

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

FOR THE PERIOD 1 JULY TO 30 SEPTEMBER 2024

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

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Commonwealth Ombudsman
GPO BOX 442
Canberra ACT 2601
Tel: 1300 362 072

Email: ombudsman@ombudsman.gov.au



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Executive summary

This is the first Quarterly Report for 2024–2025 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 Appeals Tribunal (AAT) 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).

Fair Work Inspectors (FWIs) are government officials 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 also enables a Fair Work Inspector to issue a Notice to Produce (NTP), which compels a person to provide records or documents at a specified place and within a specified time.

In August 2024, we inspected the FWO's use of the powers under ss 711 and 712 of the Act. During our inspection we identified that the FWO has very good guidance documentation, and a small enhancement to this could improve the consistent use of the powers.



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 and the 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.

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 ss 711 and 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 Fair Work Inspectors (FWI) exercising powers under ss 711 and 712 of the Act?



6. Are there adequate systems in place to record when a FWI 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 (s712AA)

There were no FWO Notices issued in the period for review under s 712AA of the Act. We made no findings in relation to the FWO's use of these powers.

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

We focussed our inspection on how FWIs draft and issue a NTP under s 712. Our inspection included:

- a review of the FWO's guidance and training materials,
- process discussions with FWIs to ascertain their operational understanding of these powers, and
- a review of a small sample of NTPs issued during the review period.

Inspection statistics for the period 1 April 2024 to 30 June 2024		
Record type	Number of records made available	Number of records inspected
S 712AA FWO Notice	NIL	NIL
s 711 Power to request name and address	NIL	NIL
s 712 Notice to Produce	76	4



We found that FWIs are supported by comprehensive guidance material which promotes a consistent approach to exercising powers under s 712. Based on our discussions with FWIs, it is evident that FWIs possess the relevant expertise, which is complimented by procedural guidance, to ensure that NTPs are drafted in accordance with s 712 of the Act.

We identified one enhancement that could be made to the FWO's guidance material to ensure consistency in how the powers are used and mitigate the risk of non-compliance. We made **one comment** in relation to this finding.

Finding: There were differences in guidance to FWO staff about the steps they should undertake if the recipient of a Notice to Produce requests an extension of time.

The FWO recently introduced mandatory self-paced training (FWI Training) which certain FWO staff must complete before being appointed as an FWI. Module 5 of the FWI Training states that a NTP cannot be extended under the Act. If more time is requested, the guidance is that the FWI may inform the recipient that they will not press for compliance until a specified date if the FWI and their manager think it is reasonable to do so.

In comparison, the Notice to Produce Guide (NTP Guide) applies more stringent guidance stating that 'Under no circumstances is it appropriate to grant an extension of time for an NTP' and this may invalidate the NTP. The NTP Guide also encourages FWIs to consider issuing a new NTP and rely upon their discretionary powers to not enforce the original. This ensures they could still validly press for compliance with the notice if the need arises.

Whilst both sets of guidance materials convey the message that a NTP should not be extended, there are differences in the detail which may cause FWIs to use the powers differently. The FWI Training is relatively new and designed as a self-paced training tool for FWO staff. Based on our discussions with FWO staff, we understand the NTP Guide is the primary resource that is more likely to be used by FWIs when preparing to draft a NTP. Accordingly, the risk of FWIs following conflicting procedures is low.



Comment:

We encourage the Fair Work Ombudsman to review its guidance material to ensure it reflects a consistent position for Fair Work Inspector's to rely upon when the recipient of a Notice to Produce requests an extension of time.

FWO response:

In January 2025, the FWO accepted our comment and stated that the FWI training in module 5 has been revised to be consistent with the guidance provided in the NTP Guide.

Progress since previous inspection

At the time of this inspection, the FWO had yet to receive their draft copy of the first Quarterly Report for the 2023-2024 year which provided the results of the previous inspection held in August 2023. Due to this, we did not review the FWO's progress in relation to these findings. However, throughout the 2023-24 review period we met with the FWO on several occasions and the FWO were proactively taking measures to address the issues raised by our office prior to receiving the report.

In particular, we were impressed with the implementation of the FWO's newly drafted self-paced FWI Training. This a positive display of the FWO's commitment to complying with the Act. We will review the work the FWO has done to action our findings from our August 2023 inspection in a forthcoming review.

