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

**FOR THE PERIOD 1 JULY TO 30 SEPTEMBER 2023**

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

**November 2024**

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# Contents

Executive summary.....	2
Scope and methodology.....	3
<i>Review criteria</i> .....	3
Our findings.....	4





# Executive summary

This is the first Quarterly Report for 2023–2024 of the Commonwealth Ombudsman (Ombudsman) under s 712F(6) of the *Fair Work Act* (the Act).

Under s 712F(3) of the Act the Ombudsman must review the exercise of certain powers by the Fair Work Ombudsman (FWO) and Fair Work Inspectors.

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 into certain suspected contraventions, and the person 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 (examination powers).

Fair Work Inspectors are government officials appointed by the FWO under the Act who can investigate possible contraventions of workplace laws. Under section 711 they have the power to require a person to tell them their name and address if the inspector reasonably believes they have contravened a civil remedy provision. During the course of an investigation, section 712 also enables a Fair Work Inspector to issue a Notice to Produce, which compels a person to provide records or documents at a specified place and within a specified time.

During the review period, we identified that the FWO have insufficient methods to record instances of when a Fair Work Inspector exercises their power under s 711 of the Act to compel a person to provide their name and address.

We also identified that there was an inconsistency in the details recorded within Notices to Produce templates issued under s 712 of the Act.



# Scope and methodology

The Ombudsman provides independent oversight of the FWO's compliance with the Act and procedural fairness for people subject to the FWO's examination powers.

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, FWO's internal guidelines and training material. We also focus on whether examinees are treated fairly and reasonably.

As required under s 8(5) of the *Ombudsman Act 1976*, we provide the FWO an opportunity to review and respond to our findings before finalising this report.

Under s 712F(6) of the Act, as soon as practicable after the end of each quarter of the financial year, the Ombudsman must prepare and present to the Parliament a report about examinations conducted under s 712AA during the quarter. Section 712F(7) enables the Ombudsman to present to the Parliament any other reports about the results of reviews conducted under this section, including the use of powers under s 711 and s 712 of the Act.

My Office acknowledges that this report has not been tabled in a timely manner. In my fourth quarterly report for 2022-23 I noted that my Office had unintentionally excluded a review of powers under s 711 and s 712 of the Act. During the 2023-24 financial year, we clarified the extent of our inspection and reporting obligations with respect to these powers. This contributed to a delay in tabling the reports for 2023-2024 financial year. We will commence applying a risk-based approach to our inspections of the FWO in the 2024-25 financial year which will fulfil our reporting obligations.

## **Review criteria**

We assess FWO Notices, examinations and the use of s 711 and s 712 powers 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?
5. Does the FWO have an effective framework to support Fair Work Inspectors (FWI) exercising powers under s 711 and s 712 of the Act?
6. Are there adequate systems in place to record when a FWI exercises a power under s 711 and s 712 of the Act?
7. Has the FWO appropriately exercised its use of powers under s 711 and s 712 of the Act?

## Our findings

### FWO Notice (s712AA)

There were no FWO Notices issued in the period for review under s 712AA of the Act. We made no findings in relation to the FWO’s use of these powers.

### Powers to Request Name and Address (s 711) and to Produce Documents (s 712)

In August 2023, we inspected the FWO’s use of the powers under s 711 and s 712 of the Act for the first time.

In most instances, the FWO were successful in gaining information amicably with parties that they are working with, and only reverted to using these powers in exceptional cases.

Inspection statistics for the period 1 April 2023 to 30 June 2023		
Record type	Number of records made available	Number of records inspected
S 712AA	NIL	NIL
s 711	NIL	NIL
s 712 Notice to Produce	65	11

FWO staff have a good understanding of their obligations when exercising powers under s 711 and s 712 and we considered the processes and controls embedded by the FWO to support the use of these powers were fit for purpose.

We identified administrative enhancements that could improve the FWO's framework and mitigate non-compliance risks. We made **3 suggestions** in relation to two findings.



**1. Insufficient requirements to record the use of s711 to compel a person to provide their name and address**

We identified that the FWO do not have a prescribed process in place within their record management system for Fair Work Inspectors to record their use of the s 711 power. In the absence of a documented and exercised process, our Office cannot be satisfied that Fair Work Inspectors have used this power lawfully.

We were able to review the training, procedures and guidance material supporting Fair Work Inspectors to use the power. We also spoke with Fair Work Inspectors and investigation teams. They understood their obligations when using the power and the circumstances in which the power would be exercised. This provided us with assurance that the power was not exercised by the FWO during the inspected record period and is reserved for exceptional cases.

Although we understand from our conversations with the Fair Work Inspectors that the power was used sparingly, we consider that the FWO should record on their case management system when the power is used to compel a person to identify themselves. While the Act does not require the decisions to use s 711 or the exercise of that power to be recorded, it would enable our Office to better assess the appropriateness with which this power has been used. We noted an interim measure instigated by the FWO post our inspection to modify a field in the case management system to reference the use of s711, but this needs to be accompanied with appropriate instructional text and guidance material to staff.



**Suggestion 1**

The FWO implement a requirement for Fair Work Inspectors to record the use of the power to compel a person to identify themselves under s 711 of Act, including any considerations supporting their use of this power.

**FWO response:**

In October 2024, the FWO accepted our suggestion and stated that the 'Contemporaneous Notebooks Guide' and the Fair Work Inspector training has been updated to include the requirement of recording contemporaneous notes whenever s 711 is exercised by a Fair Work Inspector under the Act.



## Suggestion 2

The FWO should update guidance material to specify the recording of any use of s 711 by Fair Work Inspectors in the FWO's case management system.

### **FWO response:**

In October 2024, the FWO accepted our suggestion and stated that guidance material has been developed and provided to Fair Work Inspectors which instructs them to record any use of s 711 under the Act as an 'Appointment' activity within the FWO's case management system.

## **2. Inconsistency in the details within Notices to Produce issued under s712**

There were inconsistent and divergent approaches to the content and level of detail provided in the 11 Notices to Produce (NTPs) we inspected. Whilst the FWO had a proforma for NTPs, the content, detail and supporting grounds for the NTPs varied significantly between each NTP and appeared to align with the different styles and approaches taken by the Fair Work Inspectors who drafted the instruments.

There were some good examples where the NTPs were well structured and clearly set out what was being sought and the grounds and legislative basis supporting the NTPs. There were other less structured NTPs where it was not as clear what the considerations and legislative basis were for the request. However, we acknowledge that this may have been dependant on the situation under which the Fair Work Inspector was issuing the NTP.

Whilst the 11 NTPs we inspected met the legislative requirements, the lack of consistency in content and detail presents risks to the quality of practice when exercising the powers under s 712 of the Act. The proforma, along with supporting guidance material, should enable Fair Work Inspectors to apply the power consistently and ensure their considerations and decisions in using the powers are understood and captured in a readable form within each NTP.



The FWO does have a robust policy framework and procedures available to Inspectors to assist them in exercising their powers under s 712 of the Act. This includes, but is not limited to:

- the Notice to Produce Guide,
- the Notice to Produce Assessment,
- Investigation Fundamentals, and
- Powers of Fair Work Inspectors Fact Sheet and Induction Module

While this guidance material supports the FWO having robust procedures, the application of this material was not consistent in preparing and issuing an NTP.



### Suggestion 3

The FWO should implement tailored training for Fair Work Inspectors to improve consistency when preparing and issuing a Notice to Produce. This training should align with the FWO's guidance material to promote uniformity.

#### **FWO response:**

In October 2024, the FWO accepted our suggestion and stated that they are currently considering conducting specialised training on Notices to Produce for the 2025 calendar year.