



FACT SHEET

Union Right of Entry

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Part 3-4 of the *Fair Work Act 2009* (Cth) (the 'FW Act') provides that unions can only enter workplaces to:

1. Investigate a suspected contravention of the FW Act or an industrial instrument;
2. Hold discussions with employees; or
3. Investigate suspected breaches of occupational health and safety laws.

To enter a workplace, a union official must hold an entry permit issued by the Fair Work Commission ('FWC'). This permit acts as a license allowing the permit holder to enter workplaces on behalf of the Union. An entry permit is valid for 3 years from the date of issue, unless revoked or the permit holder ceases to be an official of the Union.

RIGHT OF ENTRY NOTICES

In addition to holding a valid entry permit, the Union must serve on an employer an entry notice at least 24 hours, but not more than 14 days, before the date of entry. An entry notice must be issued on each occasion a permit holder seeks to enter a workplace and must be in writing, containing all of the following information:

- The premises that are proposed to be entered; and
- The organisation for which the entry permit holder is an official; and
- The day of the entry.

An entry notice given for the purposes of investigating a suspected contravention must be more detailed and a full list of necessary information requirements are provided at section 518(2) of the FW Act. The permit holder must not contravene a condition imposed on the entry permit.

ENTRY TO HOLD DISCUSSION WITH EMPLOYEES

A permit holder may enter the premises for the purposes of holding discussions with one or more employees:

1. Who perform work on the premises; and
2. Whose industrial interests the permit holder's organisation is entitled to represent; and
3. Who wish to participate in those discussions.

A union official may only enter the premises during working hours and may only hold the discussions during the employees' mealtime or other breaks.

The permit holder must comply with any reasonable request (of the Employer) to hold the discussions in a particular room or premises of the workplace, or to take a particular route to reach the room or area of the premises in which the permit holder can hold discussions. Similarly, the permit holder must comply with reasonable occupational health and safety requirements of the premises.

Union officials are not authorised to enter any part of a workplace that is used for residential purposes.

ENTRY TO INVESTIGATE SUSPECTED CONTRAVENTION

If the purpose of entry is to investigate a suspected contravention of the FW Act, relevant Award, or Agreement, the permit holder may investigate the workplace, equipment and employee documents.

Section 481(3) provides that the permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies with the permit holder.

During working hours and for the purpose of investigating the suspected breach, the permit holder may:

1. Inspect any work, process or object relevant to the suspected contravention
2. Interview any person about the suspected contravention (i.e. who agrees to be interviewed and whose industrial interests the permit holder's organisation is entitled to represent)
3. Inspect and make copies of any record or document (excluding a non-member record or document) that is directly relevant to the suspected contravention and is kept on premises or is accessible from a computer that is kept on premises.

If a request to inspect employee documents is made, the permit holder must produce their permit holders' authority documents to the employer prior to the inspection. This request for documents pertaining to the suspected contravention may occur either at the time of the entry or within five days of entry. The request must allow the employer a period of 14 days from the date of the notice to provide the documents.

Employers should be mindful of privacy issues involving the access of personal information.

The FWC may issue an exemption certificate (which exempts the certificate holder from having to provide at least 24 hours' notice) to an organisation for an entry to investigate a suspected contravention if:

- the organisation has first applied for it; and
- the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.

Non Member Documents

If a permit holder requests records which solely deal with employees who are not members of the permit holder's organization, the employer should not provide these records to the permit holder without the written consent of the employee or by an order provided by the FWC.

The FWC may make an Order, on application, to provide the permit holder with the authority to inspect and make copies of non-member documents. Such an Order may be made on successful argument that access to and inspection of non-member documents is necessary for investigating the suspected contravention.

ENTRY TO INVESTIGATE SUSPECTED OHS BREACH

Rights and obligations in relation to a permit holder's ability to enter a workplace to investigate a suspected OHS breach come from both the FW Act and the *Work Health and Safety Act 2011* (Qld) ('WHS Act').

A permit holder may enter a workplace to investigate a suspected OHS breach under the WHS Act. Notice of entry must be given as soon as is reasonably practicable after entering the workplace, unless the notice would defeat the purpose of the entry to the workplace or unreasonably delay the OHS entry permit holder in an urgent case.

The FW Act places conditions on the right available to a permit holder to enter a workplace to investigate a suspected breach under the WHS Act. This right may only be exercised during working hours and, similar to other entry requirements, the permit holder must produce their entry permit for inspection when requested by the employer as well as comply with any reasonable occupational health and safety requirements of the workplace.

Additionally, the FW Act and WHS Act both provide that a permit holder may *inspect or otherwise access employee records* (as opposed to merely entering the workplace to investigate a suspected OHS breach) only if they have provided written notice listing the reasons for doing so, at least 24 hours prior to exercising this right.

FAILURE TO COMPLY WITH REQUESTS

A union official is not authorised to enter, or remain on the premises for either investigation or discussion purposes if they:

- Fail to produce their entry permit when requested to do so by the employer; or
- Fail to comply with a reasonable request to hold discussions in a particular room or area of the premises, or to take a particular route to reach that room or area of the premises.

Employers should not provide any list of employee names or other personal details, despite union requests, as this may be a breach of the *Privacy Act 1988*.

ENTRY NOTICE DEFECTS AND HINDERING ACTIVITIES

An employer may refuse entry if the entry notice given, as per the provisions above, is defective. Failing this, an employer must not hinder a permit holder's right of entry, or obstruct them in carrying out their activities as notified in the entry notice.

Location of Interviews and Discussions

Section 492 of the FW Act states that the permit holder (union official) must hold discussions or conduct an interview in a room or area of the premises agreed with the occupier (e.g. employer) of the premises.

If agreement cannot be reached, the permit holder may conduct the interview or hold the discussion in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and that is provided by the occupier for the purposes of taking meal or other breaks.

Route to Location of Interview and Discussions

Section 492A provides that permit holders must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premise. The section provides that a request is not unreasonable only because the route is not that which the permit holder would have chosen.

The FWC has the ability to deal with a dispute about whether the request is reasonable.

The FWC's Ability to Deal With a Dispute About Frequency of Entry

Section 505A allows the FWC to deal with disputes about the frequency of entry of a permit holder onto a premises to hold discussions.

However, the FWC may only make an order if they are satisfied that the frequency of entry by the permit holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources.

Accommodation and Transport Arrangements in Remote Areas

Sections 521C and 521D of the FW Act contain terms requiring occupiers of premises in remote areas to provide accommodation and/or transport to permit holders for the purposes of assisting them to exercise their rights under the FW Act. The requirement will only apply if accommodation and/or transport are otherwise not reasonably available to the permit holder.

What is Considered 'Remote'?

The explanatory memorandum to the FW Act provides that what is considered to be a remote area will depend on the particular circumstances, but is limited to circumstances where the only realistic means for the permit holder to access the premises is by transport provided by the occupier, or where the only accommodation at the location, if it is required, is that provided by the occupier. These considerations, rather than the actual location of the premises, will be determinative.

The explanatory memorandum further provides that if public transport is available to the location, or access can reasonably be achieved via travel on public roads in the permit holder's own vehicle or one provided by the permit holder's organisation, this would not be regarded as a remote location for the purpose of the FW Act and the provisions will not apply.

Occupiers' Accommodation and Transport Obligations

Accommodation and transport arrangements exist where an occupier of a premises enters into an arrangement with a permit holder to provide accommodation and/or transport for the purposes of assisting them to exercise their rights under the FW Act.

In remote areas an occupier will be required to enter into an accommodation and/or transport arrangement if a permit holder and the organisation for which he or she is an officer have been unable to enter into an accommodation and/or transport arrangement by consent with the occupier, and the following matters are also satisfied:

- To provide accommodation and/or transport would not cause the occupier undue inconvenience;
- The permit holder, or the organisation for which the permit holder is an official, requests accommodation and/or transport to be provided to enable them to exercise their right under the Act;
- The request is made within a reasonable period before accommodation and/or transport is required;
- The permit holder, and the organisation for which the permit holder is an officer, have been unable to enter into an accommodation and/or transport arrangement with the occupier by consent.

Where accommodation and/or transport is provided by the occupier on the basis of the above mentioned, the occupier may charge an organisation or permit holder a fee for accommodation and/or transport, but only one which is no more than necessary to cover the cost to the occupier of the accommodation and/or transport being provided.

The FWC may deal with disputes about accommodation and transport arrangements, including:

- Whether accommodation and/or transport is reasonably available; or
- Where providing, or causing, the accommodation and/or transport to be provided would cause the occupier undue inconvenience; or
- Whether a request to provide accommodation and/or transport is made within a reasonable period.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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