

**MAGISTRATES COURT OF SOUTH AUSTRALIA**  
(Criminal)

**COMMONWEALTH DIRECTOR OF PUBLIC  
PROSECUTIONS V TRIBE, ARK**

**Judgment of Mr D Whittle SM**

**24 November 2010**

---

**Complainant:** COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS  
**Prosecution:** MR B ZICHY-WOINARSKI QC WITH MR S. HENCHLIFFE  
**Defendant:** ARK TRIBE  
**Counsel:** MR M ABBOTT QC WITH MR S DOLPHIN

**Hearing Date/s:** 15/06/10, 16/06/10, 18/06/10, 20/07/10, 21/07/10, 22/07/10 and 13/09/10  
**File No/s:** MCPAR-09-2146



under section 52 of the Building and Construction Industry Improvement Act 2005 ("the Act") to issue a notice which was served on the defendant and purported to require him to attend *'to answer questions that are relevant to an investigation by the ABC Commissioner into the contravention, by a building industry participant of a designated building law'*. The defendant did not attend on the date and at the time and place specified in the Notice. That is the conduct said to constitute the offence charged.

### Preliminary challenge

5 As a preliminary matter, there was a challenge to the validity of the Complaint, asserting that the complainant Draffin was not authorised at law to lay the Complaint. I ruled that the Complaint was validly laid and the trial commenced, with the defendant entering his plea of not guilty..

### The course of trial

6 The evidence commenced on Friday 18 June 2010 and continued on 20 and 21 July 2010. The defendant did not give evidence after the prosecution case. I adjourned the matter to receive written submissions and resumed on 13 September 2010, when oral submissions were made. Further written submissions were received thereafter.

### Onus and burden of proof

7 The prosecution must prove its case beyond reasonable doubt and in particular must prove beyond reasonable doubt each of the elements of the offence charged.

8 There is no obligation upon the defendant to prove anything.

### Elements of the offence charged

9 The elements of the offence are as follows:

1. The defendant must have been given a notice under s.52(1) of the Act.
2. The defendant must have failed to attend as required in the notice.
3. That the notice must have been a valid notice under s.52(1) of the Act

### The defendant's contention

10 There is no suggestion in these proceedings that the evidence does not establish that the defendant received a notice in purported compliance with sub-section 52(1) of the Act or that such notice was not served upon the defendant, nor is it suggested that the defendant did not fail to appear in answer to the notice. Put broadly, the contention advanced on behalf of the defendant is that the prosecution has failed to

prove that the notice was a valid notice. Indeed, it is submitted that the notice which was issued to the defendant should be found to have been invalid. Determination of the issue of the validity of the notice is the primary issue in this trial.

### The evidence

11 Five witnesses gave evidence for the prosecution. They were Seamus Flynn ("Flynn"), Nigel Hadgkiss ("Hadgkiss"), Mark Temple ("Temple"), Sandra Scalise ("Scalise") and James Mathers ("Mathers").

12 The following summaries of evidence of the witnesses represent my findings in relation to such evidence except where the evidence is not expressed as a fact. Findings are beyond reasonable doubt except where I indicate otherwise.

### The evidence of Flynn

13 Seamus Flynn was appointed as an ABC Inspector under section 57(1) of the Act, by an instrument under the hand of the ABC Commissioner John Lloyd, dated the 29 August 2006. That appointment was in force at all relevant times. He was one of a team of ABC Inspectors working from the Adelaide office of the Office of the Australian Building and Construction Commissioner.

14 On 30 May 2008, he was told by ABC Inspector Mark Temple, the Adelaide team leader, that there had been an incident at Flinders University on that day, in which workers working on a building site, where Hindmarsh Construction ("Hindmarsh") was the principal contractor, had walked off the site at about 11 or 11:30a.m., as a result of attendance by Feehan, an official of the CFMEU, who entered the site and then held a meeting with workers outside the gate. Flynn was also told of an issue in relation to a right of entry notice said to have been issued on the previous day by Feehan to Hindmarsh. Flynn was told of certain sub-contractors said to have been engaged working at the site, including Samaras Structural Engineers.

15 Temple instructed Flynn to initiate and take charge of an investigation into the incident, with the assistance of ABC Inspectors Standen, Mathers and Wilson. Flynn then regarded himself as in charge of the investigation, with Temple overseeing it as team leader.

16 Temple, Flynn, Standen, Mathers and Wilson subsequently obtained further information from various employees of Hindmarsh and the other named sub-contractors, as to who was allegedly present and working on 30 May 2008 and what had occurred when Feehan attended the site. Witnesses were spoken to and statements taken during the ensuing two to three months. In doing so, various of the powers of ABC Inspectors pursuant to section 59 of the Act were exercised, including entering premises pursuant to section 59(3), interviewing and requiring production of documents pursuant to section 59(5) and serving a written notice requiring the production of a document or documents pursuant to section 59(6).

- 17 Late in June 2008 the defendant's name was first mentioned in the context of the investigation, when Mr George I. Samaras of Samaras Structural Engineers told Flynn the names of the two of his employees who Mr Samaras said had walked off the site, one of whom he said was the defendant. He said he had been told this by his leading hand, Andrew Bills. He provided Flynn with landline and mobile telephone numbers for the other employee and the defendant and a mobile number for Bills.
- 18 On 15 July 2008, Flynn had a telephone conversation with Bills, during which Bills told him that (on the day in question), "I had a phone call from Ark (Tribe) and that there was a safety issue and that they were leaving". Flynn made contemporaneous notes of that conversation, which were later filed by a member of staff of the Office of the Australian Building and Construction Commission in a folder marked "Correspondence File Vol 2 --Inv 325 -- Hindmarsh -- Flinders University, Education Building Investigation". (This file, being two lever arch volumes is Exhibit P17. It was maintained in the ordinary course of the activity of the Office of the Australian Building and Construction Commissioner, as a running file of documents received and created during the investigation of the incident on 30 May).
- 19 On 15 and 16 July 2008 Flynn attempted to contact the defendant by calling the mobile telephone number he had been given by Mr Samaras, which is formally admitted by the defendant to be the number of a mobile phone leased to him. On each occasion the call rang out.
- 20 Mr Samaras later forwarded Flynn copies of time sheets and pay details histories, which appeared to record and confirm that the defendant had commenced work for Samaras Structural Engineers at the Flinders University site on 30 May 2008 at 7 a.m. and finished at 11:30 a.m..
- 21 In due course, after consultation with Temple in particular, Flynn prepared documents entitled "Statement in Support of Section 52(1)(e) Notice" intended to provide evidence sufficient to justify the issue of such notices, to require several people, including the defendant, to give evidence at hearings. He intended these to go to Temple, then to the Regional Director and then to a Deputy ABC Commissioner, of whom Hadgkiss was one of two. He was aware that by specific delegating document, Hadgkiss had been delegated by the ABC Commissioner in relation to section 52. He understood the Commissioner and the two Deputy Commissioners could be available for section 52 hearings but he was instructed by his team leader Temple to address the statement to Hadgkiss.
- 22 The Statement in Support relating to the defendant (Exhibit P5) included the following headings and text :
- "Why voluntary or other information gathering powers under the Act have not been successful in or not considered to be adequate for acquiring the information, documents or evidence:**
- "20. Tribe is an employee of Samaras who was on the site on 30/5/08. He attended the meeting organised by Feehan and then left the site at the conclusion of the meeting.**

"21. Two attempts have been made to contact Tribe per telephone by the undersigned, on 15/7/08 and 16/7/08, but the telephone rang out."

and

**"Reasonable grounds to believe that Ark John Tribe is capable of giving evidence relevant to the investigation:**

"22. *Tribe was present at the meeting* convened and controlled by Feehan, and it is believed that he could provide valuable evidence for the purpose of this investigation." (my italics for emphasis).

23 Under cross-examination, Flynn agreed that he did not know, on the basis of the statements and other evidence he had obtained, that the defendant had attended the meeting and I find accordingly. I find that Flynn had obtained evidence that the defendant was working at the site that day and left the site early with the other workers and that as a result of the evidence and statements which had been gathered, he concluded that all workers on the site had attended the meeting. (No witness had asserted this to Flynn as a matter of that witness's own knowledge). Accordingly, Flynn asserted in the Statement in Support of Section 52 (1)(e) Notice which he prepared, that the defendant had attended the meeting. Flynn denied under cross-examination that the statement was misleading or that he intended to mislead Hadgkiss. I am not able to find that he did intend to mislead, although he must have been aware that he had no proof in support of that assertion. However, the statement was misleading, in that it had the effect of asserting to Hadgkiss that Flynn had obtained positive evidence that the defendant was at the meeting, whereas the evidence which had been obtained, although justifying a strong suspicion that the defendant had attended the meeting, was insufficient to found knowledge, or a positive assertion, that he had done so.

24 By reference to the evidence and Exhibit P5, Flynn prepared the Statement in Support of Section 52 (1)(e) Notice in draft on or before 10 August 2008. On or about 10 August 2008 a copy was considered and settled by the Team Lawyer Mr Duggan and approved by Temple as Team Leader. Each signed a copy and dated it 10 August 2008. The Notice later forwarded to Hadgkiss was signed by Flynn as the "Investigator initiating Notice" and by Duggan and Temple on 28 August 2008. Approval of the Notice by Mr Radisich, Regional Director is indicated on the document by the inclusion within the document of a faxed copy of the page signed by Duggan and Temple on or about 10 August 2008, bearing the original signature of Radisich, dated 11 September 2008. This was the day on which Deputy ABC Commissioner Hadgkiss signed the Notice to Attend and Answer Questions and an accompanying letter, each addressed to the defendant.

25 On 16 September 2008 Flynn went with Temple and Mathers to a building site and the defendant was served with the Notice to Attend and Answer Questions and accompanying letter, each signed by Hadgkiss and dated 11 September 2008. True copies of these documents were received in evidence as Exhibits P6 and P7 respectively. Copies of these exhibits are annexed to this judgment, together with a list of exhibits tendered during the trial.

- 26 The Notice to Attend and Answer Questions purported to require the defendant to attend at a specified hearing room in Adelaide at 10 a.m. on Thursday, 2 October 2008 "to answer questions that are relevant to an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law".
- 27 On Thursday, 2 October 2008 Flynn was at the hearing room specified in the Notice at 91 Grenfell St Adelaide, where Hadgkiss was ready to ask questions of the defendant. The defendant did not attend. Flynn made several attempts to contact the defendant including, on his evidence (refreshed from his notes), two calls from his mobile telephone to the mobile number admitted to be leased by the defendant, at 10:15 and 10:20 a.m.. On the second of those occasions, he said, the call was answered by a person who said, "This bloke keeps ringing, you have it under "cunts"", and a second person was then heard to say, "They can fucking keep ringing." Shortly thereafter Flynn attempted to call the defendant using the mobile telephone of counsel assisting the Deputy Commissioner.
- 28 Taking that evidence together with a Schedule of Admitted Facts (Exhibit P29), clearly prepared by reference to telephone call records, I find that Flynn made two unanswered telephone calls made to the defendant's mobile from his mobile phone at 10.15 and 10.20 a.m. then a further call at 10:22 a.m. which was answered and lasted 105 seconds. That was the answered call of which Flynn gave evidence. A further call from Flynn's telephone to the defendant's telephone at 10:25 a.m. was not answered and a further call made by Flynn from the mobile telephone of Mr Manuel, counsel assisting, was also not answered.
- 29 It is clear that proper efforts were made to ensure that the defendant had every opportunity to attend the hearing if he wished to.
- 30 Flynn asserted under cross-examination, and I accept that in conducting the investigation which led to the issue of the Notice, he had purported to exercise only his powers as an inspector under section 59 of the Act for "compliance purposes" within the meaning of section 59 (1). He considered the "compliance purposes" to include ascertaining whether designated building laws had been complied with" and in particular whether workers walking off the site had been in breach of section 38 of the Act, prohibiting a person from engaging in "unlawful industrial action" as defined by reference to sections 37 and 36 of that Act, which included investigating whether that action was "industrially motivated" within the meaning contained in section 37, and whether those who may have been involved were "building industry participants". From this perspective, a further purpose of the investigation was to ascertain whether Feehan did have grounds to enter the building site under section 494 of Workplace Relations Act.
- 31 Flynn regarded the investigation as his investigation, as an ABC Inspector, based on his suspicion that there had been a contravention by a building industry participant of at least the BCII Act or the Workplace Relations Act, or both.
- 32 Flynn stated and I accept that he had no recollection of having any contact or communication throughout the investigation with or from the ABC Commissioner Mr

John Lloyd. In this regard I note the evidence of Hadgkiss that on 15 August 2008 there was a "muster" which he said was a gathering in the Adelaide office of the Commissioner, himself and the investigators and, to the best of his recollection the team's solicitor Mr Duggan. Given the evidence of Flynn, which was at times attended by uncertainty as to detail, I am unable to find whether or not Flynn attended this muster, although he probably did. I do find, however, that at no time did Flynn regard the investigation is being subject to any active direction or oversight by the ABC Commissioner and if Flynn and the ABC Commissioner did attend the same "master" on 15 August 2008 there was nothing said by the ABC Commissioner which left Flynn with an understanding that the Commissioner was taking over the investigation.

33 Flynn also asserted under cross examination that he believed that the ABC Commissioner's function pursuant to section 10 of the Act (although he believed it was a function of the *Office of the ABC Commissioner*) of "investigating suspected contraventions, by building industry participants, of the [BCII] Act, the Independent Contractors Act 2006, the Workplace Relations Act, or a Commonwealth industrial instrument and of the Building Code" had been delegated to him by virtue of his appointment as an ABC Inspector. To the best of his recollection, he had been told this by his team leader, then Mr Litster, during his induction on the day he commenced his employment. Whilst I can make no finding about whether he was told this in such terms at the time of his appointment in 2006, I am satisfied that he had a belief – albeit an incorrect one – that somehow this function of the ABC Commissioner was delegated to him, and to all other ABC Inspectors, without a formal delegation pursuant to section 13 of the Act.

### The evidence of Hadgkiss

34 Between 30 September 2005 and 17 October 2008 Hadgkiss was a Deputy Australian Building and Construction Commissioner. On 3 October 2008 he was appointed in writing as an ABC Inspector.

35 By an instrument dated 24 October 2005, the Australian Building and Construction Commissioner, Mr John Lloyd delegated under Section 13 of the Building and Construction Industry Improvement Act, 2005 his 'powers under Section 52 of [that] Act' to Hadgkiss.

36 Hadgkiss was aware of a Direction to the Deputy ABC Commissioners made in writing by the ABC Commissioner on the 24<sup>th</sup> of October 2005, as to the manner in which the delegated powers contained in section 52 of the Act were to be exercised by a Deputy ABC Commissioner (Exhibit P20) and also of 'Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry' issued by the 'Office of the Australian Building and Construction Commissioner' (Exhibit P 21). The Directions (P20) required *inter alia*, that the directions and the guidelines (P21) be complied with in exercising (the powers under section 52).

37 On Friday 15 August 2008 Hadgkiss, who was based in the Melbourne office of the Office of the Australian Building and Construction Commission, attended a

'muster' in the Adelaide Office, which was a gathering of the Commissioner, himself and the investigators and, to the best of his recollection the team's solicitor Mr Duggan. There he was shown a draft of the Statement in Support of Section 52(1)(e) Notice which had been prepared by Flynn. For relevant purposes in relation to the defendant, this contained the same information as the Statement in Support of Section 52(1)(e) Notice eventually signed by Flynn on 28 August 2008 and forwarded to Hadgkiss.

38 I find that from 15 August 2008, Hadgkiss expected to be presented with documents in due course to allow him formally to consider whether to issue Section 52(1)(e) Notices to a number of identified individuals including the defendant, in relation to the incident of 30 May 2008.

39 Hadgkiss gave evidence which establishes, in a general sense, that he had made the ABC Commissioner aware of the investigation of the incident of 30 May 2008 or at least that the ABC Commissioner was otherwise aware of the investigation, by the following means;

- He discussed the matter with the ABC Commissioner at the meeting in Adelaide on 15<sup>th</sup> August after being briefed at that meeting about the Flinders University Investigation.
- There were fortnightly executive meetings attended by the Commissioner, Hadgkiss, the other Deputy Commissioner, the Assistant Commissioner of Operations, the Assistant Commissioner and the Corporate and the Chief Financial Officer, together with others who were invited as required.
- These meetings were chaired by the ABC Commissioner. On the basis of the evidence of Hadgkiss I am unable to find that the Commissioner attended every one of them between 30 May 2008 and 11 September 2008, but I am satisfied, on the basis of Hadgkiss having no recollection that on any occasion the Commissioner did not attend, that the Commissioner attended most, if not all of those meetings.
- Serious Investigation Reports prepared in June, July, August and September, being brief summaries of one page as to the progress of the investigation being conducted by staff within the office of the ABC Commissioner were tabled at fortnightly executive meetings at or shortly after the time of the preparation of each of those reports. (There is no evidence as to whether the ABC Commissioner read them).
- On 11 September 2008, Hadgkiss arranged to be forwarded to the ABC Commissioner by e-mail, copies of the Statements in Support, proposed Notices Pursuant to Section 52 and covering letters in respect of six such notices which were issued on that day.

40 The general nature of this evidence by Hadgkiss as to the extent of the knowledge of the ABC Commissioner arising from the matters mentioned in the

previous paragraph, leave me unable on the basis of that evidence alone, to draw firm conclusions about the extent of any advice given to the ABC Commissioner by Hadgkiss about the investigation of the events of 30 May 2008, other than to say I am at least satisfied that it is highly likely that the Commissioner was kept informed of developments in a general sense. It is not possible for me to make any findings about what was actually known by the Commissioner, or the role, if any, taken by the Commissioner in relation to the investigation, without more detailed evidence from Hadgkiss or evidence from the Commissioner about those matters.

41 By the time Hadgkiss considered the Statement in Support with a view to issuing the Section 52 (1) (e) Notice against the defendant (and the other recipients) on 11 September 2008, he had previously considered the draft statement in support and he read it and accepted the assertions made in it at face value. He was at that time already satisfied that there was sufficient information to sign the notice as a result of discussing it with the investigators in August and seeing the draft. In addition to the grounds as set out in the Statement of Support, upon which basis he purported to form the requisite belief for the issue of the Section 52(1)(e) Notice, I am satisfied that Hadgkiss had been told by either Flynn, Temple or the team lawyer, Mr Duggan that the defendant had attended the meeting outside the gates of the site at Flinders University on 30 May 2008. The defendant's time sheets and pay records had also been brought to his attention at some time during the investigation and I accept that Hadgkiss believed on the basis of documents that he had seen and assertions he had been told of, that the defendant had attended the meeting. I find that he had also been told at some stage during the investigation that the defendant's leading hand had received a telephone call from the defendant immediately after the incident in question on 30 May 2008. I find that on 11 September 2008 Hadgkiss considered the Statement in Support, together with those things he had previously been told and formed a belief that the defendant had information relevant to an investigation and was capable of giving evidence relevant to an investigation and on that basis he determined to issue the 52(1)(e) Notice to the defendant in purported exercise of the powers under Section 52 of the Act which the ABC Commissioner had delegated to him.

42 To the extent it is necessary for me to determine, I find that Hadgkiss believed that the investigation which was on foot was properly to be characterised as an investigation 'by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law' within the definition used in sub-section 52(8). Hadgkiss was aware that he had no formal delegation pursuant to section 13 of the Act of the Commissioner's functions under Section 10, including the function of 'investigating suspected contraventions, by building industry participants of the [BCII] Act, the Independent Contractors Act 2006, the Workplace Relations Act or a Commonwealth Industrial Instrument; and the Building Code.

43 His belief was that the investigation which had been and would continue to be undertaken, was one for which the ABC Commissioner was ultimately responsible, as for all investigations carried out by staff of the Office of the Australian Building and Construction Commissioner and he further believed that the investigation was "an investigation by the ABC Commissioner" by virtue of the investigation powers vested in the Inspectors, including Flynn and himself under Section 59 of the Act and by the

delegation of the Commissioner to Hadgkiss of his powers under Section 52 of the Act.

44 I am also satisfied that Hadgkiss considered that in issuing the Notice against the defendant he was acting in accordance with the provisions of the Act and the ABC Commissioner's Directions issued on 24 October 2005 (P20) and 'Guidelines in Relation to the Exercise of Compliance and Powers in the Building and Construction Industry' (P21).

45 I note and accept the evidence of Hadgkiss that at the time of his departure from the Australian Building and Construction Commission there were 42 active investigations of a similar nature to the investigation of the incidents of 30 May 2008 and that his belief in a wide interpretation of what constituted an investigation for the purposes of Section 52 was fortified by his view "that it would be unrealistic to expect Mr Lloyd to be personally conducting each and every investigation and [he did] not believe that was the intent of Parliament and hence [his] wide interpretation of that section."

46 I note that Hadgkiss was questioned about his interpretation of the Commissioner's guidelines (Exhibit P21) and he had not appreciated that there was a distinction drawn in the guidelines between the Office of the Australian Building and Construction Commissioner (referred to in the guidelines as the ABCC) and 'investigations' being conducted by the 'ABCC' on the one hand, and the ABC Commissioner (or Deputy ABC Commissioner) and the Commissioner's powers under Section 52, on the other hand. I find that there is no distinction drawn in the guidelines between an investigation being conducted by the "ABCC" and "an investigation by the ABC Commissioner" (as appearing in sub-section 52(8)).

47 I accept the evidence of Hadgkiss that the form of the Section 52(1)(e) Notice and accompanying letter were prepared early in his time as Deputy ABC Commissioner with the assistance of legal advice and having regard to similar documents then in use by the Australian Competition and Consumer Commission. I also accept his evidence to the effect that he regarded the notice and accompanying letter as having been issued in full compliance with all relevant legislative and administrative requirements. In this instance he believed he had the power to issue it and conduct the hearing.

48 I also conclude that it was open to him, on the basis of the information provided to him in Exhibit P5 alone, to form a belief, on reasonable grounds that the defendant was capable of giving evidence in relation to the events of 30 May 2008 which were being investigated. I am mindful that certain information in the Statement in Support was incorrect, as I have observed, in the sense of being included as a positive assertion without sufficient foundation. In my view, even if the assertion that the defendant had been present at the meeting had not been included in the Statement in Support, Hadgkiss could nevertheless, on reasonable grounds, have formed the belief that the defendant was capable of giving evidence relevant to the investigation. To justify the formation of such belief, it would have been sufficient, in my view, for Hadgkiss to have been informed that the defendant was on the site and left early, with other workers, after the meeting had occurred, whether or not he had attended the meeting.

The evidence of Temple

49 Temple was appointed as an Inspector pursuant to sub-section 57(1) of the Act by an instrument signed by the ABC Commissioner John Lloyd on 3 October 2005. He was a team leader responsible for operations in South Australia and the Northern Territory at the relevant time.

50 On 29 May 2008 he received an e-mail from David Chappill, project manager for Hindmarsh, attaching copies of:

- an Entry Notice dated 29 May 2008 in which Justin Feehan of the CFMEU advised of his intention to enter the site in question at Flinders University on 30 May 2008, in purported compliance with the requirements of the Workplace Relations Act 1996; and
- a facsimile said to have been sent in response by Chappill to Feehan, purporting to notify him that the Entry Notice was not valid, for several stated reasons and, in effect, that unless the defects were rectified, entry would be refused.

51 On 30 May, Chappill telephoned Temple at about 3.10 p.m. and advised him that Feehan had attended the site at about 9.30 a.m., whereupon he had challenged Feehan about his authority to be there and called the police, who attended and talked to him. Then, Chappill said, Feehan gathered up the men on site and conducted a meeting outside the site gates and there had been a show of hands after which the men left the site between 11.00 am and 11.15am. He advised that Feehan had then spoken to supervisors and a safety officer of Hindmarsh and outlined various safety concerns. Chappill provided Temple with the names of various sub-contractors at the site and the names of his foreman and safety officer. As a result of what he had heard from Chappill, Temple formed the view that there may have been unlawful industrial action within the meaning contained in the Act and also a breach of the Workplace Relations Act.

52 Later that day, 30 May 2008 Temple instructed Flynn to commence an investigation. Chappill forwarded Temple a more detailed account of the day's events by email, together with an account of those events prepared by Chappill's foreman, Martin Lunn. All the information Temple had was provided to Flynn.

53 Temple was consulted by Flynn in relation to the preparation of the Statement in Support of Section 52(1)(e) Notice. When directed to the photocopied page of a fax transmission bearing a copy of his signature and the date 10.8.08 (in Exhibit P5) he said that he signed it and put the date under it but he would not have signed it on that day, as that was a Sunday. I am satisfied Temple saw and signed a draft of the statement in support on about 10 August 2008. He also signed the Statement in Support on a subsequent occasion, on that occasion dating his signature 28.8.08.

54 On 11 November 2008, with ABC inspectors Mathers and Standen he attended a construction site where the defendant was working and served upon him a letter

described as a 'show cause letter' which invited him to give a reason why he had not attended. He also said to the defendant 'We would like you to make a statement about what happened. Will you?' and the defendant replied 'No nothing. I am not getting involved.'

55 During the course of the investigation, Temple had seen the email from Mr Samaras giving the names of the two employees (including the defendant) and the supervisor who were working at the site that day and he was also made aware either at the time or shortly afterwards, of Flynn's telephone call with Andrew Bills on 15 July 2008.

### The evidence of Scalise

56 Sandra Scalise is the National Communications Manager for the Australian Building and Construction Commission and had previously had a similar role with the Building Industry Taskforce, since about February 2004. Scalise maintained the ABCC website, which became fully operational on 12 or 13 February 2006 after being partly operational from the commencement of the Australian Building and Construction Commission on 1 October 2005 by redirecting users to the Building Taskforce website.

57 The evidence of Scalise establishes that a copy of the instrument of delegation by the ABC Commissioner of his powers under s.52 of the Act to Hadgkiss, dated 24 October 2005 was published on the ABCC website on 3 November 2005. This was by a link from the home page of the Building Industry Taskforce website to a copy of the document tendered as Exhibit P19.

### The evidence of Mathers

58 Mathers was appointed an ABC Inspector pursuant to s.57(1) of the Act on 26 May 2008. At all relevant times he was employed in that capacity.

59 He was involved in the investigation of alleged unlawful industrial action at Flinders University on 30 May 2008. He was present when Flynn served upon the defendant the Notice to Attend and Answer Questions and the letter signed by Hadgkiss on 11 September 2008. His name and telephone number were listed at the top of the letter under the heading 'Contact Officer' and the letter invited the defendant to contact him in the event he had any questions about the matter. At no time did he receive a telephone call from the defendant.

60 He also attended a construction site with Temple and ABC Inspector Standen on 11 November 2008 and served upon the defendant what has been described as a 'show cause letter'. I admitted this letter into evidence over objection from Mr Abbott QC and only on the basis that if it was asserted to be relevant, that would be addressed in written submissions. There has been no such assertion in any of the submissions received by me and I have no regard in determining this matter to the fact of service of the letter, or its contents. I note that Mathers confirmed that on this occasion the

defendant was invited to make a statement and the invitation was declined. In my view, the outcome of this trial in no way turns on that fact.

61 Mathers also produced a CD containing a recording of a video which appeared on a website [www.rightsonsite.org](http://www.rightsonsite.org). I also received in evidence, as an *aide memoire* a transcript of that video, in which the defendant is seen and heard to make various statements about the matter before this court. The video is propaganda produced in support of the defendant, as he faces this charge. It largely comprises footage of the defendant speaking on various topics related to the matter and also of supporters of the defendant, evidently gathered and demonstrating outside the Adelaide Magistrates Court. I presume the film was tendered for the purpose of proving an admission by the defendant that he was on the site at Flinders University on the day in question. Although the prosecution need not prove that fact, I find that the defendant did admit in statements by him shown in that video, that he was present and working at Flinders University on the day the subject of the charge. I note that his admission did not extend to admitting that he had been present at a meeting convened and controlled by Feehan. Of course, I am mindful that other statements of a self-serving nature made by the defendant in that video are not to be disregarded. However, it is my view that no statement made by the defendant in that video assists me to determine the matter.

### The legislative framework

62 The overall context of the Act is to be found in its main object in sub-section 3(1) of the Act:

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

63 The means of achieving the main object are expressed in sub-section 3(2) to include:

(d) ensuring that building industry participants are accountable for their unlawful conduct;

(e) providing effective means for investigation and enforcement of relevant laws;

64 Section 9 of the Act provides:

(1) there is to be an Australian Building and Construction Commissioner (the ABC Commissioner).

(2) The ABC Commissioner is to be assisted by such number of Deputy Australian Building and Construction Commissioners (Deputy ABC Commissioners) as appointed from time to time.

65 Section 10 of the Act sets out functions of the ABC Commissioner which include:

- (b) investigating suspected contraventions, by building industry participants, of:
  - (i) this Act, the *Independent Contractors Act 2006*, the *Workplace Relations Act* or a Commonwealth industrial instrument; and
  - (ii) the Building Code;

and

- (c) instituting, or intervening in, proceedings in accordance with this Act;

66 Sections 11 and 12 of the Act provide:

### **11 Minister's directions to ABC Commissioner**

- (1) The Minister may give written directions to the ABC Commissioner specifying the manner in which the ABC Commissioner must exercise or perform the powers or functions of the ABC Commissioner under this Act.
- (2) The Minister must not give a direction under subsection (1) about a particular case.
- (3) The ABC Commissioner must comply with a direction under subsection (1).
- (4) A direction under subsection (1) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (5) Despite anything in section 44 of the *Legislative Instruments Act 2003*, section 42 of that Act applies to a direction under subsection (1) of this section.

### **12 Minister may require reports**

- (1) The Minister may, in writing, direct the ABC Commissioner to give the Minister specified reports relating to the ABC Commissioner's functions.

Note: See also section 66, which restricts the disclosure of personal information in a report.

- (2) The ABC Commissioner must comply with the direction.

67 Section 25 of the Act provides for the appointment of staff and consultants:

- (1) The staff required to assist the ABC Commissioner in the performance of the ABC Commissioner's functions are to be persons engaged under the *Public Service Act 1999*.
- (2) ...
- (3) The ABC Commissioner may, on behalf of the Commonwealth, engage persons having suitable qualifications and experience as consultants to the ABC Commissioner. The terms and conditions of the engagement of a person are such as are determined by the ABC Commissioner in writing.

68 Section 26 establishes the "Office of the Australian Building and Construction Commissioner" as consisting of (sub-section 26(2)):

- (a) the ABC Commissioner; and
- (b) the Deputy ABC Commissioners; and
- (c) the staff mentioned in subsection 25(1); and
- (d) the consultants engaged under subsection 25(3).

69 Sub-section 57(1) provides for the ABC Commissioner by written instrument, to appoint certain classes of persons as an ABC Inspector. As I have observed, ABC Deputy Commissioner Hadgkiss, Flynn, Temple and Mathers (at the least) were so appointed.

70 Sub-section 59(1) provides that an ABC Inspector may exercise powers, for purposes described in the sub-section as "*compliance purposes*", namely:

- (a) ascertaining whether a designated building law has been complied with, or is being complied with, by a building industry participant;
- (b) ascertaining whether a court order relating to a designated building law has been complied with, or is being complied with, by a building industry participant;
- (c) ascertaining whether the Building Code has been complied with, or is being complied with, by a building industry participant.

71 The powers granted to ABC Inspectors are then set out in section 59:

- (2) The powers may be exercised at any time during ordinary working hours or at any other time at which it is necessary to do so for compliance purposes.
- (3) An ABC Inspector may, without force, enter:
  - (a) any premises on which the inspector has reasonable cause to believe that building work is being carried out, or has been carried out, being building work:
    - (i) to which a Commonwealth industrial instrument applies or applied; or
    - (ii) to which the Building Code applies or applied; or
  - (b) any premises on which the inspector has reasonable cause to believe that there are documents relevant to compliance purposes; or
  - (c) any premises on which the inspector has reasonable cause to believe that a breach by a building industry participant of a designated building law or the Building Code, has occurred, is occurring or is likely to occur.
- (4) Subsection (3) does not authorise entry onto a part of premises if that part is used for residential purposes.
- (5) An ABC Inspector may do any of the following on premises referred to in subsection (3):
  - (a) inspect any work, material, machinery, appliance, article or facility;
  - (b) as prescribed by the regulations, take samples of any goods or substances;
  - (c) interview any person;
  - (d) inspect, and make copies of, any document that is on the premises, or is accessible from a computer that is kept on the premises, being a document that the inspector believes, on reasonable grounds, to be relevant to compliance purposes;
  - (e) require a person who has the custody of, or access to, a document to produce the document to the inspector within a specified period.
- (6) If a person fails to comply with a requirement under subsection (5) to produce a document, an ABC Inspector may, by written notice served on the person, require the person to produce the document at a specified place within a specified period (not being less than 14 days).
- (7) Where a document is produced to an ABC Inspector under paragraph (5)(e) or subsection (6), the inspector may:
  - (a) inspect and copy the document; and

- (b) if the inspector gives a receipt to the person who produced the document—retain the document for as long as necessary for the purpose of exercising powers or performing functions as an ABC Inspector.
- (8) While an ABC Inspector retains a document, the inspector must permit the document to be inspected and copied, at any reasonable time, by:
  - (a) the person otherwise entitled to possession of the document; or
  - (b) a person authorised by the person otherwise entitled to possession of the document.
- (9) An ABC Inspector may, without force, enter business premises in which a person ordinarily performs work or conducts business if the inspector has reasonable cause to believe that the person has information relevant to compliance purposes.
- (10) An ABC Inspector must not enter business premises under subsection (9) if the inspector has reasonable cause to believe that the person concerned is not in that place.
- (11) An ABC Inspector who enters premises under subsection (9) may interview the person concerned in that place.
- (12) For the avoidance of doubt, a refusal or failure by a person to participate in an interview under this section is not to be treated as conduct covered by section 149.1 of the *Criminal Code*.
- (13) Before entering premises under this section, an ABC Inspector must announce that the inspector is authorised to enter the place. If the occupier or another person who apparently represents the occupier is present, the inspector must produce the inspector's identity card to that person for inspection.
- (14) The occupier of premises must not refuse or unduly delay entry to the premises by an ABC Inspector exercising powers under this section.

Note: Grade A civil penalty.

72 I note that there are no offences created by section 59, and the application of section 149.1 the Criminal Code (Obstruction of a Commonwealth Official) is excluded in relation to a refusal or failure by person to participate in an interview. It follows that an offence against section 149.1 is not excluded in relation to a person obstructing an ABC Inspector in the exercise of other section 59 powers.

73 Section 52(1) of the Act relevantly provides:

**52 ABC Commissioner's powers to obtain information etc.**

*ABC Commissioner may require information, documents etc.*

- (1) If the ABC Commissioner believes on reasonable grounds that a person:
  - (a) has information or documents relevant to an investigation; or
  - (b) is capable of giving evidence that is relevant to an investigation;

the ABC Commissioner may, by written notice given to the person, require the person:

- (c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or
- (d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or

- (e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.

74 Section 52 further provides that the recipient of the notice may be legally represented, and may be required to give answers on oath or affirmation. Various specified failures by a recipient of a notice to comply with the provisions of that section are defined as offences in sub-section 52(6), including failures

"to attend to answer questions at the time and place specified in the notice" and

"to answer questions relevant to the investigation while attending as required by the notice".

The penalty for such an offence is prescribed as imprisonment for six months.

75 Sub-section 52(8) defines "assistant" and "investigation" as used in sub-section 52(1):

*assistant* means:

- (a) a Deputy ABC Commissioner; or
- (b) an ABC Inspector; or
- (c) a person referred to in subsection 25(1) or (3) who is assisting the ABC Commissioner.

*investigation* means an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law.

76 Section 53 of the Act removes any right to refuse to answer questions which might be an incriminatory, which a person served with a valid notice might otherwise be able to claim, but also provides a use/derivative use indemnity in relation to answers given, in that neither answers given (or information given or documents produced) nor "any information, document or thing obtained as a direct or indirect consequence of giving the information or answer of producing a document" is admissible in evidence in any other proceedings against the person, unless those proceedings relate to an offence against section 137.1 or 137.2 or section 149.1 of the *Criminal Code* relating to the Act (giving false or misleading information, producing false or misleading documents and obstructing a Commonwealth official respectively).

77 Section 13 of the Act provides for delegation of the ABC Commissioner's functions and powers as follows:

- (1) The ABC Commissioner may, in writing, delegate all or any of his or her powers and functions under this Act to:
  - (a) a Deputy ABC Commissioner; or
  - (b) an ABC Inspector; or
  - (c) an SES employee or Acting SES employee; or
  - (d) a person prescribed by the regulations for the purposes of this paragraph.
- (2) Powers or functions under section 52 may only be delegated to a Deputy ABC Commissioner.

- (3) In exercising powers or functions under a delegation, the delegate must comply with any directions of the ABC Commissioner.
- (4) As soon as practicable after delegating any power or function under this section, the ABC Commissioner must publish details of the delegation.

78 Section 26 provides for the establish of the establishment of the Office of the Australian Building and Construction Commissioner:

- (1) The Office of the Australian Building and Construction Commissioner is established by this subsection.
- (2) The Office of the Australian Building and Construction Commissioner consists of:
  - (a) the ABC Commissioner; and
  - (b) the Deputy ABC Commissioners; and
  - (c) the staff mentioned in subsection 25(1); and
  - (d) the consultants engaged under subsection 25(3).

79 Other provisions of the legislation were referred to in submissions or argument but it is not necessary to set them out here.

### Application of the law to the facts

#### The defendant's argument

80 The argument on behalf of the defendant in support of the proposition that the notice was not a valid notice pursuant to s.52 of the Act may be summarised as follows:

- a) That as a jurisdictional precondition to the issue of a notice and the undertaking of a hearing pursuant to sub-section 52(1) of the Act the ABC Commissioner must have formed the belief prescribed by s.52(1)(b) namely that the defendant had information...or was capable of giving evidence relevant to an investigation within the meaning of the section (defined in sub-section 52 (8) "an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law").
- b) The evidence discloses that the ABC Commissioner did not form that belief. Instead, Deputy ABC Commissioner Hadgkiss purported to do so.
- c) The requisite formation of such belief is a function, not a power of the ABC Commissioner.
- d) Sub-section 13(2) of the Act empowers the ABC Commissioner to delegate either his powers or functions under s.52 to a Deputy ABC Commissioner and not both. Whether or not that is correct, only the Commissioner's powers under s.52 and not his functions were delegated to Deputy ABC

Commissioner Hadgkiss. Hadgkiss was not authorised to perform the ABC's Commissioner's functions under section 52.

- e) The ABC Commissioner's belief that the defendant was capable of giving evidence relevant to an investigation must relate to 'an investigation *by the ABC Commissioner* into a contravention, by a building industry participant....' in accordance with the definition of 'investigation' in s.52(8) of the Act (emphasis added).
- f) The act of conducting a hearing pursuant to section 52 is a function, not a power and Hadgkiss did not have delegated to him the function of doing so. Accordingly, he could not conduct a hearing other than as an "assistant" pursuant to sub-section 52(1) and the definition in sub-section 52(8). He purported to conduct the hearing as the delegate of the ABC Commissioner so the hearing could not be a valid exercise of the function and accordingly the notice to appear at that hearing was invalid.
- g) Although the Notice to Attend and Answer Questions served upon the defendant purported to require him to attend "to answer questions that are relevant to an investigation by the ABC Commissioner into a contravention, by building industry participant, of a designated building law", the investigation cannot be an investigation by the ABC Commissioner because it was an investigation by an ABC Inspector or Inspectors, purporting to exercise powers under section 59 for "compliance purposes", which fall short of the ABC Commissioner's function of "investigating suspected contraventions..." and there is no evidence that the ABC Commissioner had any role in relation to the investigation or took any step to assume it as his own, for the purposes of section 52. So, there was no basis upon which Hadgkiss could establish a jurisdictional precondition to the exercise of the power to issue a notice under s.52, namely the formation of the requisite belief, referable to "an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law."
- h) The conduct of such an investigation is a function of the ABC Commissioner. Section 10(b) of the Act says so. This function of the ABC Commissioner had not been delegated to Deputy ABC Commissioner Hadgkiss. Absent a delegation, Hadgkiss could not purport to conduct the investigation in satisfaction of the requirement that it be the ABC Commissioner's investigation. So there was no alternative basis upon which it could be suggested that the requisite belief of Hadgkiss was referable to "an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law."
- i) The Notice purportedly issued pursuant to section 52 was invalid because although it was in accordance with the form provided in schedule 7 of the Regulations under the Act it failed to comply with the Act in three

important respects and is, as a consequence of such failure, an invalid and unlawful notice:

- (i) the Notice failed to state that the ABC Commissioner, or for that matter anyone else, had formed the Relevant Belief; and
- (ii) the Notice failed to state, as required by section 52(1)(e) of the Act, that the proposed recipient (Tribe) had to appear before the ABC Commissioner or his assistant;
- (iii) the Notice was not a notice issued as a consequence of the ABC Commissioner's investigation pursuant to section 52(8) and section 10, but an investigation instituted and conducted by inspectors who had no power to appropriate and utilise section 52 for their "investigation".

81 In determining the asserted invalidity of the Notice, it is necessary to consider the proper construction of the relevant sections of the Act within the Act as a whole, having regard to the judgment of the majority in *Project Blue Sky v Australian Broadcasting Authority*<sup>2</sup>

"The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute. The meaning of the provisions must be determined "by reference to the language of the instrument as a whole" ... the process of construction must always begin by examining the context of the provision that has been construed."

Can an ABC Inspector exercising powers pursuant to section 59(1) conduct an investigation into a suspected contravention, by a building industry participant, of a designated building law, which is a function of the ABC Commissioner pursuant to section 10, without a delegation pursuant to section 13?

82 Section 9 of the Act, in establishing the office of Deputy ABC Commissioner, provides that the ABC Commissioner "is to be assisted" by them and section 25 provides for the appointment of staff "required to assist the ABC Commissioner in the performance of the ABC Commissioner's functions".

83 The investigation in question, evidently described within the Office of the Australian Building and Construction Commissioner as "Investigation 325" was initiated by ABC Inspectors purportedly exercising powers pursuant to section 59 for "compliance purposes" within the meaning of that section. "Compliance purposes" relevantly include ascertaining whether a designated building law and/or the Building Code have been complied with or are being complied with by a building industry participant. The prosecution submits it necessarily follows that the powers for compliance purposes given to an ABC Inspector permit him or her to ascertain

---

<sup>2</sup> (1998) 194 CLR 355 at 381)

whether there has been "a contravention, by a building industry participant, of a building law" which necessarily requires the power to investigate.

84 I accept this submission. Even though "compliance purposes" within the meaning of section 59 do not extend to "investigating suspected contraventions", being one of the ABC Commissioner's functions under section 10, it would be absurd if an ABC Inspector could not exercise section 59 powers for "compliance purposes", just because he suspected that there had been a contravention and equally absurd if he had to cease exercising those powers in the event he formed such a suspicion whilst exercising those powers for "compliance purposes". Section 59(3)(c) confirms that this must be so, in empowering an ABC Inspector to enter, without force "any premises on which the inspector has reasonable cause to believe that a breach by a building industry participant of a designated building law or the Building Code, has occurred, is occurring or is likely to occur."

85 It follows that I accept that the Act does not require the ABC Commissioner to personally carry out all acts of investigation of suspected contraventions unless he or she delegates in writing to another eligible person.

86 It is argued on behalf of the defendant that there can be no performance of the Commissioner's function of investigating suspected contraventions in section 10, unless it is demonstrated that the Commissioner himself has formed the suspicion that there has been a contravention. I conclude that the Act, when viewed as a whole and particularly having regard to the provisions for the employment of staff to assist the Commissioner in the performance of his functions and Deputy Commissioners to assist the Commissioner, together with the creation of the Office of the Australian Building and Construction Commissioner, contemplates that the Commissioner's function might be carried out by those staff at a time when the Commissioner himself or herself has not formed the relevant suspicion.

Was there an "investigation by the ABC Commissioner into a contravention, by a building industry participant of, of a designated building law" for the purposes of sub-section 52(8) of the Act?

87 Section 52 is specific in that the belief required to exist before the issue of a section 52 notice must relate to an investigation, within the meaning of section 52(8) namely an investigation by the ABC Commissioner into a contravention..."

88 The argument on behalf of the defendant that there can be no such investigation without evidence that the Commissioner has formed the relevant suspicion is advanced compendiously in respect of this question and the previous question I posed and dealt with. Slightly different terminology is employed in sub-section 52(8) to that employed in section 10, in that section 52(8) omits the word "suspected" in describing the contravention being investigated. It seems to me that by the stage that an investigation is one as to which the issue of a notice pursuant to section 52 is sought, the legislative intention is clear that the ABC Commissioner must have taken steps to assume the investigation as his or her own, in the sense of assuming the task of directing the investigation, as opposed to one which , as I have concluded, might be

conducted by an ABC Inspector without a delegation of the Commissioner's function under section, without the necessity of the Commissioner personally forming the suspicion referred to in section 10 and conceivably without the ABC Commissioner knowing anything about it.

89 The evidence in the present case establishes no more than that the ABC Commissioner had some unascertained level awareness of the investigation initiated by Temple, which thereafter became Inspector Flynn's investigation. If the Commissioner played a role in or had a knowledge the investigation which might elevate the evidence above what has been established through the evidence of Hadgkiss, the Commissioner has not given evidence of it.

90 So, I accept the submission on behalf of the defendant that in the present case Flynn via Temple and others applied to Hadgkiss for Hadgkiss to use his section 52 powers, not in respect of any investigation by the ABC Commissioner but in respect of the ABC Investigator's investigation.

91 In reaching this conclusion I have had regard to all the arguments advanced on behalf of the prosecution including that an ABC Inspector is an "eligible person" for the purpose of making an application for contravention of a civil penalty under section 49 and that under section 52, having regard to the definition of "assistant" an ABC Inspector may be the direct recipient of information or evidence delivered at a hearing pursuant to section 52.

92 I have also considered alternative arguments advanced on behalf of the prosecution, firstly that on or about between 15 August 2008 and 11 September 2008, Hadgkiss commenced to carry out an investigation of the incident and issued the Notice pursuant to his investigation. I understand this submission to be founded on the delegation by the ABC Commissioner of his section 52 powers to Hadgkiss and the contention that Hadgkiss may therefore commence or assume an investigation pursuant to section 52(8) in the name of the ABC Commissioner, as the ABC Commissioner's delegate.

93 I reject this submission. Even if the task of conducting the section 52(8) investigation was a task authorised under the mantle of section 52, rather than as a function of the ABC Commissioner under section 10, it is nevertheless clearly a function not a power. Section 10 says so. Deputy ABC Commissioner Hadgkiss had no delegation of any function under section 10 and only the Commissioner's powers under section 52 were delegated.

94 The next alternative argument advanced on behalf of the prosecution is that the appointment in writing of Hadgkiss, Flynn, Mathers [and the other inspectors involved in the matter] as ABC Inspectors pursuant to section 57 (1) of the Act necessarily constituted a delegation in writing by the ABC Commissioner of the function to "investigate suspected contraventions..".

95 I reject this submission. Section 13 provides a specific mechanism for the delegation of all or any of the ABC Commissioner's powers and functions to a range of persons including an ABC Inspector (except section 52 powers or functions) and

requires compliance with directions of the ABC Commissioner in respect of such delegation and further, the publication by the ABC Commissioner of details of the delegation. To find that there was an implied delegation would be contrary to the legislative intention expressed in the section, namely that such delegations must be express and not implied.

96 A further alternative argument advanced on behalf of the prosecution is that Hadgkiss, Flynn, Temple and Mathers were acting on behalf of the ABC Commissioner pursuant to the principle established in *Carltona Ltd v. Commissioner of Works*<sup>3</sup>.

97 I accept the prosecution submission that the existence of the ABC Commissioner's power to delegate functions (and powers) pursuant to section 13 is but one matter to be considered in determining whether the Carltona principle is applicable. I have regard to the structure of the Act as a whole, the giving of certain functions to the ABC Commissioner by section 10 of the Act, the provision of staff and consultants to assist the ABC Commissioner, the creation of the Office of the Australian Building and Construction Commissioner, and the manner in which an ABC Inspector can exercise powers of investigation and make applications to the court without any involvement of the ABC Commissioner. I conclude that I would not exclude the operation of the Carltona principle in a general sense, in relation to the powers and functions ABC Commissioner but having regard to the significant and intrusive nature of the section 52 process and the specifying of the ABC Commissioner in the definition of "investigation" for the purpose of the section, I would exclude the operation of the Carltona principle to authorise ABC inspectors to conduct an investigation for the purposes of sub-section 52(8) in place of the ABC Commissioner, so that for the purposes of sub-section 52(8) such an investigation is an investigation by the ABC Commissioner.

98 A further alternative argument advanced by the prosecution is that the investigation was carried out by the ABC Commissioner through Hadgkiss and the ABC Inspectors involved, in that the Commissioner was kept informed of the progress of the investigation on a regular basis and had properly delegated the power contained in sub-section 52(1) to Hadgkiss. This argument has been dealt with in these reasons, in that there is no evidence to establish any more than that the Commissioner had some general awareness of the investigation and the matter of conducting that investigation is not a section 52 power or function. It is a function under section 10. If it is a separate power or function under section 52, it is clearly a function not a power and only the Commissioner's powers were delegated to Hadgkiss.

99 On the basis of my conclusions in answer to this question, I find the Notice served upon the defendant to be invalid. Even if Hadgkiss was entitled to form the requisite belief pursuant to sub-section 52(1) as a jurisdictional precondition for the issue of the Notice, I have found that such belief could not have been referable to an investigation within the meaning of section 52(8).

---

<sup>3</sup> [1943] 2 All E.R. 560, particularly at 563A-D

100 Nevertheless, it is appropriate that I proceed to consider the other issues raised in this matter as to the validity of the Notice.

Was Deputy ABC Commissioner Hadgkiss entitled to form the belief, on reasonable grounds that the defendant, had information or was capable of giving evidence relevant to an investigation (assuming that the investigation was an investigation for the purposes of section 52(8))?

101 The ABC Commissioner's powers pursuant to section 52 had been lawfully delegated to Hadgkiss pursuant to section 13 of the Act. The delegation was duly published.

102 On behalf of the defendant it is argued that the formation of the belief is a function under section 52, not a power and that the ABC Commissioner did not delegate functions under section 52 to Hadgkiss. It is clear that if the formation of the belief is a power then Hadgkiss exercised it with authority pursuant to the Commissioner's delegation. Assuming it was exercised with authority, I have already found that on the basis of the information provided to him, Hadgkiss was entitled on reasonable grounds, to form such belief.

103 In advancing the argument that Hadgkiss was not empowered under sub-section 52(1) to form the relevant belief, Mr Abbott QC argues that the terms of section 13(2) make it clear that the ABC Commissioner may delegate to a Deputy ABC Commissioner powers or functions under section 52, but not both. I reject this argument. In my opinion, the wording of sub-section 13(2) is intended merely to acknowledge the fact that under section 13(1) the Commissioner, in making any delegation, may pick and choose amongst various functions and powers as to which to delegate, if not all. Sub-section 13(2) is not the source of a power of delegation but rather, in relation to section 52, restricts the power of delegation so that it may be exercised only in favour of a Deputy ABC Commissioner. In its terms, it acknowledges that a delegation pursuant to sub-section 13(1) might be of powers only, or functions only, that is, not necessarily both.

104 However, the terms of sub-section 13(2) do acknowledge that section 52 contains functions as well as powers and, by its terms, the ABC Commissioner's delegation to Hadgkiss is only a delegation of his powers (Exhibit P19). The distinction between powers and functions of an administrative body is discussed in *Edelsten v Health Insurance Commission and Others*<sup>4</sup>:

"The distinction between the functions and powers of an administrative body is between functions or purposes or activities of an administrative body on the one hand and the powers conferred upon it to perform or execute those functions, purposes or activities on the other. This is the primary sense in which the words are understood. The types of statutory context in which the expressions "functions" and "powers" of such bodies appear differ considerably. Sometimes the two expressions are treated interchangeably or with blurred dividing lines; whilst some statutory definitions of "functions" provide that "' functions' includes powers and duties"..."

---

<sup>4</sup> (1990) 27FCR 56 at pp 62 – 63 per Northrop, Davies and Lockhart JJ

105 It is submitted on behalf of the defendant that section 52 contains at least two  
functions, the first of which, as a jurisdictional precondition to the exercise of a  
section 52 power is the formation of a relevant belief, referable to an investigation by  
the ABC Commissioner and the second of which is the function of performing the  
examination.

106 Mr Zichy-Woinarski QC on behalf of the prosecution has submitted that section  
52 is or contains only a power and no functions and that the power is available to be  
exercised, for example, when a person fails to co-operate with an ABC Inspector  
exercising powers under section 59.

107 Mansfield J. considered the distinction between powers and functions of the  
Australian Competition and Consumer Commission ("ACCC"), relating to the issue of  
a notice requiring compulsory attendance at a hearing, in *ACCC v Rural Press Ltd*<sup>5</sup>. I  
agree, adopting the reasons advanced by Mr Abbott QC for the defendant, that I am  
not bound by this decision to conclude that section 52 of the Act contains no functions  
or that the formation of the relevant belief is not a function.

108 In *Rural Press* Mansfield J had to consider the delegation power under section  
25 of the Trade Practices Act. Section 25 allows the ACCC to delegate only its powers  
(see section 25). Unlike under the BCII Act the ACCC is unable to delegate its  
functions.

109 The relevant argument in *Rural Press*, at [8], was that because it was not possible  
to delegate a function under the Trade Practices Act and because the examiner in the  
*Rural Press* case had only had powers delegated to him, the examination was unlawful  
and invalid because performing the examination was a function.

110 Mansfield J held at [13] that because the definition of the ACCC in section 4 of  
the Trade Practices Act included a member performing functions of the Commission,  
that the delegation of power carried with it the right to perform the functions.

111 Mansfield J did not find that there were no functions in section 155 of the Trade  
Practices Act and in particular that performing an examination was not the  
performance of a function. Rather, he found that in the special circumstances of this  
case, in the absence of any power to delegate functions, that the delegation of a power  
was intended by Parliament to allow the repository of the delegated power to perform  
the function referable to the power.

112 Mansfield J arrived at this conclusion after making two further observations  
about the Trade Practices Act namely, that at [19] that there was no clear division in  
section 155(1)(c) of the powers of the ACCC on one hand and functions on the other;  
and at [21] that section 155 was a power in aid of the functions of the Commission  
rather than containing within it a discrete function of the Commission.

113 The Trade Practices Act has no equivalent of section 13(2) of the BCII Act.

---

<sup>5</sup> (2000) 96 FCR 389 at 394-5

114 Section 13(2) is a statutory acknowledgement that section 52 contains both powers and functions and, unlike section 25 of the Trade Practices Act, the ABC Commissioner is specifically able to delegate his functions (or his powers) under section 52 to a Deputy ABC Commissioner by utilising section 13(2) of the Act.

115 I agree that the requirement in sub-section 52(1) for the ABC Commissioner to believe upon reasonable grounds that a person "has information... relevant to an investigation" or "is capable of giving evidence relevant to an investigation" before issuing a notice pursuant to section 52 requires the performance by the ABC Commissioner of a function of forming the belief for that purpose..

116 That function is a function of the ABC Commissioner alone. No function under section 52 was delegated to Hadgkiss. The result must be that in issuing the section 52(1)(e) Notice to the defendant, Hadgkiss acted without satisfying the jurisdictional precondition of forming the relevant belief because only the ABC Commissioner could perform that function.

117 If I had not already done so, I would find that he section 52(1)(e) notice invalid for this further reason.

Asserted failure of the Notice to comply with provisions of the Act

(a) The notice failed to state that the ABC Commissioner, or for that matter anyone else, had formed the relevant belief pursuant to sub-section 52(1)

118 In the event I had not found in the notice to be invalid upon other grounds I would not find the notice to be invalid on this ground. Section 52 contains no requirement that the Notice must state that the ABC Commissioner or a person delegated to issue a Notice under the section has formed the relevant belief. The formation of the relevant belief is but a precondition to the issuing of the notice. Section 78 of the Act provides for the making of regulations including in relation to the form of notices to be given under the Act. The regulations provide that the notice shall be in accordance with Schedule 7.7 and the notice is in accordance with the form provided in that schedule. Exhibit P20, the Direction to ABC Deputy Commissioners dated 24 October 2005 issued by the ABC Commissioner provides that in exercising the power delegated pursuant to section 52, "a Deputy ABC Commissioner will... comply with... the guidelines..."(P21). The guidelines require that the delegated power pursuant to section 52, assuming it is otherwise validly exercised, must be exercised by serving on the person both a Notice as prescribed by the Regulations and a letter that complies with the guidelines. I accept the submission on behalf of the prosecution that it is the totality of that material which encompasses the exercise by the delegate of the power and which informs the recipient of all matters required pursuant to sub-section 52(1) of the Act.

(b) The notice failed to state, as required by section 52(1)(e) of the Act that the proposed recipient had to appear before the ABC Commissioner or his assistant.

119 It is clear, in my opinion, that section 52 requires that the notice must state that its recipient is required to appear before the ABC Commissioner or an assistant. It does not do so. A Section 52 notice is a coercive notice with serious consequences of imprisonment for up to six months for disobedience of its terms. The privilege against self-incrimination is not available to a person who appears in response to the notice. It is appropriate in my view to require strict compliance with the legislative requirements. It is argued on behalf of the prosecution that in the event it does not comply with the legislation, Project Blue Sky should be applied to excuse the non-compliance. If the Deputy ABC Commissioner was entitled to conduct the hearing as the delegate of the ABC Commissioner, I accept that in that event the notice should properly state that the defendant was to appear before Deputy ABC Commissioner Hadgkiss and the delegation itself would stand as authority for the substitution in the Notice. It is submitted for the prosecution that the notice refers to the Act, which is a public document and by reference to the Act, a person receiving a notice would know that he or she is to appear before the ABC Commissioner or an assistant, as defined in sub-section 52(8). The letter which accompanied the notice, despite complying with the Guidelines published by the Commissioner in relation to the exercise of delegated section 52 powers, does not satisfy the legislative requirement of what must be stated in the notice. Nevertheless, having regard to the compliance with the Guidelines, in identifying in the letter the person who is to conduct the hearing I would conclude that the legislative intention in section 52 would not require that the notice be held to be invalid if this was the only submitted basis.

(c) the Notice was not a notice issued as a consequence of the ABC Commissioners investigation pursuant to section 52 (8) and section 10, but an investigation instituted and conducted by inspectors he had no power to appropriate and utilise section 52 for their "investigation".

120 I have accepted the proposition underlying that submission and found that the purported exercise of delegated power by Hadgkiss was invalid and it is unnecessary to consider it again in the context of the validity of the Notice on its face.

## SUMMARY

122 The media is interested in this case and what follows provides a readily accessible summary of this judgment. This summary does not alter, nor qualify my findings above.

123 The Building and Construction Industry Improvement Act 2005 has as its main object "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 industry participants and for the benefit of the Australian economy as a whole." The means of achieving that main object are expressed to include "ensuring that building industry participants are accountable for their unlawful conduct" and "providing effective means for investigation and enforcement of relevant laws". To advance its main object, the Act provides for the appointment of

an ABC Commissioner, a Deputy ABC Commissioners and ABC Inspectors and other staff to assist the ABC Commissioner, together constituting the Office of the Australian Building and Construction Commissioner. The Act as a whole provides the ABC Commissioner with a range of powers and functions designed to assist in the achievement of its main object including to enable suspected unlawful industrial action, among other things, to be investigated.

124 The Act provides certain powers to ABC Inspectors, which were exercised after they received information that on 30 May 2008 Justin Feehan, a CFMEU official, had attended a building site at Flinders University and called a meeting, following which workers ceased work early and walked off the site. Information also disclosed that the defendant was one of those workers. An ABC Inspector attempted without success to contact the defendant with a view to exercising the power to interview him in relation to the events of 30 May 2008.

125 Section 52 of the Act provides the ABC Commissioner with significant and intrusive powers and functions, which can be employed to issue a notice requiring a person to attend at a hearing and give evidence, regardless of whether such evidence may incriminate the person in the commission of an offence. A penalty of up to six months imprisonment is prescribed for disobedience to the notice or failing to co-operate during such a hearing.

126 It is appropriate for the court to require those vested with the power and responsibility to infringe in this way upon the normal rights of citizens to comply strictly with their legislative obligations. The ABC Commissioner lawfully delegated to a Deputy ABC Commissioner his powers, but not his functions under section 52 of the Act. Under section 52, it was necessary, before a notice could be issued, for the ABC Commissioner to form a belief on reasonable grounds that the defendant had information relevant to an investigation or was capable of giving evidence relevant to an investigation, which had to be an investigation by the ABC Commissioner. A Deputy ABC Commissioner formed the belief on reasonable grounds that the defendant was a person capable of giving evidence relevant to an investigation. //

127 This court finds, firstly, that the Deputy ABC Commissioner had received no lawful delegation from the ABC Commissioner to form that belief in relation to the defendant, because that is a function of the ABC Commissioner, not a power and the ABC Commissioner had not delegated his functions under section 52 to the Deputy ABC Commissioner. X

128 Secondly, this court finds that the belief formed by the Deputy ABC Commissioner was not a belief that the defendant could give evidence relevant to an investigation by the ABC Commissioner, because the investigation was being undertaken by ABC Inspectors and the ABC Commissioner had taken no steps to assume conduct of that investigation. X

129 Thirdly, this court finds that the Notice was required to state the person before whom the defendant was required to appear, and did not do so. On its own, that matter would not have been sufficient to invalidate the notice. X

130 For these three reasons, I find that the Notice Pursuant to Section 52(1)(e) of the Act served upon the defendant was invalid and did not lawfully require the defendant to comply with its terms and attend the hearing referred to in that notice.

No. or other identifying Mark on exhibit	Description of exhibit
P1	CERTIFIED COPY OF CERTIFICATE OF APPOINTMENT OF SEAMUS FLYNN AS AN INSPECTOR UNDER S.57(1) OF THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT 2005
P2	BUNDLE OF DOCUMENTS FIRST PAGE COPY OF AN EMAIL DATED 24/7/08 TO THE WITNESS FLYNN PURPORTING TO ATTACH COPIES OF TIME SHEETS AND PAY DETAILS
P3	COPY OF AN EMAIL FROM GEORGE I SAMARAS TO FLYNN 25/6/08 AT 2.29 P.M.
P4	NOTES OF CONVERSATION WITH BILLS REFERRED TO BY THE WITNESS FLYNN
P5	DOCUMENT HEADED STATEMENT IN SUPPORT OF S.52(1)(E) NOTICE
P6	COPY OF NOTICE TO THE DEFENDANT TO ATTEND AND ANSWER QUESTIONS DATED 11/9/2008 AND CERTIFIED AS A TRUE COPY
P7	COPY OF A LETTER DATED 11/9/08 TO THE DEFENDANT FROM NIGEL HADGKISS, DEPUTY ABC COMMISSIONER CERTIFIED AS A TRUE COPY
P8	COPY OF THE DOCUMENT REFERRED TO AS COPY OF ORIGINAL RECORD OF SERVICE OF S.51E NOTICE
P9	NOTES REFERRED TO BY THE WITNESS FLYNN AS TO TELEPHONE CALLS ON 2/10/08
P10	TRANSCRIPT HEADED 'EXAMINATION OF ARK TRIBE' 10.50 A.M. THURSDAY, 2 OCTOBER 2008
D11	WITNESS SUMMONS
MFI D12	NOT TENDERED
P13	STATEMENT OF SEAMUS FLYNN DATED 11/12/2008
P14	COPY OF ABC INSPECTOR IDENTITY CARD OF FLYNN
D15	AIMS RUNNING SHEET INV 325, 10 PAGE DOCUMENT
D16	RUNNING SHEET FOR INVESTIGATION INV 325 AS OF 16.7.2010
P17	CORRESPONDENCE FILES 1 AND 2 IN RELATION TO INV 325
P18	LETTER OF APPOINTMENT AND INSTRUMENTS OF APPOINTMENT AS DEPUTY ABC COMMISSIONER
P19	CERTIFIED COPY OF DELEGATION BY THE ABC COMMISSIONER DATED 24/10/05
P20	DIRECTIONS FROM MR LLOYD TO THE DEPUTY ABC COMMISSIONERS DATED 24/10/2005
P21	GUIDELINES IN RELATION TO THE EXERCISE OF COMPLIANCE POWERS IN THE BUILDING AND CONSTRUCTION INDUSTRY DATED OCTOBER 2005
P22	CERTIFIED COPY OF EMAIL FROM LAURAN COOPER TO JOHN LLOYD AND COPIED TO NIGEL HADGKISS DATED 11/09/2008 AT 2.47 P.M.
P23	CERTIFIED COPY OF SEVEN PAGES MARKED 'A' OF APPLICATION FILED BY CFMEU CONSTRUCTION AND GENERAL DIVISION ON 25/01/2006 FOR THE ISSUE OF PERMITS TOGETHER WITH ATTACHMENT 'B' BEING A CERTIFIED COPY OF A PERMIT RE2006/1273 ISSUED TO JUSTIN FEEHAN
D24	BUNDLE OF STATEMENTS IN SUPPORT OF S.52(1)(e) NOTICES
D25	ACCC LETTER
P26	CERTIFIED COPY OF INSTRUMENT OF APPOINTMENT OF ABC INSPECTORS S.57(1) 3.8.05 APPOINTING AMONG OTHERS MESSRS HADGKISS, STANDEN AND TEMPLE

No. or other identifying Mark on exhibit	Description of exhibit
P27	CERTIFIED COPY OF DIARY OF MR HADGKISS
D28	COPIES OF FOUR SERIOUS INCIDENT REPORTS
P29	SCHEDULE OF ADMITTED FACTS
P30	COPIES OF E-MAIL FROM DAVID CHAPPILL TO MARK TEMPLE DATED 29 MAY 2008, 2.13 P.M. TOGETHER WITH ATTACHMENTS BEING COPY OF ENTRY NOTICE FOR 30/05/2008 AND A COPY OF FACSIMILE FROM DAVID CHAPPILL TO JUSTIN FEEHAN DATED 29/05/2008
P31	E-MAIL FROM DAVID CHAPPILL TO MARK TEMPLE DATED 02/06/2008 AT 5.49 P.M. AND TWO E-MAILS FORWARDED WITH IT
P32	PHOTOCOPY LETTER
P33	COPY OF HOMEPAGE OF BUILDING INDUSTRY TASK FORCE WEBSITE PRINTED 21/02/2006
P34	REPORT ON THE EXERCISE OF COMPLIANCE POWERS BY THE ABC COMMISSIONER FOR THE PERIOD 1/10/05 TO 30/6/06
P35	ANNUAL REPORT OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER FOR THE FINANCIAL YEAR ENDING 30/6/2006
D36	COPY OF E-MAIL FROM NIGEL HADKISS TO WITNESS SANDRA SCALISE DATED 4/11/2005
D37	BUNDLE OF COPIES OF SIX DELEGATIONS UNDER THE BCII ACT (TWO FURTHER DELEGATIONS LATER)
D38	COPIES OF FRONT COVER AND OF PAGES 12 AND 13 OF ANNUAL REPORT OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER 2007/08
D39	COPY OF REPORT ON THE EXERCISE OF COMPLIANCE POWERS BY THE OFFICE OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER FOR THE PERIOD 1/10/2005 TO 31/3/2009
P40	ANNUAL REPORT OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER YEAR ENDING 30/6/2008
P41	ANNUAL REPORT OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER FOR THE FINANCIAL YEAR ENDING 30 JUNE 2007 SUBJECT TO BECOMING RELEVANT TO AN ISSUE WHICH ARISES
P42	ANNUAL REPORT OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER FOR THE FINANCIAL YEAR ENDING 30 JUNE 2009 SUBJECT TO BECOMING RELEVANT TO AN ISSUE WHICH ARISES
P43	CERTIFIED COPY OF INSTRUMENT OF APPOINTMENT OF ABC INSPECTOR JAMES MATHERS
P44	COMPACT DISC OF VIDEO FROM WEB SITE WWW.RIGHTSONSITE.ORG
P45	TRANSCRIPT OF EXHIBIT P44
P46	CERTIFIED COPY OF THE INSTRUMENT APPOINTMENT OF JOHN RICHARD LLOYD AS THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER DATED 27/9/2205
P47	CERTIFIED COPY OF THE REGISTERED RULES OF THE CONSTRUCTION FORESTRY MINING AND ENERGY UNION DATED 30/5/2008



Australian Government

Office of the Australian Building and  
Construction Commissioner

VERIFY THAT THIS DOCUMENT IS A EX. 4.  
TRUE COPY OF THE ORIGINAL HAVING  
BEEN SIGNED BY ME THIS DAY 28/04/2010

Atty  
SARAH V'S FAYAN  
LEVEL 3, 146 FROG ST  
ADELAIDE, SA 5000.

GPO BOX 9927  
Adelaide SA 5001  
t. 08 8402 9252  
f. 08 8402 9260

ABCC0054/2008

11 September 2008

Mr Ark Tribe

(Address deleted from copy of Exhibit)

Contact Officer: James Mathers 08 8402 \*\*\*\* (Deleted from copy of Exhibit)

Dear Mr Tribe

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 a Deputy ABC Commissioner of 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 the Administrative Appeals Tribunal, Hearing Room 4, 11<sup>th</sup> floor, Chesser House, 91 Grenfell Street, Adelaide at 10.00am on Thursday, 2 October 2008. 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.

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.

If you have any concern or question about this notice it is recommended that you obtain legal advice concerning this notice.

You have the right to be represented by a barrister or solicitor at the examination if you so choose, subject to any reasonable condition I may impose, such as a requirement that your legal adviser agree to provide a confidentiality undertaking for the duration of the investigation.

If you choose to have legal representation at the examination, your representative will be permitted to:

- (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) re-examine you 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 an extension of time or a change of time if you believe that there are exceptional circumstances that prevent or unreasonably impede your attendance at the scheduled examination. Such a request must be in writing and must also 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 interpretation or clarification of the notice, you or your lawyer may request this from the contact officer.

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 comply with 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 contravene subsection 52(6) of the BCII Act if you fail:

- to attend to answer questions at the time and place specified in the notice;
- 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.

It is also 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. The exceptions to this general rule are that your answers may be used against you in 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.

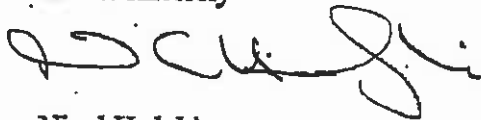
If you answer questions in good faith at the examination, you will not be liable to any proceedings for contravening any other law because of those answers. Nor will you be liable in civil proceedings for loss, damage or injury of any kind suffered by another person because of those answers.

A copy of the *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](http://www.abcc.gov.au)

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

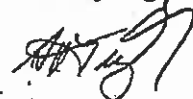
Contact Officer: James Mathers 08 8402 \*\*\*\* ( Deleted from copy of Exhibit)

Yours sincerely



Nigel Hadgkiss  
Deputy ABC Commissioner

I CERTIFY THAT THIS DOCUMENT IS A  
TRUE COPY OF THE ORIGINAL, HAVING BEEN  
SIGHTED BY ME THIS DAY 28/04/2010



LEVEL 3, 146 FRODO STREET  
ADELPHIDE, SA. 5000





Australian Government

Office of the Australian Building and Construction Commissioner

I CERTIFY THAT THIS DOCUMENT IS A TRUE COPY OF THE ORIGINAL HAVING BEEN SIGHTED BY ME THIS Ex. 3 DAY 26/04/2010

SEANUS FLYNN  
LEVEL 3 148 FLORENCE ST  
ADELAIDE, S.A. 5000

GPO BOX 9927  
Melbourne VIC 3001

Legal Telephone: 03 8509 3016  
Legal Fax: 03 8509 3023

ABCC0054/2008

**Schedule 7.7 Notice to attend and answer questions**  
(regulation 7.10)

**COMMONWEALTH OF AUSTRALIA**

*Building and Construction Industry Improvement Act 2005*

**NOTICE TO ATTEND AND ANSWER QUESTIONS**

I, Nigel Hadgkiss, Deputy ABC Commissioner, acting under paragraph 52 (1) (e) of the *Building and Construction Industry Improvement Act 2005*, and regulation 7.10 of the *Building and Construction Industry Improvement Regulations 2005*, require you to attend at

**The Administrative Appeals Tribunal, Hearing Room 4, 11<sup>th</sup> floor, Chesser House, 91 Grenfell Street, Adelaide at 10.00am on Thursday, 2 October 2008**

to answer questions that are relevant to an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law.

*Note 1.* The information relating to the investigation is specified in Parts 1 to 4 of the Schedule to this notice.

*Note 2* *Investigation* is defined in subsection 52 (8) of the *Building and Construction Industry Improvement Act 2005*.

**WARNING** — Under subsection 52 (6) of the *Building and Construction Industry Improvement Act 2005* you will commit an offence if you have been given this notice and fail:

- to attend to answer questions at the time and place specified in this notice; or
- to take an oath or make an affirmation, when required to do so under subsection 52 (4) of the *Building and Construction Industry Improvement Act 2005*; or
- to answer questions relevant to the investigation while attending as required by this notice.

**PENALTY:** Imprisonment for 6 months

Dated 11 September 2008

signature

**NOTICE GIVEN TO**

**Ark Tribe**

## SCHEDULE

### Part 1

[*address (if any) to which the contravention relates*]

Flinders University - Education building site, Sturt Road, Bedford Park, South Australia.

### Part 2

[*building industry participant or kind of building industry participant*]

The building industry participants are:

- Justin Feehan, an official of the Construction, Forestry, Mining and Energy Union (CFMEU)
- The CFMEU and
- Employees working at the site.

### Part 3

[*contravention and designated building law*]

It is suspected that Justin Feehan, the CFMEU and employees working at the site engaged in unlawful industrial action constituted by organising employees to leave the site, the employees leaving the site and the placing of a ban, limitation or restriction on the performance of work at the site on 30 May 2008.

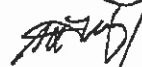
The designated building law is section 38 of the *Building and Construction Industry Improvement Act 2005* (Cth).

### Part 4

[*period during which the contravention took place*]

The day on which the alleged contraventions took place is 30 May 2008.

I CERTIFY THAT THIS DOCUMENT IS A TRUE  
COPY OF THE ORIGINAL HAVING BEEN SIGNED  
BY ME THIS DAY 28/04/2010

  
SEAMUS FLYNN

LEVEL 3, 148 FROME STREET  
ADELAIDE, S.A. 5000.