

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 cooperate 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.