Majority report

1.1 The bill before the committee is one of many introduced in successive parliaments for the purpose of amending the *Workplace Relations Act 1996* (WR Act) where experience has demonstrated the need to do so. The WR Act has been landmark legislation, facilitating significant growth in labour productivity and raising levels of industrial harmony. Nonetheless, shortcomings in the application of workplace relations law have become apparent since 1996, when some reforms were left half done as a consequence of the need to have the main framework of the law enacted.

1.2 The provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004 fulfil the Government's commitment to further the cause of industrial relations reform, as outlined in its 2004 election policy statement *Flexibility and Productivity in the Workplace: The Key to Jobs*. There are two main elements to the bill: provisions reforming the union right of entry laws to ensure balance to their operational effect; and provisions excluding the operation of state right of entry laws where Commonwealth law also applies. In the case of the second element, this can be achieved through the use of the corporations power in the Constitution, provided that employers are registered corporations.

1.3 In relation to improvements in the process for union right of entry, the bill specifically:

- strengthens the provisions for dealing with the issue, including suspension or revocation of entry permits;
- imposes a 'fit and proper person' test for union officials applying for a right of entry permit; sets out in more detail the rights and obligations of union officials, employers and occupiers of premises; and
- empowers the Australian Industrial Relations Commission to deal with abuses of right of entry.

Background to right of entry legislation

1.4 Statutory protection for the right of trade union officials to enter workplaces was first made in 1973 in amendments to the *Conciliation and Arbitration Act 1903*. These were amended in the *Workplace Relations Act 1996*. Under the provisions of former section 286 of the Industrial Relations Act (repealed under the WR Act) any trade union official authorised by the union secretary could gain access to a worksite. There was not even any requirement that the union have members at the worksite, but it is safe to assume that in an age of high levels of union membership, and with virtual compulsory unionism operating in some industries and enterprises, it may not have been regarded as a condition worth stating. As commentators have noted, the scheme was clearly open to abuse and many employers complained that union officials, under

the pretext of inspecting records, could use the opportunity to embark on a recruitment drive for members, or generally 'stir up trouble'.[1]

1.5 Current right of entry provisions that apply to trade union officials have been a problem for some segments of industry for many years. In the drafting of the WR bill in 1996 the government attempted to curb the uninvited intervention of unions in workplaces, but some resistance was met in the Senate, and the current law is the result of a compromise.

1.6 It is important to note that neither the provisions first proposed in the first WR bill, nor what is proposed in this amendment bill, remove rights of employee representation in the workplace or the rights of employees to have their needs addressed by their union. Freedom of association is the guarantee of such rights. The issue at stake between the Government and opponents of this bill is the extent to which union assumptions about their traditional role are now viewed as transgressing on the freedom of employers and the majority of the workforce, which is not unionised.

The state of current law

1.7 Under the current provisions of the WR Act (section 285A-G) a registrar of the Commission may issue a permit for a union official to enter a workplace employing persons who are either members of the union, or who are eligible to join the union, for the purposes of holding discussions, or for the purposes of investigating any suspected breach of the Act, or of any currently valid award or agreement to which the union is a party. The registrar can authorise multiple entry permits.

1.8 Twenty four hours notice must be given to the employer, although each entry must be notified separately. Union officials are given very wide powers of inspection, including time-sheets and pay-sheets and similar documents, work in progress, materials and machinery, and may interview any employee, whether a union member or an eligible non-member. Some restrictions are placed on the rights of union officials in that their visits must be during working hours, and discussions and interviews can take place only during meal breaks and other breaks. In the case of a dispute over a venue for discussions and interviews, the wishes of the union official prevail in the first instance. The Commission has the power to resolve such disputes, to enforce the return of unused and expired entry permits and to revoke permits on the application of employers.[2] Such power has been used when it is clear that union officials were behaving in a manner which is inconsistent with the exercise of their rights, but employers could well argue that their initiative in regard to applying for such orders is limited by concerns about victimisation.

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1 Colvin, Watson and Burns, *The Workplace Relations Handbook*, 2nd ed, Butterworths, 2004, p.198

2 ibid., p.199-202

1.9 The committee has heard that the building and construction industry is particularly affected. Master Builders Australia has reminded the committee that the Cole Royal Commission found that industrial disputes were often provoked by union visits to workplaces for reasons which were often contrived, and which were unwanted by affected employees.[3] The submission from the Department of Employment and Workplace Relations (DEWR) refers to anecdotal evidence of unions entering workplaces, nominally for investigative purposes, despite having no actual evidence of any breach of an award or agreement, for the purposes of engaging in a 'fishing expedition' in the hope of uncovering an actual breach.[4]

1.10 Rio Tinto Limited has submitted evidence to the committee pointing out that workplaces have changed since current laws were first introduced. One change is that most, if not all employees in the mining industry, do not show interest in joining a union. Another is that work practices no longer fit the rules. For instance, the notion of mealtime access is outdated because at Rio Tinto fixed mealtimes no longer apply. They are staggered according to operational requirements.[5]

1.11 Rio Tinto also cites instances of how union actions in regard to right of entry have caused difficulty for operations. The company's submission describes an instance where an AMWU official visited a worksite to investigate alleged breaches of the WR Act. Having obtained a permit the official refused to provide Rio Tinto with any detail of the alleged breaches. The company nonetheless provided the official with an interview room and provided opportunities for employees to meet the official. None wanted to do so. After two hours the official left, still refusing to say what the alleged breaches were. Soon after, posters were found in crib rooms and toilets urging employees to vote against a draft s170LK Agreement which was then under consideration. Rio Tinto makes the point that the entry permit had been made under false premises, and that entry had been effected for purposes not permitted under the WR Act.[6]

1.12 Another purpose of union visits to worksites is to recruit membership. This is sometimes conducted now under the pretext of other purposes for which a permit is issued by the Commission. The committee majority concedes that this can be a 'grey area' for the law-maker. It is scarcely objectionable if recruitments are made which are incidental to the purposes of an entry. It may also be the case that recruitment may follow as a consequence of the successful outcome of a union official's visit. What is objectionable are attempts to coerce employees into joining a union. The committee notes that the bill allows a recruitment visit once every six months, an acknowledgement of the importance of the principle of freedom of association.

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3 Master Builders Australia, *Submission 1*, para.3.3

4 DEWR, *Submission 16*, para.8

5 Rio Tinto Ltd, *Submission 29*, p.1

6 ibid., p.2

1.13 It is clear to the committee majority, as it is to the government, that in supporting the passage of the WR Right of Entry Bill, parliament is catching up with some unfinished business from years previously. The point has been made in previous reports of the committee on other amendments proposed for the WR Act, that workplace relations is 'work in progress', and that this work will always need to progress in order to reflect the changing labour market, itself a reflection of the changing economy.

1.14 The committee majority would also argue that right of entry provisions, as conceived more than 30 years ago, and modified in 1996, reflect a distant and entirely different world of industrial relations. They reflect the era of the 'closed shop' and the peculiar relationship enjoyed by unions in the processes of industrial agreements. The *Conciliation and Arbitration Act 1904* and its successor the *Industrial Relations Act 1988* contained provisions to protect the involvement of unions in workplace agreements and in employment conditions generally. The *Workplace Relations Act 1996* was an attempt to recognise changed workforce realities and to effect a culture of change in the management of employment conditions. The current right of entry provisions in the WR Act, a modified remnant of previous legislation, is arguably inconsistent with the freedom of association principles which are to be found in Part XA, and require amendment for this reason alone.

Extension of the Commonwealth right of entry regime

1.15 At present, some workplaces are subject to differing right of entry standards regulated by both Commonwealth and state laws. There is scope for confusion and uncertainty resulting from this regulatory overlap. Under such regulatory overlap there is potential for 'jurisdiction shopping', as highlighted in *Boral Masonry Ltd v CFMEU* (23 July 2004 PR934904). As described in the DEWR submission, the CFMEU had no right under the WR Act to enter the particular Boral premises. The state-based Federated Brick Tile and Pottery Industrial Union of Australia' (the BTPU), which the Commission described as the 'state emanation of the CFMEU', then sought entry under the New South Wales *Industrial Relations Act 1996.*

1.16 The Commission found that: 'the proper inference and conclusion to be drawn from the evidence is that the CFMEU used it's State emanation, the BTPU, to exploit the differences between the State and Federal jurisdictions in order to get right of entry to a Federally regulated site in circumstances where it does not have such a right under the WR Act' (paragraph [37]). The Full Bench went on to say that: 'the conduct of the officers of the BTPU is, in reality, an attempt at jurisdiction shopping by persons who hold concurrent positions as officers of a federally registered organisation (the CFMEU)'.[7]

1.17 Master Builders Australia has also drawn the committee's attention to the confusion arising from overlapping laws in Commonwealth and state jurisdictions. It

7 DEWR, *Submission 16*, paras.17-18

pointed to a recent case, BGC Contracting v CFMEU, in which a decision by justice French was made on the basis that there is no legal inconsistency between state and Commonwealth rights of entry laws: that it was not an intention of Commonwealth law to cover the field on right of entry to the exclusion of state laws, and therefore unions were able to obtain entry to workplaces under state laws regardless of the fact that all employees on site were covered by AWAs.[8] Master Builders makes the point that it is inefficient and confusing to employers that state laws extend to workplaces that are covered under the workplace relations Act, and that it makes no sense that AWAs should be overridden by state laws.[9]

1.18 Another case which illustrates the vagaries of overlapping laws was cited in the submission from the Australian Industry Group (AiG). Here it is reported that in the 2001 CSR Humes case:

> Mr Andrew Ferguson, the NSW Branch Secretary of the Construction and General Division of the CFMEU and two other union officials were found by Deputy Industrial Registrar Ellis to have intentionally hindered and obstructed the business of CSR Humes. The officials were found to have walked around the company's site encouraging employees to take part in a 30 to 40 minute stop work meeting.
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> In response to a decision of Registrar Ellis of 29 May 2001 (PR904755) to revoke his entry permit under the *Workplace Relations Act*, Mr Ferguson was quoted in the media as making the following comments:
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> "Ferguson said the ban would have no impact on his work as a union official. He said he went to building sites every day of the week and would continue to do so because he had a NSW entry permit and also had rights under powerful NSW OHS laws to enter premises. Any employer who tried to stop him entering a site would find workers going offsite to hold meetings, he said. But he doubted employers would try to restrict his access". ("IRC revokes CFMEU leader's entry permit" Workplace Express, 29 May 2001).[10]

1.19 The Full Bench of the Commission overturned the decision of Registrar Ellis to revoke the entry permit of Mr Ferguson and another union official on the basis that the Registrar was wrong in finding that the officials were exercising powers under the WR Act. The Commission held that the officials were exercising powers under state legislation at the time, not the WR Act. The Commission noted, however, that had entry been authorised by a permit under Commonwealth law, the conduct of the two officials was such that they would have breached the WR Act by intentionally hindering or obstructing an employer and an employee or otherwise been shown to be acting in an improper manner.[11]

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8 Master Builders Australia, *Submission 1*, paras.4.1-4.2

9 ibid., para. 4.3

10 Australian Industry Group, *Submission 20*, p.2

11 DEWR, *Submission 16*, para.21

Room for improvement

1.20 Government senators support Minister Andrews' willingness, as foreshadowed by DEWR officials, to consider amendments to three areas of the bill, apparently arising from concerns raised in submissions to the inquiry. The three areas include the limitation on a permit holder being able to engage in recruitment conduct once every six months; maintaining the existing rights of union officials to enter premises pursuant to the Victorian Outworkers Act (2003); and the requirement that notice of entry must be provided during working hours.[12]

1.21 Government senators also note that at the public hearing, officers from DEWR were receptive to the view that certified agreements should be able to include a right of entry provision, as long as the Commission's role in regulating workplace agreements was clearly set out in the legislation. Government senators are concerned that the likely effect of preventing the Commission from certifying agreements which include right of entry provisions, as currently provided for in the bill, is that employers and unions will be more inclined to enter into common law agreements. This is likely to result in the creation of a separate regime without recourse to any arbitration or conciliation process when agreements break down, and which may provoke expensive litigation.

1.22 Government senators also have sympathy for concerns with other aspects of the bill which were raised at the public hearing. The concerns are mainly with the imprecise terminology used in 280F, 280J and 280M which cover, respectively, when permits are not to be issued, orders by the Commission for abuse of the system, and use of right of entry to investigate suspected breaches of awards. The committee majority accepts the view that a number of terms covered by these provisions appear neither to have been properly thought out, nor defined with due regard to how they might conflict with other areas of the law. This could give rise to expensive and unnecessary litigation, something which Government senators want to avoid. Government senators are concerned to prevent situations arising where disputes over careless or imprecise wording result in lengthy and expensive court action, reducing the effectiveness of what is otherwise an important and urgent piece of legislation.

1.23 This is what is at stake in the imprecise definitions of 'fit and proper person' and 'appropriate training', and in the conditions which must be met under 280F before the industrial registrar can issue an entry permit to a union official. Government senators believe the definitions as currently worded are inflexible and potentially inhibiting, and could work against employers by straining good relations which may have been established with union officials over a long period.

1.24 The requirement in 280M for a permit holder to suspect on 'reasonable grounds' that a breach has occurred is also likely to provoke pointless litigation. DEWR officers told the committee at the public hearing that 'reasonable' was inserted

12 Mr James Smythe, Chief Counsel, DEWR, *Committee Hansard*, 18 February 2005, p.57

before the word 'suspicion' to provide what lawyers term an objective rather than a subjective test; in other words, the term 'reasonable' introduces a slightly harder test for permit holders who have previously been able to rely on a vague suspicion of wrongdoing. Under the new provision, a permit holder has to demonstrate to the Commission some objective basis to a written application for coming on to a work site, rather than merely holding a suspicion of wrongdoing by an employer.

1.25 Government senators feel uneasy about the term 'reasonable suspicion', and would prefer that the bill require there to be some empirical basis to a belief on reasonable grounds that a breach of an award has occurred. At the very least, Government senators believe the term 'reasonable grounds' should be codified in one form or another to eliminate potential areas of doubt so that all parties know where they stand.

1.26 Another concern is that provisions at 280J empower the Commission to make whatever orders it considers appropriate to restrict the rights of a union, or union officials, if it is satisfied that the union has abused the rights provided in the bill. The term 'abuse' is not defined with any precision and, as it stands in the bill, could be seen as yet another provocation for litigation. Government senators believe that the term 'abuse' in 280J should be codified and quantified.

Concluding comment

1.27 Government senators strongly support this legislation, noting that the bill has its genesis in cases involving the misuse of right of entry by a small number of unions, particularly the CFMEU, which have used those rights as a point of leverage and for applying pressure during periods of bargaining with employers. There should be no risk that this legislation will penalise the majority of unions who exercise their statutory rights responsibly and lawfully. Instead, it should be aimed squarely at a small number of unions which have a record of abusing a system which, up until now, has enabled unscrupulous union officials to exploit differences between state and federal jurisdictions to gain access to federally regulated workplaces. Government senators appreciate that shortcomings with the application of current right of entry laws, especially in the building and construction industry, need to be addressed in such a way that does not diminish the capacity of unions to pursue and protect the wages, terms and conditions of their members in accordance with the law.

1.28 While the Right of Entry bill addresses deficiencies with the current system, the committee majority believes that amendments which go beyond the three areas flagged by the workplace relations minister, and which address Government senators' concerns over wording of parts of 280F, 280J and 280M, should be considered by the Government before the resumption of debate on the bill in the Senate.

Recommendation

The committee majority recommends that the Senate pass this bill.

Senator John Tierney
Chair