



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

FOR THE PERIOD 1 APRIL 2021 TO 30 JUNE 2021

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*

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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 Commissioner) and any person assisting the Commissioner. Under ss 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 (ABCC) and reviews conducted by the Ombudsman.

This report covers a review conducted by our Office between 1 April 2021 and 30 June 2021 (the review period).

When conducting our review of the ABCC's use of examination powers, we assess 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.

During this review, the ABCC has complied with all criteria. We highlighted some suggestions identified in our Quarter 2 and Quarter 3 reports. Due to the timing of our 2 previous review reports, the ABCC had not had an opportunity to take remedial action in relation to the reports issued for the review period 1 October 2020 to 31 December 2020 (Quarter 2) and the review period 1 January 2021 to 31 March 2021 (Quarter 3).

We are not making any additional recommendations or suggestions to the ABCC for this review period. The ABCC continued to follow the good practices we previously reported.

Introduction

Under the BCIP Act, 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) under s 61B of the BCIP Act for an examination notice.

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 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. Under s 65(1) of the BCIP 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
- 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 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 reviewing examination powers exercised by the Commissioner.

Criteria used for reviews

The examination and notice are 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

Our last inspection report was provided to the ABCC in September 2021. In our report for the review period 1 October to 31 December 2020 we identified several issues, including:

- the need for the ABCC to provide 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
- the provision of examination transcripts to examinees.

In our report covering the period 1 January 2021 to 31 March 2021 (Quarter 3), we made findings related to the conduct of remote examinations and the provision of examination transcripts to examinees.

Due to the timing of these reviews and our reports, the ABCC had not yet had an opportunity to implement remedial action in response to our findings in Quarters 2 and 3. We will monitor the ABCC's progress in relation to these suggestions and report on them in the 2021–22 financial year.

Review results – between 1 April 2021 and 30 June 2021

Between 1 April 2021 and 30 June 2021, we reviewed one examination notice and the associated examination that was conducted by the ABCC between 1 January 2021 and 31 March 2021. Details of our review 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)?

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 presidential member of the AAT.

The ABCC was generally compliant with this criterion. At the time of this review the ABCC was not yet advised of the better practice suggestion from our previous report regarding guidance and training to support staff dealing with information in accordance with Principle 18 of the Administrative Review Council guidance on best practice for agencies using coercive examination notices.¹

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

In response to our previous report the Commissioner advised the ABCC reviewed its guidance and training on this issue, and we were satisfied with this response.

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.

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.

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: using plain language and fairness to examinee

We noted several good practices throughout our review:

- 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 could seek to postpone the examination at any time to seek legal advice if they so choose.
- The ABCC demonstrated good administrative record-keeping practices.

Appendix A – Assessments conducted under criterion 4

Detailed below are the factors we use to determine whether examinations are conducted in accordance with the requirements of the BCIP 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 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,³ examination preparation,⁴ conduct of examination⁵ 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?

² 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.

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

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’ 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 (for example, room, equipment, personnel).

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?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 are they addressed by the ABCC?¹⁰

⁶ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

⁷ The Wilcox Report, paragraphs 6.53 and 6.71.

⁸ Under paragraph 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 Commissioner believes the examinee is capable of giving evidence relevant to the investigation.

⁹ Subsection 62(2) of the BCIIIP Act.

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 one review between 1 April 2021 and 30 June 2021 of one examination conducted by the Commissioner between 1 January 2021 to 31 March 2021.

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
ABCC20/018	5 February 2021	17 May 2021