



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

**FOR THE PERIOD 1 JULY TO 30 SEPTEMBER 2021**

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

**March 2022**





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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 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 July to 30 September 2021 (the review period). The Office of the Commonwealth Ombudsman (the Office) conducted 2 reviews during this period, from 16–20 August 2021, in relation to 2 examinations conducted by the FWO over 2 days for each examination – 20 and 27 May 2021 and 10 and 15 June 2021.

Our review found the FWO’s use of examination powers was in accordance with the Act. This was also the case during the previous review period (1 April to 30 June 2021).

The FWO advised us of 1 additional FWO notice issued during this review period. We reviewed the use of powers under that notice during the Quarter 2 review period (1 October to 31 December 2021). We will include the results of that review in our next report.

# INTRODUCTION

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 and 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, and
- 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 is, 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 the notice, affidavit and other information given to a nominated presidential AAT member – as soon as practicable after a FWO notice is issued.

Under s 712F(1) of the Act, the FWO must provide the Ombudsman with copies of the relevant report, video and transcripts as soon as practicable after an examination is completed. We use these records to review how the FWO and any person assisting the FWO exercises the examination powers under the Act, as required under s 712F(3) of 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 2 reviews conducted by our Office during the review period.

<b>FWO Examination Reference Number</b>	<b>Date of FWO Examination</b>	<b>Ombudsman Review Conducted</b>
PVW21/00002	20 May 2021 27 May 2021	16–20 August 2021
PVW21/00003	10 June 2021 15 June 2021	16–20 August 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 assess FWO notices and examinations 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?

**Appendix A** sets out the detailed criteria that guide our assessment.

## **PROGRESS MADE SINCE PREVIOUS REPORT**

We did not make any new findings in our previous FWO report for the period 1 April to 30 June 2021. As such, it is not necessary for us to report on FWO progress since that previous report.

## **REVIEW RESULTS – REVIEW PERIOD 1 JULY TO 30 SEPTEMBER 2021**

We reviewed 2 examinations 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).

### **FWO Notice PVW21/00002**

***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 and the examinee was treated fairly and reasonably.

## **FWO Notice PVW21/00003**

***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 and the examinee was treated fairly and reasonably.

## **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))<sup>1</sup>

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<sup>1</sup> 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 powers<sup>2</sup>

- 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 examination<sup>3</sup>

- 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 examination<sup>4</sup>

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

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

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

<sup>4</sup> ARC Principle 16 – Examinations and Hearings.



