



FACT SHEET

Fair Work Ombudsman

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The Fair Work Ombudsman ('FWO') is a statutory office created by the *Fair Work Act 2009* ('the Act'). The FWO is required to operate independently of the Government when making decisions about all investigations.

This Fact Sheet provides information about FWO functions and powers as well as how these are exercised.

WHO MAKES UP THE FAIR WORK OMBUDSMAN?

Statutory appointee Natalie James is the current FWO and head of the Agency. The FWO is also supported by Fair Work Inspectors and other staff who assist with the performance of various functions prescribed under the Act.

FUNCTIONS OF THE FAIR WORK OMBUDSMAN

The Act provides that the FWO has the following functions:

- To promote harmonious, productive and cooperative workplace relations and compliance with the Act and fair work instruments, by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- To monitor compliance with the Act and fair work instruments;
- To inquire into, and investigate, any act or practice that may be contrary to the Act, a fair work instrument or a safety net contractual entitlement;
- To commence proceedings into a court, or to take applications to the Fair Work Commission ('FWC'), to enforce the Act, fair work instrument and safety net contractual entitlement;
- To refer matters to relevant authorities;
- To represent employees who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under the Act or a fair work instrument, where the FWO considers that representing the employee will promote compliance with the Act or fair work instrument;
- Any other functions conferred on the FWO by the Act.

NOTE: Prior to 1 January 2013, the FWC was called Fair Work Australia.

HOW DOES THE FAIR WORK OMBUDSMAN EXERCISE THEIR FUNCTIONS

Pursuant to the Act, the FWO appoints Fair Work Inspectors who have certain powers which allow them to promote, investigate and enforce compliance with workplace laws, including:

- Provisions of the *Fair Work Act 2009*, such as:
 - Terms and conditions of employment;
 - General protections, including workplace rights, freedom of association, discrimination, sham arrangements, coercion and undue influence;
 - Right of entry;
 - Unprotected industrial action;
 - Employee records and pay slip obligations;
- Provisions of the *Independent Contractors Act 2006*;
- Enterprise Agreements;

- Agreement based transitional instruments (including Australian Workplace Agreements, Individual Transitional Employment Agreements, Collective Agreement and certain other agreements made prior to 1 July 2009);
- Award based transitional instruments (including Federal Awards, Notional Agreements Preserving State Awards, State Reference Transitional Awards, and Division 2B State Awards);
- Modern Awards;
- The National Employment Standards;
- Fair Work Commission Order.

When promoting, investigating and enforcing compliance, a Fair Work Inspector's role includes:

- Conducting targeted education campaigns in industries and regions;
- Conducting compliance audits;
- Investigating workplace complaints;
- Providing assistance in resolving workplace complaints;
- Investigating suspected contraventions of relevant Commonwealth and workplace laws and fair work instruments; and
- Taking steps to enforce relevant Commonwealth workplace laws and fair work instruments through the court system (where necessary).

POWERS OF A FAIR WORK INSPECTOR

POWER TO ENTER PREMISES

A Fair Work Inspector may, without force, enter premises if the Fair Work Inspector reasonably believes that:

- The Act or a fair work instrument applies to the workplace; or
- Records or documents relevant to the compliance purposes are on the premises, including documents on a computer.

Whilst on the premises a Fair Work Inspector will be able to exercise certain powers. These powers are highlighted below within the section titled 'Powers while on the premises'.

A Fair Work Inspector does not need permission from the occupier to enter the premises. Upon seeking to enter the premises, the Fair Work Inspector must show their identity card to the occupier of the premises or a representative of the occupier of the premises.

A Fair Work Inspector may enter premises at any time during working hours or at any other time that the Fair Work Inspector reasonably believes is necessary for compliance purposes.

NOTE: A Fair Work Inspector's entry rights are not the same as those applied to Unions.

POWERS WHILE ON THE PREMISES

Pursuant to section 709 of the Act, a Fair Work Inspector may exercise one or more of the following powers while on the premises:

- Inspect any work, process or object;
- Interview any person;
- Require a person to tell the inspector who has custody of, or access to, a record document;
- Require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period;
- Inspect, and make copies of, any record or document that:
 - Is kept on the premises; or
 - Is accessible from a computer that is kept on the premises;
- Take samples of any goods or substance in accordance with any procedures prescribed by the regulations.

In some instances a Fair Work Inspector may be accompanied by a substantially qualified and experienced person while on the premises. Such a person should only accompany a Fair Work Inspector where the FWO is satisfied that the assistance is necessary and reasonable. Such an assistant may include an information technology specialist or a forensic accountant.

POWERS TO ASK FOR A PERSON'S NAME AND ADDRESS

A Fair Work Inspector may require a person to disclose his or her name and address if the Fair Work Inspector reasonably believes the person has contravened a workplace law that may attract a civil remedy provision. If the Fair Work Inspector reasonably believes the name or address is false, the Fair Work Inspector may require the person to give evidence that the name or address is correct (for example, the Fair Work Inspector may request to view a driver's licence).

Unless the person has a reasonable excuse, the person must comply with a requirement to disclose his or her name and address or evidence of correctness if the Fair Work Inspector advises the person that he or she may contravene a civil remedy provision if he or she fails to comply with the requirement and the Fair Work Inspector shows his or her identity card to the person. A reasonable excuse may be that the person is unable to provide evidence because the person does not have any form of identification available at that time.

POWERS TO REQUIRE A PERSON TO PROVIDE RECORDS OR DOCUMENTS

A Fair Work Inspector has the power to require a person to provide records or documents as part of an investigation. Where a Fair Work Inspector requires such records or documents, the Fair Work Inspector must issue a written Notice to Produce Records or Documents ('the Notice'). The Notice must:

- Be in writing;
- Be served on the person (ie the Notice may be served by sending it to the person's fax number); and
- Require the person to produce the record or document at a specific place within a specific period of at least 14 days.

A person who fails to comply with the Notice and does not have a reasonable excuse will be in contravention of the Act. It is noted that a person will not be excused from producing a record or document on the grounds that the production of the record or document might tend to incriminate the person or expose the person to a penalty.

Where a person has contravened the Notice, the Fair Work Inspector may recommend that litigation is pursued against the individual for penalties. If this occurs the maximum penalties that may apply are \$10,800 per breach for an individual or \$54,000 per breach for a corporation.

POWER TO KEEP RECORDS OR DOCUMENTS

Where a record or document is produced to a Fair Work Inspector, the Fair Work Inspector may:

- Inspect and make copies of the record or document; and
- Keep the record or document for such periods as is necessary.

During the period the Fair Work Inspector keeps a record or document, the Fair Work Inspector must allow the following persons to inspect, or make copies of the record or document at all reasonable times:

- The person who produced the record or document;
- Any person otherwise entitled to possession of the record or document;
- Any person authorised by the person mentioned in the point directly above.

FOR WHAT PURPOSE CAN A FAIR WORK INSPECTOR'S POWER BE USED?

A Fair Work Inspector may use his or her power to determine whether there has been compliance with rights and obligations under workplace laws. The Fair Work Inspector may investigate matters such as:

- Underpayment of wages and entitlements;
- Pay slips and time and wage record keeping requirements;
- Freedom of association;

- Right of entry and trade unions;
- Contraventions of the general protections provisions (ie adverse action, coercion and misrepresentation in relation to a person's workplace rights);
- Undue influence or pressure in relation to guarantees of annual earnings, deductions from wages and individual flexibility arrangements;
- Unlawful discrimination;
- Unprotected industrial action;
- Transfer of business arrangements;
- Sham contracting arrangements.

WHERE A CONTRAVENTION IS FOUND

When a Fair Work Inspector finds a contravention, he or she will issue a contravention letter and/or compliance notice to the liable party which sets out the matter and how it can be remedied. In the first instance the liable party will be asked to remedy the contravention voluntarily within 14 days.

Where the liable party does not remedy the contraventions referred to in the letter or notice within 14 days, the Fair Work Inspector may take further action including:

- Advising the employee of the next step her or she may take, for example make a small claims action;
- Recommend that an enforceable undertaking is negotiated with the FWO and the liable party (ie where a compliance notice has not yet been issued);
- Commence litigation, including seeking that penalties be imposed and/or compensation be paid to the employee/s; or
- Issue an infringement notice.

It is noted that the avenue taken by the FWO will depend entirely on the facts of the individual case.

COMPLIANCE WITH AN ENTRY AND REQUEST FOR INFORMATION

The QHA recommends that in the event a financial QHA member receives a visit or contact from a Fair Work Inspector that the member contact the QHA Employment Relations Department to discuss the matter.

Significant penalties can be pursued by the FWO against an employer that refuses to cooperate and/or respond to a request for information.

The QHA can provide tailored advice and assistance for these particular situations.

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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