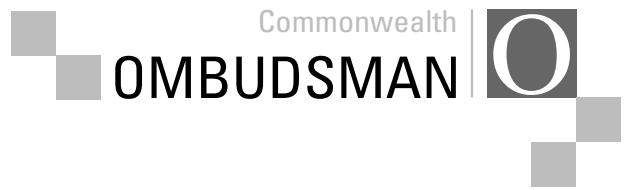


**Annual report by the
Commonwealth Ombudsman
under s 54A(6) of the
*Fair Work (Building Industry) Act 2012***

FOR THE PERIOD 1 TO 30 JUNE 2012

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

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INTRODUCTION

The *Fair Work (Building Industry) Act 2012* (the FWBI Act) commenced on 1 June 2012. Under 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 for the failure 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) 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.

As the FWBI Act commenced on 1 June 2012, this report covers the period 1 to 30 June 2012.

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.

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.

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

EXAMINATION CONDUCTED

The FWBI Act commenced on 1 June 2012 and replaced the *Building and Construction Industry Improvement Act 2005* (the BCII Act). The then Australian Building and Construction Commissioner, Mr Leigh Johns (now the Acting Director of FWBC), issued an examination notice on 30 May 2012 under the BCII Act. The examination notice required the recipient to attend before Mr Johns and answer questions relevant to an investigation. As the time for compliance with the notice was yet to expire on 1 June 2012, in accordance with regulation 2.2 of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012, this notice is valid under the FWBI Act.

The examination was conducted on 18 June 2012 under the FWBI Act. We received the examination notice on 15 June 2012. We received the

report on the examination, the examination transcript and the video recording on 26 July 2012.

As the review of the examination was conducted after 30 June 2012, the results of that review will be reported in our next year's annual report.

REVIEW SCOPE AND METHODOLOGY

Objective and scope of reviews

The objective of the reviews will be to assess the exercise of coercive information-gathering 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 reviews.

In our submission to the Senate Standing Committee on Education, Employment and Workplace Relations, we noted that there will be two aspects to the review.² The first aspect assesses the Director's compliance (and compliance by any other person assisting the Director) with relevant provisions of the FWBI Act. The second aspect relates to determining if the examinee has been treated fairly during an examination.

Criteria used for reviews

In conducting the reviews, we will apply:

- relevant provisions under Division 3, Part 1, Chapter 7 of the FWBI Act
- relevant parts of the Fair Work (Building Industry) Regulations 2005 (the Regulations)

² Submission by the Acting Commonwealth Ombudsman to the Senate Standing Committee on Education, Employment and Workplace Relations' inquiry on the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011. Available at: http://www.ombudsman.gov.au/files/submission_to_senate_enquiry_building_and_construction_industry_improvement_amendment_bill_jan_2012.pdf.

- relevant best practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies*³
- relevant requirements under the Australian Government Investigation Standards
- FWBC's internal guidelines on the use of examination notices and the conduct of examinations.

FWBC will be assessed against five criteria:

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act (s 45) and the Regulations?
2. Did the examination notice 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. Was the examination notice given in accordance with the requirements of the FWBI Act (s 50) and claims of privilege properly dealt with (s 52(2))?
4. Was the examination conducted in accordance with the requirements of the FWBI Act (s 51), and was the examinee treated fairly?⁴
5. Where directions were issued by the Minister or the Director, were these complied with (ss 11 and 59F)?

³ In its report *The coercive information-gathering powers of Government agencies*, the Administrative Review Council provided 20 best practice principles which 'seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of those in relation to whom the powers are exercisable'. These principles are directly relevant to the exercise of powers by the Director of the FWBC under Division 3 of the *Fair Work (Building Industry) Act 2012*. The report is available from: http://www.ema.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports_Administration_Review_Council_Reports.

⁴ This involves an assessment against the relevant best practice principles set out by the Administrative Review Council, the requirements of the Australian Government Investigation Standards, and FWBC's internal guidelines.

As the notice (dated 30 May 2012) was issued under the BCII Act, we will not assess the notice. The examination, which was an exercise of powers under the FWBI Act, will be assessed. Any future examination notices and examinations will be assessed against all five criteria.

Review and reporting methodology

The reviews are carried out by:

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

For each review conducted, we will advise FWBC of our review findings and provide an opportunity for comment.

FWBC will be provided an opportunity to comment on each published annual report.

Colin Neave
Commonwealth Ombudsman