



Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Regulatory Powers (Standard Provisions) Bill 2014*

Overview

1. This is the submission of the Fair Work Ombudsman (FWO). The FWO submits that application of the *Regulatory Powers (Standard Provisions) Bill 2014* (the Bill), in its current form, has significant implications for the agency. The regulatory powers contained in the *Fair Work Act 2009* (the Fair Work Act) are uniquely suited to enabling the FWO to carry out its regulatory functions and effectively fulfil its role under the Fair Work Act.
2. The FWO's submission does not seek to make comment in respect to the merits of the Bill itself.
3. The FWO notes that on 6 December 2012, the agency made a similar submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the *Regulatory Powers (Standard Provisions) Bill 2012*. The FWO had previously made a submission to the Parliamentary Joint Committee on Law Enforcement in October 2012 in regards to that Bill.
4. The purpose of the Bill is to create a framework of standard regulatory powers to be exercised by agencies across the Commonwealth. The Bill includes provisions for monitoring and investigations powers and enforcement provisions. The monitoring and investigations powers are based upon those found in existing Commonwealth legislation.
5. The FWO acknowledges the Bill will only apply to regulatory schemes that trigger its provisions through primary legislation. The effect being that the Bill would not apply to FWO unless the Fair Work Act is amended to remove existing regulatory powers and trigger the provisions.
6. It is noted that the Explanatory Memorandum to the Bill states, in some cases, the powers contained in the Bill would not be appropriate or meet the specific requirements of particular regulatory agencies. In such cases, agencies may choose not to trigger the Bill's provisions or may choose to trigger only certain provisions that are relevant to carrying out their regulatory activities.
7. The investigative and monitoring powers under the Bill are distinctly different from those provided for in the Fair Work Act. There are also significant differences to the civil remedy provisions and important mechanisms in the Fair Work Act that are not included in the Bill.
8. Should a decision be made to extend these standard regulatory powers to the FWO, we consider the FWO's capacity to deliver our statutory functions would be impeded.

About the Fair Work Ombudsman

9. The FWO is a statutory office holder pursuant to section 681 of the Fair Work Act. Amongst other responsibilities, the FWO:
 - a) assists employees and employers to understand their rights and obligations;
 - b) investigates complaints; and
 - c) promotes and monitors compliance with Commonwealth workplace laws.

10. During the 2012-13 financial year, the FWO:

- Finalised 26,574 complaints and 5,675 audits, recovering more than \$24 million for 17,434 employees.
- Achieved court ordered penalties of more than \$1.6 million in 45 matters decided in the courts.
- Provided education, assistance and advice in response to more than 615,905 enquiries received through Fair Work Infoline services;
- Provided information and resources through fairwork.gov.au with more than 10.3 million visits, including 401,455 industry section visits and more than 1 million factsheet downloads.

The Fair Work Ombudsman's current powers under the *Fair Work Act 2009*

11. The powers of Fair Work Inspectors are prescribed by the Fair Work Act (see Appendix A for a summary of Inspectors' powers under the Fair Work Act). The compliance powers of Inspectors have historically also been contained in Commonwealth workplace relations legislation.
12. Pursuant to section 700 of the Fair Work Act, the FWO can appoint a person as an Inspector for up to four years, provided the FWO is satisfied that the person is of good character.
13. Inspectors exercise compliance powers for specific compliance purposes, which relate to determining whether Commonwealth workplace laws are being, or have been complied with. In particular, Inspectors rely heavily on the powers to obtain documentary evidence, for example employment records required to be kept under the Fair Work Act, to ensure compliance with these laws.
14. The FWO provides Inspectors with detailed operational guidance and training in relation to exercising legislative powers, and has measures in place to ensure those powers are exercised appropriately. The FWO publishes Guidance Notes publicly available on its website www.fairwork.gov.au for employers and employees to clearly understand the processes behind how the FWO exercises its regulatory functions.
15. The FWO deals with around 25,000 complaints a year. The significant majority of those complaints relate to allegations of underpayment of wages and employment entitlements, or contraventions of workplace rights.
16. The FWO has unique powers under the Fair Work Act. These powers were considered and refined in the drafting of the Fair Work Act and the subject of significant consultation. Should the Bill apply to the FWO and replace the powers in the Fair Work Act, it would substantially alter the approach the FWO takes when resolving workplace issues and impact service timeframes relating to compliance and dispute resolution activities.
17. The FWO uses its specific regulatory powers to monitor and respond to enquiries and complaints and enforce compliance with Commonwealth workplace laws. The FWO's powers allow the agency to take a proportionate approach to its regulatory activities when ensuring compliance with workplace laws, including enforcement through the courts where appropriate.
18. The FWO has a range of compliance tools, including compliance notices, that enable the FWO to maintain a flexible and measured approach to its compliance and enforcement activities.

Implications of the *Regulatory Powers (Standard Provisions) Bill 2014*

Monitoring and investigation powers

19. Whilst the Bill contains monitoring and investigation provisions that are broadly similar to the Fair Work Act, there are some significant differences that would impact the FWO's investigative capacity if applied to Inspectors. In particular, the FWO's ability to regulate the national workplace relations system would be impeded.
20. The Bill does not contain an equivalent to section 712 of the Fair Work Act, which provides the power to require a person, by notice, to produce records or documents within 14 days (a civil remedy provision). Under the Bill, an Inspector would require a warrant to compel a person to produce a document associated with the reason for entry.
21. The Bill provides powers of investigation including the power to enter *any* premises by consent of the occupier or under an investigation warrant if the authorised person suspects on reasonable grounds that there may be evidential material on the premises. Under sections 707 and 708 of the Fair Work Act, an Inspector may enter a business or residential premises and exercise compliance powers in specified circumstances, without force and without the consent of the occupier. If an occupier prevents entry by an inspector they may contravene section 149.1 of the Criminal Code, which deals with obstructing Commonwealth officials (see the Fair Work Bill 2008 Explanatory Memorandum).
22. The exercise of the monitoring and investigation powers under the Bill are subject to a person's right to refuse to answer a question, give information, or produce a document on the ground that it might tend to incriminate the person or make them liable to a penalty. Additionally, the exercise of these powers is subject to legal professional privilege. Section 713 of the Fair Work Act provides that a person is not excused from producing a record or document on the ground that it might tend to incriminate the person or expose them to penalty.
23. Employee records are the primary basis on which the FWO can assess compliance with workplace laws. The ability for Inspectors to quickly and easily acquire this documentary evidence is essential to the FWO's compliance responsibilities. The Fair Work Act contains sufficient protections to ensure Inspectors exercise their compliance powers in a reasonable and balanced manner. Any amendment to these powers is likely to significantly affect the nature of FWO's investigation processes and service timeframes.

Civil remedy provisions

24. The civil remedy provisions under the Bill differ from those under the Fair Work Act.
25. The Bill has provisions for the ability of the court to make pecuniary penalty orders. The Fair Work Act, in sections 545-547, contains the ability for the courts to make any order the court considers appropriate. The FWO often seeks the imposition of additional orders, including injunctions, or an order awarding compensation or for payment of underpayments and interest.
26. There is no provision in the Bill for a penalty to be paid to a party other than the Commonwealth, such as an employee affected by the contravention. The FWO often seeks orders for payment directly to the affected individual, including payment of wages and interest.

Fair Work Act mechanisms not adopted

27. The Bill does not include some important Fair Work Act mechanisms utilised by the FWO as part of its compliance strategy. Specifically,

- Section 548 allows for proceedings, such as pursuit of underpayments, to be dealt with as a small claims procedure where a person applies for an order other than a pecuniary penalty order. During the 2012-13 financial year, the FWO assisted 45 matters through Federal Circuit Court small claims proceedings. The small claims jurisdiction provides an important low cost avenue for individuals to access the justice system.
- Section 716 provides for compliance notices to be issued by an Inspector. The FWO issued 74 compliance notices during 2012-13 financial year. Compliance notices are an effective way for the FWO to ensure compliance without the need for lengthy and costly court proceedings.

Appendix A – Summary of Inspector Powers under Part 5-2 of the *Fair Work Act 2009*

Section	Summary of power
s708	An Inspector may enter premises without force, where the Inspector reasonably believes that the Fair Work Act or fair work instrument applies to work that is being or has been performed on the premises. An Inspector may enter a business premises if the Inspector reasonably believes that there are records or documents relevant to compliance purposes on the premises. An Inspector must not enter a part of a premises that is used for residential purposes unless the Inspector reasonably believes that the Fair Work Act or fair work instrument applies to work that is being performed on that part of the premises.
s709	<p>While on a premises, an Inspector may:</p> <ul style="list-style-type: none"> ○ Inspect any work, process or object ○ Interview any person ○ Require a person to tell the Inspector who has custody or access to a record or document ○ Require a person, who has custody or access to a record or document , to produce the record or document either while they are 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 kept on the premises ○ Take samples of any goods or substances in accordance with the Regulations
s710	An Inspector may direct a support officer to accompany and assist them at a workplace.
s711	An Inspector may require a person to tell them their name and address if the Inspector reasonably believes that the person has contravened a civil remedy provision under the Fair Work Act.
s712	Require a person by notice to produce a record or document to the Inspector.
s713	S 713 provides that a person is not excused from producing a record or document if it might tend to incriminate the person or expose them to a penalty
s713A	Certain records, documents, information or things inspected, copied or obtained under s709 are not admissible in evidence in criminal proceedings against an individual.
s714	Inspect, make and keep copies of the record or document produced to the Inspector in accordance with the functions and powers of inspectors under subdivision D of division 3 of part 5-2.
s715	Enter into an enforceable undertaking.
s716	Issue a compliance notice.
Reg 4.04	An Inspector can issue a penalty infringement notice (PIN) if they reasonably believe that a person has committed one or more contraventions of a particular civil remedy provision.