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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Senate Employment, Workplace Relations and Education Committee

Senate Inquiry into the Workplace Relations Amendment (Right of Entry) Bill 2004

1. The Transport Workers' Union of Australia ("the TWU") has approximately 82,000 members. The TWU's members are predominantly employed in road transport although there are a significant number of employees in air transport and persons who are, at law, not employees but contractors who nevertheless work in the road transport industry.

2. The TWU strongly opposes the Workplace Relations Amendment (Right of Entry) Bill 2004 ("the Bill") and seeks that the Committee reject the Bill in its entirety.

3. The Bill represents a further attempt by the Government to unfairly intervene in industrial relations at the workplace in favour of the employer at the expense of the employee.

4. The Government has chosen an ideological and combatative approach to dealing with a perceived problem rather than a constructive and consultative approach. The decision to be a combatant in workplace relations rather than the impartial legislator has meant that the Government is likely to be in breach of international obligations.

5. The Bill's approach sits uncomfortably with the Liberal Party's professed preference for people exercising choice (see for example the speech of the Prime Minister to the National Press Club on October 7 2004).

6. It is worth recalling the comments of the then Minister for Workplace Relations when introducing the Workplace Relations Bill in 1996 as part of the Second Reading Speech. The Minister, Mr Reith, stated

> *Our legislation puts the emphasis on direct workplace relationships, and on the mutual interest of employer and employee in the success and prosperity of the enterprise. The bill promotes a legislative framework, without unnecessary complexity or unwanted third party intervention...*

7. The Bill makes the exercise of an employee's right to choose, freely, whether they wish to belong to a union or not more difficult. The Bill provides the employer, contrary to freedom of association principles, with the capacity to determine where, when and what basis an employee can consult with their union representatives. The effect of the Bill is a constrained choice model, where constraints are placed upon the employee's capacity to choose.[1]

8. The Bill provides to the employer the power to dictate the circumstances within which an employee has the right to consult, discuss or investigate union representation subject to a test of unreasonableness. By limiting access in this way the Government prevents a legitimate exercise of choice, placing employees in an invidious position of having to exercise their choice subject to the whims of the employer.

9. It is not enough to suggest, as the Government has, that unions are in a "privileged" position in society. After all right of entry provisions have been in existence for many decades in the transport industry and elsewhere with relatively few problems being raised. There must be a good case for change of the existing system or else the policy is not being pursued as reform but for ideological reasons. The TWU submits that the evidence relied upon by the Government is weak and actually demonstrates that the Commission has supervised the rights of unions effectively.

10. These submissions will deal with four main issues:

    (a) conditions imposed upon the exercise of a right of entry permit;
    (b) requirements imposed upon the location for discussions to take place;
    (c) the attempt to override State right of entry regimes;
    (d) the prohibition on the inclusion of right of entry clauses in certified agreements.

11. Lest it be thought that the TWU does not oppose other aspects of the Bill, the TWU indicates that it is opposed to the Bill in its entirety and urges its rejection by the Senate.

Conditions imposed upon the exercise of a right of entry permit

12. The Bill proposes to require that:

[1] See for example the *ILO Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*

a) entry rights only be available where there are reasonable grounds for suspecting a breach and where the alleged breach relates to or affects the work of a union member;

b) an entry notice in a prescribed form to be provided to the employer prior to the date of entry and limits entry for recruitment purposes to once every six months.

13. It is difficult to see the justification for these requirements other than as designed to inhibit union activities and rights. There has been no genuine suggestion that the existing right of entry regime is flouted by union officials and certainly not in the transport industry.

14. Indeed over the life of the Howard Government the TWU has not had a single instance of an application to revoke a right of entry permit.

15. In any case it is difficult to see the legislation restricting union right of entry provisions as being other than an interference in the industral system.

16. The decision of the Government to remove rights of entry from awards by the introduction of allowable award matters in 1996 remains contrary to the basis upon which the award system operates. It established an artificial constraint which prevents unions from having their rights determined by an *independent* third party through arbitrated awards.

17. It is important to remember what awards are. They are legal documents binding upon a union, and an employer in part settlement of an industrial dispute. The industrial dispute exists between the union and the employer and sets up the *minimum* wage system which exists in Australia.

18. Unions are principals to the existence of the dispute in their own right. The dispute and the minimum wage system are established through the actions of the union. It is the union movement which ensures that minimum terms and conditions of employment are maintained.

19. In this context, where a further obstacle is introduced preventing unions from accessing the workplace it cannot be inferred other than that minimum standards will be less readily enforced.

20. Given the existence in the award system and in Australian constitutional law that members of unions have a legitimate interest in the maintenance of their terms and conditions and also the maintenance of the terms and conditions of non-members who are employed in competitor companies, the attempt to exclude unions from the workplace, or impose rigorous entry provisions is, we submit, an attack on the rights of union members and non-members alike in their capacity to believe that wages and conditions are meeting the minimum standards.

21. The changes sought to be imposed by the Bill are to create greater barriers to unions exercising their rights to visit the workplace and ensure that minimum terms and conditions are being met.

22. There are, already, extensive obligations imposed upon unions when exercising right of entry permits and the powers which exist in the system. These obligations, we submit, have been shown to be workable and appropriate. The restrictions upon unions are in our view presently excessive and to worsen them can only be assumed to be because of ideological reasons.

23. The added introduction of a requirement imposed upon the union to demonstrate the nature of the suspected breach to the satsifaction of the employer is inappropriate. It ought be remembered that the union is enforcing its own terms and conditions when investigating suspected breaches. The union has an independent role, quite separate from its membership.

24. Corporations, for example, act independently from their shareholders. They, like unions, are expected to act in their best interests of shareholders (members) but within that general principle they have a separate existence. Unions also have a separate existence but with the same obligations to act in their members best interests.

25. One part of that existence is and ought be, the mainteance of the award safety net for all workers covered by the union's award(s).

26. The decision of the Government to itself determine the rights and obligations imposed upon a union and removing much of the discretion which was formerly reposed in the Australian Industrial Relations Commission ("the Commission") is, we submit, unnecessary and unjust.

Locations where discussions are to take place

27. The Bill would require that persons exercising their right of entry are to conduct interviews in a particular room or area and take a particular route to reach the room or area. In the event that there is a dispute on the basis that either the room or route is unreasonable, the Commission has the capacity to resolve the dispute.

28. The Bill appears to be designed to overcome what are perceived to be problems arising from the decision of the Full Bench in *ANZ v FSU*.[2]

29. Unfortunately, like most other aspects of the Bill, the legislation involves the use of a sledgehammer to crack a non-existent nut. The Commission currently has the discretion to deal with these matters and has done so on numerous occasions. The fact that the ANZ and the Commonwealth dislike the decision in the aforementioned case ought not be a reason to reverse the existing law.

30. Nonetheless what appears to have happened is the insertion by the Government of a different standard and one which favours the employer. The test now appears to be less based upon what an independent person sees as fair and reasonable but rather what the employer sees as reasonable.

31. The Senate should not allow legislation to be enacted based upon the pretence that employers are studiously neutral to unionism and the rights of employees to join or participate in the activities of unions. Employers can and do have conscious strategies to de-unionise the workforce and to make the activities of unions illegitimate. Such policies can include activities which might lead to making a particular room or route, on its face, reasonable but contextually unreasonable.

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[2] PR951766

32. The suggestion that union officials will be required to use a particular room, or a particular route may superficially seem reasonable but in practical terms show the employees how unwelcome the union is at the workplace.

33. The approach of the Government is similar to that suggested by Anatole France who wrote

> *The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.*

Decision to override State rights of entry regimes

34. The Government's approach to Federal-State relations, and the attempt to remove from State Governments their capacity to use their plenary power to regulate right of entry regimes within their States is unnecessary and inappropriate.

35. This submission does not seek to deal with the constitutional aspects relating to the capacity of the Commonwealth to rely upon the Corporations power (s51(xx)) other than to note that there must be questions as to the:

a) extent of the power to regulate all aspects of a corporation; and/or

b) the fact that such regulations cannot cover the entire Australian workforce but only those employed by corporations.

36. However the Bill again emphasises the willingness of the Government to pursue ideological outcomes at the expense fair-minded policy outcomes.

37. For example, when the Government introduced the *Workplace Relations Act* it included section 111AAA to allow State agreements or awards to override Commonwealth awards.

38. This policy appeared to have been based upon the combination of allowing employers and employees to choose their method of regulation *and* an acceptance that State regulation of industrial relations is appropriate.

39. The current policy as embodied in the Bill denies this. State Governments are not to be trusted in their capacity to prepare and develop legislation dealing with rights of entry.

40. Perhaps the rationale behind the difference in approaches to the Workplace Relations Act and the Bill is that in 1996 there were State Governments pursuing policies which had at their heart non-union or anti-union agendas while in 2004 no such State Governments are in existence.

41. If the Government was truly interested in developing national regulation for the purposes of providing businesses only with a single form of regulation rather than possibly competing systems, it would not be necessary to pursue the lowest form of regulation. The approach in the Bill can only be considered as an attempt to pursue the lowest standard rather than the fairest or even the best.

42. It is, as we have already noted, a fundamental aspect of the award system that unions are party principals to the dispute. This is as much true at the State level as it is at the Federal level. The impact of the Government's legislative program as embodied by the Bill is to deny unions and workers covered by State awards of rights that exist currently to ensure that minimum standards are met in the State jurisdictions.

43. The removal of the capacity of unions to attend workplaces governed by State awards other than in accordance with the Federal legislation is an unjustified limitation on the rights of unions and the rights of State Governments.

44. The attempt to suggest that this is as a result of competing right of entry jurisdictions, for example, in relation to the decision of the Federal Court in *BGC Contracting v CFMEU*[3] is of course a nonsense when the facts of the case are analysed (as they were by Justice French).

45. Ultimately the issue is whether, in the event there are State jurisdictions of industrial law, State right of entry regimes are appropriate. It seems to us that there is only one answer in these circumstances. If State jurisdictions exist then State right of entry laws must be a legitimate and logical outcome.

[3] [2004] FCA 981

The removal of right of entry clauses from certified agreements

46. The approach of the Government to remove from the parties *their right* to include right of entry provisions in *their industrial instruments* stands in stark contrast to all of the rhetoric the Government has espoused for the past decade.

47. The rhetorical approach of the Government is to provide the parties to the industrial relationship with the means to determine their own relationship on the basis that they see fit. For example the then Minister Peter Reith in the Second Reading Speech introducing the Workplace Relations Bill stated (at page 1300) that

> *The bill does not discriminate in favour of one form of agreement over another...These are matters for decision by employers and employees, according to their own circumstances and their own perception of how their interests are best served*

48. It is for the parties at the workplace, not unwanted third parties such as the Commonwealth Government, to determine the nature of the industrial relationship.

49. By contrast, the philosophical basis underpinning this aspect of the Bill is that the parties cannot be trusted to make agreements in their own interests. The parties are, seemingly, unable to know where their interests lie and the nanny state in the shape of the Government must intervene to provide an outcome.

50. Remarkably the Government has not introduced legislation which would have the impact of removing the right to refuse entry under other industrial instruments.

51. It has been held, for example, that if all workers are engaged under AWAs an employer has the right to refuse entry. If the legislation was fair-minded it would, appropriately, regulate that entry applied in all circumstances regardless of the form of instrument which applied at the workplace.

52. Regrettably the legislation does not do so, instead operating on the paternalistic notion that the Government should decide what the parties should agree on in relation to

certified agreements, but workplaces with AWAs do have the capacity to determine for themselves what form of regulation will apply.

53. If choice is to mean anything it should mean freedom of choice. Choice is not genuine when the parameters of choice are established at the whim of the Government.

54. The establishment of limitations on the choice of parties as to what to include in their agreements is illogical and contrary to good policy. It represents the triumph of ideology over good policy.