Opposition Senators' report

2.1 The Department of Employment and Workplace Relations (DEWR) claimed in evidence before the Committee that the Right of Entry Bill 2004 has two main goals. First, to enhance the federal right of entry regime to provide a better balance between the right of unions to represent their members in the workplace and the right of employers to conduct their businesses without undue interference or harassment; and second, to simplify the current system by providing as far as possible for a single right of entry scheme to apply to all workplaces.[1] These objectives, according to DEWR, fulfil the Government's election promise to legislate to tighten up existing right of entry laws; specifically to protect businesses against union entry to the workplace for improper purposes and to exclude the operation of state right of entry laws where federal right of entry laws also apply.[2]

2.2 Notwithstanding the Government's stated objectives, Opposition senators are concerned that the intention and practical effect of this bill will make it harder for employees to join a union and participate in legitimate union activities. Evidence before the committee in written submissions and at the public hearing demonstrated that the bill places unreasonable impediments on the rights of union officials by further restricting the grounds for entry, the number of workplace visits, the location of meeting places and the route that a union official can take to access a meeting place. Opposition senators agree with the assessment of the Australian Rail, Tram and Bus Industry Union (RTBU) that the provisions of the bill 'establish a kind of labyrinthine structure of bureaucracy and regulation to undermine the capacity of a union to simply speak to his or her members, and vice versa'.[3]

2.3 The claim made by both Minister Andrews and DEWR that the bill strikes a balance between the rights of unions and the rights of employers does not wash with unions and Opposition senators, for reasons which will be made clear in this dissenting report. The bill is not a thoughtful or sensible approach to regulating the contemporary labour market, nor is evidence before the committee from industry bodies and DEWR in support of the bill convincing in any shape or form. Put simply, Opposition senators can not see any justification for the bill on policy or legal grounds and therefore believe it should be rejected by the Senate.

Right of Entry Bill lacks a clear and coherent policy framework

2.4 Submissions from unions and state governments pointed to the lack of any policy justification for the bill and the absence of any serious workplace problems

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1 Mr James Smythe, Chief Counsel, DEWR, *Committee Hansard*, 18 February 2005, p.56

2 DEWR, *Submission 16*, p.1

3 Mr Andrew Thomas, National Industrial Officer, Australian Rail, Tram and Bus Industry Union, *Committee Hansard*, 18 February 2005, p.11

which employers or unions have identified that would explain why the draconian measures being proposed are necessary. The RTBU's submission, for example, stated:

> There is no objective or evidentiary basis for the provisions of this Bill. Nowhere does the…Government move beyond the realm of rhetoric and provide some rational basis for its provisions. The reference in the [Minister's] second reading speech to balancing the rights between unions and business with respect to right of entry can only be made on the basis of a skewed vision of the term 'balance'.[4]

2.5 Arguably the strongest representation on this issue was made by the New South Wales Government submission. It expressed the view that:

> Broadly speaking, no policy rationale demonstrating that changes to right of entry legislation are required is provided, let alone the compelling, wide-ranging case that changes on the scale proposed would seem to dictate.
>
> …
>
> [T]here seems to be no support for claiming that union entry to workplaces is inappropriate, intrusive or disruptive to an extent sufficient to warrant legislating across the length and breadth of all Australian jurisdictions.[5]

2.6 The Queensland Government submission captured a view which was also expressed by most other union submissions: 'Contrary to accepted practices of government policy implementation, there is no attempt in any of the…Government's documentation supporting the Bill to explain why such significant changes are necessary'.[6]

2.7 The Queensland and New South Wales Government submissions also rejected the assertion by the minister and DEWR that a single statutory scheme applying across Australia is necessary to remove confusion about the rights and responsibilities of unions and importantly to prevent unions from exploiting their statutory rights to enter the workplace. As will become clear later in this report, it seems that such confusion and exploitation are seldom encountered by employers who in the main value their good relations with union officials which have been established over time. The Opposition believes that the Government's argument for uniform right of entry laws arises because it does not agree with recent court and tribunal decisions on right of entry disputes. This bill is the latest example of the Government legislating to override decisions of the Federal Court and the Australian Industrial Relations Commission (AIRC) with which it does not agree. The Opposition does not believe this is a sound basis for legislative change.

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4 Australian Rail, Tram and Bus Industry Union, *Submission 19*, p.6

5 New South Wales Government, *Submission 8*, p.25, paras 84 and 89

6 Queensland Government, *Submission 25*, p.3

2.8 The concerns held by Government and business which DEWR claimed underpin this bill, are not reflected in how right of entry laws are currently being practiced in workplaces across the country. Evidence before the committee from various unions demonstrated that the relatively uniform state right of entry laws work effectively and have done so for some time. This was acknowledged by Government senators at the public hearing who speculated that the bill is designed to address a small number of union officials representing one or two unions who have abused the system, rather than penalise the majority of unions who exercise their statutory rights responsibly and lawfully.[7]

2.9 According to the 2003–04 Industrial Registry annual report, between 2001 and 2004 some 1884 permits were issued of which only 15 were revoked, which represents a very small proportion of the total number of permits in circulation.[8] The RTBU told the committee that since 1996 there has been only one application by an employer for the permits of two RTBU officers to be revoked. On that occasion, the Industrial Registrar declined to revoke the permits.[9] Evidence from other unions also pointed to very few examples of entry permits being revoked.

2.10 State right of entry laws provide a sensible and flexible regulatory environment which has all but eliminated the need for employers, employees and their union representatives to initiate industrial action over right of entry disputes. Opposition senators note that right of entry disputes are at historically low levels. Contrary to claims by the Government and DEWR, which were not supported with any evidence, the right of entry issue does not currently appear on any radar of national industrial issues of major concern to employers. ACTU President, Ms Sharan Burrow, told the committee at the public hearing that she could not recall one occasion where peak employer bodies had raised the right of entry issue with the ACTU, either formally or informally.[10]

2.11 The Government's so-called policy justification for the bill amounts to unfounded paranoia about fictitious unions flouting the law and exploiting, or potentially exploiting, vulnerable employers by pressuring and harassing employees at their workplace. Apart from isolated cases in one or two industries, there is no evidence to back up this proposition. Opposition senators find descriptions by the Government and industry bodies of alleged 'unscrupulous' or 'noxious' union behaviour at the workplace offensive and ridiculous. Opposition senators reject the proposition put to the committee by DEWR that the bill is necessary to circumvent unions which are in the habit of conducting 'fishing expeditions' at workplaces under the guise of investigating an employer's suspected breach of industrial instruments.[11]

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7 Senator Johnston, *Committee Hansard*, 18 February 2005, pp. 8-9

8 RTBU*, Submission 19*, p.4

9 ibid., p.5

10 Ms Sharan Burrow, President, ACTU, *Committee Hansard*, 18 February 2005, p.39

11 DEWR, *Submission 16*, p.2

The submission by DEWR only referred to 'anecdotal evidence' which could not be substantiated. Opposition senators note that the Commission already has the power to investigate whether there is a genuine suspected breach or whether entry to a workplace is for the purpose of conducting so-called fishing expeditions. This was clearly spelt out in Senior Deputy President Polites' decision in *BHP Billiton Iron Ore Pty Ltd and William Warren Tracey*:

> If it became apparent that the right of entry provisions were simply being used as a "fishing expedition" or for an ulterior purpose, then the Commission would have the power to place additional limits on the exercise of this power.[12]

2.12 Not only does the bill lack any coherent and cogent policy framework, the committee heard evidence from unions and the New South Wales Government that it is inconsistent with one of the principal objects of the Workplace Relations Act as set out in section 3; that is, matters effecting the employment relationship between employers and employees are to be addressed as far as possible at the workplace level by the relevant industrial parties. Opposition senators accept the view that many provisions of the bill undermine the ability of parties to explore mutually acceptable outcomes. The submission from the National Union of Workers pointed out in its submissions that while the right of entry provision in workplace agreements is consistent with the Act, the proposed bill is contrary to workplace bargaining, '…in that it seeks to restrict the rights of the industrial parties…in relation to what they can agree to include in an agreement'.[13]

DEWR and employer groups are out of touch with the modern workplace

2.13 Opposition senators stress that submissions from employer groups and DEWR provided no empirical evidence for the measures contained in the bill. Like the rhetorical flourishes of the minister's second reading speech, their claims regarding the basis for change are entirely without foundation. Most of the claims appear to have originated as figments of the minister's imagination. Special mention is reserved for so-called evidence before the committee from the Australian Chamber of Commerce and Industry (ACCI). At a public hearing, Mr Christopher Harris, Senior Workplace Relations Adviser, was unable to elaborate on the extent to which right of entry provisions are subject to abuse. Assertions of abuse were based on anecdotal evidence from ACCI constituent members, but the committee was not informed of any cases or independent research which would point to widespread abuse.

2.14 Opposition senators note that ACCI's evidence before the committee is contemptuous towards unions and freedom of association principles. ACCI claimed that right of entry should only exist where employees choose to be represented by

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12 Australian Industrial Relations Commission*, BHP Billiton Iron Ore Pty Ltd and William Warren Tracey and another*, C2002/34, 6 May 2002, para.37

13 National Union of Workers, *Submission 5*, p.3

trade unions in respect of a particular workplace matter and that this approach is consistent with principles of association. Opposition senators reject this position outright. The ACTU pointed out in its submission that union right of entry is fundamental because:

> …it fosters employee representation and participation at the workplace. In particular right of entry for the purpose of discussion and as an adjunct to bargaining fosters employee involvement in and commitment to enterprises, which is associated with improved loyalty, worker morale, lower turnover and better enterprise performance.[14]

2.15 Another example of ACCI's dismissive approach is its resigned acceptance of right of entry laws on the grounds that right of entry should be recognised as 'legalised sanctioned trespass' and 'restricted to the maximum extent possible' in line with the move away from an awards-based system to one characterised by agreement-making at the workplace level. Yet, later in its submission ACCI claimed that employers do not oppose the legitimate and proper role that trade union officers and employees have in the representation of their members. Opposition senators are unable to take ACCI at its word. The difficulty for Opposition senators is that ACCI's implied definition of 'legitimate' and 'proper' is completely at odds with the right of workers to have access to their union representatives and their freedom to organise collectively at the workplace level.

2.16 At a public hearing, Mr Christopher Harris questioned whether it was necessary for unions to have face-to-face contact with employees in workplaces when recruitment activities could be pursued off-site with the assistance of modern telecommunications and the electronic media. The ACTU, RTBU and the Textile Clothing and Footwear Union of Australia (TCFU) dismissed the suggestion as being completely out of touch with the realities of the modern workforce, where only a small percentage of employees have access to email and the internet in the workplace and at home. The ACTU, for example, expressed the view:

> If you think about the workplaces in this country, English is still the predominant language but there is a multitude of languages. There is a multitude of work practices, from factory floor to hospital to call centre, all in some sort of hierarchy. Common sense dictates that the change suggested [by ACCI] is an improbable reality.[15]

2.17 The TCFU's Victorian State Secretary, Ms Michele O'Neil, also drew the committee's attention to the reality facing home workers and outworkers in the clothing, textile and footwear industries. Responding to the suggestion that technological advancement had eliminated the need for face-to-face contact with unions at the workplace, Ms O'Neil responded:

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14 ACTU, *Submission 7*, p.3

15 Ms Sharan Burrow, President, ACTU, *Committee Hansard*, 18 February 2005, p.40

> It is not the world I live in. My members by and large do not have access to the internet. They definitely do not have access to the internet in their workplaces. Some would fit demographically into the lowest portion of the Australian community in terms of having internet access at home.[16]

2.18 Like ACCI, the workplace relations department's submission showed a blind allegiance to the Government's ideologically aggressive workplace relations agenda and, like the submissions from industry groups, a habit of presenting claims and accusations as fact without taking the trouble to attempt to substantiate them. Opposition senators find that the evidence in DEWR's submission is not grounded in any real life experience of employees and their union representatives at the workplace level. The submission from DEWR reflected an attitude towards employees and unions which is out of touch with the needs and expectations of the modern Australian workforce.

2.19 One example is DEWR's claim that current right of entry provisions 'lack sufficiently robust and flexible measures to properly safeguard against abuse of the permit system'.[17] This view is completely at odds with how unions and state governments described the current operation of state right of entry laws at the public hearing. Again, the department did not provide a shred of evidence to back up its claim, and unions were quick to reject it. Opposition senators are left in no doubt that permit holders overwhelmingly exercise their statutory rights lawfully and responsibly. Over recent years, those few right of entry disputes which have been before the Federal Court have invariably been resolved in favour of the union involved.

Right of Entry Bill contravenes Australia's International obligations

2.20 Opposition senators agree with union claims that unions are party principal to awards and to most certified agreements, which means their role extends beyond merely representing members to include entering premises for the purpose of inspecting wage records and other documents, to interview employees in order to investigate any suspected breaches and to ensure enforcement of awards and agreements.[18] What AACI, and the department for that matter, fail to realise in their written submissions is that these union rights are enshrined in ILO conventions 87 and 89 relating to freedom of association.

2.21 The committee received a detailed submission from the International Centre for Trade Union Rights (ICTUR) which expressed major concerns about the impact of the proposed legislation on Australia's international obligations.[19] Similar concerns about how the WR Act contravenes ILO Conventions on freedom of

16 Ms Michele O'Neil, TCFU, *Committee Hansard*, 18 February 2005, p.46

17 DEWR, *Submission 16*, p.2

18 ibid., p.1

19 ICTUR, *Submission 27*

association and the right to collective bargaining had been raised with the committee by ICTUR on at least five previous occasions over the past decade. This latest submission from ICTUR argues persuasively that the Right of Entry Bill, if enacted, will worsen Australia's breach of ILO standards, which have been voluntarily accepted, and exacerbate an apparent lack of respect for the rule of international law, in at least two ways:

- The proposal that certified agreements not contain any provisions which relate to union right of entry represents a severe, unnecessary and impermissible restriction on collective bargaining which is contrary to the principles of freedom of association and the rights guaranteed by Article 3 of ILO Convention 98.
- Union access to workplaces will be restricted in ways which will further impair workers' freedom of association and the right to organise, undermine right of entry as a way of ensuring compliance with industrial instruments, and prevent unions from monitoring compliance with industrial instruments and organising and recruiting new members.[20]

2.22 It is noteworthy that these concerns are raised in a number of other union submissions. Opposition senators also note the ACTU's argument that the bill's restrictions on union right of entry contravene established freedom of association principles under ILO Conventions also by conferring upon employers an implied right to oversee the interaction between employees and unions.[21]

2.23 It is for these reasons that Opposition senators dismiss the Government's attempt, as described by DEWR, to re-define unions simply as 'membership-based service organisations',[22] so as to limit the scope of legitimate union activity at the workplace level. There is no doubt that the provisions of the bill are so restrictive as to make it difficult for unions to exercise their right of entry. It is disingenuous on the one hand for ACCI to claim that it recognises State and Commonwealth right of entry laws while on the other hand supporting proposed legislation which will deny unions any real opportunity to exercise their rights under both Australian and international labour laws.

A single statutory scheme for right of entry is not required

2.24 The bill seeks to exclude state industrial laws and industrial instruments for union entry to workplaces where the employer is a 'constitutional corporation' or the premises are in a territory or Commonwealth place. According to DEWR, state unions will not be precluded from entering an employer's premises for purposes relating to state industrial laws.

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20 ibid., p.4

21 ACTU, *Submission 7*, p.2

22 DEWR, *Submission 16*, p.2

2.25 There was speculation at the public hearing about the principle behind the Government's proposal that a single scheme for right of entry replace the different regulatory schemes under Commonwealth and state industrial laws and instruments. However, Opposition senators are not convinced that the provisions of this bill relating to a single statutory scheme will result in a harmonised industrial relations system, as claimed by the Government and DEWR. The concerns of a number of witnesses were summarised at the public hearing by the ACTU:

> If the government was talking about a harmonised industrial relations system or an end to confusion, they could…seek to sit down with state ministers and state governments and work out by agreement a range of provisions that were equal, whether they were in a state of federal. The nature of this bill is arrogant in that it seeks to override state entitlements with no such commitment to a harmonised environment and would leave at least 15 per cent of employees on a very different set of arrangements.[23]

2.26 The committee heard evidence from various unions that current state right of entry laws are working effectively and the level of confusion and uncertainty from the current regulatory overlap has been kept to a minimum. The committee also heard that any attempt to impose upon the states a single statutory scheme for right of entry will create more problems and confusion for employers and employees. The ACTU told the committee that the bill is a recipe for confusion because it replaces simple, well understood state laws with a highly restrictive federal scheme, while retaining different laws for small businesses that are not incorporated entities.[24] A single statutory scheme is therefore not required.

2.27 State governments were also critical of this unwarranted intrusion into areas of state jurisdiction, highlighting the lack of any consultation and signalling to the committee the possibility of future legal challenges over the bill's constitutionality. The Queensland Government submission took strong exception to the Government's attempt to impose a unitary system of industrial relations which ignores the laws, processes and policy positions of the states.[25]

2.28 There was general agreement among the union submissions that the government has invented an argument about the need for uniformity because, as previously mentioned, it does not agree with certain decisions of the Federal Court and the AIRC. Opposition senators believe that the Government's latest attempt to legislate to overturn AIRC decisions with which it does not agree is not a sound basis for legislative reform. It further undermines the role of the Commission and erodes public confidence in both the Commission and the industrial relations system as a whole. Opposition senators also note the view of the RTBU that the Government is

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23 Ms Sharan Burrow, President, ACTU, *Committee Hansard*, 18 February 2005, p.36

24 ACTU, *Submission 7*, p.19

25 Queensland Government, *Submission 25*, p.11

motivated to override state right of entry laws because state laws are seen to be more employee friendly than Commonwealth laws.

Why the Right of Entry Bill should be rejected

2.29 The ACTU submission provided a detailed critique of each of the main provisions of the bill. These criticisms are fully supported, and in some instances reinforced, by submissions from other unions. Strong representations to the committee were made from the Finance Sector Union of Australia (FSU), the RTBU, the Liquor, Hospitality and Miscellaneous Union (LHMU), the National Union of Workers (NUW) and the Media, Entertainment and Arts Alliance (Alliance). Each of these unions provided evidence to show that the bill will have an adverse impact on workers across a range of industries. The concerns voiced by unions relate to the main provisions of the bill regarding how entry permits are issued, when entry permits may be used, how permit holders may exercise their right to enter premises, and the expiry, revocation and suspension of entry permits.

2.30 The committee heard compelling evidence from the TCFU about the likely adverse effect of the bill on home workers and outworkers in the clothing industry. The TCFU argued at the public hearing that while there are good reasons to oppose the bill in its entirety, an alternative to outright opposition would be to amend the bill to preserve outworker rights under Commonwealth and state jurisdictions. An amendment of this kind would enable existing provisions under the Federal Clothing Trades Award, the Victorian Outworkers Act and the Workplace Relations Act to continue.[26]

2.31 According to the TCFU, the protection provided to outworkers under existing state and Commonwealth legislation is critically important, especially in relation to contracting out of work and the transparency of the contracting chain within the clothing industry. The committee heard evidence from Ms Michele O'Neill, TCFU's Victorian State Secretary, that the bill in its current form will have a disproportionate effect on the clothing industry's most vulnerable workers, including migrant workers for whom English is not a first language and the disproportionately large number of women who fill the majority of casual positions. The bill is most likely to effect those workplaces in the textile and clothing industries '…where workers are most vulnerable, most fearful, most likely to be cautious of having their union membership exposed to their employer and most likely to be already in an exploitative or unfair situation…'.[27] Opposition senators, in agreeing that the bill ignores the unique situation of some of the most vulnerable workers in the community, support in principle any amendment that gives continuing effect to provisions of state and Commonwealth legislation that deal with the unique situation of workers in the textile and clothing industries.

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26 Ms Michele O'Neil, Victorian State Secretary, TCFU, *Committee Hansard*, 18 February 2005, p.43

27 ibid., p.43

2.32 The Government believes that because right of entry permits confer significant rights on union officials, they should only be issued to 'fit and proper persons' who understand their rights and obligations. Accordingly, the bill identifies a number of matters that the Registrar must take into account before issuing a permit, to determine whether a union official meets the 'fit and proper person' test. These matters include whether the union official has received appropriate training about their rights and responsibilities as a permit holder, been convicted of an offence against an industrial law, or held a permit under the WR Act or under a state industrial law that has been revoked or suspended.[28] Evidence before the committee from various unions demonstrated that the 'fit and proper person' test is unnecessary and would most likely increase the workload of the Registrar with no improvement to the right of entry regime.

2.33 The main objections to the bill raised by unions relate to the bill's restrictions on the use of entry permits. Specifically, the proposed amendments place the onus on the official seeking entry to demonstrate any reasonable grounds for suspecting a breach, and require the permit holder to particularise any suspected breach. Further restrictions only allow permit holders to inspect records of employees who are members of the permit holders' union, and to enter premises for the purpose of recruitment only every six months.

2.34 The committee heard evidence that the proposed restrictions on the use of entry permits are both unnecessary and unworkable, especially the burden of proof provision and the restriction placed on union visits for the purpose of recruitment. The FSU clearly demonstrated the ridiculous nature of the requirement for unions to show evidence of a suspected breach before being granted access to gather evidence of an actual breach. It was claimed by FSU that this will only result in a '…circular situation that would effectively negate the right of entry as an investigative tool'. The FSU illustrated the flaw with the proposal when it told the committee:

> One of the principal reasons for conducting an investigation is to substantiate a suspicion. Suspected breaches are often based on verbal advice from members who do not wish to be identified by putting their concerns in writing or from documents that have been supplied confidentially. It appears unlikely that either type of evidence would be considered 'reasonable grounds' under the proposed provisions unless the confidentiality of members or whistleblowers was breached.[29]

2.35 The general point made by the FSU and other unions is worth repeating: there is no evidence of widespread entry to workplaces resulting in non-union members suffering unfair pressure and harassment to justify the six-monthly visitation provision, as alleged by the minister in his second reading speech. The National Union of Workers voiced strong opposition to this provision, noting the absence of any cogent reason for specifying only two visits per year:

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28 DEWR, *Submission 16*, p.4

29 FSU, *Submission 6*, p.7

> With many employers having large disparate workplaces, shift work arrangements in place, or a high level of casual workers, more than two visits per year are required just to make contact with all employees. The practical reality is that it usually takes more than two visits per year to a workplace in order to recruit and organise workers and to ascertain what issues are present at the workplace.[30]

2.36 Opposition senators accept that many workplaces covered by various unions have part-time employees and shift workers, making it almost impossible for permit holders to see all employees in one visit. Restricting recruitment visits to every six months will ensure that a large number of employees never see a union official.

2.37 Evidence before the committee from the Alliance and the LHMU highlighted how this bill assumes a workforce comprising full-time and permanent employees. Opposition senators note that this is no longer the reality for an increasing number of workers. This is particularly the case for members of the Alliance and the LHMU '…who work part time, who work shiftwork, who are employed as casual or fixed term, who work in large workplaces or move around to different workplaces'.[31] The LHMU told the committee that many of its members are amongst the most vulnerable in the Australian workforce, including from non English speaking backgrounds.[32] The Alliance stressed in its submission that the provisions of the bill assume a relatively stable workforce which is not a characteristic of the media and entertainment industries or, for that matter, a range of other industries: 'For instance, in a theatre venue, the technicians and cast might be completely different even as often as every two months. Other sectors are even more volatile'.

2.38 Opposition senators refer in particular to the Alliance submission's conclusion:

> As employment arrangements in Australia continue to change, as permanent part-time, freelance, and casual employment increase and as reliance on labour hire companies increases, the challenges that the Alliance has confronted for a century will become increasingly common across other industries.[33]

2.39 The bill requires that the permit holder must comply with any reasonable requests from the employer regarding occupational health and safety requirements, the venue for discussions between the union and employees, and the route to be taken to reach the venue where staff discussions are to be held. DEWR justified this provision on the grounds that it strikes and 'appropriate balance' between the right of permit holders to enter premises and the right of employers to conduct business without unnecessary disruption. Opposition senators do not accept this argument. It

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30 National Union of Workers, *Submission 5*, p.4

31 LHMU, *Submission 17*, p.2

32 ibid., p.6

33 Media, Entertainment and Arts Alliance, *Submission 21*, p.5

is clear the provision is aimed at reversing a recent decision of the Commission in favour of the FSU following a protracted dispute with the ANZ Bank regarding the location of interviews. The FSU told the committee that while the existing laws can be used to frustrate union access by employers, the framework proposed in the bill would be even more restrictive. For instance, it could be used to frustrate legitimate union access to workplaces and facilitate breaches of the law, awards and agreements.

2.40 The general conclusion of unions is that the proposed provision will be open to abuse and make it practically impossible for employees in many industries to see a union official. Opposition senators agree with the FSU's position that the process described in the bill fails to understand the realities of the workplace and could deprive employees their right to freedom of association as well as their confidentiality.[34]

2.41 Currently, the only means of addressing improper behaviour is through revocation of a permit. The bill allows for some or all permits that have been issued to a union to be either suspended or made subject to limiting conditions for a period which the bill does not specify. Contrary to the assertion by DEWR that these alternatives 'provide scope to address less serious examples of improper behaviour', Opposition senators accept the view put to the committee by the FSU, and endorsed by other unions, that the proposal is:

> …a potentially draconian power that could punish and inconvenience numerous union employees who have done nothing wrong, jeopardise ongoing legitimate investigations, and consequently punish and disadvantage employees…[35]

2.42 Opposition senators can not see any merit in a provision which penalises an entire union for the behaviour of a few of its members. To take away the rights of a union based on isolated cases in one or two states is nonsensical. National Secretary of the FSU, Mr Paul Schroder, made the analogy when he told the committee: 'I have not heard anyone in the parliament say that a banking licence should be revoked because a dodgy loan was written. It is a nonsense'.[36]

Concluding comments

2.43 Opposition senators are opposed to this bill on the grounds that it lacks any clear and cogent policy framework and is based on claims about unions exploiting a 'complex regulatory web' of state right of entry laws for which there is no compelling evidence. Opposition senators note that union officials enter thousands of workplaces across Australia every day. Most of these visits occur without incident and as a result

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34 FSU, *Submission 6*, p.7

35 ibid., p.5

36 Mr Paul Schroder, National Secretary, Finance Sector Union of Australia, *Committee Hansard*, 18 February 2005, p.28

of cooperation between the union and the employer. The rare exceptions which give rise to a dispute are able to be resolved under existing law.

2.44 Contrary to the stated purpose of the bill, the effect of its provisions will be to further concentrate power in the hands of employers to the detriment of workers across a range of industries. This is particularly the case for outworkers in textile and clothing industries. The overwhelming response from unions is that the bill in its current form will further inhibit legitimate union activities and rights in the workplace, exacerbate the current power imbalance between employers and employees and increase the capacity of employers to act unlawfully and with impunity.[37]

2.45 At the public hearing, officers from DEWR told the committee that although the Government could see no justification for delaying the introduction of the bill, it was not unwilling to consider possible amendments, as long as they were 'appropriate'. Three issues under consideration of possible amendment include the limitation on a permit holder being able to engage in recruitment conduct once every six months, maintenance of 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.[38] The department also appeared to be receptive to the view that the bill be amended to enable provisions for right of entry to be included in certified agreements, as long as parameters are placed around the terms of any provisions to enable the Commission to properly regulate workplace agreements.[39]

2.46 Opposition senators welcome these positive overtures from the Government and believe that amendments to the bill which address the concerns of the Opposition and unions will drastically improve this legislation. However, Opposition senators are puzzled by the minister's decisions to consider amendments to certain 'appropriate' provisions of the bill before the committee has reported its findings to the Senate. It is all well and good for the minister to decide which issues are 'appropriate' based on the written submissions to the inquiry. If the Government was genuinely concerned with improving this legislation and was respectful of the processes of a Senate committee inquiry, it would have announced its intention with regard to amendments after the committee had tabled its report and any findings and recommendations had been debated in the Senate. Be that as it may, while Opposition senators are supportive of possible amendments in areas flagged by the department at the public hearing, this does not alter the fact that the Opposition finds the bill to be fundamentally flawed on policy and ethical grounds.

37 ibid, p.2

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

39 ibid., p.64

2.47 Opposition senators are extremely concerned that the bill fundamentally undermines a number of rights and principles which are entrenched in domestic and international law. The right of unions to properly investigate suspected breaches of awards, agreements and other legislative protections; the right of union representatives to visit workplaces and organise members and potential members; and the right of workers to take part in these discussions without fear of reprisal will be seriously compromised by this legislation, even if the Government was to proceed with amendments.[40]

2.48 Evidence from employer groups and DEWR disregarded the established principle that union right of entry is a vital corollary to the right of employees to join unions and be represented by them in the workplace. The committee heard evidence from unions that the culturally and legally accepted and understood role of union organisers in Australia is seriously threatened by the provisions of this bill. The FSU in particular expressed the view that there is no recognition in the bill of the positive role that unions play in the workplace. In fact, the bill discourages unions from contributing to workplace democracy by attempting to make them invisible.

2.49 Opposition senators are in no doubt that the right of entry provisions introduced with WR Act (1996) are sufficiently restrictive, making it difficult for unions to easily operate within the spirit of the law. Contrary to ACCI's claim that the bill is largely remedial and focused only on moderate amendments, any further unreasonable and unnecessary restrictions on the fundamental right of unions to enter workplaces in order to represent the industrial interests of their members or potential members would be totally unacceptable.

2.50 Opposition senators are disturbed to find that the provisions of the bill are inconsistent with the stated objectives of the WR Act and are contrary to Australia's obligations under ILO conventions and international labour laws. Any further erosion of Australia's observance of ILO conventions would be regrettable and should be opposed.

Recommendation

Opposition senators recommend to the Senate that the bill be rejected.

Senator Gavin Marshall
Deputy Chair

40 FSU, *Submission 6*, p.3