



**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 2019 TO 31 DECEMBER 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*

JULY 2020



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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 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 eight reviews conducted by our Office between 1 October and 31 December 2019 (the review period), consisting of eight examination notices to attend before the Commissioner and answer questions.

When conducting our review of the Australian Building and Construction Commission's (ABCC) use of examination powers, we assessed the Commission'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.

Overall, we were satisfied the ABCC was compliant with the requirements and standards outlined above. We made one suggestion for better practice arising from the ABCC requesting an examinee to verify and provide opinions on documents during an examination to appear and answer questions. We also identified one instance of technical non-compliance regarding providing an examinee sufficient notice of an examination date change. In this particular instance, however, the ABCC was acting in the best interest of the examinee and we acknowledged the ABCC's responsiveness. Additionally, we noted a number of positive practices used by the ABCC.

We appreciated the ABCC's prompt and thorough responses to our requests for further information, which assisted us in finalising our reviews.

During the review period the ABCC advised our Office it conducted one examination under the BCIIP Act. We will review the examination 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 Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents. Under s 65 of the BCIIP 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 BCIIP Act.

REVIEW SCOPE AND CRITERIA

Objective and scope of reviews

Under s 65(3)(a) of the BCIP Act, the Ombudsman must review the examination powers exercised 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 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 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 REPORTS

In our previous report, for the review period 1 July to 30 September 2019, we made four suggestions for better practice to the ABCC. Due to the timing of these reviews, the ABCC has not yet had the chance to implement any remedial action. We will monitor the ABCC's progress in relation to these suggestions and report on them in a future review.

One of the suggestions in our previous report related to the situation where an examinee is issued a notice that only requires them to attend an examination and answer questions and the ABCC then requests documents from the examinee during that examination. In this situation, we suggested that the ABCC should make it clear that the examinee is not obliged to comply with such a request. In these circumstances, the examinee would be providing documents on a voluntary basis. The ABCC agreed with this position.

We identified this issue again during our most recent reviews. For three examinations we noted that the ABCC either requested or directed the examinee to provide the ABCC with documents that were in the examinee's possession. Additionally, during the course of one examination, the ABCC requested that an examinee attempt to locate and play a voice message from the examinee's mobile phone. As noted above, the ABCC has not yet had the chance to implement any remedial action in relation to our previous report as our reviews are conducted retrospectively. We will continue to monitor the ABCC's progress in addressing this issue in future reviews.

REVIEW RESULTS—1 OCTOBER TO 31 DECEMBER 2019

We conducted eight reviews of examination notices and examinations between 1 October and 31 December 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 BCIIIP Act (s 61B) and Regulations (s 5)?

We determined the ABCC was compliant with this criterion.

Criterion 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?

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 Administrative Appeals Tribunal.

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

We determined the ABCC was compliant with this criterion, noting one exception that was the result of the ABCC complying with an examinee's request to change the date of the examination.

Varying the date of an examination

Subsection 61E(4) of the BCIIIP Act provides that the Commissioner may notify an examinee that the relevant examination is to take place at a later time than the time originally specified on the examination notice. However, s 61E(5) of the BCIIIP Act requires that the later time must be at least 14 days after the examinee is notified of this change.

For one examination, the examinee requested that the date of the examination be moved by one day to enable the examinee's support person to attend the examination. This request was made nine days prior to the original examination

date. The ABCC promptly responded to the examinee's request to change the date, and formally notified the examinee of the date change within 24 hours; however, this was done only nine days prior to the new examination date.

We note that, although the ABCC did not provide at least 14 days' notice of the date change, in accordance with the requirements of s 61E(5) of the BCIIIP Act, this change was at the request, and in the best interests, of the examinee. We acknowledge that the ABCC accommodated and promptly responded to the examinee's request and provided good advice to the examinee's support person about how they could support the examinee during and after the examination. The ABCC noted the above comments concerning varying the date for an examination.

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?

Overall we determined the ABCC was compliant with this criterion. We noted a number of positive practices, but have also made one suggestion for better practice, discussed below.

Positive practices

- The ABCC was well prepared for its examinations and had considered relevant information and documents to inform its questioning, which was logical and sequential.
- At the commencement of each examination, it is the ABC Commissioner's usual practice to explain the examination process and the examinee's rights and obligations, in both legal terms and plain English, and seek confirmation from examinees that they understand the process.
- The Commissioner confirmed that the examinee was served with the examination notice on a specific date, prior to entering it into exhibits. This enables our Office to verify that the examinee had been afforded procedural fairness.
- The ABC Commissioner ensured that legal professional privilege (LPP) was upheld during examinations. This included:
 - providing comprehensive explanations to examinees and their legal representatives about the right to claim LPP, and confirming that they understand

- reminding examinees about their right to claim LPP when examinee’s responses indicated that legal matters may be discussed
 - clarifying ABCC questions to note that answers were to exclude legal matters.
- During one examination, the Commissioner allowed an examinee’s legal representative to object to a statement posed by the ABCC, as it was considered pejorative and the Commissioner requested that Counsel assisting rephrase it. At another point in the examination, the examinee’s legal representative was allowed to rephrase a question after the ABCC posed a question to the examinee which the examinee’s legal representative described as ‘a very lawyer question’.

Requesting an examinee to verify and provide opinions on documents during an examination to appear and answer questions

When reviewing examinations and assessing whether examinees were fairly treated, we consider the Administrative Review Council’s (ARC) guidance for best practices when exercising coercive information-gathering powers. For example, Principle 2 provides that an agency must choose the most efficient and effective means of obtaining information.¹

Under one examination notice, the examinee was required to attend and answer questions regarding an event that had occurred several months earlier. In addition to answering questions about the event during the examination, the examinee was provided with a series of documents that the ABCC had obtained under s 77 of the BCIIIP Act.² The ABCC requested the examinee verify, or provide an opinion on, the purpose or meaning of the documents or parts thereof. At one point, this resulted in the examinee attempting to access information on their mobile telephone in order to answer certain questions.

The examinee’s legal representative objected more than once to the line of questioning, proposing that the documents be verified outside of the examination process, so that the examinee could have access to information in order to more efficiently respond to specific questions. This objection was eventually upheld by the ABCC. At the conclusion of the examination, the ABCC appropriately reminded the examinee that they were no longer obliged to cooperate in accordance with the examination notice, but thanked the examinee for their ongoing cooperation.

¹ See 'Coercive Information-gathering powers of Government Agencies' (Report no.48) 2008, Principle 2 - Exercising the powers.

² Section 77 of the BCIIIP Act provides the ABCC with the power to require persons to produce records or documents.

In future, we **suggest** that the ABCC considers other options for achieving the objective of verifying documents, particularly if the examinee would need to seek information that is not in the examinee's immediate possession in order to answer the ABCC's questions. For example, the ABCC may wish to consider seeking an examination notice for the examinee to produce specific documents or information in order for the ABCC to verify such documents itself. This would ensure the most fair and efficient method of obtaining considered information from witnesses.

In response, the Commissioner advised our Office that in this instance he considered it was appropriate to ask the examinee to verify certain documents. In the Commissioner's opinion, there was confusion during the examination and making the documents available may have clarified the sequence of conversations and assisted in making the remainder of the examination more efficient and effective. The Commissioner noted our suggestion about exploring other options for verifying documents to ensure the most fair and efficient method of obtaining considered information from a witness, and indicated that this would be considered if similar circumstances arise in the future.

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 the BCIIIP 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 BCIIIP 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 BCIIIP 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 BCIIIP 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 powers,⁴ examination preparation,⁵ conduct of examination,⁶ and post examination.

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 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.

⁴ ARC Principles: 8—‘Training’, 10—‘Accountability’, 12—‘Conflict of Interest’, 14—‘Notices’. 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.

⁶ ARC Principles: 1 and 2—‘Setting the threshold and scope’, 16—‘Examinations and hearings’.

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?

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

- 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?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

⁷ AGIS Investigation Practices, paragraph 4.1.1 obtaining information.

⁸ The Wilcox Report, paragraphs 6.53 and 6.71.

- 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

⁹ Under s 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 examinee is capable of giving evidence relevant to the investigation.

¹⁰ Section 62(2) of the BCIP Act.

¹¹ ARC Principle 16—‘Examinations and hearings’.

APPENDIX B—EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted eight reviews between 1 October and 31 December 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
ABCC19/006	29 April 2019	4 December 2019
ABCC19/008	30 April 2019	27 November 2019
ABCC19/009	1 May 2019	27 November 2019
ABCC19/012	19 July 2019	18 November 2019
ABCC19/013	19 July 2019	18 November 2019
ABCC19/014	29 August 2019	19 November 2019
ABCC19/015	28 August 2019	19 November 2019
ABCC19/016	29 August 2019	20 November 2019