

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

FOR THE PERIOD 1 JULY TO 30 SEPTEMBER 2019

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

March 2020

COMMONWEALTH
OMBUDSMAN



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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 ABCC) and any person assisting the Commissioner. Under s 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 ABCC and reviews conducted by the Ombudsman during that quarter.

This report covers seven reviews conducted by our Office between 1 July and 30 September 2019 (the review period).

When conducting our review of the ABCC's use of examination powers, we assessed its 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. We also focused on the fair and reasonable treatment of examinees.

Overall, we were satisfied the ABCC was compliant against these requirements and standards, with the exception of repetitive questioning in one of the reviewed examinations. We made four better practice suggestions to the ABCC regarding clarity around providing documents during examinations, adjournments during examinations, and updating internal guidelines and templates. We also noted several positive practices around the use of plain language and fairness to the examinee that we encouraged the ABCC to continue.

During the review period the ABCC advised our Office it conducted five examinations under the BCIIP Act. These will be reviewed by our Office in a subsequent quarter, with the results included in the quarterly report for that period.

INTRODUCTION

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP 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, a safety net contractual entitlement, 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 BCIIP 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 BCIIP Act, the Commissioner is required to notify the Commonwealth Ombudsman (the Ombudsman) as soon as practicable after an examination notice is issued and provide copies of relevant documents. 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 BCIIP Act.

REVIEW SCOPE AND CRITERIA

Objective and scope of reviews

The Ombudsman performs the independent oversight mechanism under Part 2 of Chapter 7 the BCIP Act, assessing the ABCC's performance and confirming procedural fairness for examinees. Under s 65(3)(a) of the BCIP Act, the Ombudsman must review the exercise of examination powers by the Commissioner and any person assisting the Commissioner.

Under s 65(3)(b) of the BCIP Act, the Ombudsman may do anything incidental or conducive to review the exercise of the Commissioner's examination powers.

Criteria used for reviews

When reviewing the examination notices and examinations, we assessed them against the following criteria:

1. Was the application for the examination notice made in accordance with the requirements of the BCIP Act (s 61B) and the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the Regulations) (s 5)?
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?
3. Was the examination notice given to the person named on the notice, in accordance with the requirements of the BCIP 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 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)?

PROGRESS MADE SINCE PREVIOUS REPORT

We did not identify any repeat issues from our last quarterly report containing review findings (report for the period 1 January to 31 March 2019).¹ We will continue to monitor issues discussed in that report in future reviews.

REVIEW RESULTS—1 JULY TO 30 SEPTEMBER 2019

We conducted seven reviews of examination notices and examinations between 1 July and 30 September 2019. 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)?

We determined the ABCC was compliant with this criterion.

We noted one administrative discrepancy where an examination notice listed one suspected contravention that was not listed in the corresponding application documents (ABCC19/003). The ABCC advised that it will endeavour to prevent this issue from reoccurring.

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 AAT Member.

We determined 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 BCIP Act (s 61E), and were claims of privilege properly handled?

We determined the ABCC was compliant with this criterion.

¹ The Ombudsman's quarterly report for the period 1 April to 30 June 2019 did not contain any review results.

Criterion 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?

Overall we determined the ABCC was compliant with this criterion, except in the instances below.

Tone and manner of questioning

One of the concerns raised in the Wilcox Report,² which initially recommended the Ombudsman’s independent oversight of the ABCC’s coercive examinations, was the tone and manner of questioning during examinations.

In one examination we identified instances of repetitive questioning, which could be used as a tactic to solicit a particular answer from the examinee. Although these instances were not representative of how the remainder of this examination was conducted, the ABCC should aim to avoid this manner of questioning. We will continue to monitor the ABCC in this regard.

In response the ABCC advised that its objective was to elicit truthful evidence to assist the relevant investigation and not to elicit a particular answer from the examinee. The ABCC advised that it aims to ensure that its conduct during an examination, and the tone and manner of its questioning, is fair, reasonable, appropriate and in accordance with the Act.

Clarity around voluntarily providing documents during examinations

Section 61B(2) of the BCIP Act states that an examination notice may require the person to give information to the ABCC, produce documents to the ABCC, or attend before the ABCC and answer questions relevant to an investigation.

For three examinations the respective notices only required the examinees to attend before the ABCC to answer questions; however, it was explained to the examinees that it is an offence to provide false or misleading documents to the ABCC under the *Criminal Code Act 1995*. In one of these instances, the examinee was requested to provide a document to the ABCC. To avoid potential confusion for the examinees about their obligations in complying with the notice, best practice would have been for the ABCC to explain that providing documents during these examinations was voluntary.

² ‘Transition to Fair Work Australia for the Building and Construction Industry’ (Report) 2009, by the Honourable Murray Wilcox QC (Wilcox Report)

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The ABCC acknowledged it is best practice for document requests to be clearly expressed as voluntary where the examination notice is limited to requiring the examinee to attend an examination and answer questions.

Adjournments during examinations

The ABCC's policy is to break for adjournment every two hours during an examination. For one examination, although its duration was approximately three hours, the examinee was not offered an adjournment. We note that the examination was suspended for approximately 15 minutes due to a fire alarm; however, better practice would have been to offer the examinee the opportunity to adjourn separately to this event.

The ABCC noted our suggestion to offer examinees an additional opportunity for an adjournment and will do so in future if similar circumstances arise.

Internal guidelines and templates

Guidance on conflicts of interest

Although there were no apparent conflicts of interest during this review period, in the course of our review we identified that the ABCC's guidance materials for coercive examinations do not specifically address how to avoid or manage conflicts. We consider this is an area of possible risk.

The Administrative Review Council states that it is best practice for agencies to adopt procedures and offer training aimed at avoiding conflicts of interest in relation to the exercise of coercive information-gathering powers.³ Although the ABCC advised that its conflict of interest policy applies to all operations and associated investigations, from which the requirement for an examination would arise, we suggest the ABCC specifically address the issue, or refer to its other policies, in its internal guidance to staff who conduct examinations.

Cover letter template

The Administrative Review Council states that an examination notice should clearly state whether it is the usual lawful practice of the agency to provide information collected in response to notices to another area of the same agency or to another agency.⁴

³ 'Coercive Information-gathering powers of Government Agencies', Report no.48, 2008, by the Administrative Review Council (ARC Principles), Principle 12 – 'Conflict of interest'

⁴ ARC Principle 14 – 'Notices'

The ABCC states this in broad terms in its covering letter to the examination notice and during the examination. As a matter of best practice, we suggest the ABCC revises its cover letter to expressly state that answers provided during an examination may also be used as evidence if the relevant investigation proceeds to Court.

In response, the ABCC advised that the only agency to which it usually discloses such information is our Office, in accordance with the Act. The ABCC also addresses the matter of the ABCC making a disclosure to a Court in its opening and closing remarks of an examination. (We also note that the ABCC refers to our Office's role during its opening remarks). Nevertheless, the ABCC will consider whether this issue requires further clarification in its covering letter.

Positive practices: using plain language and fairness to examinee

We noted several good practices throughout our reviews that we encourage the ABCC to continue adopting, as outlined below.

- ABCC19/0001—the Commissioner confirmed with the examinee that it was the examinee's intention not to be legally represented at the examination, stating that the examinee can seek to adjourn the examination at any time to seek legal advice.
- ABCC19/0001—the Commissioner outlined s 61F(6) of the BCIP Act and then explained it in plain language.
- ABCC19/003—the Commissioner explained the examinee's rights and obligations and then asked the examinee if they would like an example of how certain concepts apply to the examination (for example, privilege against self-incrimination).
- ABCC19/005—the Commissioner provided a very thorough overview of the offences suspected of being contravened.
- ABCC19/010—the ABCC counsel reminded the examinee not to reveal information under legal professional privilege.

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

Detailed below is how we determine whether examinations were conducted in accordance with the requirements of s 61F of the BCIP Act, relevant best practice principles and standards, and the ABCC’s internal guidelines.⁵

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.

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 during an examination.

Criterion 4.3—Did the Commissioner require the person being examined to not disclose information or answers given at the examination?

Under s 61F(6) of the BCIP 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 four parts (discussed below): guidance for staff exercising coercive powers⁶, examination preparation⁷, conduct of examination⁸, and post examination.

⁵ This involves an assessment against: the ARC Principles, the best practice principles in relation to the report ‘Transition to Fair Work Australia for the Building and Construction Industry’, 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.

⁶ ARC Principles: 8—‘Training’, 10—‘Accountability’, 12—‘Conflict of Interest’, 14—‘Notices’. AGIS Investigation Practices, paragraph 4.2 ‘Formal interview’ and 4.4 ‘Coercive powers’.

⁷ AGIS Investigation Management, paragraphs 3.2 ‘Investigation commencement’ and 4.2.

⁸ ARC Principles: 1 and 2—‘Setting the threshold and scope’, 16—‘Examinations and hearings’.

Guidance for ABCC staff exercising coercive powers

- Do those exercising coercive powers 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?

Examination preparation

Before conducting an examination, did the ABCC 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

- Prior to commencing the examination, did the ABCC explain the examination process to the examinee?
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?⁹
- 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?¹⁰

⁹ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

¹⁰ The Wilcox Report, paragraphs 6.53 and 6.71.

- Was the line of questioning relevant to the investigation?¹¹
- 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?¹²

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?¹³

¹¹ Under s 61B(5)(c) of the BCIIP Act, the Commissioner’s application for an examination notice must include an affidavit, which amongst other things, outlines the grounds on which the examinee is capable of giving evidence relevant to the investigation.

¹² Section 62(2) of the BCIIP Act.

¹³ ARC Principle 16—‘Examinations and hearings’.

APPENDIX B—EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted seven reviews between 1 July and 30 September 2019. The table below shows the date on which the examination was conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC19/001	8 February 2019	18 September 2019
ABCC19/003	15 February 2019	19 September 2019
ABCC19/004	Examination did not proceed	16 September 2019
ABCC19/005	29 April 2019	25 September 2019
ABCC19/007	30 April 2019	18 September 2019
ABCC19/010	1 May 2019	26 September 2019
ABCC19/011	13 June 2019	20 September 2019

