



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

FOR THE PERIOD 1 APRIL TO 30 JUNE 2021

Quarterly report by the Acting Commonwealth Ombudsman, Penny McKay,
under Part 5-2 of Chapter 5 of *the Fair Work Act 2009*

NOVEMBER 2021



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EXECUTIVE SUMMARY

Under s 712F(3) of the *Fair Work Act 2009* (the Act), the Commonwealth Ombudsman (the Ombudsman) must review the exercise of examination powers by the Fair Work Ombudsman (FWO) and any member of the staff of the Office of the FWO. Under s 712F(6) of the Act, as soon as practicable after the end of each quarter of the financial year, the Commonwealth Ombudsman must present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted during that quarter.

This report covers the period 1 April to 30 June 2021 (the review period). Our Office conducted one review during this period, from 18–20 May 2021, in relation to one examination conducted by the FWO on 13 April 2021.

Our review found the FWO's use of examination powers was in accordance with the Act. We also found the FWO took appropriate remedial action in relation to the findings of our previous report.

The FWO advised us of 2 additional notices issued during the review period. We will review the use of powers under these notices during our next review.

INTRODUCTION

Under s 712F(3) of the Act, the Ombudsman must review the exercise of examination powers by the FWO and any member of the staff of the Office of the FWO.

Under s 712AA(1) of the Act, the FWO can apply to an Administrative Appeals Tribunal (AAT) presidential member for an FWO notice if they reasonably believe a person has information or documents that will assist an investigation. 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
- attend before the FWO, or a specified staff member of the FWO, and answer questions relevant to the investigation.

Under s 712E of the Act, the FWO must notify the Ombudsman that a FWO notice was issued and provide copies of relevant documents (a report, video and transcript of the examination) as soon as practicable after an examination is completed. Our Office uses these records to review how the FWO and any person assisting the FWO exercises the examination powers under the Act.

Under s 712F(6) of the Act, the Ombudsman must report to the Parliament as soon as practicable after the end of each quarter about examinations conducted by the FWO and reviews conducted by the Ombudsman during that quarter.

This report relates to one review conducted by our Office during the review.

FWO Examination Reference Number	Date of FWO Examination	Ombudsman Review Conducted
PVW21/00001	13 April 2021	18–20 May 2021

REVIEW SCOPE AND CRITERIA

Objective and scope of reviews

The Ombudsman provides independent oversight of the FWO's compliance with the Act and procedural fairness for examinees.

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. We also focus on the fair and reasonable treatment of examinees.

We provided the FWO an opportunity to review and respond to our findings before finalising this report.

Review criteria

We assessed the FWO notice and examination 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 practices and the FWO's internal guidelines?

Appendix A provides the detailed criteria used to guide our assessment.

PROGRESS MADE SINCE PREVIOUS REPORT

In our FWO report for the period of 1 October to 31 December 2020, we made one suggestion and 7 better practice suggestions that we undertook to monitor in future reviews. These were:

Previous report suggestions	Remedial action / progress
<p>Suggestion 1 – The FWO should ensure FWO notices strictly comply with the form prescribed in the regulations.</p>	<p>The FWO updated guidance embedded in its notice template to improve compliance with the form requirements.</p> <p>During this review we observed the FWO was compliant with the form prescribed in the regulations.</p>
<p>Better practice suggestion 1 – The FWO should expand its internal guidance materials and/or direct staff to appropriate guidance and resources to support effective management of interpreting services during FWO examinations.</p>	<p>The FWO updated its internal guidance for managing interpreting services during FWO examinations. In particular, the FWO added guidance about:</p> <ul style="list-style-type: none"> • commencing an examination with an interpreter (e.g allowing that interpreter to introduce themselves to the examinee) • providing breaks for interpreters • communicating with interpreters throughout the examination.
<p>Better practice suggestion 2 – When sourcing interpreting services, the FWO should first seek to obtain interpreters with a minimum NAATI accreditation level of Certified interpreter (or equivalent).</p>	<p>The FWO’s guidance (FWO Notice Coordinator Guide, Section 7.4) now requires that:</p> <p>Every effort should be made to obtain the highest certified interpreter possible. A certified specialist legal interpreter should be obtained, if possible. If a certified specialist legal interpreter is not able to be obtained, a certified interpreter should be obtained.</p>

Previous report suggestions	Remedial action / progress
<p>Better practice suggestion 3 – FWO guidance require breaks to be offered every 90 minutes when using an interpreter. The guidance should also specify the FWO is to advise the examinee and the interpreter of this requirement, noting it does not preclude them from making requests for additional breaks as the examination proceeds.</p>	<p>The FWO guidance was updated to provide that the ‘Fair Work Inspector responsible for the examination should establish a brief plan for the proposed timings of the examination, including when breaks may be scheduled.’ The guidance also requires that where an interpreter is involved in an examination a short break should be allowed every 60 to 90 minutes.</p>
<p>Better practice suggestion 4 – When it appears an examination may extend beyond five hours in one day, or past the originally agreed finish time, the FWO should flag this to participants and seek agreement to either extend the examination or adjourn to a later date.</p>	<p>The FWO updated its guidance to reflect this requirement.</p>
<p>Better practice suggestion 5 – The FWO should ensure its examination closing script articulates clearly that the examinee, after being discharged from further compliance with the FWO notice:</p> <ul style="list-style-type: none"> • is not compelled to answer questions or provide further information • must answer truthfully should they choose to answer questions • is no longer protected by the use indemnity in relation to any information or answers they give. 	<p>In response to this better practice suggestion the FWO updated its closing script which now states:</p> <p>I discharge the witness from further compliance with the notice. You are no longer compelled to answer questions or provide further information. You are no longer protected by the use indemnity in relation to any further information or answers you give.</p> <p>During the examination under review, this script was not used as the changes had yet to be made. The examinee was discharged from compliance with the notice but was not advised they were no longer compelled to provide further information or that the indemnity afforded by the notice was no longer in effect.</p> <p>We encourage the FWO to use the updated closing script in future and will monitor this legacy issue at future reviews.</p>

Previous report suggestions	Remedial action / progress
<p>Better practice suggestion 6 – The FWO should improve its quality assurance process to check the accuracy of the transcript record of an examination. Further, the FWO notices and examination guide should be expanded to emphasise the importance of a complete and accurate transcript record and to more clearly specify the quality assurance role of the Fair Work Inspector in the post-examination process.</p>	<p>The FWO’s updated guidance requires the transcript to be reviewed for accuracy. Where the transcript and examination audio recording do not align the FWO is to provide feedback to the transcriber.</p> <p>For the current FWO notice we were satisfied the transcript was accurate.</p>
<p>Better practice suggestion 7 – The FWO should provide sufficient information about the basis for each suspected contravention of the Act listed on the FWO notice, to ensure the AAT decision-maker can be satisfied of the matters in s 712AB(1) in issuing a FWO notice.</p>	<p>The FWO amended its FWO notice template guidance to enhance compliance with this requirement of the Act.</p> <p>For the FWO notice under review, sufficient information was provided about the basis for each suspected contravention of the Act.</p>

REVIEW RESULTS – REVIEW PERIOD 1 APRIL TO 30 JUNE 2021

We reviewed one examination conducted by the FWO. The results are reported below, with reference to the relevant review criteria (see **Appendix A** for more information about our criteria).

Criterion 1: Was the application for a FWO notice made in accordance with the requirements of the Act (s 712AA)?

We determined the application for the FWO Notice was made in accordance with the requirements of the Act.

Criterion 2: Did the FWO notice comply with the requirements of the Act and the Regulations (ss 712AA, 712AB and 712AC)?

We determined the FWO Notice complied with the requirements of the Act and the regulations.

Criterion 3: Was the FWO notice served in accordance with the requirements of the Act (s 712AD)?

We determined the FWO Notice was served in accordance with the requirements of the Act.

Criterion 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?

We determined the FWO was compliant with this criterion.

APPENDIX A – REVIEW CRITERIA

Criterion 1: Was the application for a FWO notice made in accordance with the requirements of the Act (s 712AA)?

1.1 Was the application made to a nominated AAT presidential member? (s 712AA)(1))

1.2 Was the application made by the FWO (s 712AA(1)), or a delegated SES employee or acting SES employee? (s 683(1B)(a))

1.3 Does the application outline the grounds upon which the FWO believes the person has information or documents relevant to a FWO investigation? (s 712AA(1)(a))

1.4 Is the application in the prescribed form? (s 712AA(3)(a))

1.5 Did the application relate to only one person? (s 712AA(4))

1.6 Did the affidavit accompanying the application include the information required by the Act (ss 712AA(5)(a) to (f))?

1.7 Is there any indication of further information being provided to the AAT presidential member? (s 712AA(6))

Criterion 2: Did the FWO notice comply with the requirements of the Act and the regulations (ss 712AA, 712AB and 712AC)?

2.1 Did the FWO notice only relate to one person? (s 712AB(3))

2.2 Is the FWO notice in the form prescribed by the regulations and does it include the requirements in s 712AC (b), (c), (d)?

2.3 Did the FWO notice seek the recipient to give information, produce documents or attend before the FWO to answer questions relevant to an investigation in accordance with s 712AA(2)(a), (b) or (c)?

2.4 Was the notice signed by the nominated AAT presidential member who issued it? (s 712AC(e))

2.5 Does the notice include other information as prescribed by the regulations? (s 712AC(f))

Criterion 3: Was the FWO notice served in accordance with the requirements of the Act (s 712AD)?

3.1 Was the examination notice served within 3 months after the day on which it was issued (s 712AD(2)) and in the appropriate manner? (s 28A of the *Acts Interpretation Act 1901*)?

3.2 Was the notice recipient given at least 14 days to comply with the FWO notice? (s 712AD(3)(b))

3.3 Was the time for complying with the notice varied? If so, was the varied timeframe for compliance at least 14 days after the FWO notice was given to the person? (s 712AD(5))

Criterion 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?

4.1 Did the FWO, or a specified member of the staff of the Office of the FWO who is an SES employee or an acting SES employee, conduct the examination? (s 712AA(2)(c))

4.2 Was the examinee represented by a lawyer? (s 712AE(1))

4.3 Did the FWO, or any member of the staff of the Office of the FWO, administer an oath or affirmation? (ss 712AE(2) and (3))

4.4 Did the FWO or member of the staff of the FWO outline the entitlement of an examinee to be paid for reasonable expenses? (s 712C(1))

4.5 Was our Office provided with the required materials? (ss 712E (1)(b) and 712E(2) and ss 712F(1) and 712F(2))¹

¹ As part of our review, we may also request other records that enable our assessment of compliance and procedural fairness.

4.6 Assessment of conduct of examination and related issues

We assess this criterion under 3 parts:

Guidance for FWO staff exercising coercive powers²

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

Conduct of examination³

- If relevant, was the examinee offered the service of an accredited interpreter when attending a face-to-face examination?
- If an interpreter is required, did they take an oath or make an affirmation?
- Before commencing the examination, did the examiner explain the examination process to the examinee?
- Did the examination exceed 5 hours? Were there regular breaks?
- Was the location of the examination appropriate?
- Were those present at the examination appropriate?
- Was the line of questioning relevant to the investigation as set out in the supporting documentation?
- Tone and manner of questioning: were there obvious forms of intimidation, particularly intrusive questioning?
- Was the examinee requested not to disclose the content of the examination?
- Was the examination adjourned? If so, was this decision made during the examination by the FWO or delegated SES officer with assistance from the Fair Work Inspector and Legal Branch?

Post examination⁴

- Was the examinee provided a transcript of the examination and given an opportunity to make corrections?

² ARC Principles 8 – Training, 10 – Accountability, 12 – Conflict of Interest, 14 – Notices, 16 – Examinations and hearings, AGIS paragraph 4.4 – Coercive powers

³ ARC Principle 14 – Notices, AGIS paragraph 4.1 – Witnesses, FWO Guidance, s 15(2) of the *Ombudsman Act 1976*.

⁴ ARC Principle 16 – Examinations and Hearings

