



Submission by the  
Commonwealth Ombudsman to  
Jaguar Consulting

***Review of the *Building and Construction Industry (Improving Productivity) Act 2016****

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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## Introduction and summary

Under section 119A of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act), prior to the end of the first twelve months following the commencement of the Act, the Minister must cause a review of the operation of the Act to be conducted. Jaguar Consulting has been appointed to conduct the review and has sought submissions from relevant stakeholders. In line with the Terms of Reference of the review, this submission addresses the following in relation to the independent oversight of compulsory examination powers:

- Reporting requirements; and
- Safeguards and public accountability in the application of these powers.

Our submission highlights that the current quarterly reporting mechanism does not provide the optimum level of assurance as to the Australian Building and Construction Commission's (ABCC) use of coercive examination powers due to several limiting factors. Such factors involve the scheduling of examinations and the time required to provide relevant information to the Commonwealth Ombudsman (the Ombudsman). These preclude the Ombudsman reviewing and reporting on an examination within a single quarter and result in reports that only provide statistical information on the number of examinations that have taken place.

We recommend that a minimum six-monthly reporting mechanism would be more appropriate, as it would allow the Ombudsman's reporting to adequately capture an examination and a review within a single reporting period. This consolidated approach would permit the reports to comprehensively address any systemic and previously identified issues, which currently may be staggered across a series of quarterly reports.

## Background

The purpose of the Office of the Commonwealth Ombudsman is to:

- Provide assurance that the organisations we oversight act with integrity and treat people fairly.
- Influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action; and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers

With regard to the coercive powers mentioned above, the Ombudsman is responsible for the review of coercive examinations by the ABCC. Such a review involves comprehensively assessing

the examination and associated documentation against legislative requirements and best practice principles. Through these reviews, the Ombudsman is able to provide assurance to Parliament and the public that these considerable powers have been exercised appropriately and in accordance with the intent of the legislation.

The Ombudsman is required to report quarterly to Parliament on examinations conducted by the ABCC during the quarter. This report is also to include the results of reviews conducted by the Ombudsman during the quarter.

## **Response to Terms of Reference**

### **Reporting requirements**

Since the commencement of the BCIIIP Act, my Office has reviewed seven examinations. Although a relatively modest number, it is consistent with our experience reviewing examinations under the *Fair Work (Building Industry) Act 2012* (FWBI Act). Our experience is also that while the number of examinations notices given and examinations conducted may fluctuate in any given period, it is not by a significant margin.

Before the Ombudsman can commence a review, the BCIIIP Act requires the ABCC to provide an information package to the Ombudsman containing the report on the examination, the video recording of the examination and the transcript. These must be provided to the Ombudsman as soon as practicable after the completion of an examination. Several factors, including the procedural fairness requirement that the transcript be provided to the examinee for amendments, mean that some time may elapse before the Australian Building and Construction Commissioner (ABC Commissioner) is able to consolidate the required materials for provision to the Ombudsman.

These time-frames are also affected by the scheduling of ABCC examinations and the manner in which my Office schedules its reviews. For instance, the ABC Commissioner may group scheduled examinations into relevant tranches for planning and operational reasons. Similarly, my Office will review these examinations in batches, for reasons of efficiency, practicality and to consolidate any systemic issues that may arise.

As a result there have been instances where the Ombudsman's quarterly reports have not reported the details of any conducted reviews. Instead, the quarterly report has noted the number of examinations conducted, as notified by the ABCC in accordance with the BCIIIP Act, but about which my Office has not yet received the relevant information. The corresponding reviews of the examinations then occur in a subsequent quarter once all the relevant information is available. The quarterly report is effectively duplicated by the ABCC in its own quarterly and annual reports which detail the number of examination notices issued.

As an independent oversight mechanism, these 'nil' quarterly reports provide no additional assurance as to the ABCC's use of coercive examination powers. My Office's ability to report on the ABCC's progress in addressing any previous review findings is also limited to quarters in which reviews by my Office are conducted.

I consider that a six-monthly reporting mechanism would allow more time for the relevant examination information to be received and reviewed by my Office within a corresponding reporting period. It would also enable a more consolidated approach to reviews by my Office, particularly of previously identified issues.

## **Safeguards and public accountability in the application of these powers**

Within the current framework, the scope of the Ombudsman's role provides that the Ombudsman may do anything incidental or conducive to review of the exercise of the examination powers by the ABC Commissioner. Our fulfilment of this obligation is principally guided by an assessment of the ABCC's exercise of its coercive examination powers against the following five criteria:

- Were the applications for examination notices made in accordance with the requirements of the BCIP Act and the Regulations?
- Did the examination notice comply with the requirements of the BCIP Act, the Regulations, and relevant best practice principles set out by the Administrative Review Council?
- Was the examination notice given in accordance with the requirements of the BCIP Act and were claims of privilege properly dealt with?
- Was the examination conducted in accordance with the requirements of the BCIP Act, relevant best-practice principles, standards and ABCC's internal policies and guidelines?
- Where directions were issued by the Minister, were these complied with?

Under these criteria we assess the ABCC against the legislative requirements, internal guidelines and best practice principles.

Our past reviews of examinations conducted under the FWBI Act using this criteria resulted in recommendations to correct administrative shortfalls and improve administrative practices that safeguard the public interest.