



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

FOR THE PERIOD 1 JANUARY to 31 MARCH 2022

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*

JULY 2022



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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 17 reviews conducted by our Office between 1 January 2022 and 31 March 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 will continue to assess the actions the ABCC takes in response to our reports at each review.

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 the Act, a designated building law, Commonwealth industrial instruments, or the Building Code¹. 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, and
- 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.

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

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

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 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.

In our 2021–22 quarterly review for the period 1 July to 30 September 2021, we made 2 better practice suggestions:

- The ABCC ensures staff review Record of Service documents to ensure complete and accurate records are kept reflecting the service of examination notices.
- The ABCC provides instructions for sub agents that align with ABCC service practices and requires sub agents to adhere to the same standards as ABCC inspectors. These instructions should include how to maintain examinee confidentiality in accordance with ABCC guidelines.

In our 2021–22 quarterly review for the period 1 October to 31 December 2021, we were satisfied the findings made related to legacy issues from previous reports. Due to the remedial action the ABCC advised our Office it had undertaken, we made no further suggestions for improvement.

For this reporting period, we identified one issue which we have previously made findings on,² which related to maintaining examinee confidentiality when serving an examination notice. Noting the further emphasis the ABCC placed on the requirement to maintain examinee confidentiality in guidance materials and staff training, in response to our previous finding, we did not make any further suggestions in this report. However, we will continue to monitor this issue at future 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.

² See our reports for the periods 1 October to 31 December 2020 and 1 January to 31 March 2021

Review results – between 1 January 2022 and 31 March 2022

We conducted 17 reviews of an examination notice and examination between 1 January 2022 and 31 March 2022. 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. 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 examinee confidentiality was breached during the service of examination notices in the review period.

In our quarterly report for the period 1 January to 31 March 2021, we commented on an instance where ABCC inspectors served an examination 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 risk the examinee's confidentiality and privacy. In response, the ABCC advised our Office in November 2021 that it was not aware of any breaches of examinee confidentiality, and it had refined and amended guidance documents and emphasised this requirement in staff training.

During this review we identified 6 instances where ABCC inspectors served notices on examinees in locations that may have created a higher risk with maintaining the examinee's confidentiality. In these instances, there were no records available demonstrating what action was taken to ensure that confidentiality was maintained in the higher risk locations.

The ABCC advised our Office of steps that would ordinarily be undertaken to confirm the location with the examinee prior to the service to ensure confidentiality was maintained. The ABCC acknowledged that no contemporaneous records of these actions were recorded in relation to any of the instances identified.

Noting the further emphasis the ABCC placed on the requirement to maintain examinee confidentiality in guidance materials and staff training, we did not make any suggestions for improvement in this report and will continue to monitor this issue at future reviews. The ABCC may

wish to consider whether it is necessary to keep appropriate records of the actions taken to maintain examinee confidentiality in circumstances where the location of service may result in a higher risk.

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.

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 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.³

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,⁴ examination preparation,⁵ conduct of examination,⁶ 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?

³ 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.

⁴ 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'.

⁵ AGIS Investigation Management paragraphs 3.2 'Investigation commencement' and 4.2 'Formal interview'.

⁶ 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?⁷
- 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?⁸
- Was the line of questioning relevant to the investigation?⁹
- 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?¹⁰

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?¹¹

⁷ Australian Government Investigation Standards Investigation Practices, paragraph 4.1.1 'Obtaining information'.

⁸ The Wilcox Report, paragraphs 6.53 and 6.71.

⁹ 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.

¹⁰ 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.

¹¹ 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 17 reviews between 1 January 2022 and 31 March 2022 of examinations conducted by the Commissioner between 1 October 2021 and 31 December 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
ABCC21/014	22/11/2021	17/02/2022
ABCC21/015	24/11/2021	23/02/2022
ABCC21/016	24/11/2021	24/02/2022
ABCC21/017	25/11/2021	24/02/2022
ABCC21/018	25/11/2021	24/02/2022
ABCC21/019	26/11/2021	24/02/2022
ABCC21/020	26/11/2021	23/02/2022
ABCC21/021	29/11/2021	24/02/2022
ABCC21/023	14/12/2021	23/02/2022
ABCC21/024	15/11/2021	23/02/2022
ABCC21/026	19/11/2021	25/02/2022
ABCC21/027	14/10/2021	22/02/2022
ABCC21/028	14/10/2021	22/02/2022
ABCC21/029	14/10/2021	22/02/2022
ABCC21/030	15/10/2021	22/02/2022
ABCC21/031	13/10/2021	21/02/2022
ABCC21/032	20/10/2021	25/02/2022