



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

FOR THE PERIOD 1 JANUARY TO 31 MARCH 2019

Quarterly report by the Commonwealth Ombudsman,
Michael Manthorpe PSM,
under Part 2 of Chapter 7 of the
*Building and Construction Industry
(Improving Productivity) Act 2016*

March 2020



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ISSN 2208-1062 (Print)

ISSN 2208-1070 (Online)

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Inquiries regarding the licence and any use of this report are welcome at:

Commonwealth Ombudsman

GPO Box 442

Canberra ACT 2601

Tel: 1300 362 072

Email: ombudsman@ombudsman.gov.au

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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 ABCC) 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 January and 31 March 2019 (the review period), consisting of five examination notices to attend before the Commissioner and answer questions, and one examination notice to provide documents to the Commissioner.

When conducting our review of the ABCC's use of examination powers, we assessed its 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. We also focused on the fair and reasonable treatment of examinees.

Overall, we were satisfied the ABCC was compliant with these requirements and standards.

During the review period the ABCC advised our Office it conducted one examination and issued one notice to give information to the ABCC under the BCIIP Act. We will review these in a subsequent quarter, with 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 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.
- 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. The Commissioner must give the Ombudsman the following as soon as practicable after the examination is completed:

- 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

The Ombudsman performs the independent oversight mechanism under Part 2 of Chapter 7 of the BCIIP Act, assessing the ABCC's performance and confirming procedural fairness for examinees. Under s 65(3)(a) of the BCIIP 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

When reviewing the examination notices and examinations, we assessed them against the following criteria:

1. Was the application for the 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 that guide our assessment.

5. Did the ABCC comply with any directions issued by the Minister (s 17)?

PROGRESS MADE SINCE PREVIOUS REPORT

We did not identify any issues in the last quarterly report containing review findings, for the period 1 October to 31 December 2018.

REVIEW RESULTS – 1 JANUARY TO 31 MARCH 2019

We conducted six reviews of examination notices and examinations between 1 January and 31 March 2019. 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 the examination notice made in accordance with the requirements of the BCIP 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 BCIP 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 AAT 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 BCIP 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 BCIP Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

We determined the ABCC was generally compliant with this criterion. Our review highlighted questions about the ABCC's actions to limit examinees' legal representatives' participation to certain times in the examination. We will consider our position and monitor this approach in future reviews.

Criterion 5—Did the ABCC comply 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.

APPENDIX A—ASSESSMENTS CONDUCTED UNDER CRITERION 4

Detailed below is how we determine whether examinations were conducted in accordance with the requirements of s 61F the BCIP Act, relevant best practice principles and standards, and the ABCC’s internal guidelines.¹

Criterion 4.1—Did the Commissioner conduct the examination?

Under s 61F(2) of the BCIP 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 BCIP Act, an examinee may choose to be represented by a lawyer during an examination.

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

Under s 61F(6) of the BCIP 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.

¹ 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 (ARC); ‘Transition to Fair Work Australia for the Building and Construction Industry’, 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.

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 powers², examination preparation³, conduct of examination⁴, and post examination.

Guidance for ABCC staff exercising coercive powers

- Do those exercising coercive powers 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 ABCC 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 ABCC explain the examination process to the examinee?

² 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’.

³ AGIS Investigation Management, paragraphs 3.2 ‘Investigation commencement’ and 4.2.

⁴ ARC Principles: 1 and 2—‘Setting the threshold and scope’, 16—‘Examinations and hearings’.

- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?⁵
- 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?⁶
- Was the line of questioning relevant to the investigation?⁷
- 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?⁸

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?⁹

⁵ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

⁶ The Wilcox Report, paragraphs 6.53 and 6.71.

⁷ Under s 61B(5)(c) of the BCIIIP 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.

⁸ Section 62(2) of the BCIIIP Act.

⁹ ARC Principle 16—'Examinations and hearings'.

APPENDIX B—EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted six reviews between 1 January and 31 March 2019. 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
ABCC18/007	16 August 2018	21 March 2019
ABCC18/008	Scheduled for 16 August 2018 - examination did not proceed	21 March 2019
ABCC18/009	21 August 2018	20 March 2019
ABCC18/010	14 November 2018	26 March 2019
ABCC18/012	20 December 2018	22 March 2019
ABCC19/002	08 February 2019 Notice to produce documents	20 March 2019

