completion of the examination as to any relevant matter.

The representative will not be permitted to disrupt the examination and to this end I will generally not allow you to consult with your representative prior to answering particular questions.

The examination will be held in private and you will be required to give evidence on oath or affirmation.

You may request a change of date or time if there are exceptional circumstances that prevent or unreasonably impede your attendance at the scheduled examination. Such a request must be in writing and must set out reasons for the request. Any written request should be provided to the contact officer (listed below) at least 7 days prior to the examination. I may, at my discretion, re-schedule the examination.

Should you require further clarification of the notice, you or your lawyer may request this from the contact officer (listed below).

When answering questions or providing information during the examination you may nominate some or all of the information provided as “confidential”. If you do so, you must subsequently provide written reasons why the information is confidential.

If you refuse or fail to attend to answer questions at the time and place specified in this notice you may contravene subsection 52(6) of the BCII Act. **A person who contravenes subsection 52(6) of the BCII Act is guilty of a criminal offence. The maximum penalty is imprisonment for 6 months.**

You may also contravene subsection 52(6) of the BCII Act if you fail:

- to take an oath or make an affirmation, when required to do so; or
- to answer questions relevant to the investigation while attending the examination.

Further, it is a serious offence if you knowingly give false or misleading information or evidence at the examination.

At the examination you will not be excused from answering a question on the ground that the answer may incriminate you or expose you to a civil penalty.

However, the general rule is that any answer you give cannot be used in evidence against you in later proceedings, nor can any material obtained directly or indirectly as a result of an answer given by you. The exceptions to this general rule are that your answers at the examination may be used against you in later proceedings for:

- refusing to take an oath or affirmation at the examination;
- failing to answer questions relevant to the investigation at the examination;
- knowingly giving information that is false or misleading; or
- obstructing, hindering, intimidating or resisting a Commonwealth public official in the performance of official functions.

If you answer questions in good faith at the examination, you will not be liable to any proceedings for contravening any other law because of those answers. Nor will you be liable in civil proceedings for loss, damage or injury of any kind suffered by another person because of those answers.

A copy of *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry* is available free of charge from the contact officer below or on www.abcc.gov.au

If you have any question about the notice please ring the contact officer on the number below, who would be happy to discuss the matter:

Contact Officer: [Contact Officer's name and telephone number]

Yours sincerely

[Deputy ABC Commissioner]