

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

FOR THE PERIOD 1 JANUARY TO 31 MARCH 2025

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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ISSN 2651-8635 - Print
ISSN 2651-8643 - Online

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Executive summary

This is the third 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 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).

Fair Work Inspectors (FWI) are government officials appointed by the FWO under the Act who can investigate possible contraventions of workplace laws. Under s 711 of the Act, 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 (NTP), which compels a person to provide records or documents at a specified place and within a specified time.

In March 2025, we inspected the FWO's use of the powers under s 712 of the Act. There were no FWO Notices issued in the period for review under s 712AA of the Act or use of the power to ask for a person's name and address (s 711).

We made **2 suggestions** and **1 comment** in relation to these **3 findings**.

We identified deficiencies and administrative errors in 5 of the NTPs. These included:

- One NTP where an extension of time was provided to respond to the NTP in breach of FWO's internal guidelines;



- Two NTPs did not sufficiently describe the nature of the contravention and the relevant clauses being assessed; and
- Two NTPs that contained a minor administrative error.

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 FWIs 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 focused our inspection on how FWIs used the powers under ss 711 and 712 of the Act between the 1 October to 31 December 2024 (the relevant period). Our inspection included:

- monitoring progress on addressing our previous inspection findings
- a review of FWO's guidance material for NTPs, and
- a review of a small sample of NTPs issued during the relevant period.

Inspection statistics for the period 1 October 2024 to 31 December 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	192	30

We found the quality of the NTPs to be generally of a high standard, with most NTPs adequately demonstrating the connection between the requested records and documents with the compliance purpose for which the NTP was issued.



Finding One: An extension of time was given to respond to an NTP instead of issuing a new NTP

We identified an NTP where extra time was requested by the recipient for compliance with the NTP.

Pursuant to s 712(2)(c) of the Act, the NTP must specify a time, being at least 14 days, for the person to produce the requested records and documents. The FWOs NTP Guide¹ states that:

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

We requested further information on why the FWO did not follow their internal guidelines. The FWO advised that the FWI and team leader held discussions surrounding the response date and had not considered issuing a new NTP as the employer was engaged in the process. These decisions were not recorded in the FWO case management system.

To progress the investigation, the FWI allowed additional time for the employer to produce the requested records. The FWO advised that the FWI relied on their discretion not to enforce compliance by the due date specified in the NTP, however the FWO did not deem this to be an extension of time, as it was not intended to extend the due date of the NTP. Despite the FWO’s intention not to extend the time of the NTP, we consider allowing an extra 3 weeks for the respondent to provide the records to be an extension of time. As a new NTP was not issued with this extended response date, there is a risk that the person receiving the NTP did not comply with the notice and may have been in breach of s712(3) of the Act.



Suggestion 1:

¹ The Fair Work Ombudsman, *Notice to Produce Guide*, Version 9 (2024), s 13.

FWIs should issue a new NTP whenever the specified date of response in an NTP is extended or when a person served with the NTP is given more time to respond to the notice. Any considerations and decision to extend the response date or not proceed with an NTP should be accurately recorded in the FWO case management system.

FWO response:

The Fair Work Ombudsman (FWO) considers that whether a new NTP 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 NTP should be issued. FWO agrees that any decision making should be documented in the case management system.

Finding Two: A Notice to Produce did not sufficiently describe the nature of the contravention under investigation or how the records being requested related to this investigation

We identified an NTP which failed to identify which Modern Award was applicable in the circumstances or the provisions of the specific Award that may have been contravened. The NTP did not explain how the date by which the records or documents were required related to the FWO's investigation.

The NTP Guide² provides guidance to FWIs on the requirement to provide detailed and specific descriptions surrounding the nature of the contravention under investigation. Contraventions as stated under s 45 of the Act (compliance with the Modern Award) captures a large range of conduct. The NTP should list the particular provision of the Award for the person receiving the NTP so that they clearly understand the relationship between the matter under investigation and how the requested records or documents relate to this investigation.

² The Fair Work Ombudsman, *Notice to Produce Guide*, Version 9 (2024), s 8.

In our first quarterly report for 2023-24, we suggested that the FWO implement tailored training for FWIs to improve consistency when preparing and issuing NTPs, and that the training should align with the FWO's guidance material to promote uniformity. The FWO accepted our suggestion, however the scheduled delivery of this training was not finalised at the time of our inspection.

The FWO advised that the training would be live by the end of March 2025. Following our inspection, we received a copy of the training and were pleased to note that it contained a section marked as "important" which highlighted the requirement to provide details and descriptions in the NTPs of the specific reference to the Award and nature of the contravention.



Comment 1:

We acknowledge that the Fair Work Ombudsman have launched their training to FWIs and their managers. We will continue to monitor and review details provided in NTPs.

FWO response:

FWO acknowledges that this NTP was deficient and that we continue to seek opportunities to ensure all FWIs are aware of the requirement to explain the compliance purpose of the NTP. We also confirm that to this end, the self-paced online training was launched in 2025, and continues to be available to current and new Fair Work Inspectors (FWIs).

Finding Three: Minor errors on NTP

We identified two minor administrative errors on NTPs. The first error relates to a typographical error of a date. The date for the documents to be provided is listed on the NTP as 14 January 2024. The date should have been 14 January 2025.



The second administrative error relates to a drafting mistake on the NTP. The NTP inadvertently listed two different persons as being required to produce the requested records or documents.

We followed up with the FWO and were advised that the inclusion of the second person on the NTP was a drafting error. While the mistake may not invalidate the NTP, it may affect FWO's ability to enforce the NTP or provide a reasonable excuse for the recipient not to comply with the notice.



Suggestion 2:

The Fair Work Ombudsman implement a quality checking process for NTPs to minimise the risk of administrative errors occurring.

FWO response:

The FWO acknowledges that administrative errors have occurred and will consider strategies to reduce and eliminate these types of errors.

Progress since previous inspection

During the inspection, we reviewed the FWO's progress against the previous inspection findings from the second quarterly report for 2023-24 which was held in December 2024. We were satisfied that the FWO had addressed our suggestion to update internal FWI Training to be consistent with the FWO Notice to Produce Guide³.

In our first quarterly report for 2023-24 to the FWO we suggested that 'The FWO should implement tailored training for Fair Work Inspectors to improve consistency when

³ The Fair Work Ombudsman, *Notice to Produce Guide*, Version 9 (2024).



preparing and issuing an NTP. This training should align with the FWO's guidance material to promote uniformity'.⁴

At our second quarterly inspection for 2024-25, held in December 2024, we followed up on the FWO's progress and implementation of specialised training on NTPs. The FWO advised that the specialised training on NTP was in draft form and would be rolled out by the end of March 2025. Following this inspection, we received a copy of the training which was launched on 12 June 2025 to FWIs and their managers.

⁴ The Office of the Commonwealth Ombudsman, *Quarterly report by the Commonwealth Ombudsman under s 712F (6) of the Fair Work Act 2009*, Report For the period 1 July to 30 September 2023, June 2024

