Australian Democrats' report

The case for change to right of entry

As noted in the majority report the Workplace Relations Amendment (Right of Entry) Bill 2004 is one of many introduced to parliament to further improve the effectiveness of the *Workplace Relations Act 1996* (WRA).

While workplace relations law is invariably contentious, too often the claim is made that the Senate has been obstructionist on workplace relations matters.

Since the major reform of the WRA in 1996, secured by the Coalition and the Democrats and opposed by Labor and the Green Party, eighteen bills totalling many hundreds of pages have passed; one by the Coalition and Labor opposed by the Democrats and the Green Party; five by all parties; and, twelve by the Coalition and the Democrats opposed by Labor and the Green Party.

It is fair to say that this Bill is most of all a reaction to the actual and perceived abuse of right of entry by a minority of union officials. Those self-indulgent militants that revel in their notoriety in such matters have not done the broader union movement any favours. From 1 July 2005 the Coalition will be able to pass any legislation it wishes because it will have the numbers in the Senate. Even tougher right of entry will inevitably result.

In negotiating the passage of the WRA, the Democrats rejected the proposal of the Coalition government that right of entry, among other things, should be restricted to a written invitation. It was just not practical in all circumstances.

Instead the Democrats negotiated a scheme that in our view provided a sensible balance of union, employer and employee rights.

Professor McCallum in evidence to the 2004 Senate committee hearing into the Building and Construction Industry raised concerns about watering down the system that the Democrats negotiated:

> What I would say about right of entry is that, under our system, it is for the arbitration inspectors and the registered trade unions to have the capacity to police awards and certified agreements. I do not think that that ought to be destroyed or watered down. Obviously improper use of right of entry is another thing.[1]

As the Bills Digest to this Bill notes, the balance is important:

> Union right of entry to workplaces for the purposes of consulting with members and those eligible to become members has been seen as

---

1 Senate Inquiry Building and Construction Industry, *Committee Hansard*, Sydney, 2 February 2004. p.8

> fundamental to the core purpose of trade union organisation, as lawyers Shaw and Walton have observed:
>
> It is plain that effective trade union organisation of employees cannot occur without access on the part of the union and its authorised representatives to workplaces in order to recruit non-unionists, to communicate with union members and take up their concerns, and to police award prescriptions and occupational health and safety requirements by inspecting the workplace.[2]

Nevertheless, unbridled intrusion can interfere with the conduct of business, and as Professor Bill Ford has also noted, balance is the key to facilitating entry and preventing intrusion:

> the difficult policy problem [that] right of entry arrangements have always had to address – that of striking an appropriate balance between the interest unions have in, at the very least, monitoring compliance with the terms of industrial instruments and the interest employers have in carrying on business without unreasonable interference or interruption – remains the same [after the 1996 Act].

The ACTU in their submission refer to the conclusions of the 2000 report of the Senate Standing Committee for the Scrutiny of Bills on Entry and Search provisions in Commonwealth legislation, which concluded:

> No evidence was put before the Committee to suggest that the unions should not have a right to enter, but some dissatisfaction was expressed with the way in which the current provisions have operated on some occasions. Where practical difficulties such as these arise, they are better addressed through a voluntary code of practice developed between employers and employees rather than through legislation.[3]

In our minority report to the Senate Employment, Workplace Relations and Education References Committee report *Beyond Cole- The future of the construction industry: Confrontation or cooperation?*, we rejected the Government's proposed provisions to right of entry for the building and construction industry and recommended the following instead:

- Applicants for right of entry permits to be required to demonstrate a knowledge of the rights and obligations associated with the permit;
- The Registry be requested to develop, in consultation with union and employer bodies, a code of practice governing the right of entry;
- Implement a two tiered approach where on serious industrial issues or where there is dispute about the right of entry, an independent third party, such as an inspector, is called to arbitrate the matter.

---

2 Workplace Relations Amendment (Right of Entry) Bill 2004, *Bills Digest*, no. 117 2004-2005, p.2 and 3.

3 Submission No. 7, ACTU, p. 4.

- Increase penalties to right of entry provisions under the WR Act 1996, to act as a deterrent.

The Democrats still hold that these would be sensible improvements to the law, and the fourth dot-point above has already been enacted by the Coalition/Democrats.

In 2004 via the Workplace Relations Amendment (Codifying Contempt Offences) Bill, the Democrats negotiated a threefold increase in penalties for abuse of the right of entry system, albeit not to the much higher level the Government was seeking.

However higher penalties are useless unless the WRA is policed and enforced.

We made a strong case for the Commonwealth Government to provide for a national workplace regulatory body capable of enforcing the *existing* law. Most problems that occur in workplaces, particularly with respect to right of entry, occur because of breaches of existing statute, and the very inadequate enforcement of essentially sound laws.

This bill before the Committee is another attempt to further restrict the rights of all unions with respect to right of entry, for what appears to be the purpose of preventing a relative few officials from a few unions from continuing to abuse the system.

These new provisions will affect all unions, yet there is little evidence that a widespread problem with respect to right of entry exists. A few court cases identifying particular problems are not evidence that the system is broken, and that the whole union movement should face drastic change.

Industry groups representing industries that have a higher incidence of militancy than other industries gave evidence. When the Committee Chair questioned the Australian Industry Group (AiG) about hard evidence and to cite cases of misuse of right of entry, AiG responded:

> I would have to say that I cannot cite particular cases. We have within the AI Group what we call our BIZ Infoline, which is the equivalent to a call centre for members to ring in. I would make the observation that right of entry is a fairly significant issue when one analyses the nature of the calls that come into the BIZ Infoline. Just yesterday I got out some statistics which would be very conservative, and that is that we have had about 350 or more contacts—354, I think it was—in the past 12 months just on the right of entry issue. I am not saying that that is evidence of misuse, but certainly it is evidence of our member companies not properly understanding what the rights are and seeking clarification. It does demonstrate that, if nothing else, it is a significant issue that our members are dealing with.[4]

4 Mr Peter Nolan, AIG, *Committee Hansard*, 18 February 2005, p. 17.

The Department of Employment and Workplace Relations (DEWR) provided evidence that:

> The Office of the Employment Advocate, over the period 1997 to 2004, dealt with 284 right of entry matters. That works out to about 35 'matters' a year out of probably many thousands of right of entry activities.

Mr Andrew Thomas from the Australian Rail, Tram and Bus Industry Union (RTBU) gave evidence that his union had not had problems with right of entry as described by the Government and Industry groups:

> The RTBU's submission identifies that, over a period of three years, the percentage of permits revoked was 0.007 of a per cent. No RTBU official has ever had his or her permit revoked, nor has the RTBU been embroiled in disputes involving a right of entry. We have not been involved in disputes within the Commission that have not gone on to applications under section 285. I have been a union officer for roughly 20 years. I have never been denied the right to enter a premise. I have never been asked to leave a premise. I have never been involved with a group of other unions and union officials who have been asked to leave or have been denied entry to a premise.[5]

The Australian Chamber of Commerce and Industry (ACCI) gave evidence that right of entry is not a widespread problem:

> I think it is worth remembering that, for many employers, they will never receive a right of entry notice because they do not have any union members and unions are not active in that particular sector. So we are talking about a small proportion of the overall work force or of businesses for whom right of entry is going to be an issue. It is going to be generally the unionised sectors of the economy, but it does appear that there are niches where right of entry is a serious issue—say, in building construction and manufacturing.[6]

During the inquiry into the Building and Construction Industry, we heard evidence from the CFMEU that approximately two thirds of the 392 breaches identified by the Cole Royal Commission were industrial matters and that a significant number of these were related to right of entry:

> Of the two-thirds that are industrial matters, I can point you to the fact that a significant number involve the union failing to adhere precisely to the right of entry provisions. One of the common reasons for finding breaches—a whole litany of them against us—is that we failed to tell the employer that we had come on site or that we did not come on site during the prescribed lunchbreak.[7]

---

5 Mr Andrew Thomas, RTBU, *Committee Hansard*, 18 February 2005, p.11.

6 Mr Christopher Harris, ACCI, *Committee Hansard*, 18 February 2005, p.2.

7 Senate Inquiry Building and Construction Industry, *Committee Hansard*, Sydney, 2 February 2004. p.90.

The Government Senators also acknowledge that the problems are not wide spread:

> This legislation….should be aimed squarely at a small number of unions which have a record of abusing the system.[8]

I readily concede that there is irrefutable evidence that abuses are occurring in a few industries, on behalf of a few unions, and by a few union officials.

I am not against reasonable changes to the right of entry provisions in the WRA, so long as they are targeted at affecting the behaviour of those few who are abusing the system and so long as they do not inadvertently tip the scale too much in the employers favour, thereby preventing unions from communicating with union members, taking up their concerns, monitoring compliance with the terms of industrial instruments, being equipped to bargain effectively, able to service members and able to recruit new members.

As I have argued before, it is vital for industrial democracy and good workplace practice that search and entry provisions are retained, but better practice is desirable.

Overriding state right of entry jurisdictions

In their submission to the inquiry the Government outlined several reasons why they believe it is necessary for the federal right of entry system to override the state right of entry law.

> The Government believes that, as far as possible, a single statutory scheme for RoE should apply to all workplaces. At present, however, some workplaces are subject to a complex regulatory web of differing RoE standards under concurrent federal and state industrial laws and instruments. Companies with premises in more than one state may therefore have to comply with multiple and different state and federal laws.
>
> The Government is concerned at the scope for confusion and uncertainty resulting from the regulatory overlap. Unions, employers and employees will benefit from having a single scheme that sets out their rights and obligations. Additionally, the Bill will prevent this uncertainty being exploited by union officials to enter the workplace for proper purposes and subsequently engage in inappropriate or other wise unlawful behaviour.[9]

The Government cited a case last year in NSW in *Boral Masonry Ltd v CFMEU*, where the CFMEU had no rights to enter under federal jurisdiction, but sought to enter via a state division of the CFMEU, under the state jurisdiction.[10]

Another recent example was in Western Australia where the unions used state jurisdiction to enter premises where all employees were under federal AWAs.

---

8 Majority report, paragraph 1.27, p 7.

9 Submission No. 16, DEWR, p.2 and 3.

10 Submission No. 16, DEWR, p. 3.

The Government's submission highlighted several other problems:

> Union officials use State laws to circumvent federal RoE obligations by claiming to enter workplaces under their state powers and subsequently engaging in conduct that would otherwise be in breach of federal obligations.
>
> Even where federal permits have been revoked, union officials may still retain rights of entry under state law. This undermines the effectiveness of the compliance mechanisms in the federal right of entry system.[11]

The Democrats support the idea of a unitary IR system for productivity, common rights and efficiency reasons. Our preferred method would be for the States, like Victoria did in 1997, to refer their powers to the Commonwealth, not just with respect to right of entry, but their entire IR system.

The Democrats believe that, the jurisdiction shopping and confusion over which right of entry jurisdiction operates in a workplace, which currently occurs, should be addressed.

I strongly support ending dual jurisdictions on one worksite, and support the bill's overall intentions in this regard. The important thing is that either state or federal right of entry should prevail in workplace right of entry, not both.

Agreement making

The Bill proposes to prohibit the certification of agreements containing right of entry provisions. The ACTU submitted that:

> It is inconsistent with the scheme of the Act, which seeks to encourage employers and employees to determine matters affecting the relationship between them at the workplace enterprise level to impose this restriction upon the subject matter which may be the subject of bargaining. It is incongruous that the Government opposes applications to amend the award safety net which are clearly supported on strong policy grounds, such as in the recent Family Provisions Case, on grounds that these matters are best left to bargaining, yet will intrude on the parties' agreement making to frustrate collective bargaining.[12]

The ACTU also noted that this issue was neither discussed nor determined in the High Court decision on *Electrolux Home products Pty Ltd v Australian Workers Union*, and to date the issue has been determined differently in a number of Commission cases.

The Committee also heard evidence that this provision may force employers and unions to go outside the Workplace Relations system, and make common law agreements.

---

11 Submission No.16, DEWR, p. 3.

12 Submission No.7. ACTU, p. 18.

I welcome the Government Senators view (at 1.21 of the majority report) that certified agreements should be able to include right of entry provisions. The Democrats do not support the prohibition of right of entry provisions in agreements.

Fit and proper test

The Democrats agree with the concerns raised by Government senators at paragraph 1.23 of the majority report with respect to imprecise definitions of 'fit and proper person' and 'appropriate training'.

Concerns were raised at the hearing that the terms outlined at section 280F were too broad and that union officials could be denied a permit for a minor infringement.

As we have said in the past all that is necessary is that the permit holder in some way be able to demonstrate knowledge of the rights and obligations associated with the permit. Obviously appearing before a Registrar to 'pass a test' would be too onerous and time consuming for all. I recommend the following:

- that the Registrar develop in consultation with unions and employer bodies a right of entry code of conduct, which will be reproduced into a booklet for distribution to employers and unions;
- that applicants for right of entry permits certify that they have read and understood the right of entry code of conduct and have attended a registered organisation-provided training session; and
- that the union secretary be required to also certify via the right of entry permit application that the applicant has undergone training on right of entry and has read and understood the code of conduct.

I further recommend that employers should be given a standard card or information sheet when right of entry is being exercised, that reminds them what *their* rights and obligations are. This too should be developed by the Registrar.

Written notice and evidence

The Department of Workplace Relations refers to anecdotal evidence of unions entering workplaces, nominally for investigative purposes, despite having no actual evidence of any breach for the purposes of engaging in a 'fishing expedition' in the hope of uncovering an actual breach.

However, the FSU argued that the new provisions would lead to a circular situation that would effectively negate a right of entry as an investigative tool:

> 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.

The unions play a pivotal role in monitoring compliance with the terms of industrial instruments, and have been responsible for recovering millions of dollars of under paid wages and entitlements, and tax and superannuation avoidance. For example:

> The building industry suffers from chronic under/non-payment of workers entitlements. A great deal of the union's time and resources is devoted to recovering these monies. The following are gross figures for the sum of entitlements recovered on behalf of workers by our corresponding State Branches in recent times.

State/Territory	Amount recovered	Time frame
Tasmania	$170,000	years 1999, 2000 and 2001
Queensland	$1,333,285	years 1999, 2000 and 2001
Australian Capital Territory	$5,312,395.46	years 1999, 2000 and 2001
New South Wales	$11,629,172.28	years 1999, 2000 and 2001
Victoria	$10,687,616.78	From 28/2/01 to 21/2/02
Western Australia	$950,000	years 1999, 2000 and 2001
South Australia	$750,000	years 1999, 2000 and 2001

> Whilst our union does its best to ensure that workers receive their entitlements, we are not always successful. Many workers are left out of pocket by companies which go bust or close down only to reappear under a different corporate structure. On other occasions workers choose to settle their cases for less than what they are owed in order to avoid lengthy court proceedings.[13]

The FSU submitted that the new provisions would further reduce the capacity of unions to investigate suspected breaches, and employees would be further disadvantaged.[14]

The Democrats are also concerned that the requirement that the purpose of the intended entry be detailed and limited to the purpose identified will limit the carrying out of legitimate union activity. The ACTU submitted that the restriction prevents a

13 Building and Construction Industry Senate Committee inquiry, CFMEU response to Question on Notice, 8 March 2004

14 Submission No.6. FSU, p. 7.

union official from dealing with unanticipated issues that may arise while visiting a workplace or that emerge as a result of discussions with employees.[15]

The Democrats agree with the concerns outlined at paragraph 1.24 and 1.25 of the majority report. There was no understanding from any of the non-government witnesses at the hearing as to what 'reasonable grounds' means. As the majority report points out, this could lead to unnecessary litigation, and as the unions point out, reduce the ability of the unions to investigate reported breaches.

Access to certain employees

The bill proposes to restrict unions' right of entry for the purpose of holding discussions with employees, and to investigate breaches to only those employees whose employment is governed by an award or a certified agreement employed at the workplace. Discussions or investigation of breaches with employees not covered by an award or agreement would not be permitted.

The ACTU argued:

> That the extent to which employees enjoy meaningful freedom of association should not be dependent upon the type of instrument that governs their conditions of employment. To restrict valid entry for the purpose of discussions to only employees already governed by instruments that bind the union conflates the unions' interests of enforcing instruments to which it is a party with the broader interests of all workers to access to information and advice.[16]

The FSU also raised concerns:

> Many FSU members choose not to disclose their membership status to their employer for fear of discrimination and will be less likely to speak out about a suspected breach if doing so will identify them as union members.
>
> The proposed requirement to obtain a written request from an AWA worker in order to enter premises to investigate a breach of that AWA will probably ensure that such a request is never made. It is highly unlikely that an AWA employee would make such a request in writing if there was a dispute with their employer.[17]

The Democrats have some sympathy with the unions concerns.

Not examine non-union employee records

The Bill proposes to limit investigation of breaches of legislation, awards or agreements to union employee records only.

---

15 Submission No.7. ACTU, p. 14.

16 Submission No.7. ACTU, p. 6.

17 Submission No. 6. FSU, p. 5.

Duress and fear is often itemised as an employer concern. It is no less an employee concern.

The ACTU argued that the Bill exposes an employee's choice to be a union member to their employer. The Commission has consistently upheld the right of union members to have the fact of membership withheld from their employer. Many employers will not know which of their employees are union members, as many opt to pay union dues direct from their personal accounts.[18]

The unions argued that the change will further limit their role and their ability to prove breaches.

The change further reduces the role of unions in the industrial system despite the High Court accepting that unions have a legitimate interest in the pay and conditions of non-members because if the latter can be employed on terms more favourable to employers than those applying to members this will be an incentive to employers to discriminate again union members.[19]

Consideration should be given to retaining the right to access all records, as it currently is, but include a provision enabling non-union (and union) employees to request that their records not be examined.

Location of interviews

The FSU argued that the Bill's new provision reverses the onus of proof from the current regime and creates another barrier to limit the union's ability to perform their role to protect the rights and conditions of employees:

> It should be noted that the existing regime can be used to frustrate union access by employers; however the proposed framework would be even worse. It took the FSU from June 2003 (notice to enter) until September 2004 (full bench decision) to enter that bank premises at 530 Collins Street due to disputes over locations of interviews. In that case ANZ had [eventually] conceded the existence of numerous breaches……..
>
> By the time FSU had gained access, staff turnover meant that more than one third of those employees being underpaid had moved on. [20]

The FSU in their submission stated that in the case of the ANZ dispute, they received 'covert' phone calls from people who would like to have attended an interview but did not.[21]

The FSU also submitted that in work environments such as a call centre, employees are under constant supervision including requiring permission to log off to go to the

---

18 Submission No.7. ACTU, p. 8.

19 ibid.

20 Submission No. 6, FSU, p. 6.

21 Submission No. 6, FSU, p. 6 and 7.

toilet. The FSU argued that under the proposed system the procedure would lead to such intimidation to an individual that no one would exercise their right.

The ACTU submitted that the Commission currently is able to deal with disputes dealing with employee contact and has in the past taken a balanced approach to the interests of all parties. The ACTU also submit that:

> the effect of the Bill would be to allow the place for discussion be determined by the employer, subject only to a reasonable test, a significant limitation on the exercise of the Commission's discretion.[22]

The balance between employer rights to reduce disruption and union and employee rights to access without intimidation is a difficult one. In response to a request at the hearing the FSU by way of a supplementary submission suggested a set of principles underpinning right of entry protocols, which is outlined below:

Principles Underpinning Right of Entry Protocols

1 The [Union] recognises the employer's business requirements and will seek to minimise work disruption to work wherever possible.

2 Permit holders of the [union] will avoid arranging entry at predicted peak work times wherever practicable.

3 The [union] shall exercise every care in preserving the confidentiality and privacy of information gained, purposely or otherwise, during entry to the employer's workplace.

4 The employer recognises the right of employees to belong to and have access to their union in the workplace.

5 The employer recognises the permit holders right to enter the workplace for the purposes of investigating suspected breaches of awards and agreements, recruitment of employees and for the purposes of conducting discussions and/or other reasons prescribed by the Act from time to time.

6 The employer will ensure there is no unreasonable barrier; be it work measures, performance assessment processes; intimidatory behaviour by management or other employees; physical or psychological constraints; constructed to impede an employee's access to the permit holder.

7 The employer will not penalise employees in any way for meeting a permit holder of the [union].

8 Wherever possible, locally agreed arrangements should be entered into and adhered to by both parties.

---

22 Submission No.7. ACTU, p. 16.

9 Such arrangements will recognise the varying and/or various arrangements required by either party in accordance with the nature of work being conducted and the reason stated for entry to the workplace.

10 Agreement to arrangements that meet these principles will not be unreasonably withheld by either party.

The Democrats believe that the current provisions, in combination with Commission discretion and guiding principles (which could be included in the code of conduct suggested earlier), would effectively achieve the appropriate balance.

6 month recruitment

The Bill proposes that entry to premises for the purposes of recruitment be limited to once every 6 months.

The Committee received a lot of evidence indicating the negative impact this would have on unions' ability to meet the needs of the whole workforce, particularly given the prevalence of casual employment, shift work and high labour turnover in some industries.

The Democrats note Government senators' support for amendments to the 6 month limitation and also welcome the indication by DEWR officials to consider amendments to the 6 month limitation.

Suspending permits

Concerns were raised that the bill takes away the discretion of the Registrar to revoke or suspend an entry permit by prescribing a 'minimum disqualification period'. The AIG submitted that:

> …consideration should be given to amending the Bill to give the Industrial Registrar more flexibility to determine an appropriate length for the disqualification period.[23]

The Democrats believe that this discretion should be reinstated.

Commission powers

The Democrats support the concerns raised by Government senators at paragraph 1.26 of the majority report regarding the term 'abuse' in proposed section 280J and agree that it should be codified and quantified.

23 Submission No. 20, AIG, p. 3.

Conclusion and recommendation

We very much appreciate the willingness of DEWR and the Government senators on the Committee to address shortcomings in the Bill. The majority report's 'Room for improvement' section is helpful.

It should be noted that the right of entry prescribed in the WRA is a minimum requirement and that employers and unions are able to have more liberal conditions and often do.

However, anecdotal evidence would suggest that we have seen a recent shift away from support of the union's legitimate role in protecting employees' rights and conditions, and that some employers resent union involvement and entry into the workplace, so the minimum prescribed in the WRA is becoming the norm.

Other employers have indicated that right of entry in fact provides them with a useful inspectorate and management tool.

The Democrats are concerned that the bill will result in increased litigation and have an unnecessarily detrimental impact on the ability of the union to perform their role, which is to protect workers' (union and non-union) rights and conditions.

The law should be designed to effectively address those few who abuse or mean to abuse the system, but not to the extent that it will impinge on the effectiveness of the system - this bill does not achieve this balance.

I recommend that the bill be amended to reflect our concerns. I strongly support ending dual jurisdictions on one worksite, and support the Bill's intentions in this regard. The important thing is that either state or federal right of entry should prevail in workplace right of entry, not both.

Senator Andrew Murray