

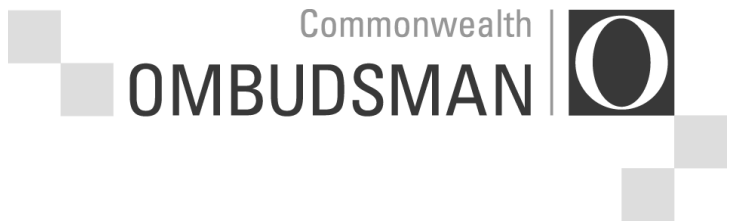


# **Review of the use of compliance powers by the Building Industry Taskforce**

**REPORT FOR THE PERIOD  
13 JANUARY 2005 TO 27 MARCH 2006**

Report under s 88AI of the *Workplace Relations Act 1996*

**October 2006**



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## INTRODUCTION

This report has been prepared under s 88AI of the pre-reform *Workplace Relations Act 1996* (the Act).

Section 88AA of the Act allowed the Secretary of the Department of Employment and Workplace Relations (the Secretary), subject to certain conditions, to require a person to give information, produce documents or answer questions relevant to a building industry investigation.

Section 88AI of the Act provided that, as soon as practicable after the end of each year to which s 88AA applied, I was to conduct a review of the use of the power given by s 88AA in that year. Section 88AI also required me to cause a copy of each report to be tabled in each House of the Parliament. The first year to which s 88AA applied was the year ending 12 January 2006.

Although ss 88AA and 88AI of the Act were repealed by the *Workplace Relations Amendment (Work Choices) Act 2005* (the amending Act) with effect from 27 March 2006, regulation 7.2.18 of the *Workplace Relations Regulations 2006* allows me to finalise my review for the year ending 12 January 2006 and to table my report.

Transitional provisions in the amending Act also require me to undertake a review of the use of the power given by s 88AA of the Act in the period starting on 13 January 2006 and ending on 27 March 2006. However, the Secretary has provided written advice that the s 88AA power was not utilised in that period.

In effect, this report covers the period 13 January 2005 to 27 March 2006.

## BACKGROUND

In response to the findings of the first report of the Cole Royal Commission into unlawful or inappropriate workplace practice or conduct in the building and construction industry, a Building Industry Taskforce (the Taskforce) was established within the Department of Employment and Workplace Relations (the Department). The Taskforce commenced in October 2002 and ceased to operate after 30 September 2005. A new independent body, the office of the Australian Building and Construction Commissioner (the ABCC), commenced on 1 October 2005.

The *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* inserted Part VA into the Act and gave compliance powers to the Secretary of the Department of Employment and Workplace Relations under s 88AA of Part VA. Part VA commenced on 13 January 2005 and conferred a review function on the Commonwealth Ombudsman in relation to the exercise by the Secretary of powers in s 88AA. Part VA was repealed with effect from 27 March 2006.

Under s 88AA, if the Secretary believed, on reasonable grounds, that a person had information or documents, or was capable of giving evidence, relevant to a building industry investigation that was not minor or petty, the Secretary could give the person a written notice requiring the person to:

- give information by the time, and in the manner and form specified, or
- produce documents by the time, and in the manner specified, or
- attend, at the time and place specified, and answer questions relevant to the investigation.

While there were certain protections for a person required to comply with a notice given under s 88AA, the person was not excused from giving information, producing a document, or answering a question on the ground that to do so would contravene any other law, or might tend to incriminate the person or would be otherwise contrary to the public interest. It was an offence to fail to comply with the requirements of a s 88AA notice.

The Secretary's powers under s 88AA were delegable to the Director of the Taskforce (the Director) but ss 88AA(3A), (3B) and 88AG of the Act required that in exercising the powers, the Director had to comply with guidelines, tabled in Parliament as a disallowable instrument, and with any directions of the Secretary.

Guidelines, determined under s 88AGA and tabled in Parliament, came into force on 22 June 2005. On 23 June 2005, the Secretary delegated his powers under s 88AA to the Director and made written directions.

## **REVIEW**

My office was advised that the s 88AA power was used on four occasions. Each occasion involved a requirement for a person to attend at a time and place specified to answer questions relevant to a building industry investigation. The Director exercised the power in each case.

### **Review methodology**

#### ***Overview***

As part of the review, my office obtained information from staff of the Taskforce and the Department and inspected the files relating to each occasion the power was exercised. Guidelines and a checklist were developed by my office to assist with the review.

#### ***Methodology***

All four eligible records were checked for compliance with s 88AA of the Act, the tabled guidelines and the Secretary's directions. The detailed checklist used to conduct the inspection addressed whether:

- all required actions took place before a s 88AA notice was issued, including obtaining the Secretary's written agreement to issue the notice
- the s 88AA notice and covering letter contained the required content, was in the required form, was served correctly and gave the person the required amount of time in which to respond
- the oral examination was conducted correctly
- information, documents and evidence obtained were used correctly.

## **RESULTS**

Inspection staff from my office found that the Taskforce's files were well maintained and contained sufficient documentation and information to conduct the review.

My office was advised that, prior to exercising the s 88AA powers, all Taskforce staff undertook training in the use of compliance powers. A further training session was conducted for the Director and all Taskforce lawyers and operations managers. The Taskforce also obtained external legal advice

about the form and content of the s 88AA notice and the internal documents used in support of the exercise of the s 88AA power.

In each case examined, inspection staff found that other avenues had been explored, or were not considered adequate, before the s 88AA power was exercised. Each file contained a Statement of Reasons by the Director indicating why he believed, on reasonable grounds, that the person to whom the notice was to be issued was capable of giving evidence relevant to a building industry investigation. Each file also contained advice from the Director to the Secretary of the type of evidence sought, a summary of the alleged case being investigated and the reasons for the Director's belief that the power should be exercised in the particular case. In each case the Secretary's written agreement was obtained before the s 88AA notice was issued.

Each s 88AA notice examined was in the required form, contained the required information and gave the person at least the minimum amount of time required by the legislation in which to comply with the notice. Each notice was accompanied by a covering letter that included, among other things, an explanation of what the examination was about, the grounds for believing that the person could provide relevant evidence, the person's rights and obligations, and the name and telephone number of a contact officer with whom the person could discuss the matter.

All recipients of a s 88AA notice complied with the notice by attending an examination and answering questions. Each file contained a copy of the transcript of the examination. In addition to information provided by Taskforce staff, the transcripts sighted by my inspection staff indicated that the examinations were conducted in accordance with requirements of the Act, the tabled guidelines and the Secretary's directions. All examinees were provided with a copy of the transcript of the examination and were invited to make written comments.

Some minor issues involving administrative best practice were discussed with Taskforce staff at the completion of the inspection. One issue arising from the review was that of withdrawing a direction to a witness not to disclose the content of an examination.

Paragraphs 59–60 of the tabled guidelines provided that the delegate could direct an examinee not to disclose the content of the examination to certain third parties until such time as the delegate concluded the inquiry or otherwise consented. Paragraph 62 provided that, as a general rule, the delegate would send a letter to the examinee withdrawing the direction of non-disclosure as soon as possible.



In each of the files inspected, the examinee was directed not to disclose the content of the examination but, at the time of the inspection by my office, there was no evidence of a letter withdrawing the direction. The view of the Taskforce was that the appropriate time to withdraw the direction was either once a civil prosecution had commenced or once the investigation had concluded. Taskforce staff explained that no directions had been withdrawn at that time as no civil prosecution had commenced and the investigations had not concluded.

I am of the view that a direction not to disclose the content of an examination is an onerous obligation on the examinee and it was of concern that with the repeal of Part VA of the Act, my office would not be able to monitor the withdrawal of the directions, except through an own motion investigation. However, written advice from the Secretary subsequently advised that there are no extant non-disclosure directions in respect of the four examinations conducted by the Taskforce and all four witnesses have been advised in writing of the withdrawal of the non-disclosure orders.

### **Issues of concern**

There were two issues of concern arising from the review.

#### ***The public interest test***

The tabled guidelines, which had the force of law and with which the Director was required to comply when exercising the s 88AA power, provided at paragraph 5 that, while other factors could be taken into account, 'the public interest' would be 'the key factor' in determining whether or not the compliance powers were to be used in a particular investigation.

The Taskforce advised that paragraph 5 was contained in the introduction to the guidelines whereas the procedures the delegate had to satisfy before issuing a notice, in accordance with the Secretary's directions, were contained in paragraph 8 and did not refer to the public interest test. However, the Taskforce acknowledged that the guidelines as a whole were binding on the delegate.

The Taskforce was of the view that the decision about whether the public interest was the key factor in a particular investigation rested with the Director, and required the Secretary's agreement. While in three of the four cases examined, case officers had included public interest in the matters as a factor in determining that the investigation was not minor or petty, the Taskforce took the view that this was not relevant to the Director's

consideration of public interest. The Taskforce also acknowledged that the case officers had treated 'public interest' as meaning 'of interest to the public' but believed that this approach was appropriate in determining whether a matter was minor or of major significance.

The case officers' consideration of 'public interest', although limited, was the only record that this factor had been considered at any level.

There was no written documentation on any of the files evidencing that the Director or Secretary had turned their minds to the public interest, in the sense of the interest of the public, in the decision to issue a notice. Although the Taskforce argued that the Director and Secretary would not have approved the use of the compliance powers if the public interest had not been the key factor, the lack of documentation means that there is no evidence that the public interest test was considered by the decision-maker, notwithstanding that the public interest was deemed the 'key factor' in paragraph 5 of the guidelines. This does not mean that the public interest was not considered at all, or was not an important factor, in the decisions. However, it would have been preferable if consideration of the public interest had been explicitly recorded, particularly since it is a notion which is often difficult to define and apply.

### ***Use of evidence obtained by the Taskforce***

During the review, inspection staff were advised that the new body, the ABCC, was using information in ongoing investigations that had been obtained by the Taskforce in its examinations. The Act protected such information from disclosure except in certain circumstances. Although it appears that staff of the Taskforce became staff of the ABCC, and that the ABCC continued investigations that had been started by the Taskforce, the legislation applicable to the ABCC did not specifically allow it to have access to the documents and information obtained by the Taskforce. Although it is arguable that one of the exceptions in the Act applied to allow disclosure without such a provision, whether the Taskforce was permitted to pass the information to the ABCC had not been specifically addressed in the legislation, as would be expected where one statutory body replaces another.

However, this situation was rectified by the amending Act. Although the amending Act came into effect on 27 March 2006, clause 14 of schedule 4 of that Act has retrospective effect and provides that information given to the Taskforce is taken to have been given to the ABCC. Including such a section in the legislation governing the ABCC would have been more appropriate and would have provided certainty from the commencement of the ABCC on 1 October 2005.

## **CONCLUSION**

Although I have noted some issues of concern, I have concluded that the use of the s 88AA power was administered according to the legislation.

I thank the staff of the Taskforce and the Department for their cooperation during the review.

Prof. John McMillan  
Commonwealth Ombudsman