



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

FOR THE PERIOD 1 OCTOBER TO 31 DECEMBER 2020

Quarterly report by the Commonwealth Ombudsman,
Michael Manthorpe PSM,
under Part 5-2 of Chapter 5 of *the Fair Work Act 2009*

JUNE 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 prepare and 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 one review conducted by our Office between 1 October and 31 December 2020 (the review period). Due to the time it takes the FWO to develop the materials to be sent to our Office (video, transcript, and report), it is common for the FWO examination to be conducted in one quarter, and our review in a subsequent quarter. The table below shows the date on which the FWO examination was conducted and when we conducted our review.

FWO Examination Reference Number	Date of FWO Examination	Ombudsman Review Conducted
PVW20/00001	8 September 2020	Started 28 Oct 2020 Finalised 3 Dec 2020

The FWO advised us that it did not issue any new FWO notices or conduct examinations between 1 October and 31 December 2020.

Our review identified some issues, including managing interpreting services during the FWO's examination, and significant inaccuracies and omissions in the transcript record of examination.

We found that certain aspects of the conduct of the examination could be improved and suggest that the FWO consider:

- providing staff with appropriate guidance and resources to support the effective management of interpreting services during FWO examinations
- sourcing interpreters with a minimum NAATI¹ accreditation level of

¹ National Accreditation Authority for Translators and interpreters

Certified interpreter

- improved management of the duration of examinations and breaks, especially when interpretation services are required
- clarifying what legal obligations may apply after discharge from compliance with a FWO notice
- undertaking a thorough quality assurance process of its transcript record.

We also identified technical non-compliance where the FWO notice was not strictly compliant with the required form under the *Fair Work Regulations 2009*.

The examination was conducted in difficult circumstances, with participants remotely located attending by video-conference due to COVID-19 travel restrictions. Not being able to have the FWO examiner in the same room as the examinee may have contributed to some issues relating to examination conduct. We acknowledge the good practices of the FWO staff who facilitated the remote access arrangements and effectively managed the technical issues that arose.

INTRODUCTION

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 712AA(1) of the Act, the FWO can apply to the Administrative Appeals Tribunal 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, who is a Senior Executive Service (SES) employee or an acting SES employee, and answer questions relevant to the investigation.

Under s 712E of the Act, the FWO must notify the Ombudsman that an FWO notice has been 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.

The FWO advised us that it has not issued any new FWO notices or conducted examinations between 1 October and 31 December 2020. This report therefore relates to one review conducted by our Office during the review period².

FWO Examination Reference Number	Date of FWO Examination	Ombudsman Review Conducted
PVW20/00001	8 September 2020	Started 28 Oct 2020 Finalised 3 Dec 2020

² Due to the time it takes the FWO to develop the materials to be sent to our Office (video, transcript, and report), it is common for the FWO examination to be conducted in one quarter and yet we may not be able to review the examination until the following or a subsequent quarter.

REVIEW SCOPE AND CRITERIA

Objective and scope of reviews

The Ombudsman performs the independent oversight mechanism under Part 5-2 of the Act, to determine the FWO's compliance and confirm procedural fairness for examinees. Specifically, under s 712F(3)(a) 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 712F(3)(b) of the Act, the Ombudsman may do anything incidental or conducive to reviewing how the FWO exercised their examination powers.

When conducting our review of the FWO's use of examination powers, we assessed 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 focused on the fair and reasonable treatment of examinees.

Prior to finalising this report, we provided the FWO an opportunity to review and respond to our findings. After reviewing a draft version of this report, the FWO advised that it updated relevant guidance documents, form templates and its opening and closing statements. We will review these updated documents during our upcoming review.

Review criteria

When reviewing the FWO notice and examination, we assessed them 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 a previous FWO report for the period of 1 January to 31 March 2019, we made three suggestions that we undertook to monitor in future reviews. These were:

Previous report suggestions	Remedial action / progress
<p>The FWO should revise its internal guidance to include ways to manage interpreters that appear to overstep their role in the examination process.</p>	<p>In our FWO report reviewing the FWO's use of examination powers (for the period 1 July to 30 September 2019) we found that the FWO had appropriately managed an interpreter. However, we were unable to identify any specific adjustments to the FWO's internal guidance material on managing and working with interpreters, following our suggestion in our 1 January–31 March 2019 report.</p> <p>As a result of the findings of this report, we have made additional findings and suggestions for the FWO's management of interpreting services during its most recent examination.</p>
<p>The FWO should clearly articulate the extent of an examinee's obligations under the FWO notice during an examination and distinguish them from their legislative obligations should the examinee choose to provide additional information at a later date.</p>	<p>The FWO amended its examination closing script to clarify the examinee's obligations outside an examination.</p> <p>This report makes a further finding and suggestion to ensure an examinee is clear about their obligations after discharge from compliance with the FWO notice.</p>
<p>To avoid the risk of potential confusion for the examinee (particularly when not legally represented), the FWO should not discuss the body corporate penalties that might apply in relation to obligations under a FWO notice.</p>	<p>The FWO updated its script for the examination opening to include references to the correct individual penalties applicable.</p>

REVIEW RESULTS—1 OCTOBER AND 31 DECEMBER 2020

During the review period of 1 October and 31 December 2020, we reviewed one examination conducted by the FWO and the results are reported below, with reference to the relevant review criteria (see **Appendix A** for more information about our criteria).

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?

The FWO was compliant with most requirements considered by this criterion and we acknowledge the FWO has taken some positive steps to address previous findings. However, we identified several areas of concern in the conduct of the examination. These include:

- managing interpreting services
- managing examination time and breaks
- clarifying what obligations apply after discharge from compliance with a FWO notice.

Managing the interpreter and interpreting services

During the examination there was a need for all questions and answers to be interpreted. This made the examination particularly lengthy. In reviewing the FWO examination, we observed instances where the FWO did not manage interpreting services in a way that achieved fair outcomes. For example, it is difficult to say with confidence that the Examinee consistently received a fair opportunity and time to respond to the questions asked. Examples of this include:

- Long answers were given by the Examinee, with demonstrative hand gestures, but the interpreted answer was comparatively short. For example, one answer by the Examinee took 71 seconds to convey and the interpreted answer was 11 seconds. On another occasion the Examinee’s answer was 21 seconds long and clearly used the English phrase ‘finance department’, but the interpreted answer was one second long and did not mention the finance department.
- On some occasions when the Examinee responded to questions with an extended discussion, the Counsel Assisting interrupted the Examinee’s answer.

This meant that sometimes the answer provided up to the point of interruption was not interpreted at all, or was described by the interpreter (e.g. “[the Examinee] was going to give you some examples”) but not actually interpreted or recorded.

In some instances, the Counsel Assisting suggested to the interpreter and Examinee that they consider breaking the answers up into smaller chunks. This highlighted to us that such techniques and approaches on working with interpreters could be included in internal FWO guidance and provided to all participants prior to the examination, to help enable a more productive session.

FWO’s practices and guidance re: engaging, briefing, and managing interpreting services

The interpreter engaged for this examination was accredited as a ‘Certified Provisional interpreter’. The National Accreditation Authority for Translators and interpreters (NAATI) advises that Certified Provisional interpreters transfer non-complex, non-specialised messages from one language into another, accurately reflecting the meaning.³

We acknowledge that the FWO had provided notes in its request that described the interpreter “will be interpreting for a witness of a Fair Work Ombudsman investigation”, but it is not clear what level or whether a higher level accreditation was sought. There are higher NAATI certifications, such as a Certified interpreter, that would have been more appropriate to the specialised content of a FWO examination.

Insufficient breaks provided for the interpreter

The FWO provided records demonstrating that the interpreter was sourced through the Department of Home Affairs’ Translating and Interpreting Service (TIS). The website’s Frequently Asked Questions page⁴ includes advice for agencies about workplace health and safety obligations when working with interpreters, tips to get the most out of an interpreting session and responsibilities during an interpreting session. With regards to breaks the TIS website notes:

Question: Do I have to provide a break for an interpreter?

Answer: If a session runs for longer than 90 minutes you will need to provide the

³ <https://www.naati.com.au/become-certified/certification/> Accessed 16/03/2021

⁴ <https://www.tisnational.gov.au/en/Agencies/Frequently-Asked-Questions-for-agencies>
Accessed 16/03/2021

interpreter with sufficient breaks. Interpreting can be very demanding and interpreters should be provided with sufficient breaks to eat and rest.

In considering this advice, the FWO did not provide sufficient breaks to the interpreter, with extended examination periods of two hours or more being conducted without a break being taken. We suggest that the FWO review a range of guidance documents (such as the *Recommended National Standards for Working with interpreters in Courts and Tribunals*) available for working with interpreters when developing its internal guidance materials on working with interpreters during a FWO examination.

Overall, the FWO should consider implementing measures to better manage interpreting services in future examinations. This includes addressing a suggestion made in a previous report (for the period 1 January to 31 March 2019) that the FWO revise its internal guidance to include ways to manage interpreters that appear to overstep their role in the examination process, and the below better practice suggestions.

Better practice suggestion 1 - The FWO provide staff with appropriate guidance and resources to support effective management of interpreting services during FWO examinations.

Better practice suggestion 2 - When sourcing interpreting services to assist in examinations, the FWO should first seek to obtain interpreters with a minimum NAATI accreditation level of Certified interpreter (or equivalent).

Following the review, the FWO advised us that it has amended its Notices and Examination Guide and Notice Coordinator Guide to address these issues.

Management of examination time and breaks

The FWO's internal guidance materials state that, "Generally, an examination should not exceed five hours in any one day unless the FWO has consulted the Examinee and they have agreed to this". In the examination opening, the Examiner advised that "I intend to adjourn the examination for a break after two hours, however, please feel free to ask for an earlier break should you need".

The examination went for a total of five hours and 44 minutes, and the recordings showed that the Examinee was in attendance in the examination room for just over six hours. In total, the Examinee attended at 9:30am and was free to leave

just after 5pm (7.5 hours). The total duration of breaks was 89 minutes (or approximately an hour and a half). There were two examination periods that went for over two hours (albeit by less than 10 minutes over in each instance).

Better practice suggestion 3 - FWO guidance require breaks to be offered approximately every 90 minutes when using an interpreter. The guidance should also specify that the FWO is to advise the examinee and the interpreter of this requirement, noting that it does not preclude them from making requests for additional breaks as the examination proceeds.

Better practice suggestion 4 - When it appears that an examination may extend beyond five hours in one day, or past the originally agreed finish time, the FWO should flag this to the examinee and interpreter, and seek agreement to either extend the examination or adjourn to a later date.

Following the review, the FWO advised us that it has amended its Notices and Examination Guide and Notice Coordinator Guide to address these issues.

Clarity about what obligations apply after discharge from compliance with a FWO notice

During the examination's closing statement the FWO advised:

"You may be contacted again by Fair Work inspectors or other officers of the Fair Work Ombudsman after today. If you are asked questions outside of this examination, you are to answer those questions in the same way as you were today."

This latter sentence may be misunderstood by the Examinee as suggesting that they are compelled to answer questions by the FWO after the examination, as though they are still required to comply with the FWO notice (that is, "in the same way as they were today"). Noting that, not only was the Examinee not legally represented, but they were also receiving the information through interpretation, we consider that the FWO closing statement could be clearer and avoid phrasing that could be misunderstood.

There was no associated caution provided that the protections afforded to the Examinee when answering questions under the FWO notice will also cease when they are discharged from complying with the FWO notice. Section 713(3) of the Act provides a use indemnity in relation to FWO notices. This means that the information provided during an examination under a FWO notice is generally not

admissible in evidence against the Examinee in subsequent proceedings. However, when discharged from complying with the FWO notice, these protections lapse.

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:

- 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.

Following the review, the FWO advised us that it has amended its opening and closing remarks document to address this issue.

Errors in post examination transcript

We conducted our review by watching the FWO examination video recordings alongside a transcript of the recordings. This revealed errors in the transcript, including:

- an entire question and answer missing from the transcript
- many references in the transcript to “(indistinct)” were clearly audible to our staff watching the recording
- errors that altered and in some cases changed the meaning of the answer—for example the transcript reads ‘It **was** my decision’, when the audio clearly indicated ‘It **wasn’t** my decision’; the transcript reads ‘every manager excluding ...’ when the audio clearly indicated ‘every manager including ...’
- inaccurate indications of who the speaker is—for example in one instance the Examiner was speaking but the transcript indicates it was the Counsel Assisting.

The transcript is a key record, and it is important that the FWO has processes in place to ensure the final transcript is complete and accurate.

With respect to quality assurance and review of the transcript, the internal FWO guidelines note that:

Where practical the Fair Work Inspector will review and personally provide a transcript of the examination to the Examinee. The transcript should be accompanied by a covering letter inviting the Examinee to identify any errors in the transcript.

We understand that the transcript is reviewed for accuracy by the Fair Work Inspector and if, as in this case, English is not the preferred language of the Examinee, the English transcript will be translated and provided to the Examinee for correction/comment. The conspicuous errors in this transcript indicate that the FWO's quality assurance process was inadequate and the Examinee's review cannot be relied upon to identify such deficiencies.

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.

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

Under this criterion, we only comment on action taken by the FWO. We do not comment on the merits of decisions made by a nominated AAT presidential member.

FWO notice not compliant with required form

The FWO notice was not strictly compliant with the required form under the *Fair Work Regulations 2009* (the Regulations). Section 712AC(a) of the Act requires that a FWO notice must be in the form prescribed by the Regulations if a form is prescribed. Schedule 5.3 of the Regulations prescribes the forms for FWO notices, with Form 3 being the relevant form for a FWO notice to attend and answer questions. The FWO notice issued for the examination we reviewed was non-compliant in two respects:

1. The FWO notice did not state the delegate's role and title in the prescribed form. The prescribed form requires "[the Fair Work Ombudsman] OR [name] who is an SES or acting SES member of the staff of the Office of the Fair Work Ombudsman". What was stated in the FWO notice is "Deputy Fair Work Ombudsman [name]". This was not the delegate's full title (Deputy Fair Work Ombudsman—Compliance and Enforcement). In this instance the full title is important because not all Deputy Fair Work Ombudsmen have a delegation covering FWO notices and examinations. The FWO notice also did not state the delegate's role in the prescribed form, that is "[name] who is an SES or acting SES member of the staff of the Office of the Fair Work Ombudsman".
2. *Incomplete information/lack of specificity in Part 3 of the FWO notice*: Part 3 requires the "suspected contravention of the Fair Work Act 2009, fair work instrument or safety net contractual entitlement, and which matters referred to in subparagraphs 712AA(1)(a)(i) to (viii) of the Fair Work Act 2009 the suspected contravention relates to". Part 3 of the FWO notice sent to the Examinee only lists the suspected contravention of the Act, without including which matters referred to in subparagraphs 712AA(1)(a)(i) to (viii) of the *Fair Work Act 2009* the suspected contraventions relate to.

<p>Suggestion 1 - The FWO should ensure that FWO notices strictly comply with the form prescribed in the regulations.</p>
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Was the application for a FWO notice made in accordance with the requirements of the Act (s 712AA)?

Discrepancy between the application and the FWO notice

We found that there was a discrepancy between the application which listed three suspected contraventions (underpayment, unreasonable deductions and unreasonable requirements) and the FWO notice which listed four suspected contraventions (above contraventions plus the contravention of a provision of the National Employment Standards).

The affidavit that was included as part of the application for the FWO notice outlined the particulars of the suspected contraventions of the Act and referred to these suspected contraventions being related directly to ss 712AA(1)(a)(i), (ii) and (iii) of the Act. However, no similar description of the suspected contravention of the National Employment Standards (s 712AA(1)(a)(vii) of the Act) was outlined in the application (including the affidavit), despite being listed on the FWO notice. This inconsistency in the information presented may mean the AAT decision-maker was not fully informed about relevant suspected contraventions listed on the FWO notice they issued.

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 that the AAT decision-maker can be satisfied of the matters in s 712AB(1) in issuing a FWO notice.

APPENDIX A—REVIEW CRITERIA

Criterion 1: Was the application for a FWO notice made in accordance with the requirements of the Act?

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

1.2 Was the application made by the Fair Work Ombudsman (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 that 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 (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?

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 do one of the following:
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?

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 (s 712AE), the Regulations, relevant best practices⁵ and the FWO's internal guidelines?

4.1 Did the Fair Work Ombudsman, or a specified member of the staff of the Office of the Fair Work Ombudsman 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 Fair Work Ombudsman, or any member of the staff of the Office of the Fair Work Ombudsman, administer an oath or affirmation? (ss 712AE(2) and (3))

4.4 Did the Fair Work Ombudsman or member of the staff or the Fair Work Ombudsman 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))⁶

4.6 Assessment of conduct of examination and related issues

⁵ This involves an assessment against: the best practice principles in relation to 'Coercive Information-gathering powers of government agencies', Report no. 48, 2008, by the Administrative Review Council (ARC) and the requirements of the Australian Government Investigation Standards (AGIS) 2011, the FWO's internal guidelines and the *Ombudsman Act 1976*.

⁶ As part of our review, we may also request other records that enable our assessment of compliance and procedural fairness.

We assess this criterion under three parts (discussed below): guidance for staff exercising coercive powers, conduct of examination and post examination.

Guidance for FWO staff exercising coercive powers⁷

- 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 coercive powers have access to assistance, advice and support for the exercise of those powers?

Conduct of examination⁸

- If required, was the Examinee offered the service of an accredited interpreter when attending a face-to-face examination?
- If an interpreter is required, did they undertake an oath or affirmation?
- Prior to commencing the examination, did the examiner explain the examination process to the Examinee?
- Did the examination exceed five 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 examination⁹

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

⁷ ARC Principles 8—Training, 10—Accountability, 12—Conflict of Interest, 14 – Notices, 16—Examinations and hearings, AGIS paragraph 4.4—Coercive powers

⁸ ARC Principle 14—Notices, AGIS paragraph 4.1—Witnesses, FWO Guidance, s 15(2) of the *Ombudsman Act 1976*.

⁹ ARC Principle 16—Examinations and Hearings