



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

**FOR THE PERIOD 1 JANUARY 2021 TO 31 MARCH 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*

**FEBRUARY 2022**





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ISSN 2208-1062 (Print)

ISSN 2208-1070 (Online)

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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 during that quarter.

This report covers 6 reviews conducted by our Office between 1 January 2021 and 31 March 2021 (the review period).

When conducting our review of the 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), relevant best practice principles and standards and the ABCC's internal guidelines.

The ABCC was mostly compliant against these requirements and standards.

We encourage the ABCC to continue its existing positive practices around using plain language and ensuring fairness to the examinee.

In 4 examinations we identified aspects that could be improved. As with our previous report for the period between 1 October 2020 and 31 December 2020 (our previous report), the findings in this report relate to the conduct of remote examinations and the provision of examination transcripts to examinees.

The examinations reviewed in this report were conducted by the ABCC between October 2020 and December 2020. Our preliminary views from our previous review were not provided to the ABCC for comment until 9 July 2021. As such, the ABCC did not have the benefit of the previous report when it undertook the examinations that are the subject of this report. We will assess the actions the ABCC took in response to our previous report during future examination reviews.

## Introduction

Under the BCIIIP 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 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 BCIIIP 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 BCIIIP 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 BCIIIP 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.

The Ombudsman uses these records to review how the Commissioner, and any person assisting the Commissioner, exercises examination powers under the BCIIIP Act.

## Review scope and criteria

### Objective and scope of reviews

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

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

### Criteria used for reviews

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

1. Was the application for the examination notice made in accordance with the requirements of the BCIIIP Act (s 61B) and the Regulations (s 5)?
2. Did the examination notice comply with the requirements of the BCIIIP 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 BCIIIP 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?

This criterion is the 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

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 this reporting period (1 January to 31 March 2021), we identified some repeat issues from our previous report. Due to the timing of these reviews and the provision of our final report to the Commissioner, the ABCC had not yet had an opportunity to implement any remedial action. We will monitor the ABCC's progress in relation to these suggestions and report on them in our quarterly reviews conducted in the 2021–22 financial year.

## Review results – between 1 January 2021 and 31 March 2021

We conducted 6 reviews of examination notices and examinations between 1 January 2021 and 31 March 2021. Details of our reviews 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.<sup>1</sup>

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 BCIIIP Act (s 61E), and were claims of privilege properly handled?***

The ABCC was compliant with this criterion, but we queried one issue in relation to adherence with the ABCC’s internal guidelines.

*Maintaining examinee confidentiality*

The ABCC’s internal guidelines require examinee confidentiality to be maintained when serving an examination notice. There was no evidence of examinee confidentiality being breached during the service of examination notices in the review period.

During this review we identified one instance where ABCC inspectors served the notice on an examinee in the presence of a third party. In the absence of further information from the record, we were concerned the presence of a third party during the service of the examination notice may have been a risk to the examinee’s confidentiality and privacy.

In response to the concerns raised by our Office, the Commissioner advised the ABCC is not aware of, nor has been advised of, any breaches of confidentiality. The ABCC refined and amended its Inspectors Guide and Legal Practice Manual to further emphasise the need to maintain confidentiality of examinees. This is also emphasised during staff training.

We were satisfied with this response and will continue to monitor this issue at future reviews.

***Criterion 4 – Was the examination conducted in accordance with the requirements of the BCIIIP Act (s 61F), relevant best practice principles and standards, and the ABCC’s internal guidelines?***

The ABCC was compliant with this criterion except in the instances listed below.

*Comments on examination preparation when conducted remotely*

Due to restrictions imposed by COVID-19, the Commissioner was unable to attend and oversee 2 examinations in person and therefore relied on conducting these examinations remotely via video conferencing. Our previous report noted while there is no requirement that an examination be conducted in person, the ABCC’s Legal Practice Manual details that everyone in the room must be seen in the video. We consider this to mean all attendees must be visible in the video recording.

In one instance we were unable to observe all the attendees present for the examination. One participant was seated at the periphery of the video camera’s capabilities. This resulted in intermittent appearances throughout the examination.

In another instance, the audio in the video was distorted and the review officers were unable to consistently hear what was said by the parties. We instead relied on the transcript as an ancillary record.

The ABCC advised appropriate measures would be undertaken to record all proceedings and participants during examinations. We will continue to monitor this issue at future reviews.

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

*Inaccuracies in transcriptions*

The ABCC’s internal guidelines require ABCC staff to verify examination transcripts before they are provided to an examinee for review. We identified one instance where the transcript did not present a sufficient record of parts of the examination. The transcript was deficient in relation to:

- misidentification of a speaker, Counsel Assisting Commissioner, as the examinee
- an absent date and time of the examination, marked as ‘unspecified’
- reoccurring incomplete sentences, missing text throughout the transcript and the insertion of text using hard brackets where it appeared the scribe was unsure of what was said
- unclear passages where the examinee had responded to questions with physical cues (for example ‘nodding of the head’) but was not asked by the examiner to also respond orally, and the transcript was not amended to reflect these physical cues.

Our previous report suggested as a matter of better practice the ABCC remind its staff of their obligations to appropriately review examination transcripts to ensure the most complete and accurate transcript of the examination is provided to examinees.

We note the Commissioner’s position that the transcript of an examination is not the formal record of the evidence given. Nevertheless, the examinee is provided the transcript as their single record of the examination and must rely on this transcript when commenting on any inaccuracies with their evidence. We consider it is incumbent on the ABCC to provide the examinee with an accurate and fulsome transcript.

We are advised the ABCC has now engaged an Examinations Coordinator who will be responsible for transcript preparation and revision. These changes are reflected in the ABCC’s revised Inspectors Guide and the Legal Practice Manual.

We will continue to monitor this issue at future reviews.

*Process for transcript review by the examinee*

As in our previous report, we identified instances in this review period where the process for delivery of transcripts included the following features:

- No stated deadline for when the examinee should reply to the invitation to comment.
- An invitation for the examinee to telephone an ABCC officer to report any errors or omissions in the transcript. This is contrary to ABCC guidelines which provide for written examinee comments to be sought. We consider that while an oral conversation can help to explain or clarify an issue it does not replace a formal written response.

Our previous report suggested as a matter of better practice that the ABCC establish a single consistent process for providing transcripts to examinees for their review and requesting a response by a specified date. The Commissioner advised that examinees will be requested to provide written confirmation of the accuracy of the transcript, or advice of any identified errors or omissions, within 14 days of receipt of the transcript. The template letter to examinees enclosing the transcript was also amended to reflect that the examinee, or their legal representative, may arrange to review a recording of the examination prior to confirming the accuracy of the transcript.

We will continue to monitor this issue at future reviews.

***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.

**Positive practices: using plain language and fairness to examinee**

We noted several good practices throughout our reviews:

- The Commissioner sought confirmation from self-represented examinees that it was their intention not to be legally represented at the examination. The Commissioner stated the examinee could seek to postpone the examination at any time to seek legal advice if they so choose.
- The Commissioner provided a thorough and accessible general explanation to examinees at the start of each examination about their obligations, including examples of how certain concepts apply to the examination (for example, privilege against self-incrimination) and confirmed the examinee's understanding of the concepts. During one examination the Commissioner displayed consideration of the perspective of the examinee and checked on their ability to continue through the remainder of the examination.

## 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.<sup>2</sup>

### ***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 that the person 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,<sup>3</sup> examination preparation,<sup>4</sup> conduct of examination,<sup>5</sup> 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?

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<sup>2</sup> 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.

<sup>3</sup> 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’.

<sup>4</sup> AGIS Investigation Management paragraphs 3.2 ‘Investigation commencement’ and 4.2.

<sup>5</sup> 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?<sup>6</sup>
- 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?<sup>7</sup>
- Was the line of questioning relevant to the investigation?<sup>8</sup>
- 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?<sup>9</sup>

### ***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?<sup>10</sup>

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<sup>6</sup> AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

<sup>7</sup> The Wilcox Report, paragraphs 6.53 and 6.71.

<sup>8</sup> Under paragraph 61B(5)(c) of the BCIP 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.

<sup>9</sup> Subsection 62(2) of the BCIP Act.

<sup>10</sup> 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 6 reviews between 1 January 2021 and 31 March 2021 of examinations conducted by the Commissioner between 1 October and 31 December 2020.

The table below shows the date on which the examinations were conducted and when the Ombudsman conducted its reviews.

<b>ABCC Examination Reference Number</b>	<b>Date Examination Conducted</b>	<b>Ombudsman Review Conducted</b>
ABCC18/011	27 November 2020	4 February 2021
ABCC20/013	20 October 2020	1 February 2021
ABCC20/014	19 October 2020	1 February 2021
ABCC20/015	12 November 2020	1 February 2021
ABCC20/016	17 December 2020	25 March 2021
ABCC20/017	18 December 2020	23 March 2021