



**Quarterly report by the
Commonwealth Ombudsman
under s 65(6) of the
*Building and Construction Industry
(Improving Productivity) Act 2016***

FOR THE PERIOD 1 OCTOBER TO 31 DECEMBER 2018

Quarterly report by the Commonwealth Ombudsman:
In accordance with Part 2 of Chapter 7 of the
*Building and Construction Industry
(Improving Productivity) Act 2016*

July 2019



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CONTENTS

Executive summary.....	1
Introduction.....	2
Review scope and criteria.....	3
Objective and scope of reviews.....	3
Criteria used for reviews.....	3
Progress made since previous reports.....	4
Results of our reviews — 1 October to 31 December 2018.....	5
Appendix A—Assessments conducted under criterion 4.....	7
Appendix B—Examinations conducted and reviewed.....	10

EXECUTIVE SUMMARY

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), the Commonwealth Ombudsman (the Ombudsman) must review the examination powers exercised by the Commissioner of the Australian Building and Construction Commission (the Commissioner) and any person assisting the Commissioner. Under s 65(6) of the BCIIP Act, the Ombudsman must report to Parliament as soon as practicable after the end of each quarter of each financial year about examinations conducted by the ABCC and reviews conducted by the Ombudsman during that quarter.

This report covers six reviews conducted by our Office between 1 October and 31 December 2018 (the review period), consisting of five examination notices to attend before the Commissioner and answer questions and one examination notice to produce documents.

When conducting our review of the Australian Building and Construction Commission's (ABCC) use of examination powers, we assessed the Commission's performance against the requirements of the BCIIP Act, the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the Regulations), relevant best practice principles and standards, and the ABCC's internal guidelines. Overall, we were satisfied the ABCC was compliant with the examination powers under the BCIIP Act. We did not make any recommendations or suggestions to the ABCC as a result of our reviews during this quarter.

During the review period the ABCC advised us it conducted two examinations under the BCIIP Act. These will be reviewed by our Office in a subsequent quarter and the results included in the quarterly report for that period.

INTRODUCTION

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), the Australian Building and Construction Commissioner (the Commissioner) may inquire into and investigate any act or practice by a building industry participant, which may be contrary to a designated building law, a safety net contractual entitlement, or the Building Code. As part of an investigation, the Commissioner may apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice, under s 61B of the BCIIP Act.

An examination notice may require its recipient to:

- a) give information to the Commissioner
- b) produce documents to the Commissioner, or
- c) attend before the Commissioner to answer questions relevant to an investigation.

Under s 64 of the BCIIP Act, the Commissioner is required to notify the Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents.

Under s 65 of the BCIIP Act, as soon as practicable after the examination is completed, the Commissioner must give the Ombudsman the following:

- a) a report about the examination
- b) a video recording of the examination
- c) a transcript of the examination.

Our Office uses these records to review how the Commissioner, and any person assisting the Commissioner, exercises examination powers under the BCIIP Act.

REVIEW SCOPE AND CRITERIA

Objective and scope of reviews

Under s 65(3)(a) of the BCIP Act, the Ombudsman must review the exercise of examination powers by the Commissioner and any person assisting the Commissioner.

Under s 65(3)(b) of the BCIP Act, the Ombudsman may do anything incidental or conducive to review the exercise of the Commissioner's examination powers.

Criteria used for reviews

The examination notices issued and examinations conducted during the review period were assessed against the following criteria:

1. Was the application for an examination notice made in accordance with the requirements of the BCIP Act (s 61B) and the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the Regulations) (s 5)?
2. Did the examination notice comply with the requirements of the BCIP Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?
3. Was the examination notice given to the person named on the notice, in accordance with the requirements of the BCIP Act (s 61E), and were claims of privilege properly handled?
4. Was the examination conducted in accordance with the requirements of the BCIP Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

This criterion is the main focus of our reviews. **Appendix A** provides detailed inspection criteria to guide our assessment.

5. Was there compliance with any directions issued by the Minister (s 17)?

PROGRESS MADE SINCE PREVIOUS REPORTS

In our quarterly report (March 2018), covering the 1 July 2016 to 31 March 2017 review period, we made a recommendation in relation to the Commissioner's practice of expressing a preference that an examinee not disclose information or answers given during the examination, or not discuss matters relating to an examination with another person.¹ This practice is not allowed under s 61F(6) of the BCIP Act.

In response to our October 2017 and March 2018 reports, the ABCC advised our Office that this practice was no longer used as a matter of course. This was reflected in our previous report, February 2019, covering reviews during the period 1 October to 31 December 2017, where we noted the ABCC did not use this practice.

Due to the retrospective nature of our reviews, the effectiveness of this change in practice by the ABCC was determined during this review period. In four of the five examinations to answer questions reviewed by our Office during this review period, the Commissioner outlined at the conclusion of the examination that the contents of the examination would be kept confidential by the ABCC, but that there was no obligation on the examinee not to discuss matters relating to the examination with any other person.²

We are therefore satisfied with the ABCC's progress on this issue.

¹ On 1 December 2016 the BCIP Act commenced repealing the *Fair Work (Building Industry) Act 2012* (FWBI Act) and established the ABCC to replace the Fair Work Building and Construction (FWBC). This practice was also prohibited under the FWBI Act, and this recommendation had been provided to the FWBC in two annual reports (September 2016), covering the period 1 July 2014 to 30 June 2015 and (October 2017) covering the period 1 July 2015 to 30 June 2016.

² References: ABCC18/002, ABCC18/003, ABCC18/004 and ABCC18/006.

RESULTS OF OUR REVIEWS — 1 OCTOBER TO 31 DECEMBER 2018

We conducted six reviews of examination notices and examinations between 1 October and 31 December 2018. Details of our reviews are at [Appendix B](#) and the results are reported below.

As we review actions performed by both the Commissioner and persons assisting the Commissioner, our assessment of compliance will refer to the ABCC.

Criterion 1—Was the application for an examination notice made in accordance with the requirements of the BCIIIP Act (s 61B) and Regulations (s 5)?

We determined the ABCC was compliant with this criterion.

Criterion 2—Did the examination notice comply with the requirements of the BCIIIP Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?

Under this criterion, we only comment on action taken by the ABCC. We do not comment on any decision made by a nominated Administrative Appeals Tribunal Member.

We determined the ABCC was compliant with this criterion.

Criterion 3—Was the examination notice given to the person named on the notice, in accordance with the requirements of the BCIIIP Act (s 61E), and were claims of privilege properly handled?

We determined the ABCC was compliant with this criterion.

Criterion 4—Was the examination conducted in accordance with the requirements of the BCIIIP Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

Overall we determined the ABCC was compliant with this criterion.

We identified two good practices, which we suggest the ABCC continue to apply, where relevant. These include:

- In one instance³ the Commissioner reminded the examinee they were still under oath following a break during the examination. This is a good practice, as it ensures that an examinee is aware or reminded of their continued obligation in answering questions whilst under oath/affirmation.
- In one instance⁴ the ABCC provided our Office with a copy of the email providing the examination transcript to the examinee and a copy of the examinee's requested changes. This is a good practice in ensuring procedural fairness to the examinee. This practice is consistent with the ABCC's internal guidance for conducting examinations. Providing this information in the ABCC's report to our Office is not required under s 65(2) of the BCIP Act. However, including this information to our Office provides confidence that procedural fairness is afforded to an examinee and ABCC guidance is being followed in relation to examinations, particularly post examinations.⁵

Criterion 5—Was there compliance with any directions issued by the Minister (s 17)?

The Minister did not issue any directions relevant to the ABCC's examinations during this reporting period.

³ ABCC18/003.

⁴ ABCC18/004.

⁵ Consistent with the best practice principles in relation to 'Coercive Information-gathering powers of Government Agencies' (Report no.48, 2008) by the Administrative Review Council's (ARC), Principle 16—'Examinations and hearings'.

APPENDIX A—ASSESSMENTS CONDUCTED UNDER CRITERION 4

Detailed below is how we determine whether examinations were conducted in accordance with the requirements of the BCIIIP Act (s 61F), relevant best practice principles and standards, and the ABCC’s internal guidelines.⁶

Criterion 4.1—Did the Commissioner conduct the examination?

Under s 61F(2) of the BCIIIP Act, the Commissioner must conduct the examination of the person named on the issued Examination Notice (under s 61C). Under ss 61F(4) and 61F(5) the Commissioner may require the examinee to answer questions under oath/affirmation.

Criterion 4.2—If requested by the examinee, did the Commissioner agree for a lawyer for the examinee to be present at the examination?

Under s 61F(3) of the BCIIIP Act, an examinee may choose to be represented by a lawyer during an examination.

Criterion 4.3—Did the Commissioner require the person being interviewed to not disclose information or answers given at the examination?

Under s 61F(6) of the BCIIIP Act, the Commissioner cannot request that the person not disclose or discuss with other people any information, answers or other matters covered during the examination.

Criterion 4.4—Assessment of conduct of examination and related issues

We assess this criterion under four parts (discussed below): guidance for staff exercising coercive powers⁷, examination preparation⁸, conduct of examination⁹, and post examination.

⁶ This involves an assessment against: the best practice principles in relation to ‘Coercive Information-gathering powers of Government Agencies’ (Report no.48) 2008, by the Administrative Review Council’s (ARC), ‘Transition to Fair Work Australia for the Building and Construction Industry’ (Report) 2009, by the Honourable Murray Wilcox QC (referred to as the Wilcox Report), the requirements of the Australian Government Investigation Standards (AGIS) 2011, and the ABCC’s internal guidelines.

⁷ ARC Principles: 8—‘Training’, 10—‘Accountability’, 12—‘Conflict of Interest’, 14—‘Notices’. AGIS Investigation Practices, paragraph 4.2 ‘Formal interview’ and 4.4 ‘Coercive powers’.

⁸ AGIS Investigation Management, paragraphs 3.2 ‘Investigation commencement’ and 4.2.

⁹ ARC Principles: 1 and 2—‘Setting the threshold and scope’, 16—‘Examinations and hearings’.

Guidance for staff exercising coercive powers

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

Examination preparation

Before conducting an examination, did the Commissioner or person/s assisting the Commissioner 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; and consider likely reactions by 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 Commissioner explain the examination process?
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?¹⁰
- Was the examination conducted within standard business hours?
- Were regular breaks provided to the examinee throughout the examination?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning?¹¹

¹⁰ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

¹¹ The Wilcox Report, paragraphs 6.53 and 6.71.

- Was the line of questioning relevant to the investigation?¹²
- If relevant, was the examinee or the examinee’s legal representative permitted to ask questions, object to questions as being unclear or irrelevant to the subject matter of the examination, make comments and/or submissions at the completion of the examination?
- Did the person claim legal professional privilege or public interest immunity during the examination?¹³

Post examination

- Did the ABCC 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 the ABCC?¹⁴

¹² Under s 61B(5)(c) of the BCIP Act, the Commissioner’s application for an examination notice must include an affidavit, which amongst other things, outlines the grounds on which the examinee is capable of giving evidence relevant to the investigation.

¹³ Section 62(2) of the BCIP Act.

¹⁴ ARC Principle 16—‘Examinations and hearings’.

APPENDIX B—EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted six reviews between 1 October and 31 December 2018. The table below shows the date on which the examination was conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC18/001	22 March 2018	3 - 4 December 2018
ABCC18/002	22 March 2018	4 December 2018
ABCC18/003	23 March 2018	15 November 2018
ABCC18/004	23 March 2018	13 November 2018
ABCC18/005	No examination—notice to produce documents	20 March 2019
ABCC18/006	11 April 2018	20 December 2018