Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submission no: 1

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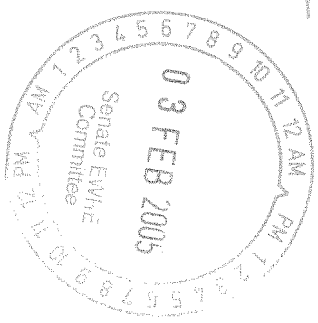
AUSTRALIA



3 February 2005

Mr John Carter
Secretary
Employment, Workplace Relations and Education Committee
Department of the Senate
Suite SG.52
Parliament House
CANBERRA ACT 2600

Dear Mr Carter

Workplace Relations Amendment (Right of Entry) Bill 2004

Thank you for your letter dated 8 December 2004.

Please find attached two copies of Master Builders Australia's submission on the *Workplace Relations Amendment (Right of Entry) Bill 2004* for your consideration.

If you require further information or an oral presentation, please do not hesitate to contact Richard Calver or myself on 6202 8888.

If oral evidence is required, would you please advise us regarding appropriate dates as soon as possible.

Yours sincerely

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Chief Executive Officer

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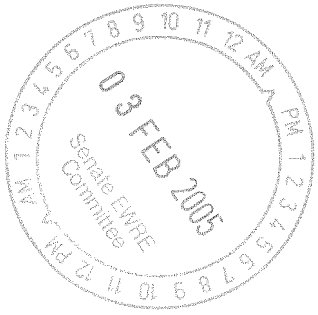

Submission
to the
Senate Employment, Workplace Relations
and
Education Committee
on the
Workplace Relations Amendment
(Right of Entry) Bill 2004

February 2005

Master Builders Australia Inc ABN 701 134 221 001

1. INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interests of all sectors of the building and construction industry. Master Builders consists of nine State and Territory builders' associations with approximately 28,000 members. The building and construction industry contributes $81 billion of economic activity annually to the Australian economy.[1]

2. THE BILL

2.1 The *Workplace Relations Amendment (Right of Entry) Bill 2004* (the Bill) has the following principal effects:

- strengthens the provisions for dealing with the issue, suspension and revocation of right of entry permits;
- imposes a 'fit and proper person' requirement for union officials seeking a right of entry permit;
- more clearly sets out the rights and obligations of union officials, employers and occupiers of premises;
- empowers the Australian Industrial Relations Commission (AIRC) to deal with abuses of the right of entry system; and
- provides that the AIRC must not certify a federal certified agreement that contains right of entry provisions.

3. PURPOSE OF THIS SUBMISSION

3.1 The building and construction industry welcomes reform of the law relating to union right of entry. We support the replacement of current Part IX of the *Workplace Relations Act 1996* (WRA) with the new Part IXA as set out in the Bill. We strongly support the creation of a more harmonised system of right of entry. We understand the intent of the proposed section 280U of the Bill. It is to use Commonwealth power in order to override State right of entry laws to the extent of constitutional power. We note, however, that State-based union rights of entry under occupational health and safety (OH&S) laws are not to

[1] ABS catalogue 8755 Construction Work Done November 2004

be affected by the Bill. We believe that this will reduce the effectiveness of the Bill – discussed in Section 7 of this submission.

3.2 This submission argues that the reforms should be as comprehensive as constitutional heads of power will allow and should, for example, extend to regulate rights of entry conferred under State OH&S laws. The Royal Commission into the Building and Construction Industry[2] (Cole Report) found that the proper regulation of entry and inspection rights exercised by unions is a matter of considerable importance in bringing about change to the workplace relations of the building and construction industry.

3.3 The overwhelming evidence presented to the Cole Royal Commission was that industrial disruption on building and construction sites followed upon union officials entering sites as a result of the exercise or purported exercise of a statutory entitlement. The Cole Report's finding was that industrial disputation was almost always the result of intervention in workplace relations by union officials. That intervention was often contrived, uninvited and unwanted by affected employees.

3.4 The Report found that entry and inspection provisions are routinely contravened in the building and construction industry. In order to restore the rule of law in the building and construction industry, entry and inspection provisions must be fundamentally reformed. With the failure of the passage of the *Building and Construction Industry Improvement Bill* (despite its promised re-introduction by the Federal Government) which contains specific provisions relating to a separate and complete system of right of entry for the building and construction industry, Master Builders fully supports the fundamental reform of the general workplace relations law relating to right of entry.

3.5 One general principle is that workplace relations legislation be applicable to all Australian employers rather than apply specifically to any one industry sector. However, the Cole Report made it plain that the building and construction industry is unique in its need for specific workplace relations reform. This has been substantiated by the Building Industry Taskforce. In its first report, entitled *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*[3], the then Interim Taskforce found that:

[2] http://www.royalcombci.gov.au/hearings/reports.asp
[3] http://www.buildingtaskforce.gov.au/Downloads/Documents/UpholdingTheLawReport.pdf

> "Approaches for reform which may be appropriate for other industries would simply fail in the building and construction industry because of the poor state of workplace relations and the pervading culture of lawlessness"[4].

3.6 Part of the unacceptable face of workplace relations in the building and construction industry is the abuse by unions of right of entry laws. It is for this reason that Master Builders supports the general strengthening of right of entry laws provided for in the Bill. The proposed reforms will assist the efficiency of the general workplace relations system, creating a harmonised system in this sensitive area. As noted in the Cole Report:

> "Statutory provisions which entitle officers and employees of unions to enter premises authorise conduct which would otherwise constitute a trespass. Because they are a statutory intrusion into the premises and business affairs of another and because of their potential to cause disruption to workplaces, the circumstances in which entry is permitted need to be precisely defined and limited to what is necessary to achieve the purpose for which entry is permitted."[5]

3.7 Master Builders supports a unitary system governing rights of entry to the workplace. The entry of building sites and inspection of records has the capacity to interfere with work in the industry to a greater extent than for other sectors. However, the problem of lack of uniformity throughout Australia and the confusion caused by a dual system is not confined to the building and construction industry. We would prefer that the building and construction reforms be rolled into highly desirable across the board reform in this subject area. This advocacy should not be construed in any sense as a rejection of the fundamentals of the *Building and Construction Industry Improvement Bill* or of the need for urgent workplace relations reform in the building and construction industry.

3.8 Before proceeding to analyse a number of the weaknesses in the current system which the Bill will largely address, we note the practical, on-ground problems implicit in the current laws which were encapsulated in a 2003 decision of a Perth magistrate.[6] This decision points to the inadequacies of the law. The media reported that on 31 March 2003 Perth Magistrate Paul Heaney criticised police for wrongly arresting three militant union officials involved in violence at a building site two years before the court hearing. The Magistrate's reported criticism of police was that they had not been trained in

[4] Id at page iv.
[5] Supra Note 1, Final Report of the Royal Commission into the Building and Construction Industry, Volume 7, page 175, para 3.
[6] Vanda Carson *Militant Union Wins Right-of Entry Case* The Australian 1 April 2003 p8

industrial relations law and did not understand the notion of the right of entry. This statement was made in the face of a conviction and fine of a mere $500 for one of the accused union officials for assaulting a policeman. The case is remarkable, and an example of what is wrong with the current system, for a number of reasons: the delay in it coming to the courts, the small fine, the unduly harsh criticism of the police and the absolute disincentive for the police to bother in future with criminal matters on building sites as well as the greyness, at least in the mind of the police, if not the magistrate, of rights of entry laws. Master Builders understands that there was no appeal against the magistrate's decision. Clarity in the law must prevail so that this sort of case becomes an historic relic.

4.0 WEAKNESSES IN CURRENT LAW – OVERLAPPING FEDERAL AND STATE SYSTEMS

4.1 The current laws regarding right of entry are confusing, especially regarding overlapping State and Federal rights. The case of *BGC Contracting v CFMEU*[7] recently highlighted difficulties with conflict between State and Federal laws. In that case, Justice French of the Federal Court held that State rights of entry remain valid where authorised representatives of State unions wish to have discussions with relevant employees (for example, employees who are eligible to become members of the relevant union) where those employees are parties to Australian Workplace Agreements (AWAs). Even though this right to hold discussions must be exercised so that employees do not breach their AWAs, this case is clear authority for the proposition that a State registered union has rights to enter a construction site under the relevant State industrial relations Act even though employees are covered by AWAs made under the WRA.

4.2 Justice French made this decision on the basis that there is no legal inconsistency between State and Federal right of entry laws. Obviously, this is a major defect which the current Bill seeks to remedy. Justice French held that there is not an intention on the part of the Commonwealth to cover the field on right of entry to the exclusion of State laws. Accordingly, unions were able to obtain entry to sites under State right of entry laws in the face of all workers on site being covered by Federal AWAs with the Federal system per se otherwise denying unions access: see decision in *ALDI Foods.*[8]

[7] (with Corrigendum dated 2 August 2004) [2004] FCA 981 (29 July 2004)
[8] PR943894 National Union of Workers v ALDI Foods Pty Ltd Full Bench, Justice Guidice, Senior Deputy President Harrison and Commissioner Cribb – 23 February 2004

4.3 It is highly inefficient and confusing for employers that State laws extend to circumstances where employees are already bound by Federal workplace agreements. If an employer had all of their employees covered by AWAs, this would not preclude a State based union gaining access to a construction site. This is poor in terms of administration and, in addition, on the face of it, contrary to the intention manifested by section 170VR of the WRA; that section stipulates that an AWA prevails over terms and conditions of employment specified in the State law to the extent of any inconsistency. Clearly, AWAs would not generally cover the subject of union rights of entry given that unions are not party to AWAs. However, it is manifestly not sensible that AWAs should be overridden by State laws in the context of the legislative intention otherwise reflected in section 170VR. There is a lack of sense in permitting dual regulation of one component of the workplace where, upon the completion of an AWA, all other elements are within one system.

4.4 Justice French also found that WA unions had the ability to enter AWA sites under the State Act to investigate suspected breaches of prescribed State laws, in particular the *Occupational, Health and Safety Act 1984 (WA).* (This power does not emanate for the OH&S Act itself). Hence, despite the Bill, the CFMEU would still have the capacity to investigate 'OH&S law' as prescribed by regulations pursuant to the definition of OH&S law as set out in proposed section 280B of the Bill. Hence, the harmonisation sought would be confounded by this element of the Bill.

4.5 The Bill must be extended to OH&S matters so that a true unitary system is created. This point is take up again in section 7 of this submission.

5.0 WEAKNESSES IN CURRENT LAW – THE PERMIT SYSTEM

5.1 As previously indicated, rights of entry need to be regulated to minimise disruption to the workplace. We indicated in paragraph 3.3 of this submission that industrial disruption on building and construction sites generally followed upon union officials entering sites. We support the provisions of the Bill strengthening the law concerning the issue, suspension and revocation of entry permits. We note that Division 2 of Schedule 1 to the Bill relates to the issue of entry permits and Division 3 relates to expiry, revocation, suspension and other issues dealing with entry permits.

5.2 It is Master Builders' policy that applications for permits under the WRA should be conditional on an organisation disclosing whether or not a person has previously had a permit revoked and on the Registrar being satisfied that the applicant is a fit and proper person to be issued with a permit, taking into account the purposes for which the permit is to be issued.[9] In that regard, we support the provisions of proposed section 280F as set out in the Bill. Section 280F(1) states that the Industrial Registrar must not issue a permit to an official unless the Industrial Registrar is satisfied that the official is a fit and proper person.

5.3 Currently, section 285A of the WRA states that a Registrar may issue to an officer or an employee of the organisation, a permit in the relevant prescribed form, but that provision does not provide any guidance as to the circumstance in which Registrars should exercise discretion to grant permits. The absence of such a discretion currently causes difficulties. The Cole Report found as follows:

> "The evidence presented to the Commission generally was that permit holders see themselves as being entitled to enter sites on demand and without notice for whatever purpose they consider appropriate."[10]

5.4 Accordingly, we believe that the criteria in section 280F(2), particularly the criterion in section 280F(2)(a), are entirely appropriate. A permit holder must have an adequate understanding of statutory and Award requirements and/or the requirements of registered certified agreements. In circumstances where that training is not available, the exercise of a power of inspection may be abused through ignorance of the law. The provisions of proposed Section 280F are in accordance with Recommendation 60 of the Cole Report which in turn takes into account Master Builders' policy.

5.5 Abuse of the permit system is facilitated by the deficiencies in the current exercise of the right of entry under section 285B of the WRA. A Full Bench of the AIRC in the *Victorian Association of Forest Industries* case[11] found that Parliament did not intend the words of section 285A and 285B to mean that there would be any obligation on a permit holder to particularise a suspected breach as a pre-condition to the exercise of the right of entry powers conferred by section 285B. This interpretation of the law aids the use of the

[9] Noted in Supra Note 2, Final Report, Volume 7, page 199, at para 103
[10] Supra Note 2, Final Report, Volume 7, page 206 at para 121
[11] PR939097 Victorian Association of Forest Industries v Construction, Forestry, Mining and Energy Union, 9 October 2003, Full Bench, Vice-President Lawler, Senior Deputy President Lacy, Commissioner Richards

power conferred by section 285B as a means to enter premises for an improper purpose, that is, for a purpose other than the express purpose for which the power is conferred under the statute. It is only common sense to ensure that if a power is to be exercised for the purpose of investigating a suspected breach of the Act, an Award, order of the AIRC or a certified agreement, then a mere suspicion should not be sufficient. In addition, without the need to particularise the suspected breach, illegitimate action is unlikely to be challenged and 'fishing expeditions' may be vindicated.

5.5 In the *Victorian Association of Forest Industries* case, the AIRC found that when a union official who holds a relevant permit exercises the right of entry for the purposes of investigating suspected breaches, the relevant official is discharging a function akin to that exercised by a public official. The Full Bench made it clear that a statutory power may only be exercised for the purposes for which it is conferred and that the exercise of a statutory power for some other purpose renders the exercise of power invalid. The Full Bench found that there was a substantial basis in the material then before the AIRC to support the contention that the use of the right of entry powers under question was for a purpose other than those for which the power under Section 285B was conferred. The Full Bench found that the exercise was for purposes that included an extraneous purpose as a substantial purpose. The Full Bench, therefore, found that there ought to be a further hearing of the matter that would determine whether the Commission should exercise its power to revoke the permit of the officials who issued the notices and the permit holders who sought to exercise their power of entry.

5.6 The complex and extended nature of the litigation revealed by the *Victorian Association of Forest Industries* case would have been solved quite simply by the sort of provision which is now proposed in Section 280P(2)(c) of the Bill. We fully support this provision as it will require that a permit holder is not authorised to enter premises under Section 280M unless, amongst other things, a relevant notice specifies the particulars of the suspected breach or breaches. This is an important reform and one which will add weight to the structure of the permit system by requiring those who exercise powers akin to those vested in Government officials to act responsibly.

6.0 WEAKNESSES IN CURRENT LAW – APPROPRIATE RESTRAINTS IN THE MANNER OF EXERCISE OF POWERS

6.1 Proposed section 280R corrects a defect in the current law. It provides that entry is not authorised unless the permit holder complies with a specific request of an occupier or affected employer. For example, section 280R(3) enables an occupier of premises to seek the permit holder to conduct interviews in a particular room or area of the premises or to take a particular route to reach a particular room or area of the premises. This is particularly important on building sites where OH&S requirements may mean that particular routes and paths to certain locations are strictly prescribed for the safety of permit holders and/or building and construction workers. Further, specification of, say, a lunch room for holding discussions or meetings is entirely appropriate. To hold meetings elsewhere on site may prove disruptive to work and, in addition, could create OH&S hazards.

6.2 The weaknesses in the current law were highlighted by a decision of the AIRC handed down in September 2004.[12] In that decision, there was a dispute between the ANZ Bank and the Financial Services Union (FSU) about conditions which ANZ wished to impose on FSU concerning proposals to interview employees at ANZ premises. The FSU wished to conduct what might be described as a 'walk-through' and to interview employees at their workstations. ANZ had expressed a preference for interviews to be conducted in an interview room. Whilst the Full Bench acknowledged that the right of entry under section 285B, in particular, of the WRA is not at large, it stated that no further conditions or limitations, other than those expressed in the WRA, could be imposed upon those exercising their statutory right of entry. The Commission stated that it was a balancing act between a number of factors that the Commission should take into account when making orders to facilitate matters if a dispute occurs about where and when interviews of employees should occur. The Commission stated that factors such as the need not to disrupt a business and privacy or health and safety considerations could conceivably lead to a range of locations for an interview being ordered.

[12] PR951766 dated 8 September 2004 ANZ Banking Group Limited v Finance Sector Union of Australia – Victoria and Tasmanian Branches Full Bench, Senior Deputy President Watson, Deputy President Hamilton, Commissioner Leuwin

6.3 Having said that, the Commission also stated that regard should be had to the needs and the statutory rights of those seeking to enter the premises and interview employees to be substantively implemented. The comments of the Full Bench lead to the implication that if employers, under the current law, seek to impose additional restrictions beyond those explicitly provided for in Part IX of the Act, they must have strong grounds to do so. The Commission may make orders about the manner in which interviews may take place, but will only do so where the factors referred to weigh in favour of establishing those conditions. The decision stands as authority for the proposition that unions have a right to conduct a 'walk-through' of premises at least in the context of the sort of employment experienced at the ANZ. Such a right exercised on a building site could lead to chaos and the creation of OH&S hazards. Accordingly, the manner in which the Bill deals with this problem is both reasonable and expressed in a manner that will correct the current defect in the law.

7.0 EXTENSION OF THE BILL TO ENCOMPASS PERMITS TO ENTER UNDER OCCUPATIONAL HEALTH AND SAFEY LAW

7.1 Master Builders believes that the proposed permit system should be extended to regulate rights of entry under OH&S law. In the face of an assertion by an official of the CFMEU that the union's presence on building sites was essential in ensuring compliance with OH&S legislation, the following was the response from the Cole Report:

> "The evidence was, however, that all too often union officials, and in particular organisers employed by the CFMEU in its Construction General Division, NSW Divisional Branch, manufacture or exaggerate safety issues in order to pursue industrial objectives such as increased union membership or the penetration throughout the industry of union endorsed EBAS. Occupational health and safety is simply too important an issue to be abused in this way."[13]

7.2 Master Builders proposes that if OH&S is stipulated as a ground for entry to premises, then an appropriate permit should be held by the official or employee of the union with the disciplines created in particular by proposed section 280F of the Bill applied to the relevant permit holder. In addition, the employer should be notified that the union is entering the premises (which may be an immediate entry given the gravity of an alleged safety issue). However, a permit holder should then be required to justify intervention on a

[13] Supra Note 2 Volume 7, page 189, para 69

building site on the basis of the alleged OH&S issue and should not be permitted to pursue other union aims, particularly industrial relations objectives, once on site after having gained entry by falsely alleging an OH&S concern. Removing OH&S right of entry laws from the Bill will create difficulties as, particularly in NSW, WA, ACT and Victoria, unions are given comprehensive rights to enter workplaces based upon their role in OH&S. The strength of the Bill will be diluted as spurious OH&S concerns become elevated and abused, such abuse was clearly identified in the Cole Report. Further, the extension of the permit system should only be applicable where State and Territory Governments have currently seen fit to provide for union rights of entry based upon OH&S grounds. To be clear, Master Builders is not arguing for an extension of current rights of entry based upon OH&S considerations.

7.3 It is not our intention to denigrate the role of unions in OH&S. It is also not our intention to label all of their interventions as an abuse of power. However, in too many instances, alleged OH&S disputes become elevated into industrial disputes or are used as a mask for the application of different agendas. Master Builders has a commitment to improve the OH&S of the building and construction industry and has committed to the National Occupational Health and Safety Commission's national OH&S strategy. We simply believe that if the Federal Government is establishing a permit system for the regulation of right of entry into workplaces, including building sites, then permits must be issued to officials for the purpose of entering premises to deal with OH&S matters. A notice to that effect could be given to the employer and rights of entry in this regard could become subject to the same sanctions as are proposed in the Bill for abuses of the system where industrial relations matters are invoked (see, for example, proposed section 281F re contravention of civil penalty provisions). This would assist to eliminate confusion between State and Federal right of entry systems and would ameliorate abuses under the system.

8.0 CONCLUSION

8.1 Master Builders Australia supports the Bill.

8.2 The Bill's objectives will be enhanced if the revised permit system is extended to rights of entry based upon OH&S grounds.