

**Senate Standing Committee on Education Employment and Workplace  
Relations**

**QUESTIONS ON NOTICE  
Supplementary Budget Estimates 2011-2012**

**Agency - Australian Building and Construction Commission**

**DEEWR Question No. EW0752\_12**

**Senator Abetz asked on 19 October 2011 , Hansard page 56**

**Question**

**ABCC - Letter from the Ombudsman**

Mr Johns: The basis upon which I invited the Commonwealth Ombudsman to undertake the post-examination review was always intended to be—and was clearly communicated to his office—on a fee-for-service basis. Notwithstanding that it was going to be on that basis, on 12 October I was advised that, due to a limited number of staff with the skills required, and staff being committed elsewhere, the funding from the ABCC would not assist them at this time. Senator ABETZ: Take it on notice if need be, but do you feel at liberty to be able to provide to the committee the letter from the Ombudsman? Mr Johns: I might take on notice whether that is appropriate.

**Answer**

*The Office of the Australian Building and Construction Commissioner has provided the following response:*

A letter from the Office of the Commonwealth Ombudsman discussing the possibility of an oversight role is included at **ATTACHMENT A**.

A letter from the Office of the Commonwealth Ombudsman confirming that the Ombudsman would be able to conduct an oversight role and outlining costs is included at **ATTACHMENT B**.

The e-mail of 12 October 2011 advising the ABCC that the Ombudsman would not be able to undertake the oversight function is included at **ATTACHMENT C**.



## ATTACHMENT A

Level 5, 14 Childers Street ■ Canberra  
GPO Box 442 ■ Canberra ACT 2601  
Phone 1300 362 072 ■ Fax 02 6276 0123  
ombudsman@ombudsman.gov.au  
www.ombudsman.gov.au

Our ref: 2009-112103

6 April 2011

Mr Leigh Johns  
Commissioner  
Office of the Australian Building and Construction Commissioner  
GPO Box 9927  
Melbourne VIC 3001

Dear Commissioner

I am writing to you in relation to the possibility of the Commonwealth Ombudsman undertaking an oversight role of the Australian Building and Construction Commissioner's (ABCC) exercise of powers under s 52 of the *Building and Construction Industry Improvement Act 2005*. In this regard, I refer to your comments in *The Australian* on 23 February 2011 and the *Backgrounder* on 'ABC Commissioner review of practice and procedure – s.52 powers', published on your website and dated 22 February 2011.

The Commonwealth Ombudsman is well placed to undertake an oversight function to ensure public confidence in the ABCC's exercise of s 52 powers. The office already has considerable experience in performing oversight functions under the *Telecommunications (Interception and Access) Act 1979*, *Surveillance Devices Act 2004* and Part 1AB of the *Crimes Act 1914*. We also periodically utilise our own-motion investigation powers under the Ombudsman Act 1976 to examine the administrative and investigative practices of the Department of Agriculture, Fisheries and Forestry's biosecurity investigations.

I note that subject to the passage of the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009*, the Commonwealth Ombudsman will have a statutory oversight function in relation to the new Office of the Fair Work Building Industry Inspectorate. However, in the absence of a specific legislative function, the Commonwealth Ombudsman is empowered to conduct own-motion investigations, which may be utilised to perform an ad hoc oversight function of the ABCC.

As you would appreciate, as a small agency, the Commonwealth Ombudsman would not be able to absorb the additional capital and staffing costs required to effectively perform this new function. Agreement has been reached through the Department of Education, Employment and Workplace Relations for the necessary funding once legislation is in place. However, if it remains your intention to request the Commonwealth Ombudsman to oversight the ABCC prior to this, the provision of adequate resources to the Commonwealth Ombudsman will need to be considered.

I believe it would be appropriate for our agencies to begin discussions on the most appropriate forward in relation to these oversight issues. The senior executive contact in my Office for this matter is Mr Adam Stankevicius, Senior Assistant Ombudsman, on (02) 6276 3754 or at [adam.stankevicius@ombudsman.gov.au](mailto:adam.stankevicius@ombudsman.gov.au)

Yours sincerely

A handwritten signature in black ink, appearing to read "Allan Asher".

Allan Asher  
Commonwealth Ombudsman

Defence Force Ombudsman ■ Immigration Ombudsman ■ Law Enforcement Ombudsman ■ Postal Industry Ombudsman ■ Taxation Ombudsman

## ATTACHMENT B



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23 May 2011

Mr Leigh Johns  
Australian Building and Construction Commissioner  
GPO Box 9927  
MELBOURNRE VIC 3001

Dear Mr Johns

I refer to your proposal for my Office to undertake compliance assessment and inspection work in relation to your Office's exercise of examination powers under your Act.

We have discussed your proposals and have undertaken research in relation to the Commonwealth Parliament's deliberations about the exercise of the Commissioner's examination powers. Cognisant of Senate and Standing Committee debates, I would propose that we initially limit our inspection work to the current financial year, taking into account any parliamentary progress in relation to relevant issues.

As was discussed at your meeting with my Office on 3 May 2011; I can confirm that we will undertake a compliance assessment of the Commissioner's use of examination powers, using the principles established by the Administrative Review Council (ARC) as a benchmark.

You may be aware that my office maintains an ongoing interest in the exercise of coercive powers by Australian Government agencies, having recently completed similar compliance assessments in relation to both the Fair Work Ombudsman and the Australian Customs and Border Protection Service.

The compliance assessment, conducted using our own motion powers, will assess your agency's current practices and procedures against the ARC principles and will produce a report for public release. We consider the compliance assessment program is a valuable tool that works to ensure powers, particularly coercive powers, are being exercised in accordance with the law, government policy and approved practices and guidelines.

In relation to specific inspections of each exercise of examination powers in relation to individual investigations you have conducted during 2010-2011 financial year, we will require a list of the cases where the powers have been used. As indicated at the meeting with my officers, we will also require some key documents, listed in the attachment to this letter, so that we can craft an appropriate test plan for inspections. We will provide you with a draft of the test plan in order to ensure it addresses all the relevant issues and processes. Once we have an agreed test plan for the inspections component of this task, then we will be in a position to begin the inspections process, and will require a copy of relevant documents associated with the use of the examination powers, or a venue where we can examine these documents.

Defence Force Ombudsman ■ Immigration Ombudsman ■ Law Enforcement Ombudsman ■ Postal Industry Ombudsman ■ Taxation Ombudsman

In relation to the cost issues, I anticipate that the own motion investigation will cost approximately \$80,000 and take about 6 months to complete. Once the funding amount has been agreed, we will arrange for relevant notices under the *Ombudsman Act 1976* to be sent and organise for resources to be allocated to commence the investigation. In the meantime, we ask that you provide a list of all relevant documents which you consider may assist the assessment process.

In respect to the case inspections component, this will be further costed once we have an agreed test plan which outlines the scope and amount of work.

Should you wish to discuss any of these issues, please contact me on 02 6276 0149 or Mr Adam Stankevicius, Senior Assistant Ombudsman, on 02 6276 3754.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Allan Asher'. The signature is fluid and cursive, with a large initial 'A'.

Allan Asher  
Commonwealth Ombudsman

## ATTACHMENT C

**From:** Peter Edwards  
**Sent:** Wednesday, 12 October 2011 10:30 AM  
**To:** PETTIT,Clifford  
**Subject:** Compliance and Inspection Request [SEC=UNCLASSIFIED]

Dear Clifford

Thank you for your patience as I have followed up whether our office has the capacity to undertake the work you have requested.

As previously advised, our budgetary position has changed significantly since the Ombudsman wrote to the Commissioner in May. This has meant that we have had to review all non-complaint investigation and non-statutory inspection work undertaken by our office. The ABCC request has been considered as part of that review.

I met with Ms Alison Larkins (Deputy Ombudsman) to discuss both of the ABCC projects, namely, the compliance and inspection work. Despite the ABCC's offer to provide funding for these projects on a fee for service basis, our office will not be undertaking this work. The issue for our office is that we only have a limited number of staff with the skills required to undertake inspection and own motion investigations. All such staff are committed to a number of ongoing projects that have been identified as having a much higher priority. Funding from the ABCC will not assist in this situation, as we are not in position to recruit additional staff.

I am sorry our office is not able to provide requested assistance.

Regards

Peter Edwards  
Director WA I SA  
COMMONWEALTH OMBUDSMAN

*Assisting the Australian community by resolving complaints and fostering good government administration*

