UNIONSWA
WA's PEAK UNION BODY

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UnionsWA Incorporated • ABN 64 950 883 305
Level 4, 445 Hay Street, PERTH WA 6000
PO Box Z5380, St Georges Tce, PERTH WA 6831
Tel: +61 8 9328 7877 • Fax: +61 8 9328 8132
unionsyes@unionswa.com.au • www.unionswa.com.au

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Email: eec.sen@aph.gov.au

Dear Madam/Sir

UnionsWA Submission to Inquiry into the Fair Work Amendment Bill 2014

UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australian Branch of the Australian Council of Trade Unions (ACTU). As a peak body we are dedicated to strengthening WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around 30 affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA thanks the Committee for the opportunity to make a submission on the Fair Work Amendment Bill 2014. UnionsWA supports the ACTU's positions on the amendments being proposed for Fair Work Act, however we would like to bring to the Committee's attention the particular issues of significance in WA concerning the proposed changes to the Act's Right of Entry framework.

The proposed changes to the Fair Work Act are designed to diminish the rights of workers rather than merely respond to outstanding recommendations from the Fair Work Review Panel. The Amendment Bill has specifically selected recommendations that are unfavourable to workers' rights, and ignored those which are favourable.

For example the Bill seeks to implement the Panel's recommendation two which says that:

> *s.130 be amended to provide that employees do not accrue annual leave while absent from work and in receipt of workers' compensation payments.*

This recommendation undermines the status of annual leave as a basic safety net condition of employment, and effectively punishes workers for getting injured at work. If paid leave continues to accrue while an employee is on other forms of paid leave, such as paid parental leave, workers compensation should be no different.

By contrast the Bill ignores the Panel's recommendation four which states that:

> *s.80(7) be repealed so that taking unpaid special maternity leave does not reduce an employee's entitlement to unpaid parental leave under s.70.*

The only Panel recommendations which the Bill that selects that might favour workers are the recommendations three and 28:

> 3
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> *that s.76 be amended to require the employer and the employee to hold a meeting to discuss a request for extended unpaid parental leave, unless the employer has agreed to the request.*
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> 28
>
> *that the FW Act be amended to require employers intending to negotiate a s.172(2)(b) greenfields agreement to take all reasonable steps to notify all unions with eligibility to represent relevant employees.*

Unfortunately these positive recommendations will be undermined by the Amendment Bill's proposed changes to the Fair Work Act's provisions around Right of Entry (RoE), which weaken the ability of workers to be represented by their own, independent organisations.

According to the Explanatory Memorandum of the Bill, the current Act has:

> *increased the number of unions that can visit a particular workplace and has resulted in increased costs to some employers and adversely affected their productivity, due to excessive visits by some unions and disputes between unions over eligibility to represent employees.*

The Memorandum goes onto state that:

> *Each time a union official visits a workplace to hold discussions with employees, an employer must allocate resources to facilitate their entry, taking resources away from other tasks. This would typically involve allocating employee/s to ensure that a union official complies with all work health and safety requirements at the workplace, including taking them through a safety induction if necessary, and escorting the union official around the workplace.*

To back up this claim the memorandum refers to submissions to the Review Panel from the Chamber of Commerce and Industry in WA (CCIWA), and from companies such as BHP Billiton. There is no reference to the extensive submissions that were made to the Panel from Unions that defend the necessity of current RoE provisions.

The sections of the Explanatory Memorandum that address the compatibility of the Australia's Human Rights obligations deal extremely superficially with the impact of this Bill on Freedom of Association. The Memorandum quotes the guidance provided by the Committee on Freedom of Association established by the Governing Body of the International Labour Organisation – specifically its 336th Report at paragraph 108 which states that:

> *… Governments should guarantee access of trade union representatives to workplaces with due respect for the rights of property and management, so that trade unions can communicate with workers…*

The Memorandum goes onto state that:

> *the amendments set out in the Bill merely relate to procedural matters of how a trade union may go about exercising its entry rights under the Fair Work Act, and the extent to which an occupier is required to facilitate the entry. They do not prevent or otherwise limit the exercise of existing entry rights.*

UnionsWA argues that there is nothing 'mere' about procedural matters that concern the practical exercise of Right of Entry. For workers in remote regions of Western Australia procedural matters are crucial for determining whether Right of Entry exists in any practical sense at all.

Right of Entry is often framed as an issue about the convenience of union organisers or officials meeting in work lunchrooms. UnionsWA contends, however, that Right of Entry is actually central to a worker's right to freedom of association. Right of Entry is about the practical exercise of that right by workers. Right of Entry is a worker's right.

Workers combining together to advocate for better wages, conditions and safe workplaces cannot meaningfully occur without effective access to their union organisation and its authorised representatives. Employers in most workplace have enormous power and opportunity to use 'procedures' to hamper and frustrate the exercise of worker's rights to freely associate. The most practical and effective way they can do this is to interfere with the access of union organisers and officials to workplaces. Employers whose employees need to live in the north of WA are especially empowered to hamper and frustrate Right of Entry– because of the remoteness of their locations.

Workplaces are not democracies, however Australians are citizens of a democratic nation state and certain rights are inherent to that idea. Citizenship continues into the workplace, with rights that need to be protected and improved.

In an article for the Southern California Law Review in 2007, Jennifer Gordon linked nation state citizenship with the 'labour citizenship' that a worker gains from being a union member.

> *Like national citizenship, labor citizenship is embodied in the act of democratic participation within the organization and collective action outside it, both to advance the group's campaigns and to protect its gains.*

'Freedom of association' is a broader citizen right contained in provisions such as article 22 of the International Covenant on Civil and Political Rights (ICCPR)and article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

> *Article 22*
>
> *1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*
>
> *...*
>
> *1. The States Parties to the present Covenant undertake to ensure:*
>
> > *(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests.*

For rights to become more that fine words on a page they need practical expression. Does a right exist if 'procedures' prevent you from actually exercising it?

UnionsWA contends that freedom of association is not something that should depend on what the state or your employer allows you to do by virtue of 'procedure'. Unions are not a 'third party' in the workplace. Rather Unions are workers setting up their own organisations to represent their interests in many workplaces, indeed entire industries. They are independent organisations – funded from dues paying members. They elect governing officials and employ staff to further their interests.

Because of this Unions are intimately connected to workplaces. They exist by right of association for all workers. Therefore workers have the right to meet with officials and organisers from their union organisations within in their workplaces. Giving employers more power to decide when and where Right of Entry can be exercised through 'procedure' is an attack on freedom of association.

Right of Entry is not a right that only activates when there is a 'problem' to be fixed in a single workplace. Unions exist because issues for workers are broader than just one workplace. Therefore it is legitimate and reasonable for union members to discuss broader industrial and political campaigns with their members in workplaces.

Nothing set out in the above description is incompatible with common law obligations of employee to follow lawful and reasonable directives of employers. Right of Entry can be accommodated by any reasonable employer.

It is worth pointing out that, in the principles of freedom of association, the freedom to not join a union is protected under the aforementioned covenants on civil and political rights. However 'rights' do not cancel each other out. Just because one person doesn't want to talk to a union doesn't mean other person should be deprived of that right. The Amendment Bill will in practice give employers more powers to pre-judge whether employees want to join a union or not. A non-union member's right to not join does not trump the right of another worker who may wish to join or at least listen to what a union representative has to say.

Invocations of the right to not associate are used by employers to create a chilling atmosphere around visits by union organisers. This is particularly the case when we look at the experience of organiser visits to remote location in Western Australia.

The Amendment Bill is proposing to repeal an amendment made by the previous government to the Fair Work Act which requires employers in remote sites to

> *facilitate transport to, and/or provide accommodation at, those sites if no other transport or accommodation is available for unions seeking to access remote worksites.*

Restrictions on Right of Entry are restrictions on freedom of association everywhere in Australia. However they fall particularly heavily upon remote workers. Whereas workers in the city could meet their organiser after work (which is still far from ideal) workers whose 'commute' to a local town takes hours, or who only travel between workplace and work camp, find that these restrictions make it virtually impossible to meet with an organiser at any convenient time.

Nevertheless the same rules about giving at least 24 hours notice for a visit apply to organisers and officials visiting these worksites as they do in metropolitan areas. This makes the timing of visits crucial, but also difficult. If a union organiser shows up at the front gate of a workplace – will they get there at the right time, and be at the right place, to 'catch' workers at their lunch breaks?

This is particularly problematic as, under the current Fair Work Act, employers can insist that organisers visit different groups of workers once a day and different unions must hold different meetings rather than pool time and resources.

The truth of the situation around RoE in Australia is that the current Fair Work Act contains many procedures that allow employers to restrict the practical exercise of the freedom of association. A Fair Work Commission (FWC) case that specifically references Right of Entry is *Construction, Forestry, Mining and Energy Union (CFMEU) v Foster Wheeler Worley Parsons (Pluto) Joint Venture.*

In this case the FWC found that the location requested by the employer to hold was 'reasonable' despite findings of fact that the location was exposed to:

- Extreme heat, with temperatures ranging up to 45 degrees Celsius;
- Direct sunlight, with little or no shade;
- High winds in dusty conditions;
- High levels of ambient noise; and
- Insects, such as flies.

In addition, FWC found that it was 'reasonable' for agents of the employer to observe whoever attended the meeting to participate in union activity. FWC also recommended that the site head contractor be allowed to limit the permit holder's discussions with employees, to those employees of contractors whose crib rooms were adjacent to the same designated meeting areas.

The Australian Manufacturing Workers Union (AMWU) has described how mining companies have exploited the restrictive provisions of the Fair Work Act to the full. A former AMWU Organiser in Karratha has reported that:

> *Meeting workers on site can be a nightmare. I'll usually be escorted by a representative of CCI (Chamber of Commerce and Industry), told I can meet workers on their lunch break kilometres away from where they're working, in a tiny room without air-conditioning on a 40-degree day.*
>
> *They put up every wall they can. It's effectively denying workers a chance to have representation.*

An alternative way of approaching visiting workers in remote locations would be to have meetings at the worker's actual accommodation in these remote areas.

Unfortunately once again the laws frustrate this right because the worker accommodation is not considered (for the most part) a workplace; therefore it is exempt from the entry provisions which confer rights to unions.

Indeed, s.493 of the Fair Work Act 2009 specifies that:

> *[t]he permit holder must not enter any part of the premises that is used mainly for residential purposes.*

As a result of this section, employers can by right deny entry to union officials to meet with workers whose industrial interests they represent under threat of trespass and, ultimately, the potential loss of their Right of Entry permit. Where worksites are in especially remote areas, this can have the effect of rendering it virtually impossible for workers in those locations to have the benefit of union representation. The situation becomes even more difficult when a Fly In Fly Out (FIFO) worker, upon completing his or her work cycle, is ushered onto an aeroplane and leaves the region altogether, only to return when due to work again.

These are just a few examples of the many petty difficulties and contrivances that are placed in the way of union members, and union organisers and officials when attempting to effectively represent workers interests in these remote locations. The effect of the changes proposed by this Amendment Bill will make Freedom of Association worse not better in Western Australia.

Right of Entry should not be treated in legislation as something to be grudgingly conceded by employers, and tied up in knots by government imposed procedures. UnionsWA argues that the Right of Entry should be positively affirmed in legislation as a worker's right. Right of Entry is not an abstract issue for industrial relations law specialists, rather it is vital to the practical exercise of freedom of association. It is crucial for ensuring that workers have their own voice, and are not just spoken for by their employers.

In conclusion, UnionsWA recommends that the Fair Work Amendment Bill 2014 be withdrawn on the grounds that it represents a one-sided attack on the rights of workers.

Yours sincerely

Meredith Hammat
Secretary