



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

FOR THE PERIOD 1 JULY to 30 SEPTEMBER 2022

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

March 2023



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Executive summary

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act), the Commonwealth Ombudsman (the Ombudsman) was required to review the examination powers exercised by the Commissioner of the Australian Building and Construction Commission (ABCC) and any person assisting the Commissioner. Under s 65(6) of the 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 ABCC and reviews conducted by the Ombudsman during that quarter.

The Australian Government committed to abolishing the ABCC. Sections of the Act relevant to the ABCC's functions were repealed by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 7 December 2022. Under transitional arrangements in the legislation, the Ombudsman is reporting to Parliament in 2023 on the ABCC's use of examination powers in the period between 1 July 2022 and the abolition of the ABCC.

References in this report to the Act reflect the legislation that was in force at the time of our reviews.

This report covers 9 reviews conducted by our Office between 1 July 2022 and 30 September 2022 (the review period).

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

In our view, the ABCC was compliant against these requirements and standards, and we make no recommendations in this report. We made **2 better practice suggestions** around the disclosure of examinee identities during the conduct of examinations and explaining the examination process to examinees.

The ABCC advised our Office that while it accepted our better practice suggestions, it was not able to implement them due to its abolition on 6 February 2023.

Introduction

Under the Act, the Australian Building and Construction Commissioner (the Commissioner) could inquire into and investigate any act or practice by a building industry participant, which may be contrary to the Act, a designated building law, Commonwealth industrial instruments, or the Building Code¹. As part of an investigation, the Commissioner could apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice, under s 61B of the Act.

An examination notice could 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 Act, the Commissioner was required to notify the Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents. Under

¹ The term 'Building Code' within the Act means the *Code for the Tendering and Performance of Building Work 2016*.

s 65(1) of the Act, the Commissioner was required to 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 used these records to review how the Commissioner, and any person assisting the Commissioner, exercised examination powers under the Act.

Review scope and criteria

Objective and scope of reviews

Under s 65(3)(a) of the Act, the Ombudsman was required to review examination powers exercised by the Commissioner and any person assisting the Commissioner.

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

Criteria used for reviews

We assessed the examination notices issued and examinations conducted during the review period against the following criteria:

1. Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and the Regulations (s 5)?
2. Did the examination notice comply with the requirements of the 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 Act (s 61E), and were claims of privilege properly handled?
4. Was the examination conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

This criterion was the main focus of our reviews. **Appendix A** provides detailed inspection criteria that guide our assessment.

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

Previous reports

In our 2021-22 quarterly review, for the period for the period 1 April 2022 to 30 June 2022, we found the ABCC was compliant with its legislative obligations.

The ABCC continued to follow the good practices we previously reported. We also acknowledge the positive engagement of the ABCC with our quarterly reviews.

Review results – between 1 July 2022 and 30 September 2022

We reviewed 9 examination notices and examinations between 1 July 2022 and 30 September 2022. Details of our reviews are at [Appendix B](#) and the results are reported below.

As we reviewed actions performed by both the Commissioner and persons assisting the Commissioner, our assessment of compliance refers to the ABCC.

Criterion 1 – Was the application for the examination notice made in accordance with the requirements of the 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 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 compliant with this criterion.

Criterion 3 – Was the examination notice given to the person named on the notice, in accordance with the requirements of the 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 Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

We made 2 better practice suggestions related to this criterion.

Disclosure of protected information

Section 5 of the Act states that protected information includes information disclosed under an examination notice that was obtained by an entrusted person in the course of their official employment that relates to another person. Section 106 of the Act restricts what an entrusted person may do with protected information, while permitting the disclosure of protected information if the entrusted person is a designated official at the time of the disclosure, and the disclosure occurred in the performance of the persons official employment.

We identified one instance where the ABCC disclosed the identity of one examinee to a second examinee who asked if that examinee was attending an ABCC examination and when. We were satisfied that the disclosure was compliant with the s 106 of the Act. However, we note the risks

with providing this information to examinees, particularly when the information is solicited by a second examinee. This includes:

- not providing for an examinee’s expectation of confidentiality that they are attending an examination
- impacting upon the examinee’s willingness to give information required under oath or affirmation if they are aware of who other examinees are, and when they are scheduled for an examination.

In this instance, we accept that these risks were likely reduced as the 2 examinees shared legal representation.

We suggested as a matter of better practice (**better practice suggestion 1**) that the ABCC ensure that any disclosure of the identity of examinees during examinations is limited and risks to the examinee considered.

Explanation of the examination process

Section 62(1)(b)(iv) of the Act stated that it was an offence if a person fails to answer questions relevant to the investigation while attending as required by the examination notice. Under s 61F(3) of the Act, a person required by an examination notice to attend before the Commissioner to answer questions relevant to an investigation could choose to be represented at the examination by a lawyer of the person’s choice.

The ABCC previously provided our Office with a transcript for remarks to be made by the Commissioner at examinations detailing to the examinee that it is an offence to fail to answer questions relevant to the investigation, and the grounds upon which an examinee may raise an objection, which includes questions that:

- are not relevant to an investigation
- are unfair or unreasonable
- may infringe legal professional privilege
- may give rise to a claim of public interest immunity.

In one instance where the examinee had no legal representation, the ABCC did not outline the grounds upon which an examinee may raise an objection. We observed that an examinee did not seem to understand their right to object to a question, and while it was discussed with the examinee at various points that they may raise an objection, no guidance was given to the examinee on the circumstances in which an objection may be made.

We consider explaining the ability to object to a question or seek clarification, in particular to examinees without legal representation, to be an important step in orientating the examinee with the examination process and the circumstances in which an objection may be raised. We suggested as a matter of better practice (**better practice suggestion 2**) the ABCC ensure that examinees are aware of the right to raise objections or seek clarification on any questions asked, and the circumstances under which an objection may be permitted.

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

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

Appendix A — Assessments conducted under criterion 4

We detail below how we determined whether examinations were conducted in accordance with the requirements of the 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 Act, the Commissioner must conduct the examination of the person named on the issued Examination Notice (under s 61C). Under ss 61F(4) and (5) the Commissioner may require the examinee to answer questions under oath/affirmation.

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 Act, an examinee may choose to be represented by a lawyer 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 Act, the Commissioner cannot request that the person not 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 assessed this criterion under 4 parts (discussed below): guidance for staff exercising coercive powers,³ examination preparation,⁴ conduct of examination,⁵ and post examination.

Guidance for staff exercising coercive powers

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

² This involves an assessment against the best practice principles in relation to *Coercive Information-gathering powers of Government Agencies* (Report no.48) 2008, by the Administrative Review Council, and *Transition to Fair Work Australia for the Building and Construction Industry* (Report) 2009; by the Hon Murray Wilcox QC (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 Australian Government Investigation Standards Investigation Management paragraphs 3.2 'Investigation commencement' and 4.2 'Formal interview'.

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' pages 11 and 17, 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

- Before 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 were they addressed by the ABCC?¹⁰

⁶ Australian Government Investigation Standards Investigation Practices, paragraph 4.1.1 'Obtaining information'.

⁷ The Wilcox Report, paragraphs 6.53 and 6.71.

⁸ Under s 61B(5)(c) of the Act, the Commissioner's application for an examination notice must include an affidavit, which among other things, outlines the grounds on which the Commissioner believes the examinee has information or documents, or is capable of giving evidence, relevant to the investigation.

⁹ Under s 62(2) of the Act, a person is not required to give information, produce a document or answer questions if to do so would enliven legal professional privilege or public interest immunity.

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 9 reviews between 1 July 2022 and 30 September 2022 of examinations conducted by the Commissioner between 1 April to 30 June 2022.

The table below shows the dates on which the examinations were conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC22/008	11/04/2022	12/09/2022
ABCC22/009	12/04/2022	12/09/2022
ABCC22/010	13/04/2022	12/09/2022
ABCC22/011	11/04/2022	12/09/2022
ABCC22/012	12/04/2022	13/09/2022
ABCC22/014	13/04/2022	12/09/2022
ABCC22/015	27/04/2022	15/09/2022
ABCC22/016	11/05/2022	14/09/2022
ABCC22/017	27/04/2022	14/09/2022