The Senate

Employment, Workplace Relations and Education Legislation Committee

Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004

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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 Under the provisions of former section 286 of the Industrial Relations Act (repealed under the WR Act) any trade union official authorised by the union secretary could gain access to a worksite.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.
>
> 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:
>
> "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

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

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

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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.

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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]

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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.

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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.

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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.

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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

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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.

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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

Appendix 1

List of submissions

Sub No:	From:
1	Master Builders Australia
2	Queensland Council of Unions
3.	NSW Young Lawyers
4	Transport Workers' Union of Australia
5	National Union of Workers
6	Finance Sector Union of Australia
7	Australian Council of Trade Unions
8	NSW Government
9	Australian Manufacturing Workers' Union
10	CFMEU, Construction and General Division
11	Australian Nursing Federation
12	Unions NSW
13	Textile, Clothing and Footwear Union of Australia (Vic branch)
14	Health Services Union
15	Australian Chamber of Commerce and Industry
16	Commonwealth Department of Employment and Workplace Relations
17	Liquor, Hospitality and Miscellaneous Union
18	Community and Public Sector Union
19	Australian Rail, Tram and Bus Industry Union
20	Australian Industry Group
21	Media, Entertainment and Arts Alliance

22	CFMEU – FFPD – Victorian FFTS Branch
23	Independent Education Union of Australia
24	Australian Mines & Metals Association
25	Queensland Government
26	ACT Government
27	International Centre for Trade Union Rights
28	Post Office Agents Association Limited
29	Rio Tinto Limited

Appendix 2

Hearings and witnesses

Australian Chamber of Commerce and Industry
Mr Christopher Harris, *Senior Workplace Relations Adviser*

Australian Rail, Tram and Bus Industry Union
Mr Andrew Thomas, *National Industrial Officer*

Australian Industry Group
Mr Peter Nolan, *Director*, *Workplace Relations*

Finance Sector Union of Australia
Mr Paul Schroder, *National Secretary*
Mr Rodney Masson, *National Communications Manager*

Australian Council of Trade Unions
Ms Sharan Burrow, *President*
Ms Nada Delavec, *Industrial Officer*
Ms Cath Bowtell, *Industrial Officer*

Textile, Clothing and Footwear Union of Australia
Ms Michele O'Neil, *Victorian State Secretary*

Master Builders Association
Mr Wilhelm Harnisch, *Chief Executive Officer*
Mr Richard Calver, *National Director, Industrial Relations and Legal Counsel*

Department of Employment and Workplace Relations
Mr Robert Bennett, *Assistant Secretary, Workplace Relations Legal Group,*
Mr Peter Cully, *Director, Organisations, Freedom of Association and International Section, Workplace Relations Legal Policy Group*
Mr James Smythe, *Chief Counsel, Workplace Relations Legal Group*

Appendix 3

Additional Information

Hearing: **Canberra, Friday, 18 February 2005**

Australian Council of Trade Unions
Table outlining key aspect of right of entry provisions in different State legislation

Department of Employment and Workplace Relations
Comparative provisions relating to right of entry clauses in awards
Additional material, Significant Matters 1998-2005

Finance Sector Union of Australia
Appendix A – Principles underpinning right of entry protocols
Appendix B – Award and agreement clauses

Australian Industry Group
Draft wording to amendments