



# THE WORKPLACE GUIDE TO RIGHT OF ENTRY FOR UNIONS

Australia

The *Fair Work Act 2009 (Cth) (FW Act)* introduces important changes to the provisions for right of entry (ROE) for unions. The changes enhance significantly the rights of entry for unions and potentially provide unions with a powerful recruiting weapon.

## OVERVIEW

There are three types of ROE for union officials seeking to enter 'workplaces' under the FW Act:

- To hold discussions with employees whose interests the union is entitled to represent.
- To investigate suspected contraventions of the FW Act, industrial instruments and like instruments.
- To investigate State occupational health and safety (OHS) matters.

**Important Note** – The term used to describe a workplace in the FW Act is by way of the definition of 'premises' in the FW Act which is broadly defined as 'any land, building, structure, mine, mine working, aircraft, ship, vessel, vehicle or place'.

## KEY CHANGES

- To enter a workplace to hold discussions with employees, a union official only needs to show that their union is *entitled* to represent those employees. It is *not* necessary for the union to have any members in the workplace or for the union to be bound by an award or statutory industrial agreement which applies to that workplace.
- To enter a workplace to investigate a suspected contravention of the FW Act, industrial instrument or like instrument, a union official only needs to show there is at least one member of their union who works in the workplace and to whom the suspected contravention relates.
- Where a union official suspects there has been a breach of State OHS laws they can enter the workplace for the purpose of investigating the suspected OHS breach as long as the suspected breach relates to an employee or employees the union is *entitled* to represent.
- The OHS entry can be made without notice unless the union official is seeking to inspect documents.

## THE ROE PERMIT

Fair Work Australia (FWA) may issue a federal ROE permit to a union official if it is satisfied that the official is a fit and proper person to hold the permit.

## UNION ROE TO HOLD DISCUSSIONS

Under the FW Act, a union official now has the right to enter a workplace to hold discussions with employees during meal or other breaks as long as the union is entitled to represent those employees. The union no longer needs to be bound by an award or collective agreement which applies in the workplace. There is also no need for the union to have any members in the workplace. This new provision clearly allows unions which have had no presence in a workplace to enter, hold discussions and, in practice, to recruit new members.

### Case Study 1 ROE to hold discussions

A union official, Bill Smith, seeks to exercise a ROE to hold discussions with employees in the workplace operated by XYZ Co. The union official has sent a written notice and produces a federal ROE permit. Bill says his union has no members in the workplace but there are employees in the workplace his union is entitled to represent. The employer refuses to allow ROE because the union has no members in the workplace. The employer is successfully prosecuted for breach of the ROE laws and receives a substantial fine.

**Important Note** – A union official seeking a ROE to hold discussions with employees in the workplace does not need to have any members in the workplace. The union official only needs to demonstrate that the union is entitled to represent those employees.

## Q&A – ROE to hold discussions

*Does the union official need to give notice of their intention to enter my workplace to hold discussions?*

Yes. The union must give written notice (eg by mail, by facsimile, hand delivered) during working hours of at least 24 hours before the proposed entry but no more than 14 days before the proposed entry.

*Does the ROE notice need to specify on what basis the union is entitled to represent the employee(s)?*

Yes, the ROE notice must specify which provision of the union rules entitles the union to represent the employee(s).

*What conduct is required of union officials while in the workplace to hold discussions?*

The union official must agree to:

- Hold discussions in the room or area suitable for the purpose, and which they are directed to use by the employer.
- Take a particular route to that room or area and not to deviate from that route.
- Only hold discussions during meal breaks or other breaks.
- Comply with all the OHS requirements at the site.

**Important Note** – This would include a safety induction, as long as that did not unduly delay the exercise of the ROE. It would be reasonable for a representative of management to escort the union official when en route to the room or area designated for discussions with employees.

*Who must/can meet with the union official?*

While entry must be for the purpose of holding discussions with a 'class of workers' referred to in the ROE notice, this does not mean that if other employees choose to attend or participate in discussions, that the entry is invalid or contrary to the FW Act.

The proviso that employees must wish to participate in discussions operates only after entry. The union official does not need to demonstrate before entry that there is a particular employee(s) on the premises who wishes to talk to the union official.

## ROE FOR OHS PURPOSES

A duly accredited union official can seek a ROE for the purpose of investigating a suspected breach of State OHS laws. To exercise ROE, the union official must be able to:

- Show that there are employees eligible to join the union official's union working on the site.
- Describe in general terms the nature of the alleged suspected OHS breach that it is investigating.
- As well as the ROE permit, it must also show that it has authority under the relevant State laws and from the relevant State OHS body to investigate the breach.

If the above conditions are met, the union official can enter the premises without prior notice to the employer.

However, written notice must be provided to the employer if the union official intends to also inspect documents.

### Q&A – ROE for OHS purposes

*Can the union official enter the premises at any time?*

No. The union official can only enter the premises during working hours.

*How much notice does the union need to provide if it wishes to access and inspect documents on entry to the workplace?*

If the union official intends to access, inspect or make copies of 'employee records' (or other documents) relevant to the suspected breach that are kept on the premises, the union official has to give the occupier and any affected employer written notice of no less than 24 hours of its intention to do so.

*Can the union official obtain access to the records if the records are not kept in the workplace?*

Yes. The union official can have access to, inspect or make copies of 'employee records' (or other documents) relevant to the suspected breach that are not kept on the premises, as long as the union official has given the employer written notice of not less than 48 hours of its intention to do so.

### Case Study 2 ROE for OHS purposes

Union officials arrive at the front gate of the workplace of Bobco seeking an immediate ROE for the purpose of investigating a suspected State OHS breach.

The union officials set out in general terms the nature of the alleged breaches being in relation to machinery and the lack of appropriate safety guards on that machinery. The union officials show federal ROE permits and point out that the respective breaches relate to employees who are members or are eligible to be members of the union officials' union.

*Can Bobco refuse ROE because the union officials have not provided written notice prior to entry?*

No, union officials do not need to provide written notice of an intention to exercise an OHS ROE unless, at the same time, they are seeking to inspect documents. If this were the only relevant fact, Bobco's refusal to allow OHS rights of entry could lead to a successful prosecution.

Fortunately for Bobco, the union officials were not entitled to ROE because they did not demonstrate that they were authorised under State legislation which would have enabled them to exercise a State OHS ROE.

### OHS ROE and industrial action

Stop-work meetings and strikes on the basis of OHS issues are not included in the definition of 'industrial action' if the action is taken as a result of a legitimate concern of an imminent risk to employees' health or safety. An important change in the FW Act is that the onus of proof of these matters is now not imposed upon the employees. This means it is now much more likely that an exercise of an OHS ROE by a union official could lead to immediate industrial activity and therefore disruption to the employer's business by employees.

### ROE TO INVESTIGATE CONTRAVENTIONS

A duly accredited union official can seek a ROE for the purpose of investigating a suspected contravention of the FW Act, the former *Workplace Relations Act 1996* (Cth) or 'industrial instruments'.

The 'industrial instruments' which may be the subject of investigation include new agreements made from 1 July 2009 under the FW Act (most obviously, enterprise agreements), modern awards from when they come into operation on 1 January 2010, but also old industrial instruments which were made under the WorkChoices system, such as Australian Workplace Agreements, employee collective agreements and union collective agreements.

The union official can enter only during working hours and must first:

- Show a current federal ROE permit.
- Have given written notice in the approved form to the occupier and any affected employer at least 24 hours before the attempted entry.
- Declare on the ROE notice that the union is entitled to represent the industrial interests of at least one member who works on the premises.
- Specify the particulars of the suspected contravention(s).

**Important Note** – An 'affected employer' is any employer who employs a member of the union official's union who works at the premises and is affected by the suspected contravention.

Employers and occupiers should make sure that the industrial instrument which the union wishes to investigate does actually apply at the premises the union seeks to enter, and that it applies to at least one member of the union official's union.

### Q & A – ROE to investigate contraventions

#### *Can the union access records relating to a suspected contravention?*

Yes, in certain cases the union official may access records relevant to the suspected contravention which are kept on the premises and relate to their members, however the union has no right to access non-member records unless each non-member has authorised such access in writing.

#### *Can the union access records relating to a suspected contravention which are not kept on the premises?*

Yes, provided that the union gives written notice at the time of the entry, or within five days afterwards. In addition, the date on which the off-site records are to be provided must be at least 14 days after receipt of the notice. Again, access to non-member records must be authorised in writing by the non-members.

#### *What conduct is required of unions while in the workplace to investigate contraventions?*

The union official may inspect any work, process or object relevant to the suspected contravention.

The union official is not entitled to inspect any work, process or object which is not relevant to the suspected contravention (eg work performed by employees who are not covered by the industrial instrument which is said to have been contravened).

The union official must agree to:

- Hold interviews in the room or area (suitable for the purpose) which they are directed to use by the employer.
- Take a particular route to that room or area and not to deviate from that route.
- Comply with all the OHS requirements at the site.

**Important Note** – This would include a safety induction, as long as that did not unduly delay the exercise of the ROE. It would be reasonable for a representative of management to escort the union official when en route to the room or area designated for discussions with employees.

### *Can the union official inspect all areas of the premises?*

There is no right for the union official to wander the premises at large. The union official can only inspect the areas of the premises that are relevant to the investigation of work, processes or objects relevant to the suspected contravention.

### Case Study 3

#### ROE to investigate contraventions

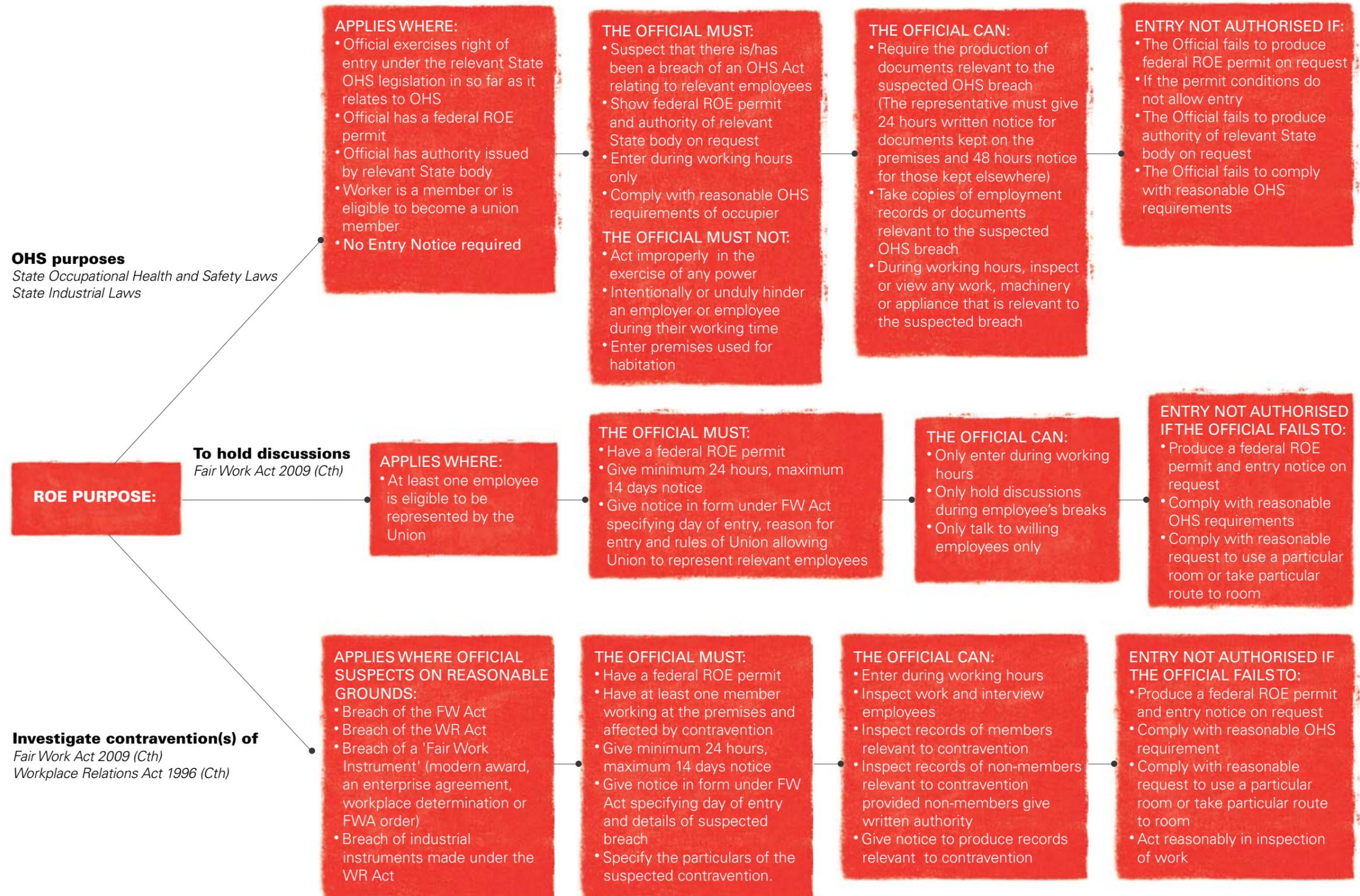
A union official, Sally Rite, seeks a ROE to NoGo's workplace on a suspected contravention of the FW Act relating to employees eligible for membership of Sally's union. Sally says her union has no members in the workplace. NoGo is unsure but says that it would allow a ROE subject to a safety induction being undertaken. NoGo says that an OHS safety induction can only be undertaken the next day and that Sally will need to come back tomorrow. Sally leaves. The union prosecutes NoGo for breach of the ROE laws. The prosecution is unsuccessful. Why?

The Court holds that even though the OHS requirement to have a safety induction the next day was unreasonable (because it was causing undue delay) Sally (and the union) had no ROE in relation to the suspected contravention of the FW Act because the union had no members in the workplace.

### COMPLIANCE CHECKLIST

- Do you have an up-to-date ROE Protocol to inform your staff of what steps to follow when presented with a union official seeking to enter your premises?
- Is your existing ROE Protocol or policy compliant with the new FW Act? It is essential that staff who control access points to your premises understand their responsibilities in ensuring that only lawful entries are allowed.
- Has your staff received any recent training in how to deal with attempted entries by union officials?
- Do you understand the rights to (and limits on) access by union officials to your employee and other records?
- Is your staff familiar with the approved format of notices of entry and able to assess whether such notices are valid?
- Do you understand the circumstances in which a refusal to allow entry to a union official will be unlawful?

FLOWCHART - ROE UNDER THE FAIR WORK ACT 2009 AND STATE OHS LEGISLATION



## HOW CAN DLA PHILLIPS FOX ASSIST?

Our national workplace relations, employment and safety team has a team of expert lawyers across Australia who can help you update your policies and procedures, conduct training to assist compliance and advise you when dealing with complaints.

We have extensive expertise dealing with union rights of entry and can also assist your organisation to respond to claims if made in Fair Work Australia, Federal Court or Federal Magistrates' Court.

**For more information or assistance please contact your DLA Phillips Fox lawyer or any of the contacts listed below.**

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