



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

FOR THE PERIOD 1 JULY – 30 SEPTEMBER 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 one review conducted by our Office between 1 July and 30 September 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. We noted positive practices during our review, and we have not made any recommendations or suggestions for improved practice.

During the review period the FWO did not advise us that any examinations were conducted under the Act.

INTRODUCTION

Under s 712AA(1) of the Act, the Fair Work Ombudsman 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 (the 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 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

In our report for the period 1 January to 31 March 2019, we made three better practice suggestions.¹

The first suggestion related to the management of interpreting services during the examination. During this review period, we noted positive practices in this area, which are discussed below. We encourage the FWO to continue these positive practices as we will monitor the issue in future reviews.

The issues relating to the remaining suggestions, around ensuring clarity when explaining an examinee's obligations and penalties under an FWO notice, were not present during this examination.

REVIEW RESULTS—1 JULY TO 30 SEPTEMBER 2019

During the period 1 July to 30 September 2019, we conducted one review of an examination conducted by the FWO. Details of our review 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.

¹ We did not conduct any reviews during the previous reporting period, 1 April to 30 June 2019.

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.

When serving the examination notice on an examinee, it is the FWO's practice to attach a cover letter explaining the examination notice and process. We note that, in November 2018, the FWO implemented a revised cover letter that encloses a 'Frequently Asked Questions' sheet and examinations checklist for the examinee's reference. Although there were no issues with the previous cover letter template, this template clearly guides the examinee through their rights and what to expect of the examination process. We encourage agencies to continually review their practices and templates for such improvements and commend the FWO for being proactive on this issue.

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.

We note the FWO's sound approach to managing interpreting services during this examination. The examinee had a reasonable command of English, however, chose to have an interpreter present during the examination. At the commencement of the examination, the FWO very clearly outlined the role of the interpreter, taking into account the examinee's level of proficiency in English. The examination was managed in a way to ensure the presence of the interpreter did not impede the conduct of the examination.

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.

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 Australian Government Investigation Standards (AGIS) 2011, 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 examination⁴ and post examination.⁵

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 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

- 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 one review between 1 July and 30 September 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 |
|---|-----------------------------------|-----------------------------------|
| PV18/00008 | 28 March 2019 | 20 September 2019 |

