Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

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Submitter: Employment & Industrial Law Committee

Organisation: NSW Young Lawyers

Address: Level 6, 170 Phillip Street
SYDNEY NSW 2000

Phone: 02 9926 0269

Fax: 02 9926 0282

Email: ptd@lawsocnsw.asn.au

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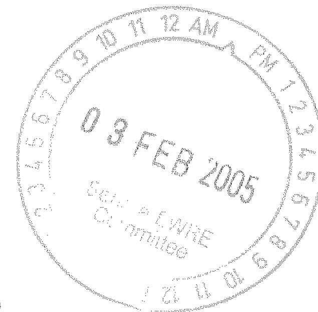

EMPLOYMENT & INDUSTRIAL LAW COMMITTEE

Submissions on the Workplace Relations Amendment (Right of Entry) Bill 2004

SECTION 280B – ADDITIONAL DEFINITIONS

Industrial law - sections 280B, 280F, 280U, 281D

The terms *"industrial law"* or *"industrial laws"* are used in the Bill to
- define the objects of the new Part IXA (280A);
- define a what is meant by "State industrial law" (280B);
- determine whether a permit may be issued (280F(2)(b)); and
- define what other rights of entry are excluded by Part IXA (280U and 281D);

however neither term is defined in the Bill nor is there an applicable definition in the Workplace Relations Act 1996 (Cth) (**WRA**).

In our view, the Bill should include a definition of *"industrial law"* for the purposes of the new Part IXA so that no ambiguity exists. Section 298B(1) of the WRA contains the following definition of *"industrial law"* in Part XA Freedom of Association:

> *"**industrial law** means this Act, the Registration and Accountability of Organisations Schedule or a law, however designated, of the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees."*

The Committee suggests section 280B should be amended to include this definition in Part IXA.

Working hours - sections 280M and 280N

Section 280M provides that a permit holder may enter premises during *"working hours"*. Section 280N sets out the rights of permit holders after entering premises during *"working hours"*. The Committee recognises that these sections use the same wording as section 285B, which the Bill will repeal, but considers Parliament should take this opportunity to clarify what constitutes *"working hours"* for the purposes of exercising a right of entry under the Part IXA.

The Federal Court has defined working hours under section 285B as times when the premises are open for work and ordinarily occupied for that purpose. For the purpose of investigating breaches, entry is not limited to those hours during which the relevant employees are actually working: *Australasian Meat Industry Employees' Union v*

Australian Food Corp Pty Ltd (2001) 116 FCR 19 at [68]–[69], [76]–[80] and [95]–[100].

The Committee suggests consideration be given to adopting the Federal Court's definition in section 280B in the following form:

> *"**working hours** means times when the premises are open for work and ordinarily occupied for that purpose".*

SECTION 280N – ACCESS TO NON-MEMBER RECORDS

The proposed section 280N recognises the role of permit-holders in investigating suspected breaches in the workplace. It specifically provides (at subsections (2) and (4)) for holders of a right of entry permit to exercise particular rights during working hours. These include:

- inspecting machinery or materials;
- interviewing employees who are eligible to be members of the permit holder's union; and
- accessing limited records relevant to the suspected breach.

The Bill proposes that permit holders not have access to non-member records without an order from the Commission. The apparent rationale for this is that unions are member service organisations and therefore, the Government contends, ought to be limited in their access to information other than that concerning its members.

Government regulatory bodies, however, have finite resources to devote to the enforcement of legislation, and this is certainly true of the workplace relations field. Legislation has long recognised that other parties have a legitimate role in ensuring that conduct in the workplace is appropriate – whether this is in relation to underpayment of wages, workplace safety, or other issues. Indeed, the system of 'right of entry permits' preserves this.

However, the restriction of access to non-member records may serve to delay establishing the true extent of suspected breaches in the workplace, by adding the additional hurdle of applying to the Commission for access to these records.

Numerous cases have highlighted that it is often non-members who suffer detriment by not receiving their proper entitlements. Preventing access to their wages records will not serve to remedy any detriment suffered by these employees. This is particularly so where the government's inspectorate has insufficient resources in its own right to widely enforce compliance.

If there are concerns in respect of the privacy of non-members' records, a number of safeguards can be put in place to protect this, such as limiting access to personal details such as names and addresses, without defeating the purpose of ascertaining the particulars of suspected breaches.

If the object of the section is to prevent frivolous and vexatious use of right of entry powers, then the requirement to apply to the Australian Industrial Relations

Commission before examining non-members records, ought to be qualified by the insertion of a provision in subsection (10) to the effect that:

> *"The Commission is required to grant such applications unless it considers them to be frivolous or vexatious."*

SECTIONS 280N AND 280R - INTERVIEWS

The Committee recognises that section 280N, which provides that permit holder may interview specified persons about suspected breaches of industrial law etc, essentially repeats the current section 285(3(c). However it is not clear how the right to conduct interviews will be exercised in light of the restrictions that may now be placed on the conduct of permit holders under section 280R.

The Committee supports the obligation placed on permit holders to comply with reasonable requests made by the occupier of the premises, however it seems inevitable that the following issues will arise in relation to the permit holders right to conduct interviews:

- what steps may the permit holder take to identify employees for interviews under section 280N;
- what restrictions will it be reasonable for the affected employer to place on those steps.

The Committee suggests that consideration be given to whether guidance on this issue should be given in either the Bill or in further regulations.

SECTIONS 280P AND 280Z

Sections 280P and 280Z require a permit holder to give an entry notice to the occupier of the premises at least 24 hours, but not more than 14 days, before the entry.

Issues have arisen in relation to section 285D's current requirement of at least 24 hour's notice, which the Bill will replace. For example, notice given on a public holiday when the premises have not been operating may result in the occupier effectively having no notice of the union's intention to enter the premises under the WRA. The Bill in its current form does not address this issue.

The Committee suggests that sections 280P and 280Z be amended to include the words *"during working hours"* so each subsection reads:

> *"(a) the permit holder gave the entry notice to the occupier of the premises **during working hours** at least 24 hours, but not more than 14 days, before the entry".*

The Committee also suggests that Parliament take the opportunity to clarify what constitutes giving notice to the occupier of the premises.

SECTION 280V

Section 280V provides that the burden of the existence of reasonable grounds for suspecting a breach of industrial laws etc mentioned in section 280M lies *"on the person asserting the existence of those grounds"*.

The person in sections 280M and 280V who must have reasonable grounds for suspecting a breach is the permit holder. In our view the burden of proving the existence of those grounds should therefore rest on the permit holder, and only the permit holder. It is not clear from the current drafting of section 280M that it does.

The Committee suggests the words *"on the person asserting the existence of those grounds"* be deleted and replaced with *"the permit holder"* so the subsection reads:

> *"Whenever it is relevant to determine whether a permit holder had reasonable grounds for suspecting a breach, as mentioned in section 280M, the burden of proving the existence of reasonable grounds lies on* ***the permit holder****."*