



**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 2020 TO 31 DECEMBER 2020

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

SEPTEMBER 2021



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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 exercise of examination powers by the Commissioner of the Australian Building and Construction Commission (the Commissioner) and any person assisting the Commissioner. Under subsection 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 Australian Building and Construction Commission's (ABCC) and reviews conducted by the Ombudsman.

This report covers 12 reviews conducted by our Office between 1 October 2020 and 31 December 2020 (the review period).

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

The ABCC was mostly compliant against these requirements and standards, although in each examination we identified some aspects that could be improved. We make no recommendations in this report.

We make 4 suggestions and 6 better practice suggestions to the ABCC stemming from 9 findings. A suggestion is made when we identify non-compliance. A better practice suggestion is made to improve administration or to manage an unrealised risk of non-compliance we identify.

Some of our findings relate to isolated errors and the ABCC does not need to take any further action. The suggestions made in this report relate to guidance for staff exercising coercive powers, maintaining examinee confidentiality, the conduct of the examination (including the examinee's right to object to questions), unintentional disclosure of sensitive information, clarity around examination obligations, and the provision of examination transcripts to examinees.

We encourage the ABCC to continue its existing positive practices around using plain language and ensuring fairness to examinees.

Introduction

Under the BCIP Act, the Commissioner may inquire into and investigate any act or practice by a building industry participant that may be contrary to a designated building law, 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 BCIP 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 BCIP 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, 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 BCIP Act.

Review scope and criteria

Objective and scope of reviews

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

Criteria used for reviews

The examination and notice were assessed 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 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?
5. Did the ABCC comply with any directions issued by the Minister (s 17)?

Appendix A provides detailed inspection criteria that guide our assessment.

Previous reports

In our last 2 reports, for the review periods of 1 April 2020 to 30 June 2020 and 1 July 2020 to 30 September 2020, the Commissioner advised that no examinations were conducted. Consequently, our Office did not complete any reviews under the BCIP Act.

Our last review covered the period 1 January 2020 to 31 March 2020. In our report to the ABCC, no issues were raised, and we were satisfied the ABCC was compliant with its use of the examination powers.

In this reporting period (1 October 2020 to 31 December 2020) we identified a need for the ABCC to provide clarity around voluntarily providing documents during examinations, a matter that was raised in previous reports. We also noted the ABCC continued with some good practices we previously reported on.

Review results—between 1 October 2020 and 31 December 2020

Between 1 October 2020 and 31 December 2020, we conducted 12 reviews of examination notices and the associated examinations that were conducted by the ABCC between 1 July 2020 and 30 September 2020. 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 generally refers to the ABCC.

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

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 presidential member of the AAT.

Guidance for staff exercising coercive powers

The Administrative Review Council (ARC) provides best practice guidance¹ for agencies using coercive examination notices. Principle 18 emphasises the need for agencies to provide:

- Guidance to staff about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information (through coercive information gathering powers) might be contemplated.
- Guidelines and training for agency officers in relation to the handling of such information and the effect of and interaction between the *Privacy Act 1988* (Cth) and agencies' secrecy provisions.

In our view the ABCC's guidelines and training documents would benefit from providing further guidance to ABCC staff in their handling of information obtained under coercive examination notices and their obligations under the *Privacy Act 1988* (Cth).

Our draft report to the Commissioner **suggested as a matter of better practice** the ABCC revise its guidelines and training documents to assist staff in dealing with information in accordance with Principle 18 of the ARC guidance (**better practice suggestion 1**).

In response to this suggestion, the Commissioner advised the ABCC had reviewed its guidance on the issue and gave an assurance that sufficient training and guidance was in place. We are satisfied with this response to our better practice suggestion.

¹ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies'* (Report no.48, 1 May 2008) page 68.

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?

The ABCC was compliant with this criterion. However, we identified one potential concern in relation to the ABCC's adherence to its internal guidelines.

Maintaining examinee confidentiality

The ABCC's internal guidelines require examinee confidentiality to be maintained when serving an examination notice.

We did not find any evidence of examinee confidentiality being breached during the service of examination notices in the review period. We identified 5 instances where the examinee's privacy appeared to be at risk due to the way the examination notice was served.

On raising this issue with the Commissioner, the Ombudsman was provided with further information regarding each of these instances which resolved our concerns. Further, the Commissioner expressed his view that ABCC staff fully understand their legislative obligations and that existing processes are robust and defensible.

We will continue to monitor this issue at future reviews.

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?

The ABCC was compliant with this criterion, except in the instances listed below.

Comments on examination preparation when conducted remotely

As a result of the COVID-19 pandemic, the Commissioner was unable to attend 3 examinations in person and therefore relied on conducting these examinations remotely via a video conferencing system. While there is no requirement that an examination be conducted in person, the *ABCC Legal Practice Manual* requires everyone in the room to be seen in any video recording. We interpret this as meaning that all attendees must be visible in the video recording.

In one examination, the Commissioner was unable to view all the participants present in the examination room. In another, the quality of the video provided for our review was intermittent as the view of the image of the Commissioner repeatedly faded in and out during the examination recording. It was not clear if the participants were impacted in the same way. Consequently, we were not able to view the Commissioner for the duration of this specific examination.

We note the examinations conducted remotely were a consequence of COVID-19 constraints and that it remains the ABCC's strong preference to conduct examinations in person.

Examinee's right to object

In 2 instances where the examinee had no legal representation, we observed an examinee being advised in an opening statement that the Commissioner will monitor and regulate the questions asked. However, the examinee was not advised they may object to questions and the Commissioner will consider any such objection. The examinee was instead advised they may clarify any question with Counsel Assisting who could then rephrase the question.

In another instance the self-represented examinee was provided with general information regarding the ability to object to questions but not that they specifically were entitled to object.

We **suggested as a matter of better practice** the Commissioner's opening statement use explicit wording about the right of an examinee to raise objections or seek clarifications and that such objections or clarifications would be considered by the Commissioner (**better practice suggestion 2**).

In response to this suggestion, the Commissioner provided an assurance that the Commissioner's opening remarks will in future address the matters about which a witness may object and the procedure for doing so.

Despite this better practice suggestion, we made a positive finding that the Commissioner provided a thorough and accessible general explanation to examinees at the start of each examination about their obligations.

Objections to questions in examinations

Paragraph 61B(2)(c) of the BCIP Act provides that an examination notice may require the person to attend before the Commissioner and answer questions relevant to the investigation. Under s 62 of the BCIP Act, it is an offence to not answer questions relevant to an investigation as required by the examination notice. The examination notice sets out the matters to be examined, and states details relevant to the investigation.

We observed 2 instances where questions were objected to by the examinee's solicitor. The objections were based on the questions' relevance to the examination notice. We expressed a view to the Commissioner that the ruling on the objections did not particularise the link between the questions asked and their relevance to the matters stated on the examination notice, which is the only record the examinee has stating the purpose of the investigation.

Under the BCIP Act a person commits an offence by failing to answer questions relevant to an investigation. The penalty for such an offence is 6 months imprisonment.² When a person is examined, they can rely on the notice to make a judgment as to whether the questions are relevant to the investigation of the suspected contravention.³ We consider the Commissioner providing sufficient reasons to the examinee, detailing the relevance of a question in overruling an objection, would:

- help ensure questions are relevant as required by the BCIP Act
- provide clarity as to whether it would be an offence not to answer the question, and
- help an examinee to assess the relevance of future questions asked.

We suggested the Commissioner obtain advice on the obligation to provide reasons for his rulings on an objection in full, including specifying which parts of the examination notice relate to any question objected to on the basis of relevance (**suggestion 1**).

In a separate examination, the Commissioner gave reasons in response to a similar objection, with an appropriate explanation for his ruling.

Having regard to these inconsistent approaches, the Commissioner agreed that on some occasions it would be appropriate to provide an explanation or reasons for ruling on an objection. However, he submitted that whether to provide this explanation on every occasion where an objection is made on relevance grounds should remain at the discretion of the Commissioner. The Commissioner

² Subparagraph 62(1)(b)(iv), BCIP Act.

³ *Ehrke v Australian Building and Construction Commissioner* [2020] FCA 267 at [52].

determines objections on their merits and considers the extent to which reasons for a ruling on objections are appropriate in each instance.

We are satisfied by the Commissioner's view. This is particularly the case when objections to questions may risk a delay to, or frustration of, an examination.

We will continue to monitor the process for dealing with objections.

Unintentional disclosure of sensitive information

We identified one occasion where sensitive information was mistakenly disclosed by the ABCC during an examination and potentially on-disclosed through further transcription processes.

While this was an isolated and accidental error, given the significant risks associated with disclosing sensitive information, we **suggested** the ABCC take steps in its pre-examination preparation to avoid accidental disclosure of sensitive information during examinations (**suggestion 2**).

We further **suggested** the ABCC obtain advice regarding the possible on-disclosure of sensitive information in its transcripts and therefore the importance of redacting transcripts (**suggestion 3**).

We **suggested** the ABCC establish a practice of reviewing transcripts and redacting sensitive information prior to further dissemination (**suggestion 4**).

In response to our suggestions the Commissioner acknowledged the inadvertent disclosure we found and agreed with the suggestion to redact sensitive information not intended for disclosure. The Commissioner advised there is an established practice for the review of transcripts and the ABCC will ensure any sensitive information is identified and flagged for legal review in future.

We will continue to monitor the handling of sensitive information at future reviews.

Clarity around voluntarily providing documents during examinations

Subsection 61B(2) of the BCIP Act provides that an examination notice may require the person to give information to the Commissioner, or produce documents to the Commissioner, or attend before the Commissioner and answer questions relevant to an investigation.

We observed one instance where documents were requested in circumstances where, in our view, the ABCC did not clearly communicate that the examinee's provision of additional documentation was voluntary. The voluntary nature of this request may not have been clearly understood by the examinee, given the request was made in the context of a compulsory examination.

Our previous reports⁴ highlight this issue and provided suggestions to the ABCC to ensure there is sufficient clarity around requesting and using voluntarily provided documents during examinations. It is of concern this remains an identified issue.

⁴ See: Commonwealth, *Quarterly report by the Commonwealth Ombudsman, under Part 2 of Chapter 7 of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 October 2019 to 31 December 2019*, (July 2020) pages 7–8. And, Commonwealth, *Quarterly report by the Commonwealth Ombudsman, under Part 2 of Chapter 7 of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 January 2019 to 31 March 2019*, (March 2020) page 5.

We also observed better practice in one review where the ABCC requested documents from an examinee in these circumstances. In this examination, the ABCC informed the examinee of the voluntary nature of the request and provided a sufficient explanation.

We reiterated our **better practice suggestion** from 2019⁵ for the ABCC to explain to examinees that provision of documents during examinations is voluntary (**better practice suggestion 3**).

In response, the Commissioner acknowledged prior findings from the Ombudsman that the witness be informed the provision of documents during an examination is voluntary, absent the examination notice requiring the examinee to produce a document. The Commissioner undertook to address this issue through additions to the examination preparation process.

We will continue to monitor this issue at future reviews.

In another instance, we found the ABCC requesting the examinee annotate a document during the examination. It was not clear how or if this annotated document was recorded. Prior to the annotation being made, the full document had already been tendered and entered as an exhibit. No subsequent tendering of the annotation within the document occurred.

We **suggest as a matter of better practice** the ABCC ensure annotated documents are tendered as separate exhibits or a fulsome explanation be recorded of the annotation (**better practice suggestion 4**).

The Commissioner acknowledged this suggestion, and advised this is the ABCC's preferred approach, and will be implemented.

Process for transcript review by the examinee

Principle 16 of the ARC guidance⁶ requires agencies to afford examinees the opportunity to view and suggest corrections to a transcript of compulsory examination proceedings.

We found the 2 ABCC internal guidance documents relied on for this process were inconsistent regarding the standard process for the delivery of examination transcripts to examinees or their legal representatives. One guideline required hand delivery of the transcript and the other required the transcript be mailed along with a cover letter. Neither document stated what was considered a reasonable timeframe for a response from the examinee, nor any instructions on what to do should no response be received.

Of the 12 examinations reviewed, in 4 instances the transcripts were hand delivered and in 8 instances a letter (or email) was sent to the examinee or their solicitor.

We further identified instances where the process for delivery of transcripts involved the following:

- Internal correspondence from the ABCC Inspector advised of the hand delivery of 3 transcripts from 3 examinations to their respective examinees. The ABCC's records do not provide details to confirm if and what precautions were taken in maintaining examinee confidentiality in the hand delivery of the transcript in these instances.

⁵ See: Commonwealth, *Quarterly report by the Commonwealth Ombudsman, under Part 2 of Chapter 7 of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 January 2019 to 31 March 2019*, (March 2020) page 5.

⁶ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no.48, 1 May 2008) page 43.

- No stated deadline for when the examinee should reply to the invitation to comment, or a deadline was given but not standardised (varying between 2 weeks and 3 weeks).
- An invitation to call the ABCC officer to report any errors or omissions in the transcript, which appeared contrary to the guidelines which sought a response in writing. We consider that while a call can help to explain or clarify an issue, it does not take the place of a written response.

We **suggested as a matter of better practice** the ABCC establish a single consistent process for providing the transcript to an examinee for their review and for requesting a response by a certain date. Ideally, the response requested from the examinee would be to provide either any suggested amendments in writing or positive confirmation in writing that no changes are required. It would clearly inform the examinee that, if no response is received by the specified date, it will be taken as confirmation that no changes are required (**better practice suggestion 5**). If adjustments to the process are made in individual cases, for example, to communicate effectively with someone with a disability or in remote Australia, the adjustment must be recorded clearly on the file.

The Commissioner advised the ABCC was reviewing its processes and will advise our Office of a revised policy in future.

We will follow up on this issue at future reviews.

Inaccuracies in transcriptions

The ABCC's internal guidelines require examination transcripts be verified by ABCC staff prior to their provision to an examinee. We observed that in one instance the transcript was not sufficiently accurate when compared with the audio of the examination provided. The transcript in this instance contained a number of references to audio marked as '[inaudible]'. However, in our review we were able to ascertain the words stated.

The examinee was not provided an audio recording, only the transcript of the examination. As such, it is incumbent on the ABCC to provide the examinee with an accurate transcript. That did not occur in this instance.

In another instance, the transcript at one stage misidentified the solicitor for the examinee as Counsel Assisting the Commissioner.

As a matter of **better practice we suggested** the ABCC remind staff of their obligations to appropriately review examination transcripts to ensure the most complete and accurate transcript record of the examination is provided to examinees (**better practice suggestion 6**).

The Commissioner noted our suggestion and advised the ABCC will apply its best endeavours to ensure accurate examination transcripts are provided to examinees.

We will continue to monitor this issue at future reviews.

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

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

Positive practices

We noted several good practices throughout our reviews that we encourage the ABCC continue:

- The Commissioner sought confirmation from self-represented examinees that it was their intention not to be legally represented at the examination and stated the examinee can seek to postpone the examination at any time to seek legal advice if they so choose.
- The Commissioner provided a thorough and accessible general explanation to examinees at the start of each examination about their obligations, including examples of how certain concepts apply to the examination (for example, privilege against self-incrimination) and checking for the examinee's understanding of these concepts.

We acknowledge the Commissioner's response to our review and draft report, and his constructive engagement with our findings. We are reassured that the ABCC has a focus on building a culture of compliance.

Appendix A—Assessments conducted under criterion 4

Detailed below are the factors we use to determine whether examinations were conducted in accordance with the requirements of the BCIP Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines.⁷

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 that the information or answers are, or will be, true.

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 of their choice 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 BCIP Act, the Commissioner cannot require the person to undertake not to 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,⁸ examination preparation,⁹ conduct of examination,¹⁰ 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 examinations powers?

⁷ This involves an assessment against: the best practice principles in relation to the Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no.48, 1 May 2008), and the Report by the Honourable Murray Wilcox, *Transition to Fair Work Australia for the Building and Construction Industry* (Report, March 2009) (referred to as the Wilcox Report); the requirements of the Australian Government Investigation Standards (AGIS) 2011; and the ABCC's internal guidelines.

⁸ 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'.

⁹ AGIS Investigation Management paragraphs 3.2 'Investigation commencement' and 4.2.

¹⁰ 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' page 11, 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

- 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?¹¹
- 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?¹²
- Was the line of questioning relevant to the investigation?¹³
- 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?¹⁴

¹¹ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

¹² The Wilcox Report, paragraphs 6.53 and 6.71.

¹³ Under paragraph 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 Commissioner believes the examinee is capable of giving evidence relevant to the investigation.

¹⁴ Subsection 62(2) of the BCIP Act.

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?¹⁵

¹⁵ 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 12 reviews between 1 October 2020 and 31 December 2020 of examinations conducted by the Commissioner between 1 July 2020 and 30 September 2020.

The table below shows the date on which the examinations were conducted and when the Ombudsman conducted its reviews.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC20/001	21 July 2020	5 November 2020
ABCC20/002	21 July 2020	6 November 2020
ABCC20/003	22 July 2020	20 October 2020
ABCC20/004	22 July 2020	20 October 2020
ABCC20/005	22 July 2020	9 November 2020
ABCC20/006	23 July 2020	10 November 2020
ABCC20/007	23 July 2020	11 November 2020
ABCC20/008	24 July 2020	11 November 2020
ABCC20/009	30 July 2020	20 November 2020
ABCC20/010	30 July 2020	25 November 2020
ABCC20/011	31 July 2020	1 December 2020
ABCC20/012	27 August 2020	25 November 2020

