



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

FOR THE PERIOD 1 JULY 2012 TO 30 JUNE 2013

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

November 2013



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1 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.

This report covers the Commonwealth Ombudsman's review activities during the period 1 July 2012 to 30 June 2013 (reporting period).

1.1 Summary of review

During the reporting period, the Commonwealth Ombudsman reviewed one examination conducted by the then Acting Director of FWBC, Mr Leigh Johns.

We reviewed the conduct of the examination against the criteria outlined under paragraph 3.2. In our view, the examination was conducted in accordance with the requirements of the FWBI Act and all aspects of the examination complied with relevant best practice principles and internal guidelines issued by FWBC.

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.

2 EXAMINATION NOTICES ISSUED AND EXAMINATIONS CONDUCTED

2.1 Examination notices issued

During the reporting period, on 4 June 2013, an AAT presidential member issued two examination notices under s 47 of the FWBI Act. The examinations were scheduled for July 2013. Therefore, the results of our review of the relevant documents and the conduct of the examinations will be published in the next annual report.

2.2 Examinations conducted

During the reporting period, Mr Johns conducted one examination on 18 June 2012. We received the corresponding examination notice on 15 June 2012 (this was mentioned in our last annual report). On 26 July 2012, we received a report about the examination, a transcript and a video recording of the examination from FWBC. We reviewed the conduct of the examination on 13 September 2012. The results of our review are discussed under part 4 of this report.

The legislative background leading to the examination is explained below.

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 (who later became 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 was taken to have effect as if it was an examination notice issued under the FWBI Act.

3 REVIEW SCOPE AND METHODOLOGY

3.1 Objective and scope of the review

The objective of the review was to assess the exercise of examination 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 review.

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.

3.2 Criteria used for the review

In conducting the review, we applied (where relevant):

- provisions under Division 3, Part 1, Chapter 7 of the FWBI Act
- parts of the Fair Work (Building Industry) Regulations 2005 (the regulations)
- best practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies*³
- requirements under the Australian Government Investigation Standards
- FWBC's internal guidelines on the use of examination notices and the conduct of examinations.⁴

FWBC was assessed against five criteria (where applicable):

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?

² Submission by the then 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.

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 FWBC under Division 3, Chapter 7, of the *Fair Work (Building Industry) Act 2012*. The report is available at: <http://www.arc.ag.gov.au/Publications/Reports/Pages/default.aspx>.

⁴ FWBC published Guidance Note 6 *Examination Notice Policy* on 2 April 2013. This document is available at: <http://www.fwbc.gov.au/guidance-notes>. We previously sighted draft guidelines from FWBC in June 2012.

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

As the notice was issued under the BCII Act and not the FWBI Act, criteria 1 to 3 did not apply. We assessed the conduct of the examination against criteria 4 and 5.

3.3 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:
 - a copy of the examination notice
 - the affidavit that accompanied the application for the examination notice
 - any other information in relation to the examination notice that was given to the nominated AAT presidential member who issued the notice.
- Section 50(7): a copy of a notice varying the time of the examination (where relevant).
- Section 54A(1) and (2):
 - a report about the examination
 - a video recording of the examination
 - a transcript of the examination.

3.4 Review and reporting methodology

The review was carried out by:

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

We advised FWBC of our findings following the review and provided an opportunity for comment. FWBC also had the opportunity to comment on this annual report ([Appendix A](#)).

4 RESULTS OF REVIEW

4.1 Application for an examination notice

Under this criterion, we assess whether an application for an examination notice was made in accordance with the requirements of s 45 of the FWBI Act and the regulations. This criterion did not apply as the examination notice was applied for under the BCII Act.

4.2 Examination notice

Under this criterion, we assess whether an examination notice complied with the requirements under ss 47 and 48 of the FWBI Act, the relevant regulations and best practice principles set out by the Administrative Review Council. This criterion did not apply as the examination notice was applied for under the BCII Act.

4.3 Service of examination notice

Under this criterion, we assess whether an examination notice was served in accordance with the requirements of s 50 of the FWBI Act. If claims of privilege were made by the receiver of the notice, we assess whether such claims were properly dealt with (s 52(2)). This criterion did not apply as the examination notice was applied for under the BCII Act.

4.4 Conduct of examination⁵

Under this criterion, we assessed whether the examination was conducted in accordance with s 51 of the FWBI Act, and if the examinee was treated fairly. The assessment of whether the examinee was treated fairly took into account 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.

4.4.1 Section 51 requirements

When a person is required by an examination notice to attend before the Director to answer questions relevant to an investigation, this attendance is called an examination (s 51(1)). We assessed the conduct of the examination against the following requirements of s 51:

- the Director must conduct the examination (s 51(2))
- the person is permitted to be represented at the examination by a lawyer of the person's choice (s 51(3))

⁵ Criteria 4.4 and 4.5 apply by virtue of regulation 2.2 of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Regulation 2012. Paragraph 2.2 of this report provides more details.

- the Director may require the information or answers given by the person at the examination to be given on oath or affirmation (ss 51(4) and (5))
- the Director must *not* require the person to undertake not to disclose information or answers given at the examination; or not to discuss matters relating to the examination with any other person (s 51(6)).

The examinee did not choose to be represented by a lawyer. The Acting Director complied with all other requirements of s 51.

4.4.2 Was the examinee treated fairly?

Guidance for staff exercising coercive powers

Guidance Note 6 *Examination Notice Policy*⁶ relates to the use of examination notices and the conduct of examinations by FWBC. FWBC publishes the guidance note on its website, and this provides transparency to the public about its use of coercive powers.

Under FWBC policy, the Director of FWBC personally presides over all examinations. It is our view that the guidance note constituted sufficient guidance to the Director, or any other persons assisting the Director, on the conduct of the examination.

Guidance Notes 1 and 2, *Litigation Policy* and *Investigative Process* respectively,⁷ relate to professional and ethical responsibilities and obligations by the Director and FWBC. They outline that the Director and the office is impartial, and do not represent either party to an investigation; they also outline the principles of natural justice in FWBC's decision-making process.

Preparing for an examination

We assessed the preparation of the examination, and in particular, whether or not there was sufficient planning. The planning should:⁸

- 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
- implement risk management strategies (where relevant)
- consider logistics and resources of the examination (e.g. arranging examination room, equipment and personnel).

⁶ This document is available at: <http://www.fwbc.gov.au/guidance-notes>.

⁷ The FWBC updated Guidance Note 1 *Litigation Policy* and Guidance Note 2 *Investigative Process* on 18 January 2013. Both documents are available at: <http://www.fwbc.gov.au/guidance-notes>.

⁸ The requirements are derived from the Australian Government Investigation Standards.

From the documents provided to us and from watching the video recording of the actual examination, it is our view that the Acting Director and persons assisting the Acting Director effectively planned the examination. We sighted a set of detailed questions prepared for Mr Johns to assist him in conducting the examination. The questions were sequential, anticipated the likely reactions of the examinee and indicated consideration of the examination's objectives.

There was also nothing to indicate that the logistics and resources relevant to the examination were lacking in any way.

Conduct of the examination

We assessed the conduct of the examination against the following requirements.⁹

1. Prior to commencing the examination, did the Director explain the examination process?

Although not a legislative requirement, FWBC provided a covering letter with the examination notice when it was served on the examinee. The letter detailed the examination process, the examinee's rights and obligations and how the information obtained from the examination will be used by FWBC. At the beginning of the examination, Mr Johns again explained the matters outlined in the covering letter to the examinee.

2. If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?

The examinee did not require an interpreter.

3. 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 they allowed to ask questions, make comments and/or submissions at the completion of the examination?

As mentioned above, the examinee did not choose to have legal representation.

The examinee was offered the opportunity, but did not choose to ask questions at the end of the examination.

4. Was the examination conducted within standard business hours? Was the duration of the examination reasonable? Were there regular adjournments?

⁹ The requirements are derived from FWBC internal guidelines and the Australian Government Investigation Standards.

The timing and duration of the examination appeared to be reasonable. We were advised that the examination was conducted during standard business hours. From the video recording, it appeared that the examination lasted for approximately 1 hour and 20 minutes, and there was a five-minute adjournment approximately 1 hour after the examination started.

5. Tone and manner of questioning: were there obvious forms of intimidation, and particularly intrusive questioning? Was the line of questioning relevant to the investigation?

The examination was conducted in a professional manner, using open, not leading questions. The questions asked appeared relevant to the investigation (this conclusion is also supported by the report we received on the examination and details on the examination notice). The examinee was treated courteously throughout the examination. During the examination, FWBC provided the examinee with a copy of the documents to which Mr Johns referred.

Post-examination

We assessed whether FWBC provided a copy of the transcript to the examinee and invited them to make any corrections. A copy of the transcript was provided to the examinee shortly after the examination and they were invited to make comments. FWBC advised that the examinee did not provide any comments or seek to amend the transcript.

4.5 Directions issued by the Minister

Section 11 of the FWBI Act provides that the Minister for Employment may give directions to the Director about the manner in which the Director is to perform the functions or exercise the powers under the FWBI Act.

Under this criterion, we assess whether an examination was conducted in accordance with any directions issued under s 11. No such directions were issued at the time of the examination. Therefore, this criterion did not apply.

Colin Neave
Commonwealth Ombudsman

APPENDIX A



Australian Government

**Fair Work Building
& Construction**

20th September 2013

Mr Colin Neave
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Neave

Draft annual report by the Commonwealth Ombudsman under s54A(6) of the *Fair Work (Building Industry) Act 2012* – 1 July 2012 to 30 June 2013

Thank you for your letter of 13 September 2013 attaching a copy of the draft report. You have sought any comments on the draft report.

I have had the report reviewed and note in particular that you find the one examination the subject of the report "...was conducted in accordance with the requirements of the FWBI Act and all aspects of the examination complied with best practice principles and internal guidelines issued by FWBC." (paragraph 1.1)

I have no additional comments to make and appreciate the opportunity provided by you to review the draft report.

Yours sincerely


Val Gostenchik
Director
Fair Work Building & Construction