



**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 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*

**May 2022**





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#### Contact us

Inquiries regarding the licence and any use of this report are welcome at:

Commonwealth Ombudsman

GPO Box 442

Canberra ACT 2601

Tel: 1300 362 072

Email: [ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

# CONTENTS

EXECUTIVE SUMMARY .....	1
INTRODUCTION .....	2
REVIEW SCOPE AND CRITERIA.....	3
OBJECTIVE AND SCOPE OF REVIEWS .....	3
CRITERIA USED FOR REVIEWS.....	3
PREVIOUS REPORTS .....	4
REVIEW RESULTS—BETWEEN 1 JULY 2021 AND 30 SEPTEMBER 2021 .....	5
APPENDIX A — ASSESSMENTS CONDUCTED UNDER CRITERION 4 .....	9
APPENDIX B — EXAMINATIONS CONDUCTED AND REVIEWED.....	11



## Executive summary

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act), the Commonwealth Ombudsman (the Ombudsman) must 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.

This report covers 8 reviews conducted by our Office between 1 July 2021 and 30 September 2021 (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.

In 5 examinations we identified some aspects that could be improved. We made 2 better practice suggestions regarding accurate record of service documentation and consistency of record of service. A better practice suggestion aims to improve administration or to manage a potential risk of non-compliance.

We also identified 2 legacy issues related to the conduct of remote examinations and the provision of examination transcripts to examinees. However, noting we provided our reports for Quarters 3 and 4 of 2020–21 to the ABCC for comment on 21 October 2021, the Commission did not have an opportunity to consider or take remedial action before our review of the examinations that are the subject of this report.

We will continue to assess the actions the ABCC takes in response to our reports at each review. We encourage the ABCC to continue its existing positive practices around using plain language during examinations and ensuring fairness to the examinee.

## Introduction

Under the Act, the Australian Building and Construction Commissioner (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, Commonwealth industrial instruments, or the Building Code. As part of an investigation, the Commissioner may 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 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 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 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.

Our Office uses these records to review how the Commissioner, and any person assisting the Commissioner, exercises examination powers under the Act.

## Review scope and criteria

### Objective and scope of reviews

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

Under s 65(3)(b) of the 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 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 is 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 2020–21 quarterly reviews, we made findings related to ABCC guidance for staff exercising coercive powers, the conduct of the examination (including the examinee’s right to object to questions), unintentional disclosure of sensitive information, clarity around examination obligations and provision of examination transcripts to examinees.

For this reporting period, we identified repeat issues from our previous reviews. These related to examination preparation, ensuring all attendees were visible during an examination and providing transcripts to examinees.

Due to the timing of these reviews and our 2020–21 quarterly reports, the ABCC has not yet had an opportunity to implement remedial action in response to all our previous report findings.

We will continue to monitor the ABCC’s progress and report on this in our 2021–22 quarterly reviews.

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

## Review results – between 1 July 2021 and 30 September 2021

We conducted 8 reviews of examination notices and examinations between 1 July 2021 and 30 September 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 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, however we note the below findings relating to better practice.

#### *Inaccurate record of service documentation*

The ABCC's Inspector's Guide at 12.10.5 states the inspector must ensure witness confidentiality is maintained when serving an examination notice and requires the inspector to complete the Record of Service. The Record of Service contains the transcript of the conversation that occurs between the ABCC inspector and the examinee at the time the examination notice and cover letter are served. Our Office refers to Record of Service documents to confirm that the notice was given to the person in relation to whom it was issued, and that witness confidentiality was maintained.

We identified 2 instances of inaccurate information in Record of Service documents.

In one examination, the transcript misidentifies the examinee with the name of another examinee. However, we were satisfied that in fact the notice was served on the correct examinee.

In another examination, we identified missing text in a conversation between the ABCC inspector and the examinee. We were unable to determine what was communicated beyond of the general information contained within the document describing the conversation, and the ABCC was unable to provide our Office with the full record of conversation.

We consider the accurate completion of Record of Service documents to be an important mechanism for the ABCC to demonstrate that examination notices were given to the person named on the notice, and that witness confidentiality was maintained.

We **suggest as a matter of better practice** the ABCC ensures staff review Record of Service documents to ensure complete and accurate records are kept to reflect the service of examination notices (**better practice suggestion 1**).

The ABCC advised our Office it has employed a Practice Coordinator with responsibility for overseeing its examinations, including reviewing documentation for completeness and accuracy. We will continue to monitor this issue at future reviews.

*Consistency around the Record of Service*

Out of the 8 examinations we reviewed, 4 involved process servers (sub agents) serving the examination notice and covering letter to the examinees. The Commissioner previously advised in response to our review of 1 October to 31 December 2020 that the service of most examination notices is undertaken by ABCC inspectors.

We noticed a considerable difference in the level of detail provided on the Record of Service by the ABCC inspectors compared to the sub agents.

In the 4 examinations we reviewed where service involved ABCC inspectors, records were maintained demonstrating that the ABCC inspector:

- confirmed the examination location meeting with the examinee
- provided identification to identify themselves to the examinee at the time of service
- recorded a transcript of the conversation
- provided information to the examinee about the examination process and that information could be found in the notice itself and the covering letter.

By contrast, the detail recorded by the sub agents was limited. Sub agent records contained the location of service and a brief conversation transcript on how the sub agent confirmed the identity of the examinee. The sub agents did not record that they had identified who they were to the examinee, and did not record a detailed transcript of the service, a clear explanation to the examinee of the examination process, or details of what was expected of the examinee and how this information could be found in the notice and the covering letter.

We **suggest as a matter of better practice** the ABCC provides instructions for sub agents that align with ABCC service practices and requires of sub agents the same standards provided by ABCC inspectors. These instructions should include how to maintain examinee confidentiality in accordance with ABCC guidelines (**better practice suggestion 2**).

The ABCC advised our Office that its default position is to have service of examination notices effected by ABCC inspectors where possible. The ABCC advised that to address consistency, it created a template letter of instruction for further engagement of sub agents. We will continue to monitor this issue at future reviews.

***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 determined the ABCC was compliant with this criterion, however we note the below findings related to better practice.

*Guidance for staff exercising coercive powers*

The Administrative Review Council (ARC) provides best practice guidance for agencies using coercive examination notices. Principle 12 of the ARC guidance suggests agencies adopt procedures and offer training aimed at avoiding conflicts of interest in relation to the exercise of coercive information-gathering powers.<sup>1</sup>

The ABCC first provided a copy of its policy for managing conflicts of interest to our Office via email on 18 December 2020 and 24 March 2021. Our review of the guidance and training materials provided to our Office identified that the materials did not address conflicts of interest for staff exercising coercive examination powers.

In response to the concerns raised by our Office, the Commissioner advised that it is only the Commissioner or their delegate, the Deputy Commissioner Legal, who may exercise examination powers, and as statutory office holders both are acutely aware of their duty and obligation to avoid and manage conflicts of interest. In relation to other employees who may be involved in assisting the exercise of these powers, the Commissioner advised that all employees have a legal duty to uphold the APS Values and the APS Code of Conduct to take reasonable steps to avoid conflicts of interest in relation to their employment, and it has a policy for all employees relating to the disclosure and management of conflicts of interest.

The Commissioner advised our Office that it did not consider additional training on conflicts of interest for ABCC employees involved in its examinations functions to be either necessary or appropriate. We are satisfied with this response and will continue to monitor this issue at future reviews.

*Comments on examination preparation*

In one examination, we observed that one participant (not the examinee) was seated away from the other attendees and therefore not completely visible throughout the examination.

The *ABCC Legal Practice Manual* states that everyone in the room must be seen in the video. We reported the same issue in previous reports.<sup>2</sup> We reiterate our view that the Legal Practice Manual requirement means that all attendees must be visible in the video recording.

At the time of the examination the ABCC was not in the possession of our previous report which raised this issue. The ABCC has since advised appropriate measures would be undertaken to record all proceedings and participants during examinations. We are satisfied the ABCC has taken appropriate steps to address this issue. 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 30 <https://www.ag.gov.au/sites/default/files/2020-03/report-48-part-1.pdf>.

<sup>2</sup> See: 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 2020 to 31 December 2020*, page 6. And further: Commonwealth Ombudsman, *Quarterly report by the Commonwealth Ombudsman, under s 65(5) of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 January 2021 to 31 March 2021*, page 5.

*Process for transcript review by the examinee*

As in previous reports, we identified instances in this review period where the process for delivery of transcripts did not state a deadline for when the examinee should reply to the invitation to comment.

Our previous reports 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 ABCC advised our Office that it had revised its procedures for the sending of transcripts for examines for all examinations, including advising examines of a 14-day period to respond.

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, including:

- The Commissioner provided a thorough and accessible general explanation to examinees at the start of each examination about their rights and obligations, their role as a witness and regularly confirmed the examinee's understanding. The Commissioner also explained the legal proceedings in plain English to the examinee, such as the concept of privilege against self-incrimination.
- The ABCC demonstrated good administrative record-keeping and a commitment to engage with the examinee, by keeping contemporaneous notes of the numerous contact attempts post examination.

## Appendix A – Assessments conducted under criterion 4

We detail below how we determine 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.<sup>3</sup>

### ***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 assess this criterion under 4 parts (discussed below): guidance for staff exercising coercive powers,<sup>4</sup> examination preparation,<sup>5</sup> conduct of examination,<sup>6</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 examination powers?

<sup>3</sup> 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 Honourable 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.

<sup>4</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>5</sup> AGIS Investigation Management paragraphs 3.2 'Investigation commencement' and 4.2 'Formal interview'.

<sup>6</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' 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?<sup>7</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>8</sup>
- Was the line of questioning relevant to the investigation?<sup>9</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>10</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>11</sup>

<sup>7</sup> AGIS Investigation Practices, paragraph 4.1.1 'Obtaining information'.

<sup>8</sup> The Wilcox Report, paragraphs 6.53 and 6.71.

<sup>9</sup> Under s 61B(5)(c) of the 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 has information or documents, or is capable of giving evidence, relevant to the investigation.

<sup>10</sup> 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.

<sup>11</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 8 reviews between 1 July 2021 and 30 September 2021 of examinations conducted by the Commissioner between 1 April 2021 and 30 June 2021.

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
ABCC21/001	19 April 2021	24 August 2021
ABCC21/002	13 April 2021	25 August 2021
ABCC21/003	15 April 2021	23 August 2021
ABCC21/004	15 April 2021	24 August 2021
ABCC21/005	16 April 2021	24 August 2021
ABCC21/006	16 April 2021	25 August 2021
ABCC21/007	20 May 2021	25 August 2021
ABCC21/008	20 May 2021	26 August 2021