



Submission by the
Commonwealth Ombudsman

**Inquiry into the Government's approach to
re-establishing the Australian Building and
Construction Commission**

Submission by the Commonwealth Ombudsman, Colin Neave
January 2014

1 Introduction

On 4 December 2013, the Senate referred the Government's approach to re-establishing the Australian Building and Construction Commission (ABCC) to the Education and Employment References Committee (the Committee) for inquiry and report by 27 March 2014. It is proposed that the ABCC would be re-established under the Building and Construction Industry (Improving Productivity) Bill 2013 (the bill), and replace the Office of the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction).

The Commonwealth Ombudsman (the Ombudsman) has a proposed oversight role under the bill in reviewing notices issued and examinations conducted by the ABCC to gather information, request documents and examine witnesses. We currently have a similar role in overseeing Fair Work Building and Construction (FWBC) under the *Fair Work (Building Industry) Act 2012* (the FWBI Act).

In November 2013, we made a submission (previous submission) to the inquiry conducted by the Education and Employment Legislation Committee on the bill and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 ([Attachment A](#)). In our previous submission we discussed the possible expansion of the scope of our oversight activities if the bill was passed and noted that we would be engaging in discussions with respect to negotiating appropriate funding for our oversight role.

We are confident that FWBC recognises the Ombudsman's resourcing constraints and that any enhanced oversight role needs to be adequately funded by FWBC for the Ombudsman to provide necessary public assurance. The Ombudsman's office does not have the capacity to absorb any costs associated with this role.

2 Oversight activities by the Commonwealth Ombudsman

2.1 Oversight activities under the *Fair Work (Building Industry) Act 2012*

Under s 54A(3) of the FWBI Act, the Ombudsman oversees the exercise of coercive information-gathering powers by the Director of FWBC and any person assisting the Director. Section 54A(6) requires the Ombudsman to report to Parliament as soon as practicable after the end of each financial year about the examinations conducted by the Director and the results of our reviews.

In conducting reviews, we assess FWBC against the following legislation and guidance material:

- provisions under Division 3, Part 1, Chapter 7 of the FWBI Act
- parts of the Fair Work (Building Industry) Regulations 2005 (the regulations)
- best practice principles set out by the Administrative Review Council in its report *The coercive information-gathering powers of Government agencies*¹

¹ In its report *The coercive information-gathering powers of Government agencies*, the Administrative Review Council provided 20 best practice principles which 'seek to strike a balance between agencies' objectives in using coercive information-gathering powers and the rights of those in relation to whom the powers are exercisable'. These principles are directly relevant to the exercise of powers by the Director of FWBC under Division 3, Chapter 7, of the *Fair Work (Building Industry) Act 2012*. The report is

- requirements under the Australian Government Investigation Standards
- FWBC's internal guidelines on the use of examination notices and the conduct of examinations.²

We apply the following five criteria in our reviews.

1. Was the application for an examination notice made in accordance with the requirements of the FWBI Act (s 45) and the regulations?
2. Did the examination notice comply with the requirements of the FWBI Act (ss 47 and 48), the regulations, and relevant best practice principles set out by the Administrative Review Council?
3. Was the examination notice given in accordance with the requirements of the FWBI Act (s 50) and claims of privilege properly dealt with (s 52(2))?
4. Was the examination conducted in accordance with the requirements of the FWBI Act (s 51), and was the examinee treated fairly?
5. Where directions were issued by the Minister, were these complied with (s 11)?

The above oversight activities are funded under a Memorandum of Understanding (MoU) with FWBC which expires in mid-2015 along with our role due to the sunset provision contained in s 46 of the FWBI Act.

2.2 Proposed oversight activities under the Building and Construction Industry (Improving Productivity) Bill 2013

The bill permanently retains the Ombudsman's oversight role and the requisite powers for the Ombudsman to effectively conduct the role. However, due to the differences between the provisions of the FWBI Act and the bill, we anticipate that the scope of our oversight activities outlined above would expand if the bill was passed to ensure continued effective scrutiny of the use of coercive powers.

For example, as noted in our previous submission, the threshold to issue an examination notice appears to have been lowered in the bill when compared to the FWBI Act. The Commissioner would not be required to apply to the Administrative Appeals Tribunal (AAT) (as the Director of FWBC is currently required to do under the FWBI Act) for a notice requiring a person to produce documents, information or attend before the Commissioner to answer questions. Further, the role of the Independent Assessor, who can declare that a building project cannot be the subject of coercive information gathering powers, is not proposed under the new legislation.

Therefore, under criterion 1 above, instead of a straightforward assessment of legislative compliance, we would expect to see records relating to the Commissioner's decision to issue notices to ensure that there was reasonable belief that the person has information or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation. We may also review and comment on the ABCC's internal processes to further

available at: <http://www.arc.ag.gov.au/Publications/Reports/Pages/default.aspx>. (Accessed 16 December 2013).

² FWBC published Guidance Note 6 *Examination Notice Policy* on 2 April 2013. This document is available at: <http://www.fwbc.gov.au/guidance-notes>. (Accessed 16 December 2013).

assure ourselves and Parliament that the power to issue notices and conduct examinations is exercised properly.

To ensure that we can continue to provide an adequate level of public assurance, this enhanced oversight role needs to be appropriately funded.

Attachment A



Submission by the
Commonwealth Ombudsman

**Inquiry into the provisions of the Building
and Construction Industry (Improving
Productivity) Bill 2013 and the Building and
Construction Industry (Consequential and
Transitional Provisions) Bill 2013**

Submission by the Commonwealth Ombudsman, Colin Neave
November 2013

1 Introduction

On 14 November 2013 the Senate referred the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 to the Senate Committee on Education and Employment (the Committee) for inquiry and report. The Bill proposes to regulate certain conduct of building industry participants who perform building work; and it would replace the Office of the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction) and re-establish the Australian Building and Construction Commission (ABCC).

The Bill proposes that the Commonwealth Ombudsman review and report on the exercise of coercive powers to gather information by the Australian Building and Construction Commissioner (the Commissioner). We currently review and report on the exercise of similar powers by the Director of Fair Work Building and Construction under the *Fair Work (Building Industry) Act 2012* (the FWBI Act).

This submission outlines the reviews by the Commonwealth Ombudsman under the FWBI Act, and then discusses the possible expansion of the scope of our oversight activities if the Bill was passed.

2 Oversight by the Commonwealth Ombudsman

The FWBI Act commenced on 1 June 2012. Under the FWBI Act, the Director of Fair Work Building and Construction can investigate any act or practice by building industry participants that may contravene particular legislative and industry requirements. As part of an investigation, the Director may apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice under s 45 of the FWBI Act. The use of an examination notice is a coercive information-gathering power which requires the recipient of the notice to:

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

Under s 54A(3) of the FWBI Act, the Commonwealth Ombudsman is required to review the exercise of these coercive powers by the Director and any person assisting the Director. Section 54A(4) provides that the Ombudsman's powers under the *Ombudsman Act 1976* extend to reviews under the FWBI Act. Our reviews not only look at legislative compliance, but also assess whether relevant best practice principles set out by the Administrative Review Council have been met and whether internal policies have been adhered to. Section 54A(6) requires the Commonwealth Ombudsman to report to Parliament as soon as practicable after the end of each financial year about the examinations conducted by the Director and the results of our reviews.

As we are required to report after each financial year, and because the FWBI Act commenced on 1 June 2012, we have made two reports to Parliament on the results of our reviews – one covering the period 1 to 30 June 2012, and the other covering the period 1 July 2012 to 30 June 2013. The reports discussed the results of our review of one examination conducted by the Director. We found that the examination was conducted in accordance with the requirements of the FWBI Act and all aspects of the examination complied with relevant best practice principles and Fair Work Building and Construction's internal guidelines.

Since 30 June 2013, we have reviewed two further examination notices and the associated examinations; the results of which will be discussed in our next report.

We welcome the retention of the Commonwealth Ombudsman's oversight function, together with the requisite powers for the Ombudsman to effectively conduct the function. The proposed coercive information-gathering powers of the Commissioner remain intrusive in nature, and appropriate safeguards should continue to apply so as to provide assurance to Parliament and the public that the powers are being exercised in compliance with legislative requirements and best practices.

3 A possible expansion of our current role

We note that, in relation to the exercise of the Director's examination powers under the FWBI Act, the Bill retains a number of safeguards (including Commonwealth Ombudsman oversight) and removes others (most notably the requirement for the AAT to issue examination notices). The following table provides an overview of the main differences.

Fair Work (Building Industry) Act 2012	Building and Construction Industry (Improving Productivity) Bill 2013
Nominated AAT presidential member issuing examination notices (s 47).	Not proposed.
Independent Assessor (Div 2, Pt 1, Ch 7).	Not proposed.
Sunset provision for the Director's application for examination notices (s 46).	No sunset clause.
Commonwealth Ombudsman oversight (s 54A).	Kept (cl 65).
Examinee may be represented by lawyer (s 51(3)).	Kept (cl 61(4)).
Examination is videotaped (s 54A(1)(b)).	Kept (cl 65(1)(b)).

Compared to the FWBI Act, the threshold to issue an examination notice appears to have been lowered in the Bill. Under the FWBI Act, the Director's application must address a number of matters before an AAT presidential member decides to issue a notice (s 45). These matters include that there are reasonable grounds to believe that the person is capable of giving information or evidence relevant to an investigation; and other methods of obtaining the information or evidence have been attempted and were unsuccessful or not appropriate. Further, under s 39 of the FWBI Act, and on application by an interested person, the Independent Assessor may determine that the Director cannot apply for examination notices for particular building projects.

In comparison, the Bill vests responsibility for Commission oversight in the Ombudsman. Clause 61 of the Bill allows the Commissioner to issue a notice based on reasonable belief that the person has information or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation. The Bill retains the FWBI Act provisions that ensure that the examinee has 14 days to respond to the notice and the Commissioner has the power to vary the time for compliance. We note that the right for the examinee to be represented by a lawyer and the requirement to videotape the examination have also been retained in the Bill.

Given these differences, and to ensure continued effective scrutiny of the use of coercive powers, we anticipate that the scope of our oversight activities would expand if the Bill was passed. We would expect to see records relating to the Commissioner's decision to issue notices to ensure that there was reasonable belief that the person has information or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation. We may also review and comment on the ABCC's internal processes to further assure ourselves that the power to issue notices and conduct examinations are exercised properly.

4 Resourcing the function

We currently have a Memorandum of Understanding (the MoU) with FWBC to resource our oversight function. As the FWBI Act contains a sunset provision (s 46), the MoU is for a limited period.

We will be engaging with the Department of Employment and FWBC / ABCC with respect to negotiating appropriate funding for the permanent role and expanded scope of our activities.