

COMMONWEALTH
OMBUDSMAN



**Annual report by the
Commonwealth Ombudsman
under s 54A(6) of the
*Fair Work (Building Industry) Act 2012***

FOR THE PERIOD 1 JULY 2014 TO 30 JUNE 2015

Annual report by the Commonwealth Ombudsman:
Reviews conducted under Division 3 of the
Fair Work (Building Industry) Act 2012

September 2016

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1 EXECUTIVE SUMMARY

This report outlines the results of the Commonwealth Ombudsman's review of the powers granted under the *Fair Work (Building Industry) Act 2012* (the FWBI Act) in relation to examination notices and examinations.¹ Twelve examinations conducted by the Director of Fair Work Building and Construction (FWBC)² during 2014-15 were reviewed and this resulted in two recommendations:

Recommendation 1

If examinees are required to reappear before the Director of Fair Work Building and Construction to answer questions at a later date, a new examination notice should be sought.

Recommendation 2

Under the *Fair Work (Building Industry) Act 2012*, the Director of Fair Work Building and Construction must not require an examinee to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person³ and should not express a preference in this regard.

There were also several suggestions. Particularly, that FWBC should:

- review its current processes to ensure that:
 - all information regarding the impact of an examination notice on the examinee is reflected in each application to a nominated presidential member of the Administrative Appeals Tribunal (AAT) and
 - the confidentiality of examinees is maintained at all times;
- consider a limit of two examinations per day; and

¹ The examinations were reviewed against the criteria outlined under paragraph 3.2 of this report. A comprehensive discussion of the findings appears under Part 5, Results of 2014–15 Reviews.

² The Office of the Fair Work Building Industry Inspectorate is established by the *Fair Work (Building Industry) Act 2012*. The office operates under the name Fair Work Building and Construction.

³ Section 51(6) FWBI Act.

- seek advice on the interpretation of provisions under the relevant legislation to ensure examinees are not financially disadvantaged by attending an examination, including legal expenses.

FWBC was invited to comment on the draft of this report. The Director's response is included at Appendix A.

2 INTRODUCTION

The FWBI Act commenced on 1 June 2012. Under the FWBI Act, the Director of FWBC (the Director) can inquire into and investigate any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code.⁴

As part of an investigation of a suspected contravention by a building industry participant, of a designated building law or a safety net contractual requirement,⁵ the Director may apply to a nominated presidential member of the AAT for an examination notice.

An examination notice requires its recipient to:

- give information to the Director;
- produce documents to the Director; or
- attend before the Director to answer questions relevant to an investigation.⁶

The Director must notify the Commonwealth Ombudsman after an examination notice has been issued and provide copies of relevant documents.⁷ After the examination is completed, the Director must give the Commonwealth Ombudsman a report about the examination, a video recording of the examination and a transcript of the examination.⁸

As soon as practicable after the end of each financial year, the Commonwealth Ombudsman is required to review the exercise of these

⁴ These terms are defined under the FWBI Act; see s 4.

⁵ If the Director reasonably believes that the building industry participant has contravened a provision or term referred to in subsection 706(2) of the *Fair Work Act 2009*; see s 10(c) of the FWBI Act.

⁶ Section 45(1) FWBI Act. A person commits an offence and may incur penalties for the failure to comply with an examination notice (s 52 FWBI Act) and an examination notice falls within the scope of coercive information-gathering powers; See Administrative Review Council *The Coercive Information-Gathering Powers of Government Agencies* Report no. 48 May 2008

⁷ Section 49 FWBI Act.

⁸ Section 54A(1) FWBI Act.

powers by the Director and any person assisting the Director and to report to Parliament regarding the examinations conducted during that year.⁹ In the report, the Commonwealth Ombudsman must include the results of reviews that are conducted in that financial year.¹⁰

This report covers reviews that were undertaken between 1 July 2014 and 30 June 2015. During 2014–15, the Office of the Commonwealth Ombudsman completed 12 reviews: 10 reviews of the examinations conducted in the 2014–15 financial year, and two reviews of the examinations conducted in June of the 2013–14 financial year. An outline of the examinations conducted by FWBC and reviews conducted by the Commonwealth Ombudsman can be found at Appendix C.

3 REVIEW SCOPE AND METHODOLOGY

3.1 Objective and scope of reviews

Under the FWBI Act, the Commonwealth Ombudsman may do anything incidental or conducive to the requirement to review the exercise of the Director’s examination powers.¹¹

3.2 Criteria used for reviews

The examinations conducted were assessed against five criteria:¹²

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act¹³ and the Fair Work (Building Industry) Regulations 2005 (the Regulations)?¹⁴

⁹ Section 54A(6) FWBI Act.

¹⁰ Section 46 of the FWBI Act was amended on 20 May 2015 by the *Construction Industry Amendment (Protecting Witnesses) Act 2015* to extend the sunset provisions on applications under s 45 of the FWBI Act from three to five years, now precluding the Director from making an application under s 45 after 1 June 2017.

¹¹ Section 54(3)(b) FWBI Act.

¹² To ensure consistency in the reviews, these criteria have been maintained throughout the course of the Ombudsman’s reviews; see previous reports: http://www.ombudsman.gov.au/_data/assets/pdf_file/0027/34596/2012-Annual-report-under-s-54A6-of-the-Fair-Work-Building-Industry-FWBI-Act-2012.pdf http://www.ombudsman.gov.au/_data/assets/pdf_file/0018/34605/2013-Annual-report-under-s-54A6-of-the-Fair-Work-Building-Industry-FWBI-Act-2012.pdf http://www.ombudsman.gov.au/_data/assets/pdf_file/0019/34525/2014-Annual-report-under-s-54A6-of-the-Fair-Work-Building-Industry-FWBI-Act-2012.pdf

¹³ Section 45 FWBI Act.

¹⁴ The Regulations continue to be the relevant Regulations for the purposes of this report. Although the Regulations were repealed by the Fair Work (Building Industry) Regulation 2015, that instrument did not come into force until 5 September 2015.

2. Did the examination notice comply with the requirements of the FWBI Act,¹⁵ the Regulations, and relevant best practice principles set out by the Administrative Review Council?¹⁶
3. Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?¹⁷
4. Was the examination conducted in accordance with the requirements of the FWBI Act,¹⁸ relevant best-practice principles, standards and FWBC's internal policies and guidelines?
5. Where directions were issued by the Minister, were these complied with?¹⁹

3.3 Review and reporting methodology

The reviews were carried out by examining the material provided by FWBC and seeking further information from FWBC where necessary. FWBC was given the opportunity to comment on this annual report (Appendix A).

Relevant documents in conducting the reviews included:

- provisions under Division 3, Part 1, Chapter 7 of the FWBI Act and the Regulations;
- best practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies*;
- requirements under the Australian Government Investigation Standards;
- FWBC's internal guidelines on the use of examination notices and the conduct of examinations; and
- the report *Transition to Fair Work Australia for the Building and Construction Industry*, March 2009, Murray Wilcox QC.

¹⁵ Sections 47 and 48 FWBI Act.

¹⁶ See Administrative Review Council *The Coercive Information-Gathering Powers of Government Agencies* Report no. 48 May 2008 cited above, where the Administrative Review Council provided 20 best practice principles which 'seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of those in relation to whom the powers are exercisable'.

¹⁷ Sections 50 and 52(2) of the FWBI Act.

¹⁸ Section 51 FWBI Act.

¹⁹ Section 11 FWBI Act.

4 PROGRESS MADE SINCE PREVIOUS REPORT

The previous report for 1 July 2013 to 30 June 2014²⁰ made suggestions regarding how FWBC might improve its adherence to legislative requirements and best-practice principles.

FWBC took appropriate remedial action for all but one issue in the previous report. The previous report suggested that FWBC incorporate a standard offer in its covering letter to make an interpreter available at examinations, if required. This best-practice measure would remove subjectivity in determining whether an examinee would benefit from an interpreter. Although there did not appear to be any instances where an interpreter would have been required, the covering letters reviewed during 2014–15 have not been amended to incorporate this suggestion.

In response to this finding, the Director noted that, prior to consideration being given to the use of the compulsory powers, all examinees will have already been interviewed by FWBC investigators, who were able to determine whether or not an interpreter would be required. A second consideration of the requirement was made when the examination notice was served. He was aware that some witnesses might take offence with the suggestion that an interpreter might be made available, but the investigators would continue to be vigilant as to whether an interpreter might be required.

In our previous Annual Report, FWBC advised that it would consider whether to inform future examinees that they could request an interpreter at the examination. Whilst investigators might have the opportunity to speak to examinees prior to issuing an examination notice, this might not give an accurate indication of how much the examinee understands, particularly if he or she is of a non-English speaking background. Offering the services of an interpreter at the examination is a practical and transparent way to ensure that an examinee understands the process and the questions being asked. It is open to the examinee to waive that offer.

²⁰ http://www.ombudsman.gov.au/_data/assets/pdf_file/0019/34525/2014-Annual-report-under-s-54A6-of-the-Fair-Work-Building-Industry-FWBI-Act-2012.pdf

5 RESULTS OF 2014–15 REVIEWS

5.1 Were the applications for examination notices made in accordance with the requirements of the FWBI Act and the Regulations?

Section 45 of the FWBI Act and the Regulations set out the general requirements to be met before making an application, and prescribe the requirements in relation to the form and content of the application.

FWBC was assessed as compliant with this criterion, however, two issues were noted, and are discussed below.

Information about the likely impact on examinee

While serving Notice 15 on the examinee, records indicate that the examinee expressed concerns regarding the provision of information to FWBC. That notice was subsequently withdrawn and replaced with Notice 16, however those concerns were not included for the AAT presidential member's consideration in the subsequent application for Notice 16. Regulation 7.3(2) requires that information about the likely impact on the examinee of complying with the examination notice must be included in an application for an examination.

FWBC should review its processes to ensure that all information regarding the likely impact of an examination notice on the examinee which is within the FWBC's possession or knowledge at the time of application is reflected in each application under s 45.²¹

Information about other methods used to obtain information

The application in relation to Notice 5 did not outline if any other methods were attempted to obtain the information, documents or evidence as required by s 45(5)(e). It appears that Notice 5 was issued on the basis of an examinee response given in relation to Notice 6 (both examinees were related). As the notices related to two separate individuals, Notice 5 should have been treated separately to Notice 6, to ensure that proper consideration had been given in relation to each examinee.

²¹ In Guidance Note 6, FWBC Examination Notice Policy paragraph 10 describes the processes for applying for an examination notice and could be expanded to include the requirement in regulation 7.3 (regulation 9 under the 2015 Regulations) that the information that must be included in an application for an examination notice for a person is information about the likely impact of complying with the examination notice.

5.2 Did the examination notice comply with the requirements of the FWBI Act, the Regulations, and relevant best practice principles set out by the Administrative Review Council?

The Commonwealth Ombudsman is required to review the exercise of powers by the Director and any person assisting the Director in relation to the examination notices.²² Consideration required under the FWBI Act by a nominated AAT presidential member is outside the scope of the review.²³ However, this review incorporates best-practice principles regarding the information that an examination notice should include to ensure that the examinee understands the notice and his or her rights and obligations.

FWBC was assessed as compliant with this criterion.

5.3 Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?

Giving of notices

An examination notice must be served on the person in relation to whom it was issued within three months after the day on which it was issued. An examination must not be conducted until at least 14 days after the notice is given.²⁴

FWBC was assessed as compliant with this criterion. There were, however, two best-practice issues regarding the service of examination notices and maintaining examinees' confidentiality:

Firstly, FWBC provided documents as evidence of the service of the examination notices on examinees. There were inconsistencies in the level of detail in service records but FWBC has advised that it will implement a consistent template for capturing service activities. A suggestion for achieving this would be a process where the person being served or receiving the notice could sign to confirm receipt.

²² Section 54A(3) of the FWBI Act requires that the Commonwealth Ombudsman must review the exercise of powers under Division 3 of the FWBI Act by *the Director and any person assisting the Director* and may do anything incidental or conducive to the performance of that function.

²³ Sections 47 and 48 of the FWBI Act outline the considerations that a nominated AAT presidential member must make to determine whether to issue an examination notice, and the form and content of that notice.

²⁴ Section 50 FWBI Act.

Secondly, in relation to one investigation, the record of service indicated that three examinees were requested to appear at the same time in order to be served with the examination notices. Two examinees were unavailable and were later served at the same place within a few minutes of each other. Notwithstanding the relationship between the examinees, it appears that the confidentiality of examinees was not considered when serving the three examination notices. FWBC could incorporate confidentiality considerations into its Guidance Notes, particularly for service of notices where the notices relate to the same investigation.²⁵

In response to this finding, the Director stated that FWBC always considers the confidentiality of examinees, particularly when serving notices. The Director considered that highlighting this one investigation by noting that the confidentiality of examinees did not appear to have been considered was unfair. The Director noted the examinees' circumstances and that they had all assisted FWBC investigators in the conduct of the investigation. They were unwilling to provide the evidence by way of a statement or affidavit but all agreed to partake in a compulsory examination. The Director stated that there was therefore no confidentiality breached when they were served in their premises.

Whilst it might not have been considered necessary in this case to serve the notices separately, to an independent observer (such as our office) the service of the notices at the same time and at the same place did appear to breach the confidentiality of the examinees. In our view, FWBC should serve notices separately in all circumstances, whether or not the examinees are known to each other.

Legal Professional Privilege

FWBC advised that no examinees claimed legal professional privilege and the records produced for the review did not reflect any claims for legal professional privilege; therefore, no assessment was made.

5.4 Was the examination conducted in accordance with the requirements of the FWBI Act, relevant best-practice principles, standards and FWBC's internal policies and guidelines?

Two recommendations and several suggestions have been made to assist FWBC to demonstrate adherence to legislative requirements and best

²⁵ This could take the form of an extension to the advice in Guidance Note 6 FWBC Examination Notice Policy para 11.5 that "...a considered decision will be made taking into account any potential repercussions that may result for the witness if they are served at work."

practice principles. The criteria and sub-criteria for the assessment of these requirements are set out in Appendix B.

Discharging examinees

The Director did not discharge the examinee from compliance with the notice after the examination had concluded for Notices 8, 9 and 10. The Director advised the examinees they were not “*discharge(d)...from further compliance with the notice just in case there is something that arises in the course of...the investigation.*” In these instances, the examinees were later discharged from compliance in writing, up to four months after the examination was concluded.

This practice does not appear to be consistent with the intention of the relevant provisions of the FWBI Act. In specifying that *a time* be provided for the examination to take place,²⁶ the FWBI Act does not provide for an adjournment or for multiple times to be advised. Additionally, an examinee will only commit a relevant offence if the person fails to attend to answer questions at “the time...specified in the notice”.²⁷ This indicates that examinees, after attending the examination and complying with the notice, should be discharged having fulfilled the requirements of the examination notice.²⁸

Recommendation 1

If examinees are required to reappear before the Director of Fair Work Building and Construction to answer questions at a later date, a new examination notice should be sought.

In response to this finding, the Director commented that it was not immediately apparent that a case requiring the seeking of a new examination notice was made out by our report. The Director stated that where the provisions of the FWBI Act allowing an examination date to be varied did not operate (because an examination notice had been complied with and the examination commenced) adopting our recommendation that a new examination notice be sought would activate the complex processes for seeking a new examination notice. In the Director’s view, if an examinee

²⁶ Section 48(d) FWBI Act.

²⁷ Section 52(1)(b)(iii) FWBI Act.

²⁸ This also appears to be FWBC’s own interpretation of the provisions; *Guidance Note 6 – FWBC Examination Notice Policy* paragraph 19.1 (c) – (e) indicate that FWBC considers that the examinee will have complied with the notice through their attendance to answer questions, taking of an oath or affirmation, and when required by answering questions relevant to the investigation at the time specified in the notice.

voluntarily agreed to attend at a later date, the benefit served by the recommendation would be of limited utility.

According to the transcript for notices 9 and 10, as distinct from being the case that examinees were willing to attend at a later date, the Director specifically stated that he would not be discharging the examinees until advised by letter, in case he needed them to return. However, the provisions in the FWBI Act require an examination notice to specify the time and place for attendance³⁰ and only require the examinee to attend at that time and place,³¹ unless the time is varied before the examination commences.³²

Those provisions provide checks and balances for the exercise of coercive powers and they apply to every application for an examination notice.

The Director commented that the extensive external review of the examination by video recording, verification of the transcript of all examinations, review and reporting by the Ombudsman and the rigorous external approval process for an examination to be issued provide a comprehensive suite of protections should there be any concerns about the examinees' willing concurrence with his decision not to discharge them.

The Director seems to rely on our office's oversight as a reason for not following the recommendations which result from that same oversight. It remains our view that once an examinee has complied with the requirements of the examination notice by attending at the time and place specified in the notice, the examinee has discharged his or her obligations under the legislation and it is not open to the Director to decide otherwise.

According to the transcripts noted above, in relation to notices 8 and 9 the examinees' concurrence was not sought; they were advised that they would not be discharged until the Director decided to discharge them. In any event, it is irrelevant whether or not the examinee appears to have consented to returning at a later time. Once the examination has commenced and the power to vary the time no longer operates, the FWBI Act does not appear to give the Director any discretion to extend the time for the examination without issuing a new notice. It would be helpful for future reviews for FWBC to obtain independent legal advice on this matter.

³⁰ Section 48(d) of the FWBI Act.

³¹ Section 52(1)(b)(iii) of the FWBI Act.

³² In accordance with subsections 50(4) and (5) of the FWBI Act.

Expressing a preference that proceedings not be discussed

The Director *must not* require the person to undertake not to disclose information or answers given at the examination; or not to discuss matters relating to the examination with any other person.³⁴

The Director informed examinees, in accordance with s 51(6) of the FWBI Act, that he must not request a person to undertake not to disclose or discuss matters relating to the examinations. However, in most of the examinations reviewed (8 of 12), the Director stated a preference that matters regarding the examinations not be discussed with others.

Whilst the FWBC must keep the information obtained under an examination notice confidential,³⁵ under the FWBI Act, the Director is precluded from requiring the examinee to make undertakings of confidentiality. Expressing a preference in the context of an examination could undermine that legislative requirement. The Administrative Review Council recommended that examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing;³⁶ the fact that the FWBI Act stipulates that no such undertaking can be required denotes that it should be left to the examinee's own consideration as to whether he or she keeps the information provided confidential.

Recommendation 2

Under the *Fair Work (Building Industry) Act 2012*, the Director of Fair Work Building and Construction must not require an examinee to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person and should not express a preference in this regard.

In response to this finding, it was the Director's view that as long as a request not to disclose information is balanced by a clear statement that there is no prohibition on information disclosure (recognising that a person has the discretion to disclose any information they wish) it seemed reasonable that an examinee be asked to respect the nature of the investigative process on-foot and thereby be invited to exercise their own discretion.

³⁴ Section 51(6) FWBI Act.

³⁵ Section 65 FWBI Act.

³⁶ Administrative Review Council *The Coercive Information-Gathering Powers of Government Agencies* Report no. 48 May 2008; Principle 16.

The Director also noted that where an examinee was legally represented, he had suggested that the examinee discuss the issue with their legal representative.

Legal representatives appeared in four of the eight examinations where the Director expressed a preference that the examinee not discuss the proceedings.³⁷ Even where the Director noted he could not require a person to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person, his expressed preference could be taken to be a prohibition on discussing the issues.

The Director notes that this report emphasises that confidentiality of examinees should be maintained at all times and finds it incongruous to suggest that an examinee cannot be requested to maintain the confidentiality of their evidence. However, this distinction is set out in the FWBI Act. Section 65 requires that FWBC maintains the confidentiality of information obtained under an examination notice and s 51(6) specifically precludes the Director from requiring an examinee to make an undertaking to keep the proceedings confidential. There is no incongruity in assessing FWBC's compliance with both sections and making recommendations in line with our observations.

Good practices

Relevance

On the basis of documents provided in association with the review, questions posed to each examinee appeared relevant to the investigation. The FWBC Director explained why questions asked might appear similar to previous questions and reminded the examinee to advise if any questions were better answered by anyone else.³⁹

One examinee was questioned and another volunteered information about matters outside the scope of the examination notice. In both cases, the Director clarified that the examinee was not compelled to answer the questions or provide information unrelated to matters outlined in the notice. The examinees chose to answer the questions and provided the information voluntarily.⁴⁰

³⁷ Notices 8, 9, 10 and 14.

³⁹ Notice 4.

⁴⁰ Notices 4 and 6.

Best-practice suggestions

The Director may require the information or answers given by the person at the examination to be given on oath or affirmation (ss 51(4) and (5))

Information and answers provided by all examinees were given on oath or affirmation. However, some examinees (Notices 5 and 13) appeared confused about the difference and the Director might explain the difference in his opening remarks to prevent any confusion.

Tone and manner of questioning⁴¹

Examinees and their legal representatives were treated in a courteous and professional manner throughout the examinations. However, there were instances⁴² where questions posed to the examinee appeared to require the examinee to speculate rather than to recount his or her own experiences. At times, FWBC representatives also completed the examinee's sentences rather than allowing the examinee to finish. Comments regarding the tone and manner of questioning are at Appendix D.

FWBC representatives could be reminded to allow an examinee time to answer questions in their own words and from their own experiences, through incorporating further guidance for questioning in *Guidance Note 6 FWBC Examination Notice Policy*.

Maintaining confidentiality of examinees

In one examination,⁴³ counsel assisting the Director revealed the identity of another examinee while checking if there was any other evidence that needed to be tendered. As the examinees (who are related) were served their notices at the same time, they would have known of each other's scheduled examination. However, the identity of an examinee should be kept confidential, regardless of their relationship to others being served.⁴⁴

GN 6 FWBC Examination Notice Policy paragraph 17.9 refers to the confidentiality of information obtained by the Director under sections 45 to 58

⁴¹ In his report *Transition to Fair Work Australia for the Building and Construction Industry* March 2009, Murray Wilcox QC noted that complaints regarding the tone and manner of questioning in examinations could be satisfactorily resolved by an independent person reviewing a videotaped record of the interrogation [para 6.54]. Accordingly this aspect is included in the review of FWBC examinations and comments regarding questioning are included at Appendix C.

⁴² Notices 4-6 and 11-13.

⁴³ Notice 11.

⁴⁴ Section 65 FWBI Act.

of the FWBI Act and could further reference the importance of maintaining the confidentiality of examinees.

In response to this finding, the Director felt it was unfair to highlight this examination as it did not reflect the context where the examinees were husband and wife. The Director felt it was unjustified criticism to report that counsel revealed the identity of the spouse while checking if there was any other evidence that needed to be tendered. Counsel had to determine whether all relevant documentation had been tendered and could not be said to have breached the identity of the examinee's spouse by posing the question in these circumstances.

In such circumstances it was open to counsel to obtain the information as to his wife's examination from the examinee first by asking relevant questions and then to proceed to ask questions in relation to her. We note that the Director has confirmed that FWBC will continue to ensure witness confidentiality is given full regard.

Examination conducted within standard business hours, of reasonable duration and with regular adjournments

The examinations were conducted within standard business hours, and the duration appeared to be reasonable, with the longest lasting approximately four hours.

In relation to scheduling, three examinations did not commence at the time specified in the notice. One began early with the agreement of the examinee. Two were delayed by almost two hours, due to FWBC scheduling three examinations on the same day, with the first examination going over time. FWBC advised that one of the examinees, who was inconvenienced by the delay, expressed disappointment, but did not make a formal complaint.

Limiting the scheduling of examinations to two per day would enable FWBC to account for unanticipated delays and prevent inconvenience to examinees.

In response to this finding, the Director noted that FWBC appreciates the requirement to prevent inconvenience to examinees and aims to accommodate their needs as far as possible but was reluctant to commit to a daily fixed examination quota as he considered that this would have cost implications, create inefficiencies and not have sufficient regard for the variability of examinations.

Payment of expenses

An examinee is entitled to be paid fees and allowances for reasonable expenses, including legal expenses, incurred in attending the examination.⁴⁵

According to documents that were provided in relation to verifying transcripts, there was a difference of opinion between FWBC and an examinee regarding payment for expenses the examinee incurred by attending the examination. Division 7.2 of the Regulations sets out the allowances payable to a witness and 7.13 entitles the witness to a payment towards meeting the legal costs and disbursements. This amount is calculated using the costs set out in the *Federal Circuit Court Rules 2001*.

The claim submitted by the examinee included legal expenses incurred in preparation for the examination. FWBC determined that the legal allowance does not include a fee for preparation as the examinee did not incur the expense in actually attending the examination. The examinee's legal representative argued that the preparation only occurred because the examinee was required to attend the examination and was directly linked to the examination. However, a lawyer would be expected to prepare prior to representing a witness at an examination and this is potentially a reasonable expense incurred by an examinee attending the examination.

FWBC should seek advice on the interpretation of the provision to ensure that examinees are not financially disadvantaged by attending an examination.

In response to this finding, the Director noted that FWBC would continue to apply the *Fair Work (Building Industry) Regulations 2005* ensuring all appropriate allowances are payable, balanced by FWBC's fiscal responsibilities as custodians of public monies. Payment of legal costs for representation "*at the examination*" is prescribed and would continue to be paid on that basis.

We note that the *Fair Work (Building Industry) Regulation 2015* came into force on 5 September 2015. Both the 2005⁴⁶ and the 2015⁴⁷ Regulations state that the witness is entitled to a payment (a **legal allowance**) towards meeting the legal costs and disbursements that the witness **reasonably incurs for a lawyer to represent the witness at the examination**. Our view remains that this provision appears broader than merely covering legal costs for representation "at the examination" and FWBC should seek legal advice in this regard.

⁴⁵ Section 58 FWBI Act.

⁴⁶ Regulation 7.13.

⁴⁷ Regulation 17.

5.5 Where directions were issued by the Minister, were these complied with (s 11)?

No directions were issued at the time of the reviews and this criterion did not apply.

Colin Neave
Commonwealth Ombudsman

26 April 2016

Mr Colin Neave AM
Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Mr Neave

Draft annual report by the Commonwealth Ombudsman under s. 54A(6) of the Fair Work (Building Industry) Act 2012 – 1 July 2014 to 30 June 2015

Thank you to your office for forwarding me a copy of the draft report for comment prior to tabling in Parliament. I am pleased to provide the following comments for inclusion.

First, FWBC notes the report's findings that it was compliant with the relevant provisions of the *Fair Work (Building Industry) Act 2012*, the Regulations and Administrative Review Council principles in relation to examination notices.

Second, FWBC notes the two recommendations made in the report.

In respect of *Recommendation 1*, it is not immediately apparent that a case requiring the seeking of a new examination notice is made out by the Report.

It is noted that only one example is cited to support the recommendation. In this particular matter, the witness had already appeared and during their examination had agreed to assist the case officer concerned. They were not being asked to reappear before me.

My view is that where an examinee has readily consented to a later appearance then it is difficult to understand what advantage is served, or end achieved, in reinstating the complex legal and administrative steps required under the Act.

These complexities, for limited benefit, are reflected in a number of ways. The Act provides a mechanism to *vary* the time for compliance with an examination notice. The amended notice must give 14 days prior notice to the next examination date. Therefore, if an examinee has willingly consented to a further appearance then they may well feel frustrated at a long delay despite having consented to an earlier date.

Where the variation provisions of the Act do not operate (because an examination notice has been complied with and the examination commenced) adopting the recommendation that a new examination notice be sought will again activate the complex processes for seeking a new examination notice being:

- any application for an examination notice must be accompanied by an affidavit deposed by the Director;
- lodgement of an application to the AAT for the issue of an examination notice;
- consideration by an AAT Presidential Member of the application for exercise of powers;
- mandatory provisions on the form and content of the examination notice;
- notification and service to the examinee; and
- a minimum 14-day notification period before the next examination.

Bearing in mind these requirements, if an examinee voluntarily agrees to attend at a later date (which may be as simple as the next morning) the benefit served by the recommendation would be of limited utility.

Further, with the extensive external review of the actual examination by:

- video recording;
- examinees verifying the transcript of all examinations;
- review by the Commonwealth Ombudsman in every case, including an examination of the video recording and transcript verified by the examinee;
- the Commonwealth Ombudsman reporting on every case and producing an annual report of the examinations' process and their conduct; and
- the rigorous external approval process for an examination notice's issue;

these steps provide a comprehensive suite of protections should there be any concerns about the examinee's willing concurrence.

In considering *Recommendation 2*, it is important that an examination is seen in its proper context. That is, an examination is merely one step in the agency's *investigation* of breaches of the building laws. As long as a request not to disclose information is balanced by a clear statement that there is no prohibition on information disclosure (recognising that a person has the discretion to disclose any information they wish) it seems not unreasonable that an examinee be asked to respect the nature of the investigative process on-foot and thereby be invited to exercise their own discretion.

By way of context, in normal day-to-day interactions with witnesses, it is often the practice that a witness will be requested not to disclose information or answers given when assisting in an investigation, such as when providing a witness statement to an investigator. Invariably, witnesses fully comprehend the basis for maintaining the confidentiality of an investigation and their own safety.

Likewise, examinees are invariably the subject of the compulsory powers because they fear retribution should it become public that they had provided their evidence voluntarily.

It is also noted that your draft report suggests that '*FWBC should: ...review its current processes to ensure that: ... the confidentiality of examinees is maintained at all times;*' (page 1). I therefore find it somewhat incongruous that you suggest that the confidentiality of examinees is maintained at all times, yet you are suggesting that an examinee cannot be requested to maintain the confidentiality of their evidence.

Notwithstanding that it is my stated preference that matters are not discussed with others, at the end of the day no such undertaking is made of the examinee and it is left to the examinee's own consideration as to whether he or she keeps the information provided confidential. Furthermore, on examination of the eight transcripts where such a preference has been expressed, it may be noted that where an examinee is legally represented, the suggestion is made by me for the examinee to discuss the issue with their legal representative.

Any perceived need for protection from undue influence is moderated by the Commonwealth Ombudsman's own independent oversight of the proceedings. The draft report notes that examinees and their legal representatives are treated in a courteous and professional manner throughout an examination. FWBC notes that the report finds that FWBC was compliant with the legislation and does not order or require an examinee not to discuss matters relating to the examination.

In view of these comments I am not inclined to accept the report's *Recommendations 1 and 2*.

Other Suggestions

Turning then to suggestions raised:

- *The previous report suggested that FWBC incorporate a standard offer in its covering letter to make an interpreter available at examinations, if required.*

By way of context, all examinees will have already been interviewed by FWBC investigators prior to consideration being given to use of the compulsory powers. It is my experience that investigators are suitably experienced and able to determine whether an interpreter is required. Consideration of this requirement is made a second time when the Examination Notice is served. I note that you report that *'there did not appear to be any instances where an interpreter would have been required'* and I am aware that some witnesses may take offence with the suggestion that an interpreter may be made available.

That said, vigilance will continue to be made by agency investigators as to whether an interpreter may be required. After all, notwithstanding the offer being made in our covering letter, an examinee could well decline an interpreter, only to commence an examination and see the overwhelming requirement for one.

- *Secondly, in relation to one investigation, the record of service indicated that three examinees were requested to appear at the same time in order to be served with the examination notices. Two examinees were unavailable and were later served at the same place within a few minutes of each other. Notwithstanding the relationship between the examinees, it appears that the confidentiality of examinees was not considered when serving the three examination notices. FWBC could incorporate confidentiality considerations into its Guidance Notes, particularly for service of notices where the notices relate to the same investigation.*

FWBC always considers the confidentiality of examinees, particularly when serving notices. Taking into account the context of this matter, it is therefore a little unfair to highlight this one investigation by stating that *'it appears that the confidentiality of examinees was not considered when serving the three examination notices.'*

The facts are that the examinees were members of a small family company comprising a husband, his wife, and their manager. They had all assisted FWBC investigators in the conduct of the investigation and provided extremely valuable information and documentation. However, all three expressed an unwillingness to provide the evidence by way of a statement or affidavit. As a consequence, they all agreed to partake in a compulsory examination. Therefore there was no confidentiality breached when they were served in their premises.

- *In one examination, counsel assisting the Director revealed the identity of another examinee while checking if there was any other evidence that needed to be tendered. As the examinees (who are related) were served their notices at the same time, they would have known of each other's scheduled examination. However, the identity of an examinee should be kept confidential, regardless of their relationship to others being served.*

FWBC takes the confidentiality of an examinee's identity extremely seriously, and I feel to highlight this examination is unfair as it does not reflect the context. The facts are that the examinees were husband and wife and, as pointed out in your report, *'were served their notices at the same time and knew of each other's scheduled examination.'* The couple had greatly assisted the investigation to date and provided useful documentation. The fact that counsel, a highly experienced Brisbane barrister, revealed the identity of the spouse *'while checking if there was any other evidence that needed to be tendered'* is, I believe, unjustified criticism. Counsel had to determine whether all relevant documentation had been tendered and by posing the question in these circumstances can hardly be said to breach another examinee's identity (their spouse).

That said, FWBC will continue to ensure witness confidentiality is given full regard.

Whilst pleased that the report found examinees were treated at all times in a courteous and professional manner, FWBC will remain sensitive to the need to clarify or confirm for the examinee any part of the proceedings or processes where there is any uncertainty apparent in the examinee.

FWBC appreciates the requirement to prevent inconvenience to examinees and aims to accommodate the needs of examinees as far as possible. FWBC will continue to work within this framework. However, FWBC is reluctant to commit to a daily fixed examination quota because to do so would have cost implications, create inefficiencies and not have sufficient regard for the variability of examinations.

Finally, FWBC will continue to apply *the Fair Work (Building Industry) Regulations 2005* ensuring all appropriate allowances are payable, balanced by our fiscal responsibilities as custodians of public monies. Payment of legal costs for representation *at the examination* is prescribed and will continue to be paid on that basis.

Thank you again for the opportunity to make these comments.

Yours sincerely

Nigel Hadgkiss

Director

Fair Work Building & Construction

Appendix B

Criteria used to determine if examinations were conducted in accordance with the requirements of the FWBI Act (s 51), relevant best-practice principles, standards and FWBC's internal policies and guidelines⁴⁸ (as discussed in 5.4 above)

4.1 Did the Director of FWBC conduct the examination? s 51(2) FWBI Act; GN 6 paragraph 17.1

4.2 If requested by the examinee, did the Director agree to a representing lawyer to be present at the examination? s 51(3) FWBI Act; GN 6 paragraph 18.1

4.3 Did the examiner require the person being interviewed to not disclose information or answers given at the examination? s 51(6) FWBI Act

4.4 Assessment of conduct of examination and related issues:

Guidance for staff exercising coercive powers (ARC Principles 8, 10, 12; Australian Government Investigation Standards (AGIS) paragraph 4.2, 4.4)

- Do those exercising coercive powers in FWBC have access to assistance, advice and support for the exercise of those powers?
- Does FWBC have procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of the examinations powers?

Examination preparation (AGIS paragraphs 3.2, 4.2)

Before conducting an examination, did the Director/persons assisting the Director prepare for the examination? Preparation should:

- Identify objectives of the examination, and the desired outcomes
- formulate questions to be asked during the examination; how best to order and phrase the key questions; consider likely reactions of the examinee
- If relevant, implement risk management strategies
- Address logistics and resources of the examination (room, equipment, personnel etc.)

Conduct of examination

- Prior to commencing the examination, did the Director explain the examination process? (derived from ARC Principle 14 in relation to examination notices)
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination? (AGIS paragraph 4.1)

⁴⁸ This involves an assessment against the relevant best practice principles set out by the Administrative Review Council, the requirements of the Australian Government Investigation Standards, and FWBC's internal guidelines.

- Was the oral examination conducted within standard business hours? Were there regular adjournments?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning? (Wilcox Report, paragraphs 6.53 and 6.71)
- Was the line of questioning relevant to the investigation? (derived from the requirement in s 45(5)(d) requiring the Director to specify in the affidavit to the AAT the grounds on which the examinee is capable of giving evidence relevant to the investigation; and in GN 6 paragraph 14 regarding the scope of information, documents and answers that may be required).
- If relevant, was the examinee or the examinee's legal representative permitted to object to questions as being unclear or irrelevant to the subject matter of the examination? Were the examinee or their legal representative allowed to ask questions, make comments and/or submissions at the completion of the examination? (GN 6 paragraph 18.4)
- Did the person claim legal professional privilege or public interest immunity during the examination? (s 52(2)).

Post – examination

- Did FWBC send a copy of the transcript to the examinee and invite them to make any corrections? Did the examinee make any comments or corrections? If so, how were they addressed by FWBC? (ARC Principle 16; GN 6 paragraph 17.7)

Appendix C

Fourteen examinations were conducted by FWBC during 2014-15. The corresponding notices and reviews conducted are shown in the table below.

Examination	FWBC Examination Notice (our ref.)	FY Examination Notice Issued	Ombudsman Review Conducted
Conducted in 2013-14	Notice #4	2013-14	Jan 2015
Conducted in 2013-14	Notice #5:	2013-14	Jan 2015
1	Notice #6:	2013-14	Jan 2015
2	Notice #7:	2013-14	Jan 2015
3	Notice #8:	2014-15	Feb & April 2015
4	Notice #9	2014-15	Feb 2015
5	Notice #10	2014-15	March 2015
6	Notice #11	2014-15	March 2015
7	Notice #12	2014-15	Feb 2015
8	Notice #13	2014-15	Feb & April 2015
9	Notice #14	2014-15	March & April 2015
	Notice #15	2014-15	N/A. This examination was not conducted as the notice was withdrawn.
10	Notice #16	2014-15	March 2015
11	Notice #17	2014-15	Not reviewed
12	Notice #18	2014-15	Not reviewed
13	Notice #19	2014-15	Not reviewed
14	Notice #20	2014-15	Not reviewed

Appendix D

Comments regarding tone and manner of questioning

Notice (page/line number)	Comment
Notice 4 (788-789)	Suggesting words to examinee rather than allowing the examinee to find their own words.
Notice 5 (283-287, 830-832, 835-837)	The intended purpose of some questions may be to clarify information, however they could also be suggesting the evidence.
Notice 5 (499-500)	Speculative questioning – examinee asked to comment on future events.
Notice 6 (1470-1487)	Questions would have required speculative responses after examinee denied knowledge about what was being asked.
Notice 11 (pages 32-42, page 53 line 5-23)	Repeated questioning.
Notice 12 (page 49 line 20 – 23, page 62 line 35)	Interviewer made statements rather than asking questions. Statements did not reflect previous information provided by examinee.
Notice 13 (page 21 line 34, page 22 line 9 onwards))	Examinee asked to speculate after examinee indicated they had no knowledge about what was being asked.

GLOSSARY

AAT	Administrative Appeals Tribunal
Best-practice principles	Best-practice principles set out by the Administrative Review Council in its report: <i>The coercive information-gathering powers of government agencies</i>
Director	Director of Fair Work Building and Construction
Examination	When an examination notice requires a person to attend before the Director to answer questions relevant to an investigation, the attendance is called an examination (s 51(1) of the FWBI Act)
FWBC	Fair Work Building and Construction, the name under which the Office of the Fair Work Building Industry Inspectorate operates
FWBI Act	<i>Fair Work (Building Industry) Act 2012</i>
Notice	An Examination Notice issued under s 47 of the FWBI Act
Regulations	Fair Work (Building Industry) Regulations 2005
Standards	Australian Government Investigation Standards 2011