COMMONWEALTH OMBUDSMAN

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

FOR THE PERIOD 1 JANUARY TO 31 MARCH 2019

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

February 2020

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EXECUTIVE SUMMARY

Under 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, the Ombudsman must report to Parliament as soon as practicable after the end of each quarter of each financial year about examinations conducted by the FWO and reviews conducted by the Ombudsman during that quarter.

This report covers three reviews conducted by our Office between 1 January and 31 March 2019 (the review period).

When conducting our review of the FWO's use of examination powers, we assessed its performance against the requirements of the Act, the regulations, relevant best practice and the FWO's internal guidelines. We also focused on the fair and reasonable treatment of examinees. Overall, we were satisfied the FWO was compliant with these requirements and standards, however we made three suggestions to improve its practices.

During the review period the FWO advised us it conducted one examination under the Act. This will be reviewed by our Office in a subsequent quarter, with the results included in the quarterly report for that period.

INTRODUCTION

Under the *Fair Work Act 2009* (the Act), the Fair Work Ombudsman (FWO) has compulsory evidence gathering powers to assist with investigations into non-compliance with Australian workplace laws.

Under s 712AA(1) of the Act, the FWO can apply to the Administrative Appeals Tribunal (AAT) for an FWO notice if they reasonably believe a person or business has information or documents that will assist an investigation.

An FWO notice may require its recipient to:

- Give information to the FWO or a specified member of the staff of the FWO.
- Produce documents to the FWO or a specified member of the staff of the FWO.
- Attend an examination before the FWO, or a specified member of the staff 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 Commonwealth Ombudsman that an FWO notice has been issued and provide copies of relevant documents. The FWO must give the following to the Ombudsman as soon as practicable after an examination is completed:

- a report about the examination
- a video recording of the examination
- a transcript of the examination.

Our Office uses these records to review how the FWO and any person assisting the FWO exercises the examination powers under the Act.

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 the review of the exercise of examination powers.

Review criteria

When reviewing the examination notices and examinations, we assessed them against the following criteria:

1. Was the application for the 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?

   Criterion 4 is the main focus of our review. **Appendix A** provides the detailed inspection criteria that guide our assessment.

PROGRESS MADE SINCE PREVIOUS REPORT

This is the first report that contains results of the Ombudsman's review of the FWO's use of examination powers under the Act. Our previous reports reflected that we had not conducted any reviews of the powers during the relevant period.

We will monitor and report on the progress made on the issues identified during this review period in subsequent reports.

REVIEW RESULTS: 1 JANUARY TO 31 MARCH 2019

We conducted three reviews of examinations between 1 January and 31 March 2019. Details of our reviews are at **Appendix B** and the results are reported below.

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

We determined the FWO was compliant with this criterion.

Criterion 2—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 any decision made by a nominated AAT presidential member.

We determined the FWO was compliant with this criterion.

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

We determined the FWO was compliant with this criterion.

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, however we have made three suggestions about improved practice.

We also noted a good practice where the examiner explained to the examinee that they did not intend to invade the examinee's privacy beyond what was required in order to investigate the matter, prior to asking a question regarding the examinee's personal affairs.

Involvement of interpreter during examination

In accordance with the Australian Government Investigation Standards,[1] the FWO offers examinees with a limited proficiency in English the services of an interpreter for the duration of the examination. FWO's internal guidelines require the Fair Work Inspector managing the investigation to consider whether the examinee will require an interpreter and, prior to an examination, the examinee is prompted in correspondence from the FWO to advise if they require an interpreter. If there is a need, the FWO then arranges for interpreter services. At the commencement of the examination, the interpreter is required to undertake an oath or affirmation that they will well and truly interpret the information and answers that will be given by the examinee.

During one examination, there were a significant number of instances where the interpreter appeared to act beyond their duties. For example, the interpreter responded to questions asked by the FWO without having a direct conversation with the examinee beforehand, and made additional statements to the FWO when the examinee had been answering in English. As a result, we are not confident that the interpreter provided accurate interpreting services during this examination.

We note that, due to the unavailability of an in-house interpreter, an alternate service provider was used. In a subsequent examination, the FWO used a different service provider, which the FWO advised is its preferred

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[1] Australian Government Investigation Standards (AGIS) 2011, paragraph 4.1.1—*Obtaining information*

provider for interpreter services but was not available for the examination discussed above.

Nevertheless, the FWO did not appear to have a strategy in place to address these issues with the interpreter during the examination. We therefore suggest the FWO revise its internal guidance to include ways to manage interpreters that appear to overstep their role in the examination process.

Clarity regarding when and what obligations and penalties apply under an FWO notice

An FWO notice may require a person to attend before the FWO and answer questions relevant to the investigation. Section 712B(1) of the Act sets out the requirements for complying with a notice during an examination. This includes taking an oath or making an affirmation that the examinee will provide truthful information and answers, in accordance with ss 712AE(2) and (3). Non-compliance with an FWO notice attracts a pecuniary penalty under Part 4-1 of the Act.

At the conclusion of one examination, the examiner stated words to the effect that it was likely that, during the course of the investigation, an FWO representative would be in contact with the examinee, and that it was important that the examinee be aware that it is a serious offence to provide false or misleading information to the FWO representative. The examiner stated, "So if any Fair Work Inspector asks you a question going forward, you need to provide a truthful [answer], outside [of] even the notice of today, [you] must provide them with…truthful information". The examiner subsequently discharged the examinee from further compliance with the FWO notice and brought the examination to a close.

In our view, the examiner's use of legalistic language when discussing future assistance needs may have caused the examinee, who was not legally represented, to believe they had no choice but to answer questions outside of the FWO notice, or face the penalties under Part 4-1 of the Act. While the examiner did differentiate between the offence of providing false or misleading information and the extent of the examinee's obligations under the FWO notice, we do not consider that the explanation was provided in sufficiently clear language. We suggest it is better practice for the FWO to more clearly articulate the extent of the 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.

In another instance, the preamble of the rights and obligations under the FWO notice, as it was read to the examinee, included discussion of penalties for a body corporate, which has a threshold of five times the maximum number of penalty units that can be applied to an individual. The examinee was an individual and not a body corporate. As the examinee was not legally represented, it would have been better practice not to discuss body corporate penalties so as to avoid the risk of potential confusion for the examinee.

APPENDIX A—ASSESSMENTS CONDUCTED UNDER CRITERION 4

Detailed below is how we determine whether examinations were conducted in accordance with the requirements of the Act, the regulations, relevant best practice and the FWO's internal guidance.[2]

Criterion 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?

Under s 712AA(2)(c) of the Act 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 must conduct the examination of the person named on the FWO notice.

Criterion 4.2—Was the examinee represented by a lawyer?

Under s 712AE(1) of the Act an examinee may choose to be represented by a lawyer during an examination.

Criterion 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?

Under ss 712AE(2) and (3) of the Act the FWO, SES or acting SES may require the examinee to answer questions under oath or affirmation.

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[2] 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 AGIS, the FWO's internal guidelines and the *Ombudsman Act 1976.*

Criterion 4.4—Did the Fair Work Ombudsman or member of the staff of the Fair Work Ombudsman outline the examinee's entitlement to be paid for reasonable expenses?

Under s 712C(1) of the Act an examinee who attends as required by the FWO notice is entitled to be paid fees and allowances fixed by, or calculated in accordance with, the regulations for reasonable expenses incurred.

Criterion 4.5—Was our Office provided with the required materials?

As soon as practicable after an FWO notice has been issued, the FWO must notify the Ombudsman that an FWO notice has been issued and give the Ombudsman a copy of: the FWO notice; the affidavit that accompanied the application for the FWO notice; and any other information in relation to the FWO notice that was given to the nominated AAT presidential member who issued the notice. The FWO must also notify the Ombudsman of any variation to the FWO notice as soon as it is given to the examinee.

Under s 712F(1), as soon as practicable after an examination is completed, the FWO must give the Ombudsman: a report about the examination, a video recording of the examination and a transcript of the examination.

As part of the review, we may also request other records that demonstrate compliance and procedural fairness.

4.6 Assessment of conduct of examination and related issues.

We assess this criterion under three parts (discussed below)—guidance for staff exercising coercive powers,[3] conduct of examination[4] and post examination.[5]

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[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

Guidance for FWO staff exercising coercive powers

- 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 examination

- 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?

- 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

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

APPENDIX B—EXAMINATIONS CONDUCTED AND REVIEWED

The Ombudsman conducted three reviews between 1 January and 31 March 2019. The table below shows the date on which the examination was conducted and when the Ombudsman conducted its review.

FWO Examination Reference Number	Date Examination Conducted	Ombudsman Review Conducted
PVW18/00003	20 June 2018	30 January 2019
PVW18/00006	27 June 2018	08 February 2019
PVW18/00007	28 June 2018	01 February 2019