



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

FOR THE PERIOD 1 JULY 2013 TO 30 JUNE 2014

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

August 2014

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1 INTRODUCTION

Under the *Fair Work (Building Industry) Act 2012* (the FWBI Act), the Director of Fair Work Building and Construction (FWBC) can investigate any act or practice by building industry participants that may contravene particular legislative and industry requirements.¹ As part of an investigation, the Director may apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice under s 45 of the FWBI Act. The use of an examination notice is a coercive information-gathering power which requires the recipient of the notice to:

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

A person commits an offence and may incur penalties if they fail to comply with an examination notice.

Under s 54A(3) of the FWBI Act, the Commonwealth Ombudsman is required to review the exercise of these coercive powers by the Director and any person assisting the Director.

Section 54A(6) of the FWBI Act requires the Commonwealth Ombudsman to report to Parliament as soon as practicable after the end of each financial year about the examinations conducted by the Director and the results of reviews carried out by the Commonwealth Ombudsman during that year.

This report covers activity that occurred in the 2013-14 financial year.

1.1 Summary of reviews

During 2013-14, we reviewed two examinations conducted by the then Acting Director of FWBC and persons assisting him. We reviewed the conduct of the examinations against the criteria outlined under paragraph 3.2. In our view, both examinations were conducted in accordance with the requirements of the FWBI Act, relevant best-practice principles, standards and FWBC's internal policies and guidelines. However, we have made several suggestions regarding how FWBC may enhance, or better demonstrate, its adherence to these principles, standards and policies in exercising its examination powers.

2 EXAMINATIONS CONDUCTED

During 2013-14, FWBC conducted four examinations: two on 23 July 2013, one on 25 June 2014 and one on 26 June 2014. The results of our reviews of the examinations conducted on 23 July 2013 are discussed under part 4 of this report. The results of the reviews of the examinations conducted in June 2014 will be discussed in our 2014-15 report to Parliament.

¹ 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 REVIEW SCOPE AND METHODOLOGY

3.1 Objective and scope of the reviews

The objective of the reviews is to assess the exercise of examination powers under the FWBI Act by the Director and any person assisting the Director. The FWBI Act gives the Commonwealth Ombudsman discretion to determine the scope of the review.

3.2 Criteria used for the reviews

In conducting the reviews, we applied (where relevant):

- provisions under Division 3, Part 1, Chapter 7 of the FWBI Act
- parts of the Fair Work (Building Industry) Regulations 2005 (the regulations)
- best-practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies* (best-practice principles)²
- requirements under the Australian Government Investigation Standards
- FWBC's internal policies and guidelines on the use of examination notices and the conduct of examinations.³

FWBC was assessed against five criteria (where applicable):

1. Were applications for examination notices made in accordance with the requirements of the FWBI Act (s 45) and the regulations?
2. Did the examination notices comply with the requirements of the FWBI Act (ss 47 and 48), the regulations and relevant best-practice principles set out by the Administrative Review Council?
3. Were the examination notices given in accordance with the requirements of the FWBI Act (s 50) and claims of privilege properly dealt with (s 52(2))?
4. Were the examinations conducted in accordance with the requirements of the FWBI Act (s 51), relevant best-practice principles, standards and FWBC's internal policies and guidelines?
5. Where directions were issued by the Minister, were these complied with (s 11)?

3.3 Provision of material by the Director

In order to assist the Commonwealth Ombudsman with the reviews, the Director must provide the following information and documents to the Commonwealth Ombudsman:

² The best-practice principles are available at:

<http://www.arc.ag.gov.au/Publications/Reports/Pages/default.aspx>.

³ FWBC published Guidance Note 6 *Examination Notice Policy* on 2 April 2013. This document is available at: <http://www.fwbc.gov.au/guidance-notes>.

- Section 49:
 - o a copy of each examination notice issued
 - o the affidavit that accompanied each application for an examination notice
 - o any other information in relation to an examination notice that was given to the nominated AAT presidential member who issued the notice.
- Section 50(7): a copy of each notice given varying the time of the examination (where relevant).
- Section 54A(1) and (2), for each examination conducted:
 - o a report about the examination
 - o a video recording of the examination
 - o a transcript of the examination.

3.4 Review and reporting methodology

The reviews were carried out by:

- examining the material provided by FWBC
- seeking further clarifying information from FWBC.

We advised FWBC of our findings following both reviews and provided an opportunity for comment. FWBC also had the opportunity to comment on this annual report ([Appendix A](#)).

4 RESULTS OF REVIEWS

4.1 Were applications for examination notices made in accordance with the requirements of the FWBI Act (s 45) and the regulations?

Section 45 of the FWBI Act and the regulations set out the general requirements before making an application, and prescribe the requirements in relation to the form and content of the application. Under this criterion, we assessed whether the applications for examination notices were made in accordance with the requirements of s 45 and the regulations.

FWBC was assessed as compliant with this criterion.

4.2 Did the examination notices comply with the requirements of the FWBI Act (ss 47 and 48), the regulations and relevant best-practice principles set out by the Administrative Review Council?

Under this criterion, we assessed whether the examination notices and accompanying documentation issued to the examinee complied with the requirements under ss 47 and 48 of the FWBI Act, the regulations and best-practice principles.

Sections 47 and 48 outline the considerations that a nominated AAT presidential member must have in determining whether to issue an examination notice, and the form and content of that notice. In making an assessment against the requirements of ss 47 and 48, we do not

comment on the nominated AAT presidential member's decisions. However, we may comment on any issues noted with the examination notices which were actions taken by FWBC. We also considered best-practice principles relating to the information that an examination notice should detail to ensure that the examinee understands the notice and their rights and obligations.

FWBC was assessed as compliant with this criterion, with one best-practice issue noted, as discussed below.

4.2.1 Ensuring the examinee understands the examination notice

Principle 14 of the Administrative Review Council's best-practice principles suggests that the examinee should be informed of: the legislative basis for the examination; how their personal information may be handled; and of their rights in relation to privilege. FWBC's *Guidance Note 6 – FWBC Examination Notice Policy* states that a covering letter will accompany all examination notices to assist the recipient to understand the notice. The matters outlined in Principle 14 are jointly addressed in the examination notice and covering letter template.

For both examination notices reviewed, covering letters were not initially provided to the examinees in accordance with FWBC's usual practice as outlined in *Guidance Note 6 – FWBC Examination Notice Policy*. However, covering letters were provided to each examinee (care of their legal representatives) approximately three weeks after the examination notices were served on the examinees.

In response to this issue, FWBC acknowledged that covering letters should have been provided to each examinee at the time the examination notices were served and noted that this was an oversight, which was rectified as soon as it was identified by FWBC.

4.3 Were the examination notices given in accordance with the requirements of the FWBI Act (s 50) and claims of privilege properly dealt with (s 52(2))?

Under this criterion, we assessed whether examination notices and variations of examination time were served in accordance with the requirements of s 50 of the FWBI Act. Section 50 requires an examination notice to be served on the person in relation to whom it was issued within three months after the day on which it was issued, and enables the Director to subsequently vary the time for examination. However, an examination may not be conducted within 14 days after the examinee is served with an examination notice or notice to vary the examination time.

FWBC was assessed as compliant with the service requirements under s 50 in relation to both examination notices and the corresponding variations of time for the examinations.

If claims of legal professional privilege were made by the examinee, we also assess whether such claims were properly dealt with (s 52(2)). FWBC advised that neither examinee claimed legal professional privilege; therefore, no assessment was made under s 52(2).

4.4 Were the examinations conducted in accordance with the requirements of the FWBI Act (s 51), relevant best-practice principles, standards and FWBC's internal policies and guidelines?

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)). Under this criterion, we assessed whether the examinations were conducted in accordance

with s 51 of the FWBI Act, relevant best-practice principles, requirements of the Australian Government Investigation Standards and FWBC's internal policies and guidelines.

FWBC was assessed as compliant with this criterion. However, we made several suggestions regarding how FWBC may enhance, or better demonstrate, its adherence to the above in exercising its examination powers. As the conduct of examinations is the primary focus of our reviews, we have discussed FWBC's performance against each aspect of this review criterion below, regardless of whether any issues requiring improvement were noted.

The Director must conduct the examination (s 51(2))

Section 51(2) requires the Director to conduct each examination. *Guidance Note 6 – FWBC Examination Notice Policy* states that the Director will personally preside over all examinations. In relation to the two examinations reviewed during the reporting period, the then Acting Director presided over both examinations and made the decision to engage an external lawyer to ask questions at the examinations on the basis that it was appropriate to do so. FWBC had previously obtained legal advice from the Australian Government Solicitor about this issue.

The person is permitted to be represented at the examination by a lawyer of the person's choice (s 51(3))

The examinees under both examination notices chose to be represented by a lawyer.

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 given by both examinees were given on oath or affirmation.

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 (s 51(6)).

Neither of the examinees were requested to undertake not to disclose or discuss matters relating to the examinations.

Guidance for staff exercising coercive powers

The Australian Government Investigation Standards and best-practice principles note the importance of having written procedures for the exercise of coercive information gathering powers. *Guidance Note 6 – FWBC Examination Notice Policy* relates to the use of examination notices and the conduct of examinations by FWBC. *Guidance Notes 1 and 2, Litigation Policy and Investigative Process* respectively,⁴ relate to professional and ethical responsibilities and obligations by the Director and FWBC. They outline that the Director and the office are impartial, and do not represent either party to an investigation. They also outline the principles of natural justice in FWBC's decision-making process. FWBC publishes these guidance notes on its website, providing transparency to the public about its use of coercive powers.

It is our view that the guidance notes constituted sufficient guidance to the then Acting Director, and other persons assisting him, on the conduct of examinations.

⁴ The FWBC updated *Guidance Note 1 – Litigation Policy* and *Guidance Note 2 – Investigative Process* on 17 April 2014. Both documents are available at: <http://www.fwbc.gov.au/guidance-notes>.

Preparing for an examination

We assessed FWBC's preparation for the examinations and, in particular, whether or not there was sufficient planning. Planning for an examination should involve:⁵

- identifying objectives of the examination, and the desired outcomes
- formulating questions to be asked during the examination, how best to order and phrase the key questions, and considering likely reactions of the examinee
- implementing risk-management strategies (where relevant)
- considering the logistics of, and resources for, the examination (e.g. arranging examination room, equipment and personnel).

FWBC undertook numerous activities in preparation for each examination. In addition to drafting the statement in support and affidavits of the then Acting Director, FWBC drafted opening remarks for him to read at each examination. FWBC also advised that numerous meetings were held between its Field Operations and Legal teams to formulate examination questions, using counsel to further develop those questions and provide advice when required.

It is our view that FWBC adequately prepared for the conduct of both examinations.

Conduct of the examination

We assessed the conduct of both examinations against the criteria below.⁶

Prior to commencing each examination, did the Director explain the examination process?

FWBC's covering letter (discussed at paragraph 4.2.1 above), which was provided to each examinee, detailed the examination process, the examinee's rights and obligations, and how the information obtained from the examination may be used by FWBC.

For both examinations, we noted the then Acting Director appeared to be reading from a script for introductory matters. He outlined the examinee's rights and obligations, stated the legislative power under which FWBC was conducting the examination, told the examinee the names and roles of FWBC attendees and why the examination was being video recorded. He also advised that a copy of the transcript of the examination would be provided to each examinee for comment.

In our view, FWBC adequately explained the examination process to each examinee.

If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?

Neither of the examinees appeared to require the services of an accredited interpreter.

Although not applicable to these examinations, we suggested that, as best practice, FWBC should incorporate a standard offer in its covering letter to make available an interpreter at examinations, if required. Incorporating this standard offer would remove the subjectivity in

⁵ The requirements are derived from the Australian Government Investigation Standards.

⁶ The criteria are derived from the Australian Government Investigation Standards, best-practice principles and FWBC's internal policies and guidelines.

determining whether an examinee would benefit from an interpreter, particularly where English may not be the examinee's first language. FWBC advised that it will consider whether to inform future examinees that they can request FWBC to provide an interpreter at the examination.

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 they allowed to ask questions, make comments and/or submissions at the completion of the examination?

Both examinees and their legal representative were able to freely clarify questions and information given throughout the conduct of the examination. At the end of each examination, the examinees' legal representative was also provided with the opportunity to clarify anything that was given by the examinees by way of evidence and make any submissions.

Was the examination conducted within standard business hours? Was the duration of the examination reasonable? Were there regular adjournments?

The timing and duration of the examinations appeared to be reasonable, with regular adjournments held throughout each examination. Based on information provided in FWBC's s 54A(1)(a) report to our office, both examinations were commenced during standard business hours. Although we were unable to determine the time that each examination commenced, adjourned and finished from the video recordings alone, we noted that the examinations lasted for approximately one hour and 15 minutes and two hours and 55 minutes, with regular adjournments.

To assist us in making our assessments, we suggested that FWBC incorporate a time counter on each video recording or position a clock in the examination room that is clearly visible in the video recording. In response to this suggestion, FWBC advised that the examinations were recorded using its video-conferencing facilities, which did not enable FWBC to incorporate a time counter on the video recordings. FWBC advised that it will consider adopting our suggestion for future video recordings.

Tone and manner of questioning: were there obvious forms of intimidation, and particularly intrusive questioning? Was the line of questioning relevant to the investigation?

Both examinees and their legal representative were treated in a courteous and professional manner throughout the examination. Based on documents provided to us under ss 49 and 54A(1) and (2), questions asked of each examinee were open and not leading, and appeared relevant to the investigation.

Post-examination

We assessed whether FWBC provided a copy of the transcript to the examinees and invited them to make any corrections or written comments in relation to it.⁷

Shortly after the examinations, a copy of the transcript and video recordings of the examinations (provided upon request of the examinees) were provided to the examinees, care of their legal representative, for correction and comment. In response, FWBC received two letters from the examinees' legal representative reporting errors and omissions in both

⁷ This criterion is derived from the Australian Government Investigation Standards and FWBC's internal policies and guidelines.

transcripts. We noted two issues in relation to the process of verifying the accuracy of the examination transcripts, as discussed below.

Process of verifying transcripts

We highlighted a risk with FWBC's practice of inviting an examinee to make corrections and comments to the transcript of the examination before FWBC has reviewed it for accuracy. There was a procedural risk that the examinee would not be provided with the opportunity to review the most accurate version of the transcript and/or agree to any subsequent amendments made by FWBC.

In response to this issue, FWBC amended its *Guidance Note 6 – FWBC Examination Notice Policy* to direct the responsible inspector to proof read the transcript for accuracy before providing it to the witness for correction and comment. We commend FWBC for its responsiveness in this matter.

We note that this was not an issue in relation to the two examinations reviewed as FWBC advised that copies of FWBC's amended transcripts were provided to the examinees' legal representative (i.e. the transcripts were provided a second time) and that no further correspondence was received in relation to them.

Ease of verifying transcripts

Examinees were provided with copies of documents to which the then Acting Director and persons assisting him referred to during the examinations. In a small number of instances, the exhibit number was not assigned to each document referred to until several minutes after questions were asked about them.

For the purpose of assisting examinees in reviewing and determining the accuracy of examination transcripts, we suggested that FWBC consistently introduce exhibits and assign the relevant exhibit number before asking questions of the examinee in relation to each document. This would avoid confusion and ensure clarity in context for both FWBC and examinees when reviewing the transcript for accuracy.

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

Section 11 of the FWBI Act provides that the Minister for Employment may give directions to the Director about the manner in which the Director is to perform the functions or exercise the powers under the FWBI Act.

Under this criterion, we assess whether an examination was conducted in accordance with any directions issued under s 11. No such directions were issued at the time of the examination. Therefore, this criterion did not apply.

Colin Neave
Commonwealth Ombudsman

APPENDIX A



Australian Government
**Fair Work Building
& Construction**

11 August 2014

Mr Rodney Lee Walsh
Senior Assistant Ombudsman
Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Sir

**Draft Annual report by the Commonwealth Ombudsman under s 54A(6) of the
Fair Work (Building Industry) Act 2012 – 1 July 2013 to 30 June 2014**

Thank you for forwarding a draft copy of the report to this agency. The Director has asked me to reply direct on his behalf.

The agency has appreciated the opportunity to provide comments and proposed actions during the preparatory stages of your report. These comments and actions are reflected in your report.

I am pleased that FWBC has been assessed as compliant with each of the elements considered by your office in the use of relevant powers under the Fair Work Building Industry Act 2013/2

Yours sincerely

A handwritten signature in blue ink that reads "Brian Corney".

Brian Corney

Chief Counsel

Fair Work Building & Construction