

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

FOR THE PERIOD 1 JULY TO 30 SEPTEMBER 2022

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

March 2023

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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.

The Office of the Commonwealth Ombudsman (the Office) conducted 4 reviews during the quarter from 1 July to 30 September 2022, for examinations conducted by the FWO on 8 April 2022, 28 June 2022, 29 June 2022 and 30 June 2022. The reviews were conducted between 22 and 26 August 2022, and 26 and 30 September 2022.

The Office undertakes reviews once per quarter. These reviews are retrospective; we review records of examinations completed at an earlier time.

As a result of the reviews, we found 3 instances where an application for a FWO notice requiring an individual to attend and answer questions related to more than one person. Under s 712AA(4) of the Act, an application can only relate to one person.

We suggest the FWO revise its internal guidance to include information on what must be included in an application for a FWO notice to the Administrative Appeals Tribunal (AAT), to ensure an application only relates to one person in accordance with the requirements of the Act.

Our reviews found no other issues with the FWO's use of examination powers.

INTRODUCTION

Under s 712AA of the Act, the FWO may apply to an 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, 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.

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 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 relevant examination powers 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 4 reviews conducted by our Office between 1 July to 30 September 2022.

FWO Examination Reference Number	Date of FWO Examination	Ombudsman Review Conducted
PVW21/00006	30 June 2022	22-26 August 2022
PVW21/00008	8 April 2022	22-26 August 2022
PVW21/00009	28 June 2022	26-30 September 2022
PVW22/00002	29 June 2022	26-30 September 2022

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 whether examinees are treated fairly and reasonably.

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 findings in our previous FWO report for the period 1 April to 30 June 2022.

REVIEW RESULTS – REVIEW PERIOD 1 JULY TO 30 SEPTEMBER 2022

During our reviews, we determined 3 FWO notice applications did not meet the requirements of the Act under criterion one.

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

We determined the FWO was compliant with most requirements considered under criterion one, however we identified 3 instances¹ where the application for a FWO notice related to more than one person.

Under s 712AA(4) of the Act, an application for a FWO notice must not relate to more than one person, but may relate to more than one investigation. In each instance, the application for a FWO notice related to 4 people, rather than one person resulting in non-compliance.

On review of the FWO's internal guidance materials, we found there was no reference to what must be included in the application and the requirement that an application must only relate to one person.

Suggestion 1: The FWO revise its internal guidance to include information on what must be included in an application to the AAT for a FWO notice, to ensure an application only relates to one person in accordance with the requirements of the Act.

¹ PVW21/00006, PVW21/00009, PVW22/00002.

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))²

² 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 powers³

- 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 examination⁴

- 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 examination⁵

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

³ ARC Principles 8 – Training, 10 – Accountability, 12 – Conflict of Interest, 14 – Notices, 16 – Examinations and hearings, AGIS paragraph 4.4 – Coercive powers.

⁴ ARC Principle 14 – Notices, AGIS paragraph 4.1 – Witnesses, FWO Guidance, s 15(2) of the *Ombudsman Act 1976*.

⁵ ARC Principle 16 – Examinations and Hearings.