

COMMONWEALTH
OMBUDSMAN



**Annual report by the
Commonwealth Ombudsman
under s 13(1) of the
*Building and Construction Industry (Consequential
and Transitional Provisions) Act 2016***

FOR THE PERIOD 1 JULY 2015 TO 30 JUNE 2016

Annual report by the Commonwealth Ombudsman:
In accordance with Chapter 7, Part I, Division 3 of the
Fair Work (Building Industry) Act 2012

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Commonwealth Ombudsman
Level 5, 14 Childers Street
Canberra ACT 2600
Tel: 1300 362 072
Email: ombudsman@ombudsman.gov.au

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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 2015 and 30 June 2016. As FWBC was still an entity at the time the reviews were conducted, we have referred to it as such for the purpose of this report. Furthermore, as our reviews were conducted under the FWBI Act, any reference to legislation will be in relation to the repealed FWBI Act. Our suggestions for improvement made in this, and previous reports, remain applicable to the ABCC and its use of the examination powers (which are unchanged under the BCIIP Act). The ABCC was given the opportunity to comment on this annual report (Appendix A).

During 2015–16, the Ombudsman completed 17 reviews: four reviews related to examinations that were conducted in 2014–15; and the remaining 13 reviews related to 12 examinations that were conducted, and one examination notice that was withdrawn, in 2015–16.

As a result of our reviews, we have made one 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 person¹ and should not express a preference in this regard.

We have also made three suggestions for improvement to ensure compliance with the FWBI Act, relevant best practice principles and standards and FWBC's internal policies and guidelines, namely that FWBC:

¹ Section 51(6) FWBI Act.

- ensure that questioning of examinees is limited to the investigation or investigations for which the examination notice was issued;
- inform examinees that they are not required to give evidence on matters outside the scope of the examination notice; and
- should allow an examinee time to answer questions in their own words and from their own experiences.

We also continued to monitor issues identified during our 2014-15 reviews, particularly the issue noted above regarding the Director stating a preference for examinees to maintain confidentiality regarding an examination.

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.² 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 13(1) of the Transitional Act the Ombudsman is required to report to Parliament about examinations conducted during the financial year ending at or before 1 December 2016. In the report, the Ombudsman must also include the results of reviews that were conducted in that financial year. This will be the Ombudsman's last report in relation to the FWBI Act and under the Transitional Act. Future reports will be tabled under the BCIP Act.

² The Building Code, made under subsection 27(1) of the *Fair Work (Building Industry) Act 2012*, was a code of practice which set out requirements to be complied with by building contractors and building industry participants in respect of building work.

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

Examination notices and the examinations conducted were assessed against the following five criteria:

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act and the relevant regulations?³
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 and standards and FWBC's internal policies and guidelines?

Appendix A provides details on our assessments made under this criterion.

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

³ The Fair Work (Building Industry) Regulation 2015 replaced the Fair Work (Building Industry) Regulations 2005, on 5 September 2015. Examination notices have been reviewed against the regulations in force at the time they were issued.

PROGRESS MADE SINCE PREVIOUS REPORT

In our previous report, covering reviews conducted in 2014–15,⁴ we made two recommendations and three suggestions regarding how FWBC might improve its adherence to legislative requirements and best-practice principles. A draft copy of that report was provided to FWBC on 7 April 2016.⁵ As the examinations under review in 2015–16 occurred prior to this date, we did not expect FWBC to have had the opportunity to act on those recommendations and suggestions. However, the Director’s response to that report indicates the recommendations and suggestions were not accepted, although some changes to the Director’s practices were evident during our 2015–16 reviews, as detailed below.

Previous Recommendations

Recommendation 1

If examinees are required to reappear before the Director of Fair Work Building and Construction to answer questions at a later date, a new examination notice should be sought.

The Director responded that this recommendation would be inconvenient to implement, as it would activate the “complex legal and administrative steps” for seeking a new examination notice. Furthermore, the Director considered the extensive external review of the examination, including the Ombudsman’s oversight, provided examinees with adequate protections. Despite the Director’s advised position, the practice of requiring examinees to reappear before the Director of FWBC was not observed in the examinations reviewed in 2015–16.

Recommendation 2

Under 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 person⁶ and should not express a preference in this regard.

⁴ Annual report by the Commonwealth Ombudsman under s 54A(6) of the *Fair Work (Building Industry) Act 2012* for the period 1 July 2014 to 30 June 2015.

⁵ The Director’s response was received on 26 April 2016, and was incorporated into the previous report. On 8 May 2016, a double dissolution election was called and it was not possible to present the report until after the 45th Parliament was opened on 30 August 2016. The report was then finalised, printed and presented to the President of the Senate on 22 September 2016, as required by s 54A(6).

⁶ Section 51(6) FWBI Act.

The Director's response to this recommendation was that any request that an examinee refrain from disclosing to others information discussed at the examination was reasonable when balanced by a clear statement that there was no prohibition on information disclosure. The Director also considered the Ombudsman's oversight provided examinees with sufficient protection. The Director's practice of stating his preference for the examinee not to discuss the examination remains an ongoing issue and was identified in all but one examination reviewed in 2015–16, as further discussed in Part 5 of this report. As such, we have made a similar recommendation in this report.

Previous suggestions for improvement

Our first suggestion was that FWBC review its current processes to ensure that, firstly, all information regarding the impact of an examination notice on the examinee is reflected in each application to the AAT, and secondly, the confidentiality of examinees is maintained at all times. The Director responded that it was unfair to highlight these instances because, in the Director's opinion, there was no breach of confidentiality. Notwithstanding, the Director confirmed that FWBC would continue to ensure witness confidentiality is given full regard. This issue was not identified during this reporting period.

Our second suggestion was that FWBC consider implementing a limit of two examinations per day to account for unanticipated delays and prevent inconvenience to examinees. The Director responded that FWBC was reluctant to commit to a daily fixed examination quota due to potential cost implications, inefficiencies and the need for the variability of examinations. On one occasion in the 2015–16 reviews, three examinations were scheduled to be undertaken on the same day; however, one notice was withdrawn and only two examinations took place on that day.

Our final suggestion was that FWBC seek advice on the interpretation of provisions under the relevant legislation to ensure examinees are not financially disadvantaged by attending an examination. In response to this suggestion, the Director noted that FWBC would ensure all appropriate allowances are payable.

RESULTS OF OUR 2015–16 REVIEWS

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

Section 45 and the regulations set out the general requirements to be met before an application for an examination notice was made, and prescribed the requirements regarding the form and content of an application.

FWBC was assessed as compliant except in the instances below.

Applications for examination notices related to more than one person

Under s 45(4) of the FWBI Act, an application for an examination notice could not relate to more than one person. Under s 45(5)(a) of the FWBI Act, an application must have been accompanied by an affidavit which must contain the name of the person in relation to whom the application relates.

In three instances,⁷ the Director made an application for an examination notice which related to more than one examinee, and the associated affidavits referred to more than one examinee.

FWBC should ensure that applications are made in accordance with the legislative requirements.

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?

Under this criterion, we will only comment on actions taken by FWBC. We do not comment on any decision made by a nominated AAT Member.

FWBC was assessed as compliant except in the instances below.

Examination notices must adhere to the regulations

Under s 48(a) of the FWBI Act, an examination notice must have been in accordance with the form prescribed by the regulations. The regulations that have been in force since 2005 were superseded by a new regulation on 5 September 2015.

⁷ These three instances related to seven examinees in total: FWBC15/010; FWBC15/011; FWBC15/012; FWBC15/013; FWBC15/014; FWBC15/015; and FWBC15/016.

We identified that five examination notices issued after 5 September 2015 were in the form prescribed by the previous regulations rather than the 2015 Regulation. As a result, these five examination notices issued by the FWBC did not comply with the regulation in force at the time.

As later examination notices were prepared in accordance with the form prescribed by the 2015 Regulation, it is not necessary to make a suggestion for improvement regarding this issue.

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 assessed as compliant.

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

FWBC was assessed as compliant; however, we have discussed three issues below where FWBC’s adherence to the above requirements could be improved.

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 all but one examination. Although the Director stating a preference differs from a direct request, we consider it contrary to the intent of the legislation.

As also noted in our previous report, expressing a preference in the context of an examination could undermine that legislative requirement. Further, the Administrative Review Council recommended that examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing.⁸ The fact that the FWBI Act stipulated no such undertaking can be required, denotes that it should be left to the examinee’s own consideration as to whether he or she keeps the information provided confidential.

⁸ Administrative Review Council: *The Coercive Information-Gathering Powers of Government Agencies Report* no. 48 May 2008; Principle 16.

As stated in Part 3, the Director did not agree with our previous recommendation. As it is an ongoing issue, we again recommend:

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.

In response to this finding, the Acting Commissioner advised that 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.

Questioning examinees beyond the scope of the examination notice

Under section 45(5)(d) of the FWBI Act, if the Director believed on reasonable grounds that a person was capable of giving evidence that is relevant to an investigation, the Director may apply for the issuing of an examination notice. An application for an examination notice must have been accompanied by an affidavit by the Director including the grounds on which the Director believes the person is capable of giving evidence relevant to the investigation (or investigations).

The FWBI Act regulation required the examination notice to specify the address (if any) to which the suspected contravention relates; the building industry participant or kind of building industry participant; the suspected contravention and designated building law or safety net contractual entitlement; and the period during which the suspected contravention took place. Additionally, FWBC's internal policies⁹ state that a person who receives an examination notice is obligated to comply with the examination notice and, where relevant, must answer questions relevant to the investigation while attending the examination as required by the examination notice.

The above requirements appeared to require the Director to demonstrate the witness is capable of giving evidence relevant to a particular investigation in order to justify the use of examination powers.

⁹ Guidance Note 6 paragraph 19.1(e).

Accordingly, we consider the evidence sought from the witness should be relevant to the investigation referred to in the application and the examination notice.

In several examinations, Counsel assisting the Director in the examination questioned the witness in relation to building sites or activities that did not directly appear to be within the scope of the examination notice. Further comments are at Appendix D.

To ensure that examination powers are always exercised appropriately, we suggest FWBC ensure that questioning of examinees is limited to the investigation or investigations to which the examination notice was issued and examinees are informed that they are not required to give evidence on matters beyond the scope of the notice.

In response to this suggestion, the ABCC stated that the scope of the investigation is clearly outlined to witnesses in the notice issued to them by the Administrative Appeals Tribunal. Accordingly, witnesses are asked questions during an examination that are relevant to the investigation as outlined in the notice; and what is relevant to an investigation will depend on the particular circumstances of each case. Further, the ABCC noted that it utilises members of the independent bar as counsel-assisting during examinations, which provides it with added comfort that questions asked are within the scope of matter relevant to the investigation.

Tone and manner of questioning

In his report *Transition to Fair Work Australia for the Building and Construction Industry* March 2009, Murray Wilcox QC noted that an independent person reviewing a videotaped record of the interrogation (paragraph 6.54) could satisfactorily resolve complaints regarding the tone and manner of questioning in examinations. Accordingly, this aspect is included in the review of FWBC examinations.

As noted in our previous report, examinees and their legal representatives were treated courteously and professionally. However, there were instances where questions posed to the examinee appeared to seek evidence as to the mindset of another person, and instances where the Director suggested words to the examinee when answering questions. In our view, FWBC should allow an examinee time to answer questions in their own words and from their own experiences. Further comments are at Appendix D.

In response to this suggestion, the ABCC stated that it always seeks to allow examinees to answer questions in their own words; however, in some circumstances it is necessary to draw the evidence from a witness by more directly asking questions, putting propositions to them, and seeking

clarification on answers given. ABCC further stated that examinations are fact-finding processes and it is permissible to directly ask a witness to comment or clarify a specific issue.

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

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

APPENDIX A – ABCC COMMENTS

31 October 2017

Mr Rodney Lee Walsh
Senior Assistant Ombudsman
Integrity Branch
Commonwealth Ombudsman
GPO Box 452
Canberra ACT 2601

Dear Mr Walsh

I refer to your letter of 10 October 2017 which enclosed an embargoed draft of the Commonwealth Ombudsman's report into the use of the Examination powers by the Fair Work Building Industry Inspectorate (FWBII) during the 2015/2106 financial year.

You have invited comments from us on the draft report. The Commonwealth Ombudsman makes a single recommendation in the report and three suggestions for the agency's consideration.

As you note, 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. We provide the following comments on the Commonwealth Ombudsman's recommendation and suggestions.

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.

Section 51(6) of the *Fair Work (Building Industry) Act 2012* (FWBII Act) is replicated in s 61F(6) of the *Building and Construction (Improving Productivity) Act 2016* (BCIIP Act).

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.

Suggestions

The Agency ensure that questioning of examinees is limited to the investigation or investigations for which the examination notice was issued.

Examinees should be informed that they are not required to give evidence on matters outside the scope of the examination notice.

Examinees should be allowed time to answer questions in their own words and from their own experiences.

The legislation allows for examination notices to be issued to witnesses requiring them to attend and answer questions relevant to an investigation (see for example, s 45(1)(e) of the FWBII Act and section 61B(2)(c) of the BCIIIP Act).

The scope of the investigation is clearly outlined to witnesses in the notice issued to them by the Administrative Appeals Tribunal. Witnesses are asked questions during an examination that are relevant to the investigation as outlined in the notice. What is relevant to an investigation will depend on the particular circumstances of each case.

In all examinations conducted by the Director in the reporting period, the Director was assisted by counsel from the independent bar. Utilising members of the independent bar as counsel-assisting provides added comfort that questions asked are within the scope of matter relevant to the investigation.

We also note the Commonwealth Ombudsman's findings in this and previous reports that examinees and their legal representatives have been treated courteously and professionally by the agency. In response to the suggestion that witnesses should answer questions in their own words; this is of course, always sought. However, in some circumstances it is necessary to draw the evidence from a witness by more directly asking questions, putting propositions to them, and seeking clarification on answers given. Examinations are fact-finding processes and it is permissible to directly ask a witness to comment or clarify a specific issue.

Thank you for the opportunity to comment on the Commonwealth Ombudsman's recommendation and suggestions in its report into the use of examination powers by the FWBII in 2015/2016.

Yours sincerely

Cathy Cato
Acting Commissioner
Australian Building and Construction Commission

APPENDIX B – 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.¹⁰

Criterion 1 – Did the Director of FWBC conduct the examination?

This is assessed against section 51(2) of the FWBI Act and Guidance Note 6¹¹, paragraph 17.1.

Criterion 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 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.

Criterion 4 – Assessment of conduct of examination and related issues:

Guidance for staff exercising coercive powers¹²

- 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 preparation¹³

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;

¹⁰ This involves an assessment against the relevant best practice principles set out by the ARC, the Wilcox Report, the requirements of the Australian Government Investigation Standards (AGIS), and FWBC's internal guidelines.

¹¹ 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.

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

¹³ AGIS paragraphs 3.2 and 4.2.

- 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, were the questions reasonable? (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 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 C – EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted seventeen reviews in 2015–16. Of those 17, four of the examinations reviewed were conducted by FWBC during 2014–15; however, the documentation to conduct the review was not received by the Ombudsman until the 2015–16 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
FWBC15/001	2014–15	January 2016
FWBC15/002	2014–15	June 2016
FWBC15/003	2014–15	January 2016
FWBC15/004	2014–15	February 2016
FWBC15/005	2015–16	June 2016
FWBC15/006	2015–16	June 2016
FWBC15/007	2015–16	June 2016
FWBC15/008	2015–16	June 2016
FWBC15/009	2015–16	June 2016
FWBC15/010	2015–16 (withdrawn)	June 2016
FWBC15/011	2015–16	June 2016
FWBC15/012	2015–16	June 2016
FWBC15/013	2015–16	June 2016
FWBC15/014	2015–16	June 2016
FWBC15/015	2015–16	June 2016
FWBC15/016	2015–16	June 2016
FWBC15/017	2015–16	June 2016

APPENDIX D – COMMENTS REGARDING: THE SCOPE OF THE EXAMINATION; AND THE TONE AND MANNER OF QUESTIONING.

Notice (page number)	Comment
Notice 6 (57-59)	Director posed questions to the examinee regarding a building industry participant not named in the notice.
Notice 15 (28-30 and 35)	Director posed questions to the examinee about a building site and a building industry participant not named in the notice.
Notice 17 (22; 25; 32; 34 and 59)	Director posed questions to the examinee regarding building sites not specified in the notice.
Notice 6 (20)	Director posed questions to the examinee which appeared to seek evidence as to the mindset of another person.
Notice 7 (15; 34; and 40-41)	Director suggested words to the examinee while the examinee was answering questions.
Notice 8 (28)	Director suggested words to the examinee while the examinee was answering questions.