

Article Information

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Understanding your organisation's rights if the Fair Work Ombudsman issues a Notice to Produce

Under section 712 of the *Fair Work Act 2009* (FW Act), the Fair Work Ombudsman (FWO) is empowered to issue to a person notices to produce (NTP) records or documents to the inspector. In this article, Emily Haar, Partner, and Joseph Hyde, Associate, examine the legal requirements for NTPs to be valid, and what organisations should do when they receive one.

The power of the FWO, which is exercised through its appointed inspectors, to issue NTPs is constrained by section 706 of the FW Act. This section requires that all *compliance powers* are exercised in accordance with the following purposes:

- To determine whether the FW Act, an industrial instrument, or contractual safety net has or is being complied with;
- Any other purposes prescribed by the Fair Work Regulations, or any other legislation.

Additionally, an inspector can only exercise compliance powers for the above purposes if they reasonably believe that a provision of the *National Employment Standards* (NES), a term of a modern award, enterprise agreement, workplace determination, national minimum wage order, or an equal remuneration order, has been contravened.

Providing the above criteria are met, and so long as the inspector serves the notice during *working hours*, they are entitled to exercise *compliance powers*.

Section 712, which provides for NTPs, further requires that the NTP must be in writing, served on the person, and require the person to produce the records or documents within a specified period of no less than 14 days. Failure to produce the documents or records within the specified time constitutes a civil remedy provision, attracting a potential of 60 penalty units (currently \$16,500).

However, that is not the end of the story. If an inspector issues an NTP, for it to be valid, then the form of the NTP "*must, amongst other things, adequately specify its statutory purpose to enable the notice recipient (and the Court) to determine whether the notice validly requires the specified records or documents to be produced.*"[\[1\]](#)

In a practical sense, on a non-technical and fair reading of the NTP, it must:

- (a) disclose that it is an exercise of the power which is conferred on an inspector by s 712 of the Act; and
- (b) both:
 1. specify with reasonable clarity the records or documents that the recipient is required to provide; and
 2. disclose the relationship between the records or documents being required and the matter (the particular inquiry as to non-compliance) which is the subject of the exercise of the power,

so as to enable its recipient to determine whether the inspector is exercising the power for a "compliance purpose" for the purposes of s 706(1) of the Act.[\[2\]](#)

For instance, in the case of *United*, the FWO inspector issued an NTP on an organisation that was the franchisor of a service station operated by another entity. The franchisee had been found to have contravened the FW Act, and the inspector was investigating whether the franchisor should be held liable under the responsible franchisor provisions, under so called "*secondary liability*".[\[3\]](#)

The Court held that the NTP issued to the franchisor was invalid because it failed to particularise the primary contraventions committed by the franchisee,^[4] because it failed to contain the “*necessary detail as to the nature of the primary contraventions*”.^[5] The NTP in question attempted to link the primary contraventions, to the franchisor’s secondary liability, and upon initial review, the NTP appeared valid.^[6] Indeed, the Court noted that franchisor may even have *subjectively* been able to link the NTP to the statutory purpose for which it was being exercised. However, an NTP must be understood by the reasonable recipient *objectively*, on its face, and it stands or falls on its own terms.

The Court put themselves in the shoes of the franchisor and determined, objectively, whether the NTP satisfied the test. The Court held that the NTP failed for lack of particularity on two fronts:

1. the NTP listed the relevant statutory provisions that the inspector *investigated*, but did not specify which provisions of the FW Act that had actually been *contravened* by the franchisee; and
2. relatedly, even if the specific sections of the FW Act which the franchisee contravened were listed, this would not have gone far enough in the circumstances where the franchisee had contravened section 44 (contravening the NES) and section 45 (contravening a modern award) – it is necessary to specify *which* NES standard(s) (and the underlying section(s)), and *which* clause(s) of the modern award were found to have been contravened.

The Court noted that if the NTP provides other information that makes it reasonably possible to ascertain the detail of the actual contravention being investigated, it may not always be necessary to include precise sections or award clauses.^[7] As stated by the Victorian Supreme Court in a matter related to the Work Cover Authority’s issue of a similar notice to produce:

“what is necessary is that the notice sufficiently inform the recipient of the nature of the particular suspected contravention or contraventions, so that the recipient can sensibly assess whether the Authority has the power to require the provision to it of documents and information, and, further, whether the information and documents, sought in the notice, may relate to the suspected contravention that is the subject of the investigation by the Authority.”^[8]

However, the Court in *United* found that the relevant NTP also failed on this front.^[9]

It follows that whether the NTP describes the suspected contravention by specific reference to the relevant sections and clauses, or by a summary of the facts, the result must be that the recipient is able to understand the particular suspected contravention, and be able to link the documents sought to that contravention and the statutory purpose that provides the FWO’s *compliance powers*.

If your business receives an NTP, it is essential that you move quickly. While the case examples discussed throughout this article, and of which there are many more, have demonstrated that businesses and unions can successfully argue about the validity of NTPs in Court, such a process can be costly and uncertain.

Getting advice about your options, which may include less adversarial engagement with the relevant regulator, may ultimately enable the matters under investigation to be worked through with the regulator in a more orderly manner, such as by negotiating a slightly different scope of documents to be provided, or agreeing to a more manageable timeframe for production.

Piper Alderman’s Employment Relations team are available to assist your organisation with wage compliance matters, including engaging with regulators where required.

^[1] *Fair Work Ombudsman v United Petroleum Pty Ltd* [2020] FCA 590 (7 May 2020) (**United**), [5].

^[2] *Construction, Forestry, Maritime, Mining and Energy Union v Fair Work Inspector Lam* [2018] FCA 1379 (**Lam**), [27], as cited in *United*, [22].

^[3] *United*, [5].

^[4] *Ibid*.

^[5] *Ibid*, [41].

^[6] *Ibid*.

[7] Ibid, [53], citing *Lam*, [30]; [34]; and *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority [2018] VSCA 16 (Aurora)*, [92].

[8] *Aurora*, [92].

[9] *United*, [58].