



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

FOR THE PERIOD 1 APRIL to 30 JUNE 2022

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

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Executive summary

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act), the Commonwealth Ombudsman (the Ombudsman) must review the examination powers exercised by the Commissioner of the Australian Building and Construction Commission (ABCC) and any person assisting the Commissioner. Under s 65(6) of the 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.

The Australian Government committed to abolishing the ABCC. Sections of the Act relevant to the ABCC's functions were repealed by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 7 December 2022. Under transitional arrangements in the legislation, the Ombudsman will report to Parliament in 2023 on the ABCC's use of examination powers in the period between 1 July 2022 and the abolition of the ABCC.

References in this report to the Act reflect the legislation that was in force at the time of our reviews.

This report covers 6 reviews conducted by our Office between 1 April 2022 and 30 June 2022 (the review period).

When conducting our review of the ABCC's use of examination powers, we assessed the ABCC's performance against the requirements of the Act, the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the Regulations), relevant best practice principles and standards, and the ABCC's internal guidelines.

In our view, the ABCC complied with these requirements and standards during the review period, and we make no recommendations in this report.

Introduction

Under the 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 the Act, a designated building law, Commonwealth industrial instruments, or the Building Code.¹ 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 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 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(1) of the Act, 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, and
- 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 Act.

¹ The term 'Building Code' within the Act means the *Code for the Tendering and Performance of Building Work 2016*.

Review scope and criteria

Objective and scope of reviews

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

Under s 65(3)(b) of the Act, the Ombudsman may do anything incidental or conducive to reviewing examination powers exercised by the Commissioner.

Criteria used for reviews

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

1. Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and the Regulations (s 5)?
2. Did the examination notice comply with the requirements of the 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 Act (s 61E), and were claims of privilege properly handled?
4. Was the examination conducted in accordance with the requirements of the 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)?

Previous reports

In our 2021–22 quarterly review for the period 1 October 2021 to 31 December 2021, we found the ABCC complied with its legislative obligations. We identified legacy issues related to record-keeping for Record of Service documents and the process for transcript review by the examinee. Given the ABCC advice to our Office of its remedial action, we made no further suggestions for improvement.

In our 2021–22 quarterly review for the period 1 January 2022 to 31 March 2022, we found the ABCC was compliant with its legislative obligations. We commented on practices around the requirement to maintain examinee confidentiality. However, noting the emphasis the ABCC has placed on the requirement in guidance materials and staff training, we did not make any suggestions for further improvement in that report.

For this review period, we found that the ABCC complied with its legislative obligations. We made one better practice suggestion relating to the review of affidavits to ensure they are complete and accurate. This was based on minor issues with the affidavit we reviewed that did not affect compliance with the Act.

The ABCC continues to follow the good practices we previously reported. We also acknowledge the ongoing positive engagement of the ABCC with our quarterly reviews.

Review results – between 1 April 2022 and 30 June 2022

We conducted 6 reviews of an examination notice and examination between 1 April 2022 and 30 June 2022. 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 Act (s 61B) and Regulations (s 5)?

The ABCC complied with this criterion. We made one minor finding related to better practice.

A single affidavit was used in relation to the 6 examination notices issued. We identified the affidavit referred to certain actions undertaken, exercising rights in accordance with Part 3-4 of the *Fair Work Act 2009*, but without referring to the specific provision (s 500 of the *Fair Work Act 2009*). The contravention of s 500 of the *Fair Work Act 2009* was referenced in the examination notices issued but not in the affidavit itself.

We also identified 2 typographical errors in the affidavit: incorrect spelling of an examinee's name, and an incorrect examinee named in relation to an examinee being invited to contact the ABCC. We are satisfied these typographical errors did not affect compliance with the Act.

We **suggest as a matter of better practice** the ABCC ensures staff review affidavits for accuracy prior to applying for examination notices.

Criterion 2 – Did the examination notice comply with the requirements of the 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 presidential member of the AAT.

The ABCC complied with this criterion.

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

The ABCC complied with this criterion.

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

The ABCC complied with this criterion.

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 review period.

Appendix A — Assessments conducted under criterion 4

We detail below how we determine whether examinations were conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines.²

Criterion 4.1 – Did the Commissioner conduct the examination?

Under s 61F(2) of the Act, the Commissioner must conduct the examination of the person named on the issued Examination Notice (under s 61C). Under ss 61F(4) and (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 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 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 4 parts (discussed below): guidance for staff exercising coercive powers,³ examination preparation,⁴ conduct of examination,⁵ and post examination.

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 examination powers?

² 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, and *Transition to Fair Work Australia for the Building and Construction Industry* (Report) 2009; by the Hon 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.

³ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principle 8 'Training' page 26; Principle 10 'Accountability', page 27; Principle 12 'Conflict of Interest', page 30; Principle 14 'Notices', page 37. AGIS Investigation Practices paragraphs 4.2 'Formal interview' and 4.4 'Coercive powers'.

⁴ Australian Government Investigation Standards Investigation Practices paragraphs 3.2 'Investigation commencement' and 4.2 'Formal interview'.

⁵ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principles 1 and 2 'Setting the threshold and scope' pages 11 and 17, Principle 16 'Examinations and hearings' page 43.

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

- Before 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?⁶
- 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?⁷
- Was the line of questioning relevant to the investigation?⁸
- 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?⁹

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?¹⁰

⁶ Australian Government Investigation Standards Investigation Practices, paragraph 4.1.1 'Obtaining information'.

⁷ The Wilcox Report, paragraphs 6.53 and 6.71.

⁸ Under s 61B(5)(c) of the Act, the Commissioner's application for an examination notice must include an affidavit, which among other things, outlines the grounds on which the Commissioner believes the examinee has information or documents, or is capable of giving evidence, relevant to the investigation.

⁹ Under s 62(2) of the Act, a person is not required to give information, produce a document or answer questions if to do so would enliven legal professional privilege or public interest immunity.

¹⁰ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principle 16 'Examinations and Hearings' page 43.

Appendix B — Examinations conducted and reviewed

The Ombudsman conducted 6 reviews between 1 April 2022 and 30 June 2022 of examinations conducted by the Commissioner between 1 January to 31 March 2022.

The table below shows the dates on which the examinations were conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC22/001	03/03/2022	14/06/2022
ABCC22/003	01/03/2022	15/06/2022
ABCC22/004	28/02/2022	15/06/2022
ABCC22/005	01/03/2022	16/06/2022
ABCC22/006	28/02/2022	15/06/2022
ABCC22/007	02/03/2022	14/06/2022