

# Quarterly report by the Commonwealth Ombudsman under s 712F(6) of the *Fair Work Act 2009*

FOR THE PERIOD 1 OCTOBER TO 31 DECEMBER 2025

**Quarterly** report by the Commonwealth Ombudsman, Iain Anderson,  
under Part 5-2 of Chapter 5 of the Fair Work Act 2009

**AUGUST 2026**



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# Executive summary

This is the second Quarterly Report for 2025–2026 of the Commonwealth Ombudsman (Ombudsman) under s 712F(6) of the *Fair Work Act* (the Act).

Under s 712F(3) of the Act the Ombudsman must review the exercise of certain powers by the Fair Work Ombudsman (FWO) and Fair Work Inspectors.

Under s 712AA of the Act, the FWO may apply to a nominated Administrative Review Tribunal presidential member for a FWO Notice if they reasonably believe a person has information or documents that will assist an investigation into certain suspected contraventions, and the person is capable of giving evidence. The FWO Notice may require its recipient to:

- give information to the FWO or a specified staff member of the FWO
- produce documents to the FWO or a specified staff member of the FWO, or
- attend before the FWO, or a specified staff member of the FWO who is a Senior Executive Service (SES) employee or an acting SES employee, and answer questions relevant to the investigation (examination powers).

A Fair Work Inspector is a government official appointed by the FWO under the Act who can investigate possible contraventions of workplace laws. Under s 711 they have the power to require a person to tell them their name and address if the inspector reasonably believes they have contravened a civil remedy provision. During an investigation, s 712 of the Act also enables a Fair Work Inspector to issue a Notice to Produce, which compels a person to provide records or documents at a specified place and within a specified time.

In November 2025, we inspected the FWO's use of the powers under s 712, and s 712AA of the Act between 1 July to 30 September 2025 (the relevant period). There was no use of the power to ask for a person's name and address under s 711 during the relevant period.

We made **4 suggestions** in relation to **4 findings**. Two of our findings related to repeat issues we reported in our Quarter 3 of 2024–25 report, and Quarter 1 of 2025–26 report. Our suggestions made in these 2 reports also apply to our findings during this



inspection. The FWO had not been presented with the findings from these reports prior to our Office conducting this inspection.

We found:

- Fair Work Inspectors choosing to allow an entity to respond to a Notice to Produce outside the time stated in the Notice. We remain concerned that the FWO's guidance material does not sufficiently differentiate between an extension of time to comply, and a discretion not to pursue non-compliance
- a Notice to Produce that did not provide sufficient information to identify the contravention of the Act or fair work instrument that was under investigation. We have seen repeat instances of errors or insufficient information, including lack of information identifying the contravention under investigation, being included in Notices to Produce over four previous inspections<sup>1</sup>
- several Notices to Produce that did not provide the recipients with sufficient timeframes to respond in line with the FWO's internal guidance, and
- several minor errors with the provision of FWO Notices under s 712AA of the Act and the guidance material provided to Fair Work Inspectors.

## Scope and methodology

The Ombudsman provides independent oversight of the FWO's compliance with the Act and procedural fairness for people subject to the FWO's examination powers.

When conducting our review of the FWO's use of examination powers, we assess its performance against the requirements of the Act, the Fair Work Regulations 2009 (the Regulations), relevant best practice, FWO's internal guidelines and training material. We also focus on whether the treatment of examinees is fair and reasonable.

As required under s 8(5) of the *Ombudsman Act 1976*, we provide the FWO an opportunity to review and respond to our findings before finalising this report.

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<sup>1</sup> Quarter 1 of 2023-24, Quarter 2 of 2024-25, Quarter 3 of 2024-25, Quarter 1 of 2025-25





Under s 712F(6) of the Act, as soon as practicable after the end of each quarter of the financial year, the Ombudsman must prepare and present to the Parliament a report about examinations conducted under s 712AA during the quarter. Section 712F(7) enables the Ombudsman to present to the Parliament any other reports about the results of reviews conducted under this section, including the use of powers under ss 711 and 712 of the Act.

## Review criteria

We assess FWO Notices, examinations and the use of s 711 and s 712 powers against the following criteria:

1. Was the application for a FWO Notice made in accordance with the requirements of the Act (s 712AA)?
2. Did the FWO Notice comply with the requirements of the Act and the Regulations (ss 712AA, 712AB and 712AC)?
3. Was the FWO Notice served in accordance with the requirements of the Act (s 712AD)?
4. Was the examination conducted in accordance with the requirements of the Act (ss 712AA, 712AE and 712C), the Regulations, relevant best practice and the FWO's internal guidelines?
5. Does the FWO have an effective framework to support a Fair Work Inspector exercising powers under s 711 and s 712 of the Act?
6. Are there adequate systems in place to record when a Fair Work Inspector exercises a power under ss 711 and 712 of the Act?
7. Has the FWO appropriately exercised its use of powers under ss 711 and 712 of the Act?

# Our findings

## FWO Notice (s 712AA)

Our inspection included:

- a review of all FWO Notices issued during the relevant period, and
- a review of the FWO's guidance materials for FWO Notices.

## Powers to Request Name and Address (s 711) and to Produce Documents (s 712)

Our inspection included:

- a review of the FWO's guidance material for Notices to Produce, and
- a review of a small sample of Notices to Produce issued during the relevant period.

| Inspection statistics for the period 1 July 2025 to 30 September 2025 |                                  |                             |
|-----------------------------------------------------------------------|----------------------------------|-----------------------------|
| Record type                                                           | Number of records made available | Number of records inspected |
| S 712AA FWO Notice                                                    | 5                                | 5                           |
| s 711 Power to ask for name and address                               | NIL                              | NIL                         |
| s 712 Notice to Produce                                               | 200                              | 38                          |

The FWO responded to all requests for further information in a timely manner, and on many occasions, the information provided was sufficient to mitigate areas of potential concern we identified.

The FWO have extensive guidelines which provide detailed instructions for the FWO's functions. However, we did identify several issues in relation to the interpretation and implementation of this guidance material. These are explored in our findings below.



## Finding 1 – Insufficient consideration in guidance material to differentiate a decision to grant an extension of time to reply to a Notice to Produce and a decision not to pursue non-compliance with the Notice

At the time of this inspection, the FWO had not received our Quarter 3 and Quarter 4 2024–25 reports and Quarter 1 2025–26 report, and had not yet been afforded an opportunity to comment on, or implement the suggestions made in those reports.

During this inspection, we observed repeat circumstances in which Fair Work Inspectors determined not to pursue non-compliance with the specified time being given to respond to a Notice to Produce (Finding 1 in our Quarter 3 2024–25 report, and Quarter 1 2025–26 report).

Section 712(2)(c) of the Act requires the recipient of a Notice to Produce to provide the requested information to the FWO within a specified time, of at least 14 days from the Notice being given to the recipient. A recipient fails to comply with the Notice under s 712(3) if they do not provide the information in the specified timeframe, unless they have provided a reasonable excuse under s712(4) of the Act. The Act does not allow the FWO to extend the specified timeframe to enable recipients to comply with the Notice. Our previous reports noted that our interpretation of s712 is supported by the FWO Notice to Produce Guide which states:

**‘Under no circumstances is it appropriate to grant an extension of time for a Notice to Produce, and Fair Work Inspectors should be aware that any attempt to extend the Notice to Produce timeframe may invalidate the Notice to Produce. Where an extension of time is sought and such extension appears reasonable in the circumstances, the Fair Work Inspector should consider issuing a new Notice to Produce (in consultation with their assistant director) and rely upon their discretionary powers not to enforce the original Notice to Produce’.<sup>2</sup>**

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<sup>2</sup> The Fair Work Ombudsman, Notice to Produce Guide, Version 10 (2025), p 26

We suggested in our Quarter 3 2024–25 report that the FWO issue a new Notice to Produce whenever the specified date of response in a Notice to Produce is extended or when a person served with the Notice to Produce is given more time to respond to the Notice. Any considerations and decision to extend the response date or not proceed with a Notice to Produce should be accurately recorded in the FWO case management system.

In our Quarter 1 2025–26 report we repeated this suggestion and further suggested that to ensure the recipient is provided with sufficient time to comply with a Notice to Produce, Fair Work Inspectors should consider contacting the recipient prior to issuing a Notice to Produce to discuss the volume of records or documents required and a reasonable timeframe to comply.

The FWO have now had the opportunity to respond to our findings on these matters. In response to these 2 suggestions in our Quarter 1 2025–26 report, the FWO advised that:

**‘The FWO considers that whether a new Notice to Produce should be issued will depend on the circumstances of the matter, and will consider possible updates and improvements to our guidance materials to better explain when and why a new Notice to Produce should be issued. FWO agrees that any decision making should be documented in the case management system. FWO agrees that Fair Work Inspectors should consider contacting the recipient prior to issuing the NTP, which is reflected in our guidance material and training.’**

At this inspection, we identified a Notice to Produce where the recipient’s legal representative requested a further two weeks to provide the requested records. This Notice to Produce was issued on 10 July 2025 with records required to be produced by 1 August 2025. The FWO’s case management records stated that the FWO would not pursue non-compliance until after 15 August 2025. This record was amended on 16 August 2025 to note that the recipient produced the records, being approximately two weeks after the initial due date.

It appears the documents may have been provided after the second agreed upon due date, if they were received on 16 August. Such circumstances demonstrate the potential risks regarding the FWO’s ability to pursue non-compliance once a decision has already been made to dispense with s 712(3) pursuant to subsection 712(4).

It is entirely reasonable for the FWO, as a regulator, to decide not to pursue non-compliance with a Notice if they have grounds to believe that the Notice will still be responded to not long after the specified period. It may however create a risk that they may be unable to pursue non-compliance under that Notice in the event that the respondent does then still refuse or fail to respond to the Notice. We have previously expressed the view that the FWO does not have the discretion to change the return date under s712(2)(c), to enable the recipient to comply with the Notice, without revoking the Notice to Produce and issuing an amended or new Notice to Produce. This is consistent with the provisions under section 33(3) of the *Acts Interpretation Act 1901*, where:

**‘an Act confers a power to make, grant or issue any instrument of a legislative or administrative character... the power shall be construed as including a power exercisable in the like manner and subject to the like conditions... to repeal, rescind, revoke, amend or vary any such instrument’.**

If the FWO determines that compliance with s 712(3) can be dispensed with pursuant to subsection 712(4) and the FWO no longer seeks the requested documents, best practice would be for the Notice to Produce to be revoked.

In the example set out above, we consider there is a risk the FWO would not have been able to pursue non-compliance after 15 August 2025 if the recipient did not provide the records. We consider that s 712 may not allow for the FWO to first excuse compliance with the return date specified in the Notice and then to subsequently enforce compliance with the Notice should they choose to.

We suggest the FWO update their guidance materials to explain the difference between an extension and a decision not to pursue non-compliance, and any associated risks, to support inspectors in making and recording informed decisions.



## Suggestion:

**Suggestion 1:** The FWO should update their guidance materials to explain the difference between a decision not to pursue non-compliance, and an extension. The guidance materials should support inspectors to understand and record the risks, and how to determine if a Notice should be amended, repealed, rescinded or revoked.

## FWO response:

FWO accepted this suggestion. The FWO advised the agency is reviewing the Notice to Produce Guide to incorporate Suggestion 1. The FWO anticipate the reviewed and updated Notice to Produce Guide will be launched in the first week of January 2027.

## Finding 2 – A Notice to Produce did not contain sufficient information to identify the contravention of the Act under investigation

Since 2023–24 we have identified and reported on repeated instances of procedural and administrative errors connected to Notices to Produce. These included errors with:

- inconsistencies in how the information included in the Notice to Produce identified what the considerations and legislative basis for the requests included in the Notice to Produce
- failing to provide sufficient details in a Notice to Produce to enable the recipient to clearly understand how the records requested were connected to the contravention of the Act under investigation or to the Modern Award being assessed
- inconsistencies in Notices to Produce on what records or information was required to be produced by the recipient
- lack of clarity on whether the Notice to Produce related to the whole of a company or only to relevant employees of the company



- not providing sufficient timeframes to recipients to respond to a Notice to Produce sent by registered mail
- missing or incorrect information in Notices to Produce relating to the issued or return dates, persons to which the Notice relates, nature of the work site and its current use, engagement of works and staff, clarification of worker role or correct ABN.

We suggested in our Quarter 3 of 2024–25 and repeated in our Quarter 1 of 2025–26 report, that *‘the FWO implement a quality review process for Notices to Produce to minimise the risk of administrative errors occurring.’* Following this inspection, the FWO responded to this suggestion advising that the FWO acknowledged that administrative errors had occurred and the FWO would consider strategies and approaches to assist in reducing and eliminating these types of errors. We will review the actions taken by FWO to improve the quality management framework supporting the use of Notices to Produce powers at future inspections.

#### Insufficient details in a Notice to Produce to demonstrate how the records requested were connected to contravention of the Act under investigation

At this inspection, we again identified a Notice to Produce which provided limited detail for the recipient to clearly understand how the records requested were connected to a contravention of the Act under investigation. The FWO provided us with a decision minute connected to the Notice, which explained how the requested records related to the company subject to the investigation and the account holder referred to in the Notice to Produce, but did not identify the contravention under investigation by the FWO.

Fair Work Inspectors may exercise compliance powers under s 706 of the Act for the specific purposes of determining whether the Act, a related offence provision in the Act, or a fair work instrument is being, or has been, complied with.<sup>3</sup> The FWO’s Notice to Produce Guide requires the Fair Work Inspector to confirm which fair work instrument is applicable and identify the instrument in the Notice to Produce, along with the clauses of the instrument that compliance is being assessed. In this circumstance, the Notice did not sufficiently identify the fair work instrument which is subject to the exercise of

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<sup>3</sup> A fair work instrument includes an order made by the Fair Work Commission (section 12(c) of the Act)

the power and did not sufficiently demonstrate to the recipient the relationship between the records or documents and the compliance purpose.<sup>4</sup>

Our suggestion (Suggestion 2) from our Quarter 3 of 2024-25 report applies to this finding namely that the Fair Work Ombudsman implement a quality checking process for NTPs to minimise the risk of administrative errors occurring.

### Finding 3 – Insufficient timeframes being given to recipients to respond to a Notice to Produce

At this inspection we identified five Notices to Produce which did not provide a sufficient timeframe for the recipient to respond as the timeframes given were not consistent with the FWO's internal guidance.

Pursuant to s 712(2)(c) of the Act, the Notice to Produce must specify a time, being at least 14 days, for the person to produce the requested records and documents.

According to the FWO Notice to Produce Guide, if a Notice to Produce is served personally or by fax, a minimum 16 days is required for response. Additionally, a Fair Work Inspector should allow 19 days in total, as a minimum, to receive a response for a Notice to Produce sent by registered post. Fair Work Inspectors must consider that service is deemed to take effect at the time at which the letter would be delivered in the ordinary course of post.<sup>5</sup> We were unable to locate any information or guidance for Fair Work inspectors to follow when service or sending a Notice to Produce is by email.

In accordance with the *Electronic Transactions Act (1999)* it may be permissible to serve Notices to Produce by email. Whilst we consider that service by email would be comparable to service by fax in terms of complying with s 712(2)(c), this is not set out in the FWO Notice to Produce Guide.

Of the Notices to Produce we reviewed:

- two Notices to Produce were served by email and afforded the recipients 14 days to respond

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<sup>4</sup> The Fair Work Ombudsman, Notice to Produce Guide, Version 10 (2025)

<sup>5</sup> The Fair Work Ombudsman, Notice to Produce Guide, Version 10 (2025)



- one Notice to Produce was served by email and afforded the recipient 15 days to respond, and
- two Notices to Produce were served by registered post and afforded the recipients 16 days to respond.

By providing the recipients with these timeframes to produce the records or documents, the Fair Work Inspector may not have given the recipient sufficient time to comply.

Suggestion 1 from our Quarter 1 of 2025–26 report also applies to this finding, namely, to ensure the recipient is provided with sufficient time to comply with an NTP, FWIs should consider contacting the recipient prior to issuing an NTP to discuss the volume of records or documents required and a reasonable timeframe to comply.



## Suggestion

**Suggestion 2:** To ensure there is no uncertainty about the timeframe provided for response, and to assist Fair Work Inspectors serving or sending Notices to Produce via email, the FWO should consider updating their Notice to Produce guide to:

- include a strict minimum timeframe for serving or sending Notices to Produce via email
- include guidance on how to serve or send a Notice to Produce via email, and
- update Appendix A & B to include service by email.

### **FWO response:**

FWO accepted this suggestion. The FWO advised that the Notices to Produce identified did not adhere to the response timeframes required by the Notice to Produce Guide at the time of inspection.

The FWO advised the Notice to Produce Guide will be updated to include guidance on service of Notices to Produce via email as part of the review of the Guide.

## Finding 4 – Procedural errors in administering FWO Notices and examinations

Prior to this inspection, in our Quarter 2 of 2022–23 report, we made a finding in relation to a 712AA Notice being issued to more than one person, in contravention of s712AA(4) and suggested that FWO revise its internal guidance to ensure applications only relate to one person. We have noted that the low frequency with which s 712AA powers are used may result in reduced proficiency or efficiency when they are relied upon and encourage FWO to keep updating their guidance material to ensure corporate knowledge is maintained in the intervening periods.

We note two administrative errors relating to examinations including:

- references to a different examinee in email correspondence with an examinee’s legal representative
- when applying Section 712AE(2) requiring an examinee to take an oath or affirmation, materials were not readily available for an examinee wishing to take their oath on the Bible.

### Administrative errors in s 712AA FWO Notice guidance material

Upon review of the FWO’s guidance material, we identified administrative errors in the guidance provided to FWO staff on the use of the FWO Notice under s 712AA of the Act.

This included:

- incorrect references to s 712A rather than s 712AA in the Guide to FWO Notices, FWO Notices and Examination Guide, and FWO Notice Coordinator Guide
- incorrect references to the Administrative Appeals Tribunal rather than the Administrative Review Tribunal, and
- outdated penalties for failure to comply with a FWO Notice in the Fair Work Inspector Training Module 5 – Evidence Gathering – Part 2.

We acknowledge that the FWO has not exercised s 712AA powers in several years, which may have led to discrepancies within the FWO’s guidance material, and likely the administrative errors noted above. The FWO should review its guidance material and ensure it remains fit for purpose. We also consider that a quality checking process may

assist the FWO in preventing administrative errors and maintaining a consistent approach between periods where 712AA powers are in use.



### Suggestions:

**Suggestion 3:** The FWO should implement a quality checking process for FWO Notices and examinations, including ensuring Notices and examinations are conducted in a manner that supports the confidentiality and requirement on an examinee to undertake the examination.

**Suggestion 4:** The FWO should review and where needed update its guidance material to ensure FWO staff have the appropriate guidance to exercise the powers under s 712AA, when necessary.

### FWO response:

FWO accepted these 2 suggestions. The FWO acknowledged that an administrative error occurred and was immediately identified and rectified by the Fair Work Inspector.

The FWO Notice examination guidance materials found to be deficient in this inspection were updated on 2 March 2026.

## Progress since previous inspection

At the time of this inspection, the FWO had not received the Quarter 3 and Quarter 4 of 2024-25 reports, and Quarter 1 of 2025-26 report. Remedial action from these reports was not assessed at this inspection and will be reviewed at our future inspections.



