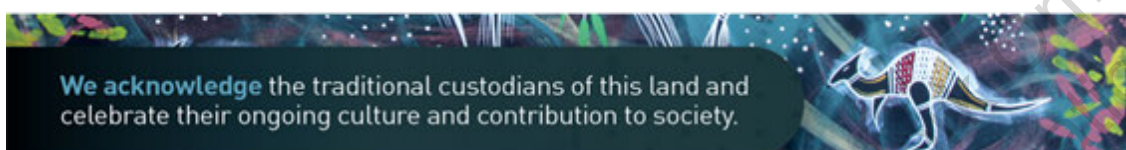


BUMP: FOR APPROVAL: draft letter to FWC re no-permit list [SEC=OFFICIAL]

From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Thu, 15 Dec 2022 23:41:29 +0000
Attachments: Attachment A - Right of entry permit lists _ ABCC (permit with conditions).PDF (417.63 kB); Attachment B - Right of entry permit lists _ ABCC.PDF (450.97 kB); Letter to FWC re no-permit list.DOCX (86.62 kB)

s.22 Irrelevant information (she/her) Executive Assistant to Commissioner
 3115 | Email: s.22 Irrelevant information@abcc.gov.au
Postal address: GPO Box 9927, Melbourne VIC 3001
Hotline: 1800 003 338 | **Web:** abcc.gov.au



From: s.22 irrelevant information@abcc.gov.au
Sent: Wednesday, 14 December 2022 9:19 AM
To: M s.22 Irrelevant information@abcc.gov.au
Cc: s.22 Irrelevant information@abcc.gov.au
Subject: t letter to FWC re no-permit list [SEC=OFFICIAL]

Hi Steve,

As requested, see attached draft correspondence to Murray Furlong regarding suggested changes to the no entry list they currently maintain.

Matt has reviewed and approved the letter.

I will add Murray's email address and sign once you are happy with it. I thought we should cc Sandra too, but if you prefer not, just let me know.

Cheers,

S



Australian Government
Australian Building and
Construction Commission



16 December 2022

Mr Murray Furlong
General Manager
Fair Work Commission

By email: [address](#)
CC: Sandra Parker, Fair Work Ombudsman

Dear Murray

Suggested update to Fair Work Commission's *Find an entry permit online tool*

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* received Royal Assent on 6 December 2022. On this date, the Australian Building and Construction Commission (ABCC) entered a 2 month transition period to enable the final transfer of responsibilities to the Fair Work Ombudsman prior to the Agency's abolition on 6 February 2023.

As part of this process, the ABCC website has recently been decommissioned. This means online tools previously maintained by the ABCC, such as the *Right of Entry permit list*, are no longer accessible to stakeholders.

The permit list has been highly valued by building industry participants on construction sites, enabling them to easily and efficiently check if an official's entry permit is invalid, including if it has conditions imposed on it. This information will continue to be of relevance to building industry participants beyond the abolition of the ABCC.

I am aware of the Fair Work Commission's (FWC) [Find an entry permit online tool](#), which allows users to search *current* entry permits. However, the tool does not include the names of officials who've had their permits suspended, revoked (or otherwise not renewed), or conditions placed on it. Such a list is also not maintained elsewhere.

I am writing to suggest the FWC consider updating its existing online tool to include this information and have included with this letter two PDF attachments which further illustrate the operation of the ABCC's permit list.

Should you have any questions regarding the permit list please don't hesitate to get in touch prior to 6 February 2023.

Yours sincerely

Stephen McBurney
Commissioner
Australian Building and Construction Commission

Automatic reply: CICT Member Update [SEC=OFFICIAL]

From: "CAREY,Michelle" s.47E Certain Operations of Agencies
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Thu, 22 Dec 2022 11:23:53 +0000

Thank you for your email. I am out of the office between 15 December 2022 and 4 January 2023 and checking emails intermittently. I will respond to your email on or after 4 January 2023 unless the matter is urgent.

Kind Regards

Michelle Carey | Deputy Fair Work Ombudsman - Large Corporates and Industrial Compliance Group (A/g)

Fair Work Ombudsman

X:

s.47E Certain Operations of Agencies

Documents released by the Fair Work Ombudsman
Under the Freedom of Information

Christmas Message

From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: ABCC - Aust Building Construction Commission <odl_51000875@abcc.gov.au>
Date: Thu, 22 Dec 2022 04:50:48 +0000

Dear Colleagues,

Wishing you all a Merry Xmas and Happy New Year.

I am very optimistic that 2023 will bring with it new opportunities, new surroundings and new hope for all of us. I want to thank you all for an incredibly resilient effort against incredibly difficult challenges throughout this year. Please forget about work for at least the shutdown period, spend time with those that matter most to you and enjoy the festivities.

If ever there was a year to over indulge, this is it. Post-election, post-Covid and soon to be post abolition.

To those of you leaving today, tomorrow and early in the new year, we wish you all the best.

To those of you staying on a bit longer, let's make a conscious effort to stay in contact through Jan to ensure we are looking out for one another.

Btw, I can't claim credit for the photos, they were a team effort.

Steve.



s 47F Personal Privacy



s 47F Personal Privacy

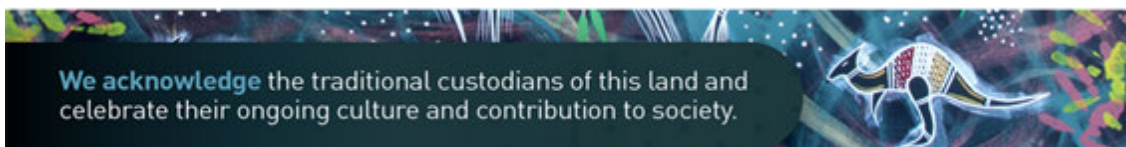
Fair Work Ombudsman
Minister of Information

s.22 irrelevant (she/her) Chief of Staff (A/g)

ter [redacted] | Email: s.22 [redacted]@abcc.gov.au

Please note: The ABCC is in a period of transition until abolition on 6 February 2023, following the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* coming into force. This mailbox will not be monitored past 6 February 2023.

The ABCC acknowledges the traditional owners and custodians of country throughout Australia and acknowledges their continuing connection to land, waters and community. We pay our respects to the people, the cultures and the Elders past, present and emerging.



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Fwd: Christmas Message [SEC=OFFICIAL]

From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: s 47 F Personal Privacy
Date: Thu, 22 Dec 2022 11:25:37 +0000

From: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Sent: Thursday, December 22, 2022 3:50:48 PM
To: ABCC - Aust Building Construction Commission <ODL_51000875@abcc.gov.au>
Subject: Christmas Message [SEC=OFFICIAL]

Dear Colleagues,

Wishing you all a Merry Xmas and Happy New Year.

I am very optimistic that 2023 will bring with it new opportunities, new surroundings and new hope for all of us. I want to thank you all for an incredibly resilient effort against incredibly difficult challenges throughout this year. Please forget about work for at least the shutdown period, spend time with those that matter most to you and enjoy the festivities.

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Steve.



s 47F Personal Privacy



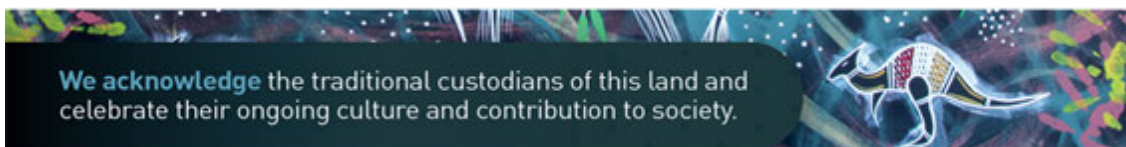
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s.22 irrelevant (she/her) Chief of Staff (A/g)

ter 0 | Email: s.22@abcc.gov.au

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Under the Freedom of Information

RE: Christmas Message [SEC=OFFICIAL]

From: s.22 Irrelevant information@abcc.gov.au>
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Thu, 22 Dec 2022 05:50:45 +0000

I can't believe I've had to wait 4 years to see you in those Christmas photos!!

It was well worth sticking around for those!

Have a safe and happy Christmas, all the best ☺

s.22 Irrelevant information Inspector s.47 F Personal Privacy d Entitled s.22 Irrelevant information
Tel: 03 8509 3056 | **Mob:** s.22 Irrelevant information | **Email:** s.22 Irrelevant information@abcc.gov.au
Postal address: GPO Box 9927, Adelaide, SA 5001
Hotline: [1800 003 338](tel:1800003338) | **Web:** abcc.gov.au



Australian Government
 Australian Building and
 Construction Commission



From: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Sent: Thursday, 22 December 2022 3:21 PM
To: ABCC - Aust Building Construction Commission <ODL_51000875@abcc.gov.au>
Subject: Christmas Message [SEC=OFFICIAL]

Dear Colleagues,

Wishing you all a Merry Xmas and Happy New Year.

I am very optimistic that 2023 will bring with it new opportunities, new surroundings and new hope for all of us. I want to thank you all for an incredibly resilient effort against incredibly difficult challenges throughout this year. Please forget about work for at least the shutdown period, spend time with those that matter most to you and enjoy the festivities.

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Steve.



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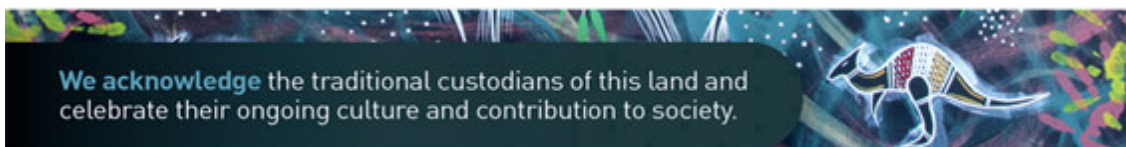
s 47F Personal Privacy

s.22 irrelevant (she/her) Chief of Staff (A/g)

0 | Email: s.22@abcc.gov.au

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Fwd: CICT Member Update

From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: "PARKER,Sandra" s.47E Certain Operations of Agencies "CAREY,Michelle" s.47E Certain Operations of Agencies
Date: Thu, 22 Dec 2022 11:23:35 +0000
Attachments: CICT Member Update 22.12.22.docx (181.5 kB)

Hi Sandra/Michelle,
 Not sure if you are registered for these updates. Worth reading.
 Regards Steve.

From: s 47 F Personal Privacy @cultureinconstruction.com.au>
Sent: Thursday, December 22, 2022 8:53 pm
Subject: CICT Member Update

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Please see attached.

s 47 F Personal Privacy AO
 Chair, Construction Industry Culture Taskforce
 E: s 47 F Personal Privacy @cultureinconstruction.com.au



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Automatic reply: CICT Member Update [SEC=UNOFFICIAL]

From: 's.22 irrelevant information' @abcc.gov.au
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Fri, 23 Dec 2022 00:57:43 +0000

Hello, I am currently on leave and will be checking emails intermittently. Cheers,

s.22
i |

Documents released by the Fair Work Ombudsman
Under the Freedom of Information

RE: Christmas Message [SEC=OFFICIAL]

From: s.22 Irrelevant information@abcc.gov.au
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Fri, 23 Dec 2022 00:35:07 +0000

Thanks Steve.

Hope you also have a Merry Christmas and Happy New Year and are able to enjoy some time relaxing with family and friends.

Thanks

From: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Sent: Thursday, 22 December 2022 3:21 PM
To: ABCC - Aust Building Construction Commission <ODL_51000875@abcc.gov.au>
Subject: Christmas Message [SEC=OFFICIAL]

Dear Colleagues,

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Steve.



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of Information

s 47F Personal Privacy



s 47F Personal Privacy

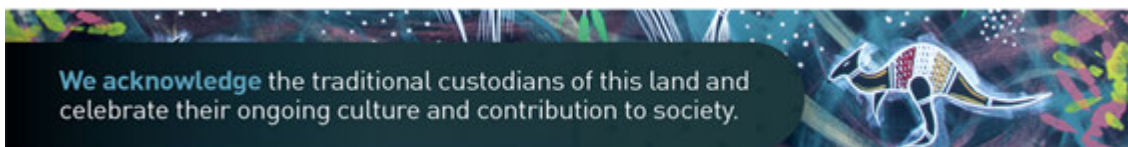


s.22 irrelevant (she/her) Chief of Staff (A/g)

0 | Email: s.22@abcc.gov.au

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Under the Freedom of Information

RE: CICT Member Update [SEC=OFFICIAL]

From: "CAREY,Michelle" <s.47E Certain Operations of Agencies>
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Tue, 03 Jan 2023 06:10:41 +0000

Thanks very much Steve

Michelle Carey | Deputy Fair Work Ombudsman – Large Corporates and Industrial Compliance Group (A/g)
FAIR WORK OMBUDSMAN

s.47E Certain Operations of Agencies

s.47E Certain Operations of Agencies

E s.47E Certain Operations of Agencies

GPO Box 9887 Melbourne VIC 3001 | 414 La Trobe Street, Melbourne VIC 3000

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From: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Sent: Thursday, 22 December 2022 10:24 PM
To: PARKER,Sandra <s.47E Certain Operations of Agencies>; CAREY,Michelle <s.47E Certain Operations of Agencies>
Subject: Fwd: CICT Member Update [SEC=OFFICIAL]

Hi Sandra/Michelle,
 Not sure if you are registered for these updates. Worth reading.
 Regards Steve.

From: s.47 F Personal Privacy <@cultureinconstruction.com.au>
Sent: Thursday, December 22, 2022 8:53 pm
Subject: CICT Member Update

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Please see attached.

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Trainor AO

E: s.47 F Personal Privacy <@cultureinconstruction.com.au>

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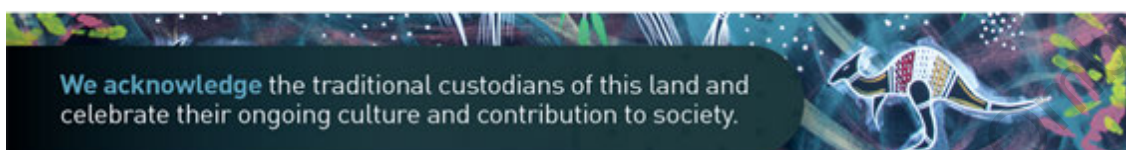
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Documents released by the Fair Work Ombudsman
Under the Freedom of Information

Hi Steve - may I have your Melbourne Airport Parking receipt please (for Expense8 recs). Many thanks. eom [SEC=OFFICIAL]

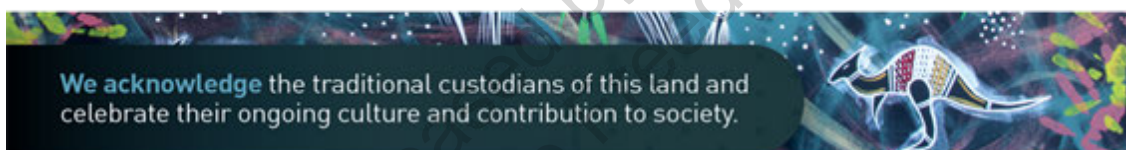
From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Tue, 31 Jan 2023 23:17:08 +0000

s.22 Irrelevant information (she/her) Executive Assistant to Commissioner
Tel: 03 8509 3115 | **Email:** s.22 Irrelevant information@abcc.gov.au
Postal address: GPO Box 9927, Melbourne VIC 3001
Hotline: 1800 003 338 | **Web:** abcc.gov.au



From: s.22 Irrelevant information@abcc.gov.au
Sent: Tuesday, 31 January 2023 10:30 AM
To: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Subject: Hi Steve - may I have your Melbourne Airport Parking receipt please (for Expense8 recs). Many thanks. eom [SEC=OFFICIAL]

s.22 Irrelevant information (she/her) Executive Assistant to Commissioner
Tel: 03 8509 3115 | **Email:** s.22 Irrelevant information@abcc.gov.au
Postal address: GPO Box 9927, Melbourne VIC 3001
Hotline: 1800 003 338 | **Web:** abcc.gov.au



From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: s.22 irrelevant information @abcc.gov.au>
Date: Tue, 31 Jan 2023 11:02:29 +0000

Count me in

From: s.22 Irrelevant information [REDACTED]@abcc.gov.au>
Sent: 1 PM
To: MCBURNEY,Stephen <Step[REDACTED]@abcc.gov.au>; KELLEHER,
<Matt.Kelleher@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
7E Certain Operations of Agencies s.22 Irrelevant information [REDACTED]
s.22 Irrelevant information [REDACTED]@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
s.22 Irrelevant information [REDACTED]@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
s.22 Irrelevant information [REDACTED]@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
s.22 Irrelevant information [REDACTED]@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
s.22 Irrelevant information [REDACTED]@abcc.gov.au>; s.22 Irrelevant information [REDACTED]
Cc: s.4/E Certain Operations of Agencies
Subject: lunch on Friday?? [SEC=UNOFFICIAL]

Hi everyone

As the majority of people are handing in their laptops this Friday, it would be remiss of us if we didn't all get together for one last time* to cheers the farewell of an epic and unforgettable ABCC era.

We were thinking of going somewhere a little bit fancier and to celebrate in style at Asian-fusion sensation [Supernormal](#) at 180 Flinders Lane. There's just a small catch – the restaurant requires groups of 8 or more guests to dine from the banquet menu which is \$85 per person. Click [here](#) to view the banquet menu.

I have put in a placeholder reservation at 12pm on Friday, 3 February so we don't lose our seats. If you are interested in joining us, please RSVP to me or [REDACTED] by 12pm this Wednesday.

Thanks everyone!

s.22 & s.22 Irrelevant

* we promise that this really is the last ABCC event (until we have regular alumni catch ups, of course).

BUMP - PLEASE DO THIS ONE ASAP STEVE! - Due tomorrow - Draft Commonwealth Ombudsman reports [SEC=OFFICIAL:Sensitive]

From: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
To: "MCBURNEY,Stephen" <stephen.mcburney@abcc.gov.au>
Date: Mon, 30 Jan 2023 06:38:28 +0000
Attachments: Letter to Deputy Commissioner (A2284553).pdf (175.31 kB); Draft ABCC 2022-23 Q1 report (A2284541).pdf (449.26 kB); Draft ABCC 2022-23 Q2 report (A2300025).pdf (267.41 kB); Draft letter to Cth Ombudsman in response to Q1 and Q2 Report.docx (100.26 kB)

OFFICIAL: Sensitive

[REDACTED] is chasing.
 Many thanks

[REDACTED] (she/her) Executive Assistant to Commissioner
 3115 | Email: [REDACTED]@abcc.gov.au
 Postal address: GPO Box 9927, Melbourne VIC 3001
 Hotline: 1800 003 338 | Web: abcc.gov.au

We acknowledge the traditional custodians of this land and celebrate their ongoing culture and contribution to society.

OFFICIAL: Sensitive

From: [REDACTED]@ABCC.gov.au
Sent: Wednesday, 25 January 2023 3:48 PM
To: MCBURNEY,Stephen <Stephen.McBurney@abcc.gov.au>
Cc: KELLEHER,Matt <Matt.Kelleher@abcc.gov.au>
Subject: FW: Draft Commonwealth Ombudsman reports [SEC=OFFICIAL:Sensitive]

OFFICIAL: Sensitive

Hi Steve

Please see **attached**, for your review and approval, draft letter to the Commonwealth Ombudsman responding to their findings in their Q1 and Q2 reports. Matt has already reviewed the draft letter.

The Ombudsman's letter and draft reports are also **attached**.

As noted in their letter and report, the Q2 report did not make any findings and accordingly the response in our letter only addresses the findings made in the Q1 report.

The Q1 Report relate to the ABCC disclosing [REDACTED] the second examinee to the first examinee (first examination). This examination was [REDACTED] examination in the West Gate Tunnel (No 2) first round of examinations. The disclosure occurred when Counsel [REDACTED] asked [REDACTED] about safety documents, and [REDACTED] responded by suggesting that his subordinate [REDACTED] would know more detail about these documents. [REDACTED] asked whether [REDACTED] was being examined later that day, which [REDACTED] confirmed to be true.

The second finding made was that the process for raising an objection to a question was not explained to a witness and he consequently did not understand how his right to raise an objection [REDACTED] examination).

Our comments address both these issues and also note that, if we were not soon to be abolished, we would try and implement their better practice suggestion regarding explaining the process for raising objections. Matt has reviewed the letter and made some minor changes. The due date to respond is **31 January 2023**.

I'd be grateful if you could please review and let me know if you're happy with the draft response or would like to make any amendments.

Kind regards

[REDACTED] Lawyer
 Tel: 03 8509 3176 | Email: [REDACTED]@abcc.gov.au

Postal address: GPO Box 9927, Melbourne VIC 3001

Hotline: 1800 003 338 Web: abcc.gov.au

We acknowledge the traditional custodians of this land and celebrate their ongoing culture and contribution to society.



OFFICIAL: Sensitive

From: s.22 Irrelevant information

Sent: 1

To: KELL FHER Matt <Matt.Kelleher@abcc.gov.au>

Cc: s.22 Irrelevant information

s.47E Certain Operations of Agencies @ABCC.gov.au>; Glen Fisher <s.47E Certain Operations of Agencies

SEC=OFFICIAL]

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OFFICIAL

Dear Deputy Commissioner,

Please see attached a letter from the acting Senior Assistant Ombudsman, Glen Fisher, attaching 2 draft reports of our reviews conducted in Quarters 1 and 2 of 2022-23 for comment.

Kind regards

s.22 Irrelevant information

Assistant Director | Law Enforcement & Integrity Oversight
Assurance & Policy Branch
Commonwealth Ombudsman
Proud to be working on the lands of Jagera and Turabal peoples

s.22 Irrelevant information



The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present

The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

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Australian Government
Australian Building and
Construction Commission



X January 2023

Mr Glen Fisher
Senior Assistant Ombudsman (A/g)
Level 5, 14 Childers Street
Canberra ACT 2600

Dear Mr Fisher

Quarterly report Q1 and Q2 2022/2023 – s 65 of the *Building and Construction Industry (Improving Productivity) Act 2016*

Thank you for your correspondence dated 3 January 2023 enclosing the draft quarterly report for the period 1 July to 30 September 2022 (**Q1 Report**) and 1 October to 31 December 2022 (**Q2 Report**).

I am pleased that the Q1 and Q2 Reports found that the ABCC was compliant with the relevant requirements and standards, and that no recommendations were made. I also acknowledge the ongoing positive engagement between the ABCC and the Commonwealth Ombudsman staff in the quarterly review process.

Given that Royal Assent was granted to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 6 December 2022, the ABCC will be abolished on 6 February 2023. The ABC Commissioner's functions now are limited to assisting the Fair Work Ombudsman until the date of abolition. In these circumstances, our responses below indicate that we are not in a position to implement any of the better practice suggestions. As a consequence of the ABCC being abolished, no further examinations will be conducted as the agency will no longer exist.

Q1 Report

Disclosure of protected information

The Q1 Report noted that there was one instance where the ABCC disclosed the identity of one examinee to a second examinee who asked if that examinee was attending an ABCC examination and when. A better practice suggestion was made to ensure that any disclosure of the identity of examinees during examinations is limited to the greatest extent possible. I accept your finding and better practice suggestion.

I note that the second witness scheduled for examination that day, being the person whose identity was disclosed to the first witness, was the subordinate employee of the first examinee. Both examinees were employed by the same company, worked closely together during the events subject to the examination notice, and were represented by the same counsel, who was instructed by the same law firm, during the examinations.

I further note the circumstances around the disclosure arose when the first examinee suggested to Counsel assisting that he ask the second examinee questions relating to particular safety documents given that the second examinee had greater knowledge of them. The first examinee then asked Counsel assisting whether the second examinee was "in today, this afternoon, isn't

he?" which Counsel assisting confirmed to be true and responded with, "Yeah, he is next."

Counsel assisting was simply confirming information the first witness already knew, in response to a question asked of the first witness. Accordingly I consider that this disclosure had no impact on either witnesses' expectation of confidentiality or willingness to give information.

I agree with your finding that this disclosure was not a breach of the BCIP Act and that the ABCC was compliant with sections 5 and 106 of the BCIP Act.

Explanation of the grounds for objection

The Q1 Report noted that the ABCC did not explain to a self-represented witness the relevant grounds for raising an objection during an examination, and that the examinee did not understand their right to object to a question as a result.

A better practice suggestion was made to ensure that examinees are aware of the right to raise an objection or seek clarification on any questions asked. I accept this finding and better practice suggestion.

There were several occasions during the examination where it was explained to the witness the relevance of the question asked and the process to object to a question. I note that there was no suggestion that any of the questions were, in fact, impermissible.

Nevertheless, I understand the better practice suggestion that is raised and, if not for the ABCC's pending abolition, would have taken this opportunity to amend the opening remarks to reflect this.

Thank you for the opportunity to respond to the matters raised in the Q1 and Q2 Reports. Thank you for engaging with the ABCC with your reviews over the years and for the Ombudsman's contributions in improving the ABCC's examination practice.

Yours sincerely

Stephen McBurney
Australian Building and Construction Commissioner



**Quarterly report by the
Commonwealth Ombudsman
under section 65(6) of the
*Building and Construction Industry
(Improving Productivity) Act 2016***

FOR THE PERIOD 1 JULY to 30 SEPTEMBER 2022

Quarterly report by the Commonwealth Ombudsman, Iain Anderson,
under Part 2 of Chapter 7 of the
*Building and Construction Industry
(Improving Productivity) Act 2016*

XXXX 2023

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Documents released by the Fair Work Ombudsman
Under the Freedom of Information



**Quarterly report by the
Commonwealth Ombudsman
under section 65(6) of the
*Building and Construction Industry
(Improving Productivity) Act 2016***

FOR THE PERIOD 1 JULY to 30 SEPTEMBER 2022

Quarterly report by the Commonwealth Ombudsman, Iain Anderson,
under Part 2 of Chapter 7 of the
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Documents released by the Fair Work Ombudsman
Under the Freedom of Information Act

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Documents released by the Fair Work Ombudsman
Under the Freedom of Information

Executive summary

Under the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act), the Commonwealth Ombudsman (the Ombudsman) must review the examination powers exercised by the Commissioner of the Australian Building and Construction Commission (ABCC) and any person assisting the Commissioner. Under s 65(6) of the Act, the Ombudsman must report to Parliament as soon as practicable after the end of each quarter of each financial year about examinations conducted by the ABCC and reviews conducted by the Ombudsman during that quarter.

The Australian Government committed to abolishing the ABCC. Sections of the Act relevant to the ABCC's functions were repealed by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 7 December 2022. Under transitional arrangements in the legislation, the Ombudsman will report to Parliament in 2023 on the ABCC's use of examination powers in the period between 1 July 2022 and the abolition of the ABCC.

This report covers 9 reviews conducted by our Office between 1 July 2022 and 30 September 2022 (the review period).

When conducting our review of the ABCC's use of examination powers, we assessed the ABCC's performance against the requirements of the Act, the *Building and Construction Industry (Improving Productivity) Regulations 2017* (the Regulations), relevant best practice principles and standards, and the ABCC's internal guidelines.

In our view, the ABCC was compliant against these requirements and standards, and we make no recommendations in this report. We have made **2 better practice suggestions** around the disclosure of examinee identities during the conduct of examinations and explaining the examination process to examinees.

We will continue to assess the actions the ABCC takes in response to our reports at the next review.

Introduction

Under the Act, the Australian Building and Construction Commissioner (the Commissioner) may inquire into and investigate any act or practice by a building industry participant, which may be contrary to the Act, a designated building law, Commonwealth industrial instruments, or the Building Code¹. As part of an investigation, the Commissioner may apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice, under s 61B of the Act.

An examination notice may require its recipient to:

- a) give information to the Commissioner
- b) produce documents to the Commissioner
- c) attend before the Commissioner to answer questions relevant to an investigation.

Under s 64 of the Act, the Commissioner is required to notify the Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents. Under s 65(1) of the Act, the Commissioner must give the Ombudsman the following as soon as practicable after the examination is completed:

- a) a report about the examination
- b) a video recording of the examination, and
- c) a transcript of the examination.

Our Office uses these records to review how the Commissioner, and any person assisting the Commissioner, exercises examination powers under the Act.

¹ The term 'Building Code' within the Act means the *Code for the Tendering and Performance of Building Work 2016*.

Review scope and criteria

Objective and scope of reviews

Under s 65(3)(a) of the Act, the Ombudsman must review examination powers exercised by the Commissioner and any person assisting the Commissioner.

Under s 65(3)(b) of the Act, the Ombudsman may do anything incidental or conducive to reviewing examination powers exercised by the Commissioner.

Criteria used for reviews

We assessed the examination notices issued and examinations conducted during the review period against the following criteria:

1. Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and the Regulations (s 5)?
2. Did the examination notice comply with the requirements of the Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?
3. Was the examination notice given to the person named on the notice, in accordance with the requirements of the Act (s 61E), and were claims of privilege properly handled?
4. Was the examination conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

This criterion is the main focus of our reviews. Appendix A provides detailed inspection criteria that guide our assessment.

5. Did the ABCC comply with any directions issued by the Minister (s 17)?

Previous reports

In our 2021-22 quarterly review, for the period for the period 1 April 2022 to 30 June 2022, we found the ABCC was compliant with its legislative obligations.

The ABCC continues to follow the good practices we previously reported. We also acknowledge the positive engagement of the ABCC with our quarterly reviews.

Review results – between 1 July 2022 and 30 September 2022

We reviewed 9 examination notices and examinations between 1 July 2022 and 30 September 2022. Details of our reviews are at [Appendix B](#) and the results are reported below.

As we review actions performed by both the Commissioner and persons assisting the Commissioner, our assessment of compliance will refer to the ABCC.

Criterion 1 – Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and Regulations (s 5)?

The ABCC was compliant with this criterion.

Criterion 2 – Did the examination notice comply with the requirements of the Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?

Under this criterion, we only comment on action taken by the ABCC. We do not comment on any decision made by a nominated presidential member of the AAT.

The ABCC was compliant with this criterion.

Criterion 3 – Was the examination notice given to the person named on the notice, in accordance with the requirements of the Act (s 61E), and were claims of privilege properly handled?

The ABCC was compliant with this criterion.

Criterion 4 – Was the examination conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

We have made 2 better practice suggestions related to this criterion.

Disclosure of protected information

Section 5 of the Act states that protected information includes information disclosed under an examination notice that was obtained by an entrusted person in the course of their official employment that relates to another person. Section 106 of the Act restricts what an entrusted person may do with protected information, while permitting the disclosure of protected information if the entrusted person is a designated official at the time of the disclosure, and the disclosure occurred in the performance of the persons official employment.

We identified one instance where the ABCC disclosed the identity of one examinee to a second examinee who asked if that examinee was attending an ABCC examination and when.² We were

s.38 Secrecy provision

satisfied that the disclosure was compliant with the section 106 of the Act. However, we note the risks with providing this information to examinees, particularly when the information is solicited from a second examinee. This includes:

- not providing for an examinee's expectation of confidentiality that they are attending an examination
- impacting upon the examinee's willingness to give information required under oath or affirmation if they are aware of who other examinees are, and when they are scheduled for an examination.

We suggest as a matter of better practice (**better practice suggestion 1**) that the ABCC ensure that any disclosure of the identity of examinees during examinations is limited to the greatest extent possible.

Explanation of the examination process

Section 62(1)(b)(iv) of the Act states that it is an offence if a person fails to answer questions relevant to the investigation while attending as required by the examination notice. Under s 61F(3) of the Act, a person required by an examination notice to attend before the Commissioner to answer questions relevant to an investigation may choose to be represented at the examination by a lawyer of the person's choice.

The ABCC has previously provided our Office with a transcript for remarks to be made by the Commissioner at examinations detailing to the examinee that it is an offence to fail to answer questions relevant to the investigation, and the grounds upon which an examinee may raise an objection, which includes questions that:³

- are not relevant to an investigation
- are unfair or unreasonable
- may infringe legal professional privilege
- may give rise to a claim of public interest immunity.

In one instance where the examinee had no legal representation, the ABCC did not refer to the transcript outlining the grounds upon which an examinee may raise an objection. We observed that an examinee did not understand their right to object to a question, and while it was discussed with the examinee at various points that they may raise an objection, no guidance was given to the examinee on the circumstances in which an objection may be made.⁴

We consider explaining the ability to object to a question or seek clarification, in particular to examinees without legal representation, to be an important step in orientating the examinee with the examination process and the circumstances in which an objection may be raised. We suggest as a matter of better practice (**better practice suggestion 2**) the ABCC ensure that examinees are aware of the right to raise objections or seek clarification on any questions asked, and the circumstances under which an objection may be permitted.

³ DOC20-115397 – Commissioner Remarks - Final

Criterion 5 – Did the ABCC comply with any directions issued by the Minister (s 17)?

The Minister did not issue any directions relevant to the ABCC's examinations during this reporting period.

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Appendix A — Assessments conducted under criterion 4

We detail below how we determine whether examinations were conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines.⁵

Criterion 4.1 – Did the Commissioner conduct the examination?

Under s 61F(2) of the Act, the Commissioner must conduct the examination of the person named on the issued Examination Notice (under s 61C). Under ss 61F(4) and (5) the Commissioner may require the examinee to answer questions under oath/affirmation.

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

Under s 61F(3) of the Act, an examinee may choose to be represented by a lawyer during an examination.

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

Under s 61F(6) of the Act, the Commissioner cannot request that the person not disclose or discuss with other people any information, answers or other matters covered during the examination.

Criterion 4.4 – Assessment of conduct of examination and related issues

We assess this criterion under 4 parts (discussed below): guidance for staff exercising coercive powers,⁶ examination preparation,⁷ conduct of examination,⁸ and post examination.

Guidance for staff exercising coercive powers

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

⁵ This involves an assessment against the best practice principles in relation to *Coercive Information-gathering powers of Government Agencies* (Report no.48) 2008, by the Administrative Review Council, and *Transition to Fair Work Australia for the Building and Construction Industry* (Report) 2009; by the Hon Murray Wilcox QC (referred to as the Wilcox Report), the requirements of the *Australian Government Investigation Standards* (AGIS) 2011; and the ABCC's internal guidelines.

⁶ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principle 8 'Training' page 26; Principle 10 'Accountability', page 27; Principle 12 'Conflict of Interest', page 30; Principle 14 'Notices', page 37. AGIS Investigation Practices paragraphs 4.2 'Formal interview' and 4.4 'Coercive powers'.

⁷ Australian Government Investigation Standards Investigation Management paragraphs 3.2 'Investigation commencement' and 4.2 'Formal interview'.

⁸ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principles 1 and 2 'Setting the threshold and scope' pages 11 and 17, Principle 16 'Examinations and hearings' page 43.

Examination preparation

Before conducting an examination, did the Commissioner or person/s assisting the Commissioner, 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 by the examinee
- if relevant, implement risk management strategies
- address logistics and resources of the examination (room, equipment, personnel etc).

Conduct of examination

- Before commencing the examination, did the Commissioner explain the examination process?
- If required, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?⁹
- Was the examination conducted within standard business hours?
- Were regular breaks provided to the examinee throughout the examination?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning?¹⁰
- Was the line of questioning relevant to the investigation?¹¹
- If relevant, was the examinee or the examinee's legal representative permitted to ask questions, object to questions as being unclear or irrelevant to the subject matter of the examination, make comments and/or submissions at the completion of the examination?
- Did the person claim legal professional privilege or public interest immunity during the examination?¹²

Post examination

- Did the ABCC 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 the ABCC?¹³

⁹ Australian Government Investigation Standards Investigation Practices, paragraph 4.1.1 'Obtaining information'.

¹⁰ The Wilcox Report, paragraphs 6.53 and 6.71.

¹¹ Under s 61B(5)(c) of the Act, the Commissioner's application for an examination notice must include an affidavit, which among other things, outlines the grounds on which the Commissioner believes the examinee has information or documents, or is capable of giving evidence, relevant to the investigation.

¹² Under s 62(2) of the Act, a person is not required to give information, produce a document or answer questions if to do so would enliven legal professional privilege or public interest immunity.

¹³ Administrative Review Council, *Coercive Information-gathering Powers of Government Agencies* (Report no. 48, 1 May 2008) Principle 16 'Examinations and Hearings' page 43.

Appendix B — Examinations conducted and reviewed

The Ombudsman conducted 9 reviews between 1 July 2022 and 30 September 2022 of examinations conducted by the Commissioner between 1 April to 30 June 2022.

The table below shows the dates on which the examinations were conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC22/008	11/04/2022	12/09/2022
ABCC22/009	12/04/2022	12/09/2022
ABCC22/010	13/04/2022	12/09/2022
ABCC22/011	11/04/2022	12/09/2022
ABCC22/012	12/04/2022	13/09/2022
ABCC22/014	13/04/2022	12/09/2022
ABCC22/015	27/04/2022	15/09/2022
ABCC22/016	11/05/2022	14/09/2022
ABCC22/017	27/04/2022	14/09/2022

XXXX 2023

Quarterly report by the Commonwealth Ombudsman under s 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* – for the period 1 October to 31 December 2022

Quarterly report by the Commonwealth Ombudsman (Ombudsman), Iain Anderson, under s 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act).¹

Australian Building and Construction Commission powers

Under the Act, the Australian Building and Construction Commissioner (the Commissioner) may inquire into and investigate any act or practice by a building industry participant, which may be contrary to the Act, a designated building law, Commonwealth industrial instruments, or the Building Code². As part of an investigation, the Commissioner may apply to a nominated presidential member of the Administrative Appeals Tribunal (AAT) for an examination notice, under s 61B of the Act.

An examination notice may require its recipient to:

- a) give information to the Commissioner
- b) produce documents to the Commissioner
- c) attend before the Commissioner to answer questions relevant to an investigation.

Commonwealth Ombudsman's review role

Under s 64 of the Act, the Commissioner is required to notify the Ombudsman as soon as practicable after an examination notice is issued and provide copies of relevant documents. Under s 65(1) of the Act, the Commissioner must give the Ombudsman the following as soon as practicable after the examination is completed:

- a) a report about the examination
- b) a video recording of the examination, and
- c) a transcript of the examination.

Our Office uses these records to review how the Commissioner, and any person assisting the Commissioner, exercises examination powers under the Act.

Under s 65(6) of the Act, the Ombudsman must report to Parliament as soon as practicable after the end of each quarter of each financial year about examinations conducted by the Australian Building and Construction Commission (ABCC) and reviews conducted by the Ombudsman during that quarter.

¹ The Australian Government committed to abolishing the ABCC. Sections of the Act relevant to the ABCC's functions were repealed by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* on 7 December 2022. Under transitional arrangements in the legislation, the Ombudsman will report to Parliament in 2023 on the ABCC's use of examination powers in the period between 1 July 2022 and the abolition of the ABCC.

² The term 'Building Code' within the Act means the *Code for the Tendering and Performance of Building Work 2016*.

Review criteria

We assessed the examination notices issued and examinations conducted during the review period against the following criteria:

1. Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and the Regulations (s 5)?
2. Did the examination notice comply with the requirements of the Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?
3. Was the examination notice given to the person named on the notice, in accordance with the requirements of the Act (s 61E), and were claims of privilege properly handled?
4. Was the examination conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?
5. Did the ABCC comply with any directions issued by the Minister (s 17)?

Progress made since previous report

No issues from previous review periods were identified as requiring further remedial action during this review.

Report on examinations and reviews conducted

1 October to 31 December 2022

The Ombudsman reviewed 8 examination notices and examinations conducted by the ABCC. Details of our reviews are at [Appendix A](#) and the results are reported below.

Criterion 1 – Was the application for the examination notice made in accordance with the requirements of the Act (s 61B) and Regulations (s 5)?

The ABCC was compliant with this criterion.

Criterion 2 – Did the examination notice comply with the requirements of the Act (ss 61C and 61D), the Regulations (ss 6, 7 and 8), and relevant best practice principles?

The ABCC was compliant with this criterion.

Criterion 3 – Was the examination notice given to the person named on the notice, in accordance with the requirements of the Act (s 61E), and were claims of privilege properly handled?

The ABCC was compliant with this criterion.

Criterion 4 – Was the examination conducted in accordance with the requirements of the Act (s 61F), relevant best practice principles and standards, and the ABCC's internal guidelines?

The ABCC was compliant with this criterion.

Criterion 5 – Did the ABCC comply with any directions issued by the Minister (s 17)?

The Minister did not issue any directions relevant to the ABCC's examinations during this reporting period.

Appendix A — Examinations conducted and reviewed

The Ombudsman conducted 8 reviews between 1 October 2022 and 31 December 2022 of examinations conducted by the Commissioner between 1 July to 31 December 2022.

The table below shows the dates on which the examinations were conducted and when the Ombudsman conducted its review.

ABCC Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
ABCC22/018	8/07/2022	5/12/2022
ABCC22/019	15/07/2022	5/12/2022
ABCC22/020	7/09/2022	8/12/2022
ABCC22/021	16/09/2022	5/12/2022
ABCC22/022	9/09/2022	8/12/2022
ABCC22/023	5/10/2022	6/12/2022
ABCC22/024	5/10/2022	7/12/2022
ABCC22/025	11/10/2022	7/12/2022

Ref: A2284553

3 January 2023

Mr Matt Kelleher
Deputy Commissioner
Australian Building and Construction Commission
Level 4, 509 St Kilda Road
MELBOURNE VIC 3004

Dear Deputy Commissioner

Quarterly report – s 65 of the Building and Construction Industry (Improving Productivity) Act 2016

I refer to the Commonwealth Ombudsman's reviews of the Commission's exercise of examination powers from under section 65 of the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) in September 2022 and December 2022.

I have enclosed draft copies of the reports for our review for the periods 1 July to 30 September 2022 (Quarter 1) and 1 October to 31 December 2022 (Quarter 2). I invite the Commission to consider the draft findings and provide any comments to our Office before we finalise the report for tabling in Parliament. The Commonwealth Ombudsman, Iain Anderson, will write to the Commissioner enclosing an embargoed copy of the final report before they are tabled.

We will remove all identifying references to Commission investigations and staff from the final reports prepared for tabling (for example, the reference numbers currently found in footnotes). This information is included in the draft report to support the Commission's review. We would appreciate your assistance in identifying any other sensitive information which in your view should be removed before the final report is tabled.

Given no findings were made by our Office in our Quarter 2 review, and the Act does not specify any formal requirements for our report, the report is in a streamlined format.

We would appreciate a response within 4 weeks of receiving this letter.

If your officers have any queries about the draft report, please contact s.22 Irrelevant Information, Assistant Director, Law Enforcement and Integrity Oversight, on s.47E Certain Operations of Agencies. If you wish to speak with me directly, please contact me on s.47 F Personal Privacy.

Yours sincerely

s.47 F Personal Privacy

Glen Fisher
a/g Senior Assistant Ombudsman

Influencing systemic improvement in public administration