

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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Introduction

The Finance Sector Union of Australia (FSU) welcomes the opportunity to contribute to the Inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004.

The FSU represents 60,000 members employed in the finance sector across Australia and exists for the purposes of providing a collective forum for them in pursuing fairness in their employment and improvements to their working conditions. Clearly, to achieve these ends, the FSU has a real interest in the right of entry issue.

The FSU submits that the Government has not made a compelling case to change the current right of entry provisions in the heavy handed, unbalanced way that proposed Bill seeks.

The power exercised by employers under the current regime severely limits finance sector employees' freedom of association, their right to collectively bargain and their right to privacy or confidentiality about their association.

Contrary to the stated purpose of the Bill, the FSU submits that the likely outcome of the proposed legislation will be to further concentrate power in the hands of already powerful employers, exacerbating the current power imbalance and increasing their capacity to act unlawfully with impunity.

Our submission will discuss the following issues:

1. the effects that the proposed legislation would have on the rights of finance sector employees to belong to and have freedom to access effective representation through their union; and
2. the restrictions already imposed on FSU's right of entry by employers under the current system.

The FSU opposes the Bill and urges the Committee to recommend that it be rejected by the Parliament.

Background

Modern workplaces, particularly in the finance sector, are characterised by considerable power imbalances between employers and employees. Major employers in our industry are large corporate entities with considerable economic, legal and human resources at their disposal.

Most finance sector employees are on low wages with limited job security and consequently very little workplace bargaining power as individuals when compared to employers such as banks and insurance companies.

The FSU is fundamental in helping to address this power imbalance by providing a collective forum for employees. Through this collective employees are able to negotiate, and be party to, awards and agreements that protect their conditions at work. However, without mechanisms for enforcement these protections are meaningless.

The purpose of FSU officials seeking to enter workplaces is therefore self evident. It is to assist and encourage employees, both in ensuring enforcement of the conditions gained through legitimate bargaining, educating employees about their rights, engaging in a dialogue with employees that enhances the relevance and benefits of industrial agreements and promoting the genuine benefits of being part of a collective.

Many employees who join the FSU do so primarily as a form of insurance for their employment and because they recognise the power imbalance inherent in the employment relationship. In recognition of this imbalance, most union members want access to paid union officials, not just for their expertise, but because they are not subject to the constraints of the employer-employee power relationship.

FSU members consistently call for greater visibility of union officials in their workplace. It is the one constant issue that members raise in respect to their views on the performance of unions. The reasons they want to see the union official in the workplace is for the purposes of providing information, promoting unionism to non-members and involving members in union decision making.

FSU is determined to be democratic and participative. The proposed Bill would undermine our capacity to achieve this goal.

The FSU believes the proposed Bill fundamentally undermines a number of key rights of workers.

1. The right for unions to properly investigate suspected breaches of awards, agreements and other legislative protections without breaching the confidentiality of sources; and
2. Freedom of association, the right of trade 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 reprisals.

The proposed measures in the Bill will severely limit the powers available to unions to investigate suspected breaches of awards and agreements – as a result it will be extremely difficult for FSU to properly fulfil our role as a party to awards and agreements, and unreasonably constrain one of the last effective mechanism for ensuring compliance with the *Workplace Relations Act 1996* (the Act).

It should be noted that various breaches of awards and agreements by finance sector employers have been identified over the years, however, the proposed legislation will make it more likely these will not be reported and not be investigated.

It is generally a characteristic of law breakers to seek to cover up their illegal activities. Not only will the Bill curtail FSU's capacity to investigate and report breaches of industrial law, it could be distorted to conceal such breaches.

Regulatory frameworks should aim to protect and promote the public good, and encourage good corporate behaviour – the FSU submits that the proposed Bill will achieve none of these outcomes. Downgrading the investigative powers available to unions will place more employees at higher risk and ensure that corporations who disregard the law will do so with less risk of being caught.

Employers sight specious reasons for the need to restrict union officials' right of entry into the workplace. Since the FSU first employed paid union officials in the early 1970's, all of whom came from the finance industry, there has never been a breach of customer privacy or confidentiality.

Further, FSU officials seek to arrange local protocols that take into consideration the needs of the business and the employees. In many instances local management recognise the benefit of co-operative relationships with the union, the professionalism of the permit holder and respect the rights of employees to discuss issues with union officials privately, collectively or anonymously. These progressive local managers respect their employees' freedom of association.

It is the experience of the FSU that frustrating union right of entry to workplaces is used as a strategic tactic by employers. Local arrangements that have been honoured by both parties in a spirit of co-operation have been dramatically changed during such times as bargaining periods. Often the changes are a result of instruction being received from head office areas, generally from those representing the employer in negotiations.

The strategy being adopted is to seek to deny employees access to critical information about matters of great importance to them. This amounts to a severe limitation on the effectiveness of collective bargaining. This process has been repeatedly attempted by employers under the current regime. The proposed Bill will only further empower employers to strategically deny employees their rights to freedom of association and to effectively bargain collectively.

Prohibiting the AIRC from certifying agreements containing right of entry provisions 170LU(2B)

The proposed section will prohibit the AIRC from certifying any agreements that contain right of entry provisions. The FSU does not believe this is consistent with the objects of the Act which purportedly aim to support cooperative workplace relations and give employers and employees the primary responsibility for determining matters affecting their relationship.¹

Subsequent to the *Electrolux* case it was held that agreements containing right of entry provisions are capable of being certified as they do pertain to the employment relationship. The proposed section prohibits right of entry provisions in certified agreements even in circumstances where employers and employees agree. The FSU does not believe this can be viewed as enhancing cooperation and flexibility as envisaged under the Act.

Such a provision will take away a fundamental right of employees covered by a collective agreement and serve to undermine enforcement of each provision of the agreement.

280F Permit not to be issued in certain cases

There is no evidence to suggest that introduction of a 'fit and proper person' test is necessary to improve the current right of entry regime. The more likely outcome of such a provision would be an increase in bureaucratic procedures and workload for the Registrar with no resulting gain for all stakeholders. There is no 'problem' that the proposed section 280F would solve.

The FSU's current procedures for ensuring permit holders comply with the requirements includes general training about the rights and obligations of permit

¹ Specifically sections 3(b), (c) and (e).

holders and staff updates regarding any relevant Commission decisions or changes to the relevant legislation.

The FSU has never had any of its permits revoked and has never been the subject of an application to have a permit revoked.

280J Orders by Commission for abuse of system

The powers proposed under this section are far reaching and unnecessary. Proposed section 280J(3) would allow for an entire union's permits to be revoked – this 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 across the finance sector.

The current legislation allows for a person's permit to be cancelled if they have behaved improperly and requires this to be considered in any subsequent applications for a permit by this person (section 285A(3&6)). This power was used by the Registrar on seven occasions during the 2003-04 financial year² and there is nothing to suggest this power has been inadequate in addressing any abuse of the current right of entry system.

280M Right of entry to investigate breach

This proposed provision stipulates that entry can only take place if there are union members on the premises. This will require unions to identify their individual members in a particular workplace before being able to gain entry to investigate a breach. 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.

280N Rights of permit holder after entering premises

The proposed process for gaining access to records of non-union members will make it extremely difficult to ever prove breaches such as pay inequity or procedural fairness in relation to termination of employment for these workers. Unions do investigate on behalf of non-union members, as these workers normally have no other recourse. The requirement to obtain a Commission order before access to records can be obtained will be yet another impediment to non-members having their concerns investigated.

280P Limitation on rights—entry notice or exemption certificate

The proposed requirement that unions must have 'reasonable grounds' and specify the particulars of a suspected breach before being granted entry is a significant change to the right of entry regime and unnecessarily onerous. Often employees request the FSU

² Annual Report of the Australian Industrial registry 2003-04 p110.

to investigate breaches on the premise that their employer will not be given any reason to deduce that the union investigation was due to an approach from a particular employee in that workplace. The particulars of a suspected breach would probably allow the union's source to be identified, which may result in reprisals against the particular employee who blew the whistle.

Conceivably, an unfortunate consequence of such a change could be to allow employers the opportunity to 'cover their tracks' through the removal or destruction of relevant items and/or the intimidation and silencing of employees. Police may require warrants, but they don't send them to suspected criminals 24 hours before conducting searches.

Under current and previous legislation the FSU has succeeded in gaining positive outcomes for numerous staff after suspected breaches were identified based on verbal advice from union members or from feedback received during right of entry visits (See [appendix A](#)). Under the proposed new restrictions the access needed to achieve these outcomes would probably never have been granted and numerous finance sector workers would have been left underpaid and without permanent positions.

280R & 281B Limitation on rights—failure to comply with requests of occupier or affected employer

The proposed guidelines about 'reasonable requests' regarding the route taken to an interview, and the location for that interview, reverses the onus of proof from the current regime. The draft provisions are also aimed at undermining the recent AIRC decision in favour of the FSU (AIRC PR951766).

Under the proposed requirements employers could block union access by simply imposing unreasonable conditions on each occasion and thereby compel the union to initiate action in the Commission in every case. It would also result in a waste of the Commission's resources. This further frustrates the capacity of union officials to inspect breaches as timeliness is often important.

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 the bank premises at 530 Collins Street due to disputes about the location of interviews (See [appendix B](#) for a chronology of the dispute). In that case ANZ had conceded the existence of numerous breaches. It should be noted that these breaches were identified in a *single* workplace.

By the time FSU had gained access, staff turnover meant that more than one third of those employees being underpaid had moved on. Under the current regime this need not be repeated, however, the proposed legislation will provide an ongoing mechanism that could be used to frustrate legitimate union access and potentially facilitate breaches of the law, awards and agreements.

The FSU had a protracted dispute with ANZ regarding the location for interviews. The evidence of Mr John Wilson (FSU Victorian/Tasmanian Branch Secretary) was that the ANZ proposal was designed to minimize the number of employees who would see an FSU official by mandating a room that was most discouraging for employees who were considering attending. As a result FSU representatives would often sit in rooms seeing two or three employees out of the hundreds employed in the building, however, the FSU would subsequently receive 'covert' phone calls from

people who would like to have attended an interview but did not. The discouragement is psychological, apparent and actual. People are already afraid to exercise their legitimate right to belong and take advantage of their union membership by contacting the FSU for fear of reprisals.

The proposed provisions will be open to abuse. Under the current regime ANZ argued that 'inviting people to an interview' was not part of the right to interview. If that were upheld, there would be no right to invite people to an interview and the power would be inoperable by effectively restricting union officials to being placed in a room to wait for employees to volunteer to come and be interviewed.

In work environments such as call centres the problems for employees accessing their union under such arrangements are further magnified. Call centre employees work under intense supervision – call monitoring, calls timed, call targets, requiring permission to log off to go to the toilet, having restrictions on the number of toilet breaks allowed etc.

In such an environment the Bill would make it a practical impossibility for an employee to see a union official. They would first have to disclose to their direct supervisor their intention (and in all likelihood, the issue they wish to discuss with the union). If permission is granted by the Supervisor (and our experience is that this is not always forthcoming – particularly if the issue is something the Supervisor feels threatened by) the employee must then log off, stand up, walk the required route (likely to be past the offices of management) to see the official. This procedure would impose such a level of intimidation to an individual that no one would exercise their right.

The process proposed in the Bill fails to understand the realities of the workplace and would deprive employees of both their rights to freedom of association and confidentiality.

280V Burden of proving reasonable grounds for suspecting breach

In conjunction with sections 280M and 280P, the proposed burden of proof in 280V will require unions to show evidence of a breach before being granted access to gather evidence of a breach – this leads to a circular situation that would effectively negate the 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. 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. This would further reduce the capacity of unions to investigate suspected breaches, and employees would be further disadvantaged.

280Z Limitation on rights—entry notice

There is no evidence of repeated entry to workplaces resulting in non-members "suffering unfair pressure and harassment" as alleged by the Minister in his Second Reading Speech. In fact the proposed provision may *increase* the likelihood of people

being pressured. If recruitment visits are restricted to once every six months then union organisers will be obliged to exert maximum persuasion on that one occasion.

Many workplaces covered by the FSU have part-time employees and shift workers, consequently it is almost impossible to see all employees in any one visit. Staff turnover in some areas also exceeds 30%, consequently many workers (especially casuals) may never see a union official if recruitment visits are restricted to six monthly intervals.

In addition there are some workplaces that employ over 500 staff in one location which makes it logistically prohibitive to see all employees in one visit. Restricting recruitment visits to every 6 months will simply ensure that a large number of employees will never see a union organiser.

Research into public attitudes towards unions reveals an understanding and sympathy for their role. In a survey conducted for the NSW Trades and Labour Council, 19% of people who were not union members said the reason they were not was because they had never been asked.³

In focus groups of union members conducted by FSU, there is a clear understanding expressed by members that non-members would join if they understood the benefits of being a member. But members do not believe it is their role to recruit non-members, it must be done by paid officials.⁴

On the basis of these findings, the Bill's restrictive approach is a denial of people's freedom of association.

Furthermore, it is the experience of FSU that a familiarity often needs to be developed between individuals and organisations before relationships are formalised. This is no different to many things in life like marriage, friendships, joining a political party or determining a voting preference. It often requires frequent interaction. The proposed Bill is clearly designed to limit the capacity for such familiarity to be developed and to therefore limit the capacity of unions to recruit.

It is unclear whether an organiser can hand out membership forms while having discussions without recruitment as a purpose. Everything a union official does can lead to people joining their union – will this mean that every conversation is for the purpose of 'recruitment'?

In summary

The FSU sees no merit in the proposed amendment. It will neither promote good industrial relations practice in our industry, nor ensure employees rights.

The FSU submits that at best the Bill will simply exacerbate the power imbalance that exists in favour of employers in our industry and at worst is no more than a barracking document for employers' perceived, short term interests.

The FSU opposes the Bill and urges the Committee to recommend that it be rejected by the Parliament.

³ State of the Union Survey, January-February 2004. Conducted for New South Wales Labour Council by Essential Research Pty Ltd.

⁴ NAB members focus groups, December 2004. Conducted for Finance Sector Union of Australia by Essential Research Pty Ltd.

Appendix A

Successful outcomes achieved for finance sector workers by FSU using the current right of entry provisions

Right of entry visits were conducted at ANZ Mortgage Operations centre at 530 Collins St, Melbourne.

Since the visits FSU has achieved the following outcomes:

- ANZ concede that agency casuals will, from January 2005, be paid penalty rates for weekends (Agencies stopped paying this in October 2003);
- ANZ concede that people are entitled to meal allowance regardless of whether they get 24 hours notice of the requirement to work overtime;
- ANZ now provide a comprehensive menu for staff meals during overtime (previously only pizza was provided, which many staff considered inadequate); and
- More than 30 temporary staff were offered permanent positions.

Appendix B

CHRONOLOGY OF ENTRY DISPUTE BETWEEN THE ANZ AND THE FSU

In response to the stated intention of the FSU and its officers to enter and inspect suspected award and EBA breaches in May 2003, the ANZ purported to implement a series of protocols asserted by it to give effect to both its and the Union's rights and obligations. Set out below is relevant chronology of the Right of Entry dispute.

- (1) Access to employees in Retail Branches has not been the subject of controversy. ANZ has allowed Organisers to visit bank branches and talk to employees at their workstation unhindered provided reasonable notice is given. Until late 2001, ANZ operated according to their policy as issued in July 1999.
- (2) Access to "centralised sites" traditionally included access to employees at their work-stations. ANZ commenced to restrict this access after the 2001 EBA campaign stoppages.
- (3) Shortly thereafter, in January 2002, ANZ issued the first version of their "Right of Entry – Manager Guidelines" (the "first protocol").
- (4) On the 12th June 2003 the Union notified the ANZ of its intention to enter the premises, inter alia, to inspect records relating to suspected award and agreement underpayments on the 16th June 2003. The suspected breaches related to underpayment of wages and overtime and related allowances under the Award and the Enterprise Agreement.
- (5) ANZ initially gave assurances that the records would be produced.
- (6) Following an exchange of emails, phone calls and letters, the FSU agreed to defer its entry and inspection to allow ANZ more time to produce the records.
- (7) On the 20th June 2003 ANZ wrote to the FSU indicating that it would refuse to allow entry for inspection or produce the requisite records
- (8) On the 23rd June, the FSU wrote to ANZ indicating that its response was not satisfactory, and indicating that FSU would exercise its rights of entry on the 30th June 2003.
- (9) On the 24th June 2003, ANZ notified the Australian Industrial Relations Commission of a dispute pursuant to s.99 of the *Workplace Relations Act 1996*. The Union agreed to defer its entry and inspection to enable the Commission to attempt to resolve the dispute.

- (10) The Commission attempted unsuccessfully to conciliate the matter on the 2nd July 2003. The FSU then sought to reschedule its entry to the 8th July 2003. On the 7th July, Mr. Zahra of ANZ wrote to Ms. Mahmoud a Lead Organiser employed by the FSU setting conditions of entry (the "second protocol"). The letter cited health and safety concerns and disturbance of employees. No mention was made of privacy concerns.
- (11) On the 8th July 2003, Ms. Kimberley Reid (then Practice Leader, Workplace Relationships, ANZ) met Ms. Mahmoud (Lead Organiser, FSU) at the premises and denied Ms Mahmoud access to the premises, except to the extent that Ms. Mahmoud was permitted to sit in a meeting room, but not to approach employees.
- (12) On the 10th July 2003 ANZ wrote again to Mr. Schroder, outlining a further set of protocols (the "third protocol").
- (13) On the 16th July ANZ notified under s.285G as proposed by the AIRC. In conciliation on the 2nd July, Commissioner Smith had indicated that the matter would be more appropriately dealt with pursuant to such a notification.
- (14) Following further conciliation proceedings, on the 18th July 2003 in the Australian Industrial Relations Commission, the ANZ provided the Union with copies of a sample of pay records relating to 50 employees over a period of three months.
- (15) The conciliation resumed on the 5th August 2003 at which time the Union confirmed its suspicion of breaches had been reinforced by an inspection of the records. The Union again asserted its right to enter and interview employees. The "protocols" were discussed at length. The Union raised the issue of inconsistency with the Act and, in particular, questioned how employees would know what the Union was there for, and ANZ's capacity to deny signage outside the room. In response ANZ issued a further set of protocols ("the fourth protocol") by letter dated 6th August 2003. This version removed the ban on signage and re-wrote the provisions dealing with the employer giving notice.
- (16) Based on the inspection of the records, the Union identified multiple underpayments. The FSU wrote to ANZ on the 8th August 2003 identifying some examples of these underpayments. This was not responded to, so the union sent an email on the 21st August.
- (17) On the 22nd August 2003, FSU notified the AIRC that it sought an arbitration of the issue of the right of entry to interview employees pursuant to s.285G of the *Workplace Relations Act 1996*.
- (18) On the 27th August 2003, ANZ responded to the Union's fax of 8 August contesting some of the alleged underpayments, but conceding

others, and indicating that some of the underpayments were being corrected. A number of employees received some back-payments.

- (19) Following conciliation proceedings on the 1st September 2003, the ANZ proposed to withdraw its notification. The Commission took the Union's fax of 28 September, attaching a draft order, to be a notification pursuant to 285G and listed that matter jointly with the ANZ notifications under ss.99 & 285G.
- (20) At about this time, some amendments to the "Right of Entry – Manager Guidelines" were issued (the "fifth protocol"). In respect of the last three versions of the protocols, insofar as they apply to inspection of suspected breaches, effectively only one matter is in dispute: the location – ie. whether the Union can approach employees at their workstation. The only other matter contained in the first and second versions (relating to signage) was withdrawn in the later three versions.

Australian Industrial Relations Commission Decision

- (21) The matter was arbitrated by the Australian Industrial Relations Commission on the 25th September and 13th October 2003.
- (22) On the 6th May 2004 the Australian Industrial Relations Commission issued a decision (PR 946294) and order (PR 946346) in relation to entry to ANZ premises at 530 Collins Street, Melbourne.
- (23) The order was stated not to come into effect for a period of 14 days to enable the parties to exercise their statutory rights (eg appeal and stay application). No appeal of the order was lodged until late on the 26th May.

Attempted Entry – May 2004

- (24) On the 24th May 2004, prior to the lodgement of the appeal and four days after the commencement of the AIRC order, the FSU permit holders notified ANZ of their intention to enter the premises on the 26th May 2004 to interview employees in relation to the suspected breaches of the Award and Enterprise Agreement. Attached to the notices was a draft of privacy undertakings proposed to be provide in respect of each official (following the decision of C. Smith – decision para 32).
- (25) On the 24th May 2004 at 7.34pm the FSU received a fax from Paul Zahra, Acting Practice Leader, Workplace Relationships of the ANZ indicating that it proposed to allow entry, but not to the extent of permitting officials to approach employees at their workstations.
- (26) Early on the 25th May 2004, the Union responded indicating that the Union proposed to exercise its right of entry in the manner permitted

by the Act and proposed by the decision and order of the Commission.

- (27) At 2.40pm on 25th May 2004 Freehills Solicitors for the ANZ, wrote to the Commission indicating that ANZ proposed to refuse entry, based upon its concerns about the number of officials proposed to enter the premises, and the intention of the FSU to “interview employees at their workstations”.
- (28) The Commission called the matter on at 9am on the 26th May. The FSU agreed to delay entry until the completion of that conciliation.
- (29) After those proceedings, six officials of the FSU, each of whom is an employee of the FSU and the holder of a permit pursuant to s.285A of the *Workplace Relations Act 1996*, sought to exercise their right of entry at the premises under s.285 B of the Act. They were refused entry on any basis, even to be shepherded to a room of ANZ’s choosing.
- (30) 4th June 2004 – Application for and grant of stay. Stay was granted effectively preventing proceeding with the entry and prosecution of underpayments until the matter was dealt with by the full bench.
- (31) The full bench issued its decision on the 8th September 2004, and breaches commenced to be rectified following entry in September / October 2004.