

**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 2016 TO 31 MARCH 2017

Quarterly report by the Commonwealth Ombudsman:
In accordance with Part 2 of Chapter 7 of the
*Building and Construction Industry
(Improving Productivity) Act 2016*

March 2018



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Commonwealth Ombudsman
Level 5, 14 Childers Street
Canberra ACT 2600
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EXECUTIVE SUMMARY

On 1 December 2016, the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) and the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (Transitional Act) commenced, repealing the *Fair Work (Building Industry) Act 2012* (FWBI Act).

As a result, Fair Work Building and Construction (FWBC) ceased operations on 1 December 2016 and the Australian Building and Construction Commission (ABCC) commenced operations on 2 December 2016.

Under the FWBI Act, the Commonwealth Ombudsman (the Ombudsman) was required to review the examination powers exercised by the Director of FWBC (the Director) and any person assisting the Director.

This report covers reviews conducted between 1 July 2016 and 31 March 2017 (the review period). As each examination reviewed by the Ombudsman during the review period was conducted under a notice issued to FWBC, in accordance with s 12(2) of the Transitional Act these were assessed under the FWBI Act, and any reference to legislation will be in relation to the repealed FWBI Act. The recommendation made in this report is applicable to the ABCC and its use of the examination powers (which are unchanged under the BCIIP Act).

As a result of our reviews, we found that in some instances the Director of FWBC expressed a preference for examinees not to discuss matters relating to the examination. As the Director could not require this under the FWBI Act, we recommend:

Recommendation

The Commissioner of the Australian Building and Construction Commission should not express a preference that an examinee not disclose information or answers given at the examination or not discuss matters relating to the examination with any other person. Under s 61F(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* the Commissioner must not require this and therefore the Commissioner should not express a preference in this regard.

We acknowledge the ABCC's position that the practice of stating a preference for examinees to maintain confidentiality regarding an examination is no longer expressed as a matter of course.

1. INTRODUCTION

The FWBI Act commenced on 1 June 2012 and was repealed by the Transitional Act on 1 December 2016.

Under the FWBI Act, the Director could inquire into and investigate any act or practice by a building industry participant that might be contrary to a designated building law, a safety net contractual entitlement, or the Building Code.¹ As part of such an investigation, the Director could apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice.

An examination notice required its recipient to:

- give information to the Director;
- produce documents to the Director; or
- attend before the Director to answer questions relevant to an investigation.

Under the FWBI Act, the Director was required to notify the Ombudsman after an examination notice had been issued and provide copies of relevant documents. After the examination was completed, the Director was required to give the Ombudsman a report about the examination, a video recording of the examination and a transcript of the examination. The Ombudsman was then required to review the exercise of these powers by the Director and any person assisting the Director.

Under s 65(6) of the BCIP Act and s 13(2) of the Transitional Act, the Ombudsman is required to report to the Parliament about examinations conducted both during the period before the transition time (1 July to 1 December 2016), and those conducted in the first quarter of the financial year following passage of the BCIP Act. Therefore this report covers reviews conducted by the Ombudsman between 1 July 2016 and 31 March 2017. Future reports tabled under the BCIP Act will be made on a quarterly basis, as required by the Act.

¹ The Building Code, made under subsection 27(1) of the *Fair Work (Building Industry) Act 2012*, is a code of practice which sets out requirements to be complied with by building contractors and building industry participants in respect of building work.

2. REVIEW SCOPE AND METHODOLOGY

Objective and scope of reviews

Under s 54A(3)(b) of the FWBI Act, the Ombudsman could do anything incidental or conducive to review the exercise of the Director's examination powers.

Criteria used for reviews

The full criteria we use to review the exercise of the Director's examination powers are listed below. Examination notices issued and the examinations conducted during the review period were assessed against narrowed criteria, focussing on areas of highest risk, being the conduct of the examinations and the monitoring of previous issues. Accordingly, no assessment was made against criteria 1–3 during this review period and criterion 5 did not apply.

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act and the relevant regulations?
2. Did the examination notice comply with the requirements of the FWBI Act (ss 47 and 48), the relevant regulations and relevant best practice principles?
3. Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?
4. Was the examination conducted in accordance with the requirements of the FWBI Act, relevant best practice principles, standards and FWBC's internal policies and guidelines?

Appendix A provides detailed inspection criteria for this criterion, as this is the main focus of our reviews.

5. Where the Minister issued directions, were these complied with?

3. PROGRESS MADE SINCE PREVIOUS REPORT

In our previous report, covering reviews conducted in 2015-16,² we made one recommendation and three suggestions regarding how FWBC (and the ABCC) might improve its adherence to legislative requirements and best-practice principles. A draft copy of that report was provided to the ABCC on 12 October 2017.³ As the examinations under review between 1 July 2016 and 31 March 2017 occurred prior to this date, we did not expect the ABCC to have acted on the suggestions made; however, the recommendation was also made in the previous report, provided to FWBC in April 2016. Therefore, we have followed up progress in addressing this recommendation during the review period.

Previous Recommendation

Recommendation

Under s 51(6) of the *Fair Work (Building Industry) Act 2012*, the Director of Fair Work Building and Construction must not require an examinee to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person; and should not express a preference in this regard.

This recommendation is also made in this report to the ABCC.

While not initially accepted by FWBC, we have noted changes to the Director's practices during the review period which may indicate the Director had partially taken this recommendation on board.

During the review period, the Director only appeared to state a preference for the examinee not to discuss the examination if the examinee was a union member.

We note the ABCC advised in October 2017 that the practice of expressing a preference that witnesses not disclose the content of their examinations was reviewed and is no longer expressed to witnesses as a matter of course. However, as this practice had not been adopted during the review period in all instances, we have maintained this recommendation.

² Annual report by the Commonwealth Ombudsman under 13(1) of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* for the period 1 July 2015 to 30 June 2016.

³ We received the Acting Commissioner's response on 31 October 2017, and those comments were incorporated into the previous report.

Previous suggestions for improvement

In our previous report we identified several examinations where we thought the examinee was questioned beyond the scope of the examination. To ensure examination powers are exercised appropriately, we suggested the ABCC ensure questioning of examinees is limited to the investigation or investigations for which the examination notice was issued and inform examinees they are not required to give evidence on matters outside the scope of the examination notice.

We did not note this issue during the review period and were satisfied that the ABCC's use of examination powers were within the scope of the notice.

Our final suggestion was that the ABCC should allow an examinee to answer questions in their own words and from their own experiences.

This issue was not identified during this review period.

4. RESULTS OF OUR REVIEWS – 1 JULY 2016 TO 31 MARCH 2017

Criterion 1 – Was the application for an examination notice made in accordance with the requirements of the FWBI Act and the relevant regulations?

FWBC was not assessed against this criterion.

Criterion 2 – Did the examination notice comply with the requirements of the FWBI Act (ss 47 and 48), the relevant regulations and relevant best practice principles?

FWBC was not assessed against this criterion.

Criterion 3 – Was the examination notice given in accordance with the requirements of the FWBI Act and were claims of privilege properly dealt with?

FWBC was not assessed against this criterion.

Criterion 4 – Was the examination conducted in accordance with the requirements of the FWBI Act, relevant best practice principles, standards and FWBC’s internal policies and guidelines?

FWBC was assessed as compliant; however, we have discussed one issue below, relating to how the Director conducted the examinations that appeared contrary to the intent of the legislation.

Expressing a preference that proceedings not be discussed

Section 51(6) of the FWBI Act stated that the Director must not require an examinee to undertake not to disclose information or answers given at the examination; or not to discuss matters relating to the examination with any other person.

The Director stated a preference for the examinee not to discuss the examination during two out of the nine examinations reviewed.⁴ Although the Director stating a preference differs from a direct request, we consider it contrary to the intent of the legislation.

As noted in our previous report, expressing a preference in the context of an examination could undermine that legislative requirement.

⁴ FWBC16/006 and FWBC16/007.

As discussed in Part 3, this issue was reported in our 2014–15 and 2015–16 annual reports.

While FWBC appeared to have ceased this practice where union members were not involved, we think this practice should cease in all instances.

Recommendation

The Commissioner of the Australian Building and Construction Commission should not express a preference that an examinee not disclose information or answers given at the examination or not discuss matters relating to the examination with any other person. Under s 61F(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* the Commissioner must not require this and therefore the Commissioner should not express a preference in this regard.

In response to this recommendation, the ABCC has reiterated its earlier position. The ABCC's response is provided in full at Appendix C.

Criterion 5 – Where the Minister issued directions, were these complied with (s 11)?

No directions were issued at the time of the reviews; therefore, this criterion did not apply.

APPENDIX A – ASSESSMENTS CONDUCTED UNDER CRITERION 4

Detailed below is how we determine whether examinations were conducted in accordance with the requirements of the FWBI Act (s 51), relevant best practice principles and standards and FWBC's internal policies and guidelines.⁵

Criterion 4.1 – Did the Director of FWBC conduct the examination?

This is assessed against section s 51(2) FWBI Act; Guidance Note 6⁶ paragraph 17.1.

Criterion 4.2 – If requested by the examinee, did the Director agree to a representing lawyer to be present at the examination?

This is assessed against section 51(3) of the FWBI Act and Guidance Note 6, paragraph 18.1.

Criterion 4.3 – Did the examiner require the person being interviewed to not disclose information or answers given at the examination?

This is assessed against section 51(6) FWBI Act.

⁵ This involves an assessment against the relevant best practice principles set out by the Administrative Review Council (ARC), the Wilcox Report, the requirements of the Australian Government Investigation Standards (AGIS), and FWBC's internal guidelines.

⁶ Guidance notes are published by FWBC and provide FWBC's advice on the interpretation of the laws it enforces or about its internal policies and procedures. Guidance Note 6 relates to FWBC's examination notice policy.

Criterion 4.4 – Assessment of conduct of examination and related issues:

Guidance for staff exercising coercive powers⁷

- Do those exercising coercive powers in FWBC have access to assistance, advice and support for the exercise of those powers?
- Does FWBC have procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of the examinations powers?

Examination preparation⁸

Before conducting an examination, did the Director/persons assisting the Director 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 of the examinee;
- If relevant, implement risk management strategies; and
- Address logistics and resources of the examination (room, equipment, personnel etc.).

Conduct of examination

- Prior to commencing the examination, did the Director explain the examination process? (derived from ARC Principle 14 in relation to examination notices)
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination? (AGIS paragraph 4.1)
- Was the oral examination conducted within standard business hours? Were there regular adjournments?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning? (Wilcox Report, paragraphs 6.53 and 6.71)
- Was the line of questioning relevant to the investigation? (derived from the requirement in s 45(5)(d) requiring the Director to specify in

⁷ ARC Principles 8, 10, 12; AGIS paragraph 4.2 and 4.4.

⁸ AGIS paragraphs 3.2 and 4.2.

the affidavit to the AAT the grounds on which the examinee is capable of giving evidence relevant to the investigation; and in Guidance Note 6, paragraph 14 regarding the scope of information, documents and answers that may be required).

- If relevant, was the examinee or the examinee's legal representative permitted to object to questions as being unclear or irrelevant to the subject matter of the examination? Were the examinee or their legal representative allowed to ask questions, make comments and/or submissions at the completion of the examination? (Guidance Note 6, paragraph 18.4)
- Did the person claim legal professional privilege or public interest immunity during the examination? (s 52(2))

Post examination

- Did FWBC 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 FWBC? (ARC Principle 16 and Guidance Note 6, paragraph 17.7)

APPENDIX B – EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted nine reviews between 1 July 2016 and 31 March 2017. Of those nine, five examinations reviewed were conducted by FWBC during 2015-16; however, the documentation to conduct the review was not received by the Ombudsman until the 2016–17 financial year.

The table below shows the financial year in which the examination was conducted.

FWBC Examination Reference Number	Financial Year Examination Conducted	Ombudsman Review Conducted
FWBC16/001	2015–16	November 2016
FWBC16/002	2015–16	November 2016
FWBC16/003	2015–16	March 2017
FWBC16/004	2015–16	November 2016
FWBC16/005	2015–16	March 2017
FWBC16/006	2016–17	March 2017
FWBC16/007	2016–17	March 2017
FWBC16/008	2016–17	March 2017
FWBC16/009 ⁹	2016–17	March 2017

⁹ This examination notice was issued to FWBC, but was conducted by the ABCC Commissioner, in accordance with s 12(2) of the Transitional Act. This review was conducted in accordance with ss 49 to 58 of the FWBI Act.

APPENDIX C – ABCC COMMENTS

13 February 2018

Ms Fiona Sawyers
Senior Assistant Ombudsman
Social Services, Indigenous, Disability and Integrity Branch
Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Ms Sawyers

I refer to your letter of 31 January 2018 enclosing a draft of the Commonwealth Ombudsman's report under section 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) into the use of the Examination powers by this agency and its predecessor agency, the Fair Work Building Industry Inspectorate, between 1 July 2016 and 31 March 2017.

You have invited comments from us on the draft report which contains a single recommendation from the Commonwealth Ombudsman.

As noted, the Inspectorate was replaced by the Australian Building and Construction Commission (ABCC) on 2 December 2016 and the examination powers available to both agencies are very similar. I provide the following comments on the Commonwealth Ombudsman's recommendation.

Recommendation

The Commissioner of the Australian Building and Construction Commission should not express a preference that an examinee not disclose information or answers given at the examination or not discuss matters relating to the examination with any other person. Under s 61F(6) of the BCIIP Act the Commissioner must not require this and therefore the Commissioner should not express a preference in this regard.

This recommendation is, in substance, identical to the recommendation made in the Commonwealth Ombudsman's report of 2015/16.

I refer to and reiterate the response from former Acting Commissioner Cato to that recommendation which response is noted in the draft report. Namely, that the ABCC does not require an examinee to undertake to not disclose or

discuss the contents of their examination with others. Further, the practice of expressing a preference that witnesses do not disclose the content of their examinations has been reviewed and is no longer expressed to witnesses as a matter of course.

Thank you for the opportunity to comment on the Commonwealth Ombudsman's recommendation in its draft report into the use of examination powers by the agency between 1 July 2016 and 31 March 2017.

Yours sincerely

Stephen McBurney
Commissioner
Australian Building and Construction Commission

