

COMMONWEALTH
OMBUDSMAN



**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 to 31 December 2017

**Quarterly report by the Commonwealth Ombudsman:
In accordance with Part 2 of Chapter 7 of the
*Building and Construction Industry
(Improving Productivity) Act 2016***

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CONTENTS

Executive summary.....	1
Introduction.....	2
Review scope and criteria	3
Objective and scope of reviews	3
Criteria used for reviews.....	3
Progress made since previous report	4
Results of our reviews – 1 October to 31 December 2017	5
Appendix A – Assessments conducted under criterion 4.....	6
Appendix B – Examinations conducted and reviewed	9

Executive summary

On 2 December 2016, the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) and the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Transitional Act) commenced, repealing the *Fair Work (Building Industry) Act 2012* (FWBI Act).

Under the BCIIP Act, the Commonwealth Ombudsman (the Ombudsman) is required to review the examination powers exercised by the Commissioner of the Australian Building and Construction Commission (the Commissioner) and any person assisting the Commissioner. The Ombudsman is then required to prepare and present a report to Parliament as soon as practicable after the end of each quarter of each financial year about the examinations conducted in that quarter.

This report covers three reviews¹ conducted between 1 October and 31 December 2017 (the review period). Each of the examinations the Ombudsman reviewed during the period was conducted under a notice issued to Fair Work Building and Construction (FWBC). In accordance with s 12(2) of the Transitional Act, these were assessed against the FWBI Act and any reference to legislation will be to the repealed FWBI Act.

That being said, in accordance with s 24 of the Transitional Act, any recommendations or suggestions made in this report apply to the ABCC and its use of the examinations powers, which are unchanged under the BCIIP Act.

In our report for the period 1 July 2016 to 31 March 2017,² we made one recommendation about the Commissioner expressing a preference for examinees not to discuss matters relating to the examination, which is contrary to the BCIIP Act.

During the review period, we were satisfied the Acting Commissioner did not express a preference for an examinee not to discuss their examination.

¹ Three examination notices to attend before the Director of FWBC, two of which did not proceed.

² Quarterly report by the Commonwealth Ombudsman under s 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016*
http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/82615/ABCC-Review-Report-1-July-16-to-31-March-17.pdf

Introduction

The *Fair Work (Building Industry) Act 2012* (FWBI Act) commenced on 1 June 2012 and was repealed by the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Transitional Act) on 1 December 2016.

Under the FWBI Act, the Director of FWBC (the Director) could inquire into and investigate any act or practice by a building industry participant that might be contrary to a designated building law, a safety net contractual entitlement or the Building Code.³ As part of such an investigation, the Director could apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice.

An examination notice required its recipient to:

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

Under the FWBI Act, the Director was required to notify the Ombudsman after an examination notice had been issued and provide copies of relevant documents. After the examination was completed, the Director was required to give the Ombudsman a report about the examination, as well as a video recording and transcript of the examination. The Ombudsman was then required to review the exercise of these powers by the Director and any person assisting the Director.

³ The Building Code, made under s 27(1) of the *Fair Work (Building Industry) Act 2012*, is a code of practice which sets out requirements to be complied with by building contractors and building industry participants in respect of building work.

Review scope and criteria

Objective and scope of reviews

Under s 54A(3)(b) of the FWBI Act, the Ombudsman could do anything incidental or conducive to review the exercise of the Director's examination powers.

Criteria used for reviews

The following criteria were used to review the exercise of the Director's examination powers.

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act and the relevant Regulations?
2. Did the examination notice comply with the requirements of the FWBI Act (ss 47 and 48), the relevant Regulations and relevant best practice principles?
3. Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?
4. Was the examination conducted in accordance with the requirements of the FWBI Act, the relevant Regulations, relevant best practice principles and standards and FWBC's internal policies and guidelines?

Appendix A provides more detail for this criterion, as this is the focus of our reviews.

5. Where the Minister issued directions, were these complied with (s 11)?

Progress made since previous report

In our 2014–15 annual report and 1 July 2016 to 31 March 2017 quarterly report, we recommended the Commissioner should not express a preference that an examinee not disclose information or answers given at the examination, or not discuss matters relating to an examination with any other person. Under s 61F(6) of the BCIP Act the Commissioner must not require this and therefore should not express a preference in this regard.

As this practice was not exercised during the examination conducted by the then-Director of FWBC, this recommendation has not been made in this report.

We note that in October 2017, the ABCC advised it had reviewed the practice of expressing a preference that examinees not disclose the content of their examinations and this is no longer expressed to examinees as a matter of course.

We will continue to monitor this issue closely at future reviews to ensure the Commissioner, or anyone acting on his or her behalf, has ceased this practice.

Results of our reviews – 1 October to 31 December 2017

Criterion 1—was the application for an examination notice made in accordance with the requirements of the FWBI Act and the relevant Regulations?

Section 45 of the FWBI Act and the relevant Regulations set out the general requirements to be met before an application for an examination notice is made, and prescribes the requirements regarding the form and content of an application.

The ABCC was assessed as compliant.

Criterion 2—did the examination notice comply with the requirements of the FWBI Act (ss 47 and 48), the relevant Regulations and relevant best practice principles?

Under this criterion, we will only comment on action taken by FWBC. We do not comment on any decision made by a nominated AAT Member.

The ABCC was assessed as compliant.

Criterion 3—was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?

The ABCC was assessed as compliant.

Criterion 4—was the examination conducted in accordance with the requirements of the FWBI Act, the relevant Regulations, relevant best practice principles and standards and FWBC's internal policies and guidelines?

The ABCC was assessed as compliant.

Criterion 5—where the Minister issued directions, were these complied with (s 11)?

No directions were issued at the time of the reviews; therefore, this criterion did not apply.

Appendix A – Assessments conducted under criterion 4

The detail below shows how we determine whether examinations were conducted in accordance with the requirements of the FWBI Act (s 51), the relevant Regulations, relevant best practice principles and standards and FWBC’s internal policies and guidelines.⁴

Criterion 4.1—did the Director of FWBC conduct the examination?

This was assessed against s 51(2) of the FWBI Act and Guidance Note 6⁵ paragraph 17.1.

Criterion 4.2—if requested by the examinee, did the Director agree to a representing lawyer to be present at the examination?

This was assessed against s 51(3) of the FWBI Act and Guidance Note 6, paragraph 18.1.

Criterion 4.3—did the examiner require the person being interviewed to not disclose information or answers given at the examination?

This was assessed against s 51(6) of the FWBI Act.

Criterion 4.4—assessment of conduct of examination and related issues:

Guidance for staff exercising coercive powers⁶

- Did those exercising coercive powers in FWBC have access to assistance, advice and support for the exercise of those powers?
- Did FWBC have procedures and offer training aimed at avoiding conflicts of interest in relation to the exercise of the examinations powers?

⁴ This involves an assessment against the relevant best practice principles set out by the Administrative Review Council (ARC), the Wilcox Report, the requirements of the Australian Government Investigation Standards (AGIS) and FWBC’s internal guidelines.

⁵ Guidance notes were published by FWBC and provided FWBC’s advice on the interpretation of the laws it enforces or about its internal policies and procedures. Guidance Note 6 related to FWBC’s examination notice policy.

⁶ ARC Principles 8, 10, 12; AGIS paragraph 4.2 and 4.4.

Examination preparation⁷

Before conducting an examination, did the Director/persons assisting the Director 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 of 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 Director explain the examination process? (Derived from ARC Principle 14 in relation to examination notices.)
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination? (AGIS paragraph 4.1)
- Was the examination conducted within standard business hours? Were there regular adjournments?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning? (Wilcox Report, paragraphs 6.53 and 6.71)
- Was the line of questioning relevant to the investigation? (Derived from the requirement in s 45(5)(d), requiring the Director to specify in the affidavit to the AAT the grounds on which the examinee is capable of giving evidence relevant to the investigation; and in Guidance Note 6, paragraph 14, regarding the scope of information, documents and answers that may be required.)
- 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 the examinee or their legal representative allowed to ask questions, make comments and/or submissions at the completion of the examination? (Guidance Note 6, paragraph 18.4)

⁷ AGIS paragraphs 3.2 and 4.2.

- Did the person claim legal professional privilege or public interest immunity during the examination? (s 52(2))

Post examination

- Did FWBC 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 FWBC? (ARC Principle 16 and Guidance Note 6, paragraph 17.7)

Appendix B – Examinations conducted and reviewed

The Ombudsman conducted three reviews between 1 October and 31 December 2017. The table below shows the date on which the examination was conducted and when the Ombudsman conducted its review.

FWBC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
FWBC16/0010	December 2016	December 2017
FWBC16/0011	Did not proceed	December 2017
FWBC16/0012	Did not proceed	December 2017