Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submission no: 7

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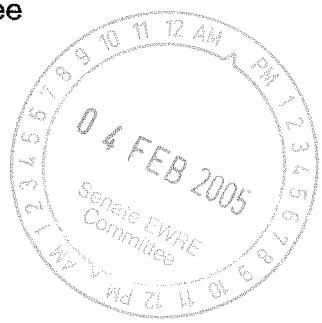

4 February 2005

Dear Mr Carter,

Re: Inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004

Attached please find the ACTU submission to the inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004.

In summary the ACTU submission calls for the Bill to be rejected.

The ACTU submits that the Bill offends the principle of freedom of association and the right to organise by:

- placing onerous and unnecessary barriers to union representatives' access to the workplace;
- sanctioning and encouraging employer monitoring and interference in the discussions between employees and their representatives by requiring permit holders to specify particulars regarding the reason for their entry on to a workplace, and making the validity of the entry conditional upon the entry being only for that purpose;
- removing the capacity of employers and employees and their unions to agree to enforceable right of entry provisions that are appropriate to the enterprise;
- restricting entry onto a premise for the purpose of recruitment to once every six months.

The Bill, by limiting right of entry to inspect documents relating breaches of the Workplace Relations Act 1996 or an award or certified agreement to records relating to

union members only, undermines the long established role of unions as parties principle to awards and agreements.

The proposed provisions for the granting of, and revocation of entry permits are unnecessary. The introduction of new requirements for the granting of permits will cause delay and impose administrative and bureaucratic hurdles in the path of unions. The provisions for revocation of permits and the prescription of mandatory disqualification periods may operate to deny an official their livelihood without regard to the seriousness of the breach.

The ACTU also submits that the attempt to create a national uniform code is misplaced, constitutes an unwarranted intrusion into an area which is already adequately regulated by the States and will create uncertainty and confusion. This will particularly affect smaller enterprises where the reach of the Commonwealth's corporations power is uncertain.

The ACTU would welcome the opportunity to appear before the Committee.

Please contact me if you have any questions regarding this submission at email cbowtell@actu.asn.au or phone 03 96647348.

Yours sincerely

Cath Bowtell
Industrial Officer

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SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

ACTU SUBMISSION TO THE INQUIRY INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

February 2005

INTRODUCTION

1. Genuine freedom of association and an effective right to bargain collectively depend upon employees having ready, practical access to advice, information and representation by trade unions in their workplace.

2. The principal objects of the *Workplace Relations Act 1996* (WRA) include:

   - providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them [section 3(e)]

   - ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association [section 3(f)].

3. Union membership, freedom of association, the right to organise and the right to collective bargaining are meaningless unless employees have the right to be represented and advised by their union about workplace issues, and to be represented by their union in collective bargaining.

4. Union right of entry is underpinned by two pillars:

   - The rights of workers to have access to their representatives is an essential and integral part of the freedom of employees to organise collectively. This right is articulated in ILO Convention 87 on Freedom of Association and Protection of the Right to Organise. This principle underpins the current legislative right of union officials to enter workplaces for the purpose of holding discussions with employees.

   - The fact that that unions are party principal to awards and to most certified agreements, rather than having a role confined merely to representing members. As a party to a type of contract, the union has a direct interest in ensuring that its provisions are complied with, that breaches are investigated, and that the award or agreement continues to meet the needs of the employees whose employment is subject to it. This principle underpins the current provisions permitting unions to enter premises for the purpose of inspecting wage records as well as other documents and things, and to interview employees in order to investigate any suspected breaches and to ensure enforcement of the award or agreement.

5. The ILO has recognised that access to workplaces is a necessary corollary to observance of Article 11 of the Convention. The Freedom of Association Committee has held that:

   "Workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions including the right of access to workplaces." [1]

[1] 234th report, Case No 1221, para 114 in ILO *Official Bulletin* Vol LXVII, 1984, Series B, No.2)

6. The Committee also held that:

"Governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so the trade union can communicate with workers, in order to apprise them of the potential advantages of unionization."[2]

7. The Bill's restrictions on union right of entry would:

- prevent workers from being able to effectively represented by unions in collective bargaining processes;
- limit unions' capacity to ensure that employers abide by awards and agreements applying to them, particularly in respect of employees who are not union members; and
- prevent unions from being able to recruit members and from being able to effectively represent employees who choose to become their members.

8. The Bill also offends freedom of association by conferring upon employers an implied right to oversee the interaction between employees and unions, restricting open communication between them.

9. In Australia, employees expect that their interaction with a union will occur at the workplace. The changes to right of entry proposed in the Bill would severely limit employees' access to unions at their workplace which, in turn, will severely limit unions' capacity to inform and represent employees.

10. In seeking to prohibit right of entry as a legitimate subject about which the parties to an agreement may bargain, the Bill offends ILO Convention No 98 The Right to Organise and Collective Bargaining. In particular Article 4 calls on States "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

11. The Bill lacks any clear and cogent public policy framework. Despite the objects stated in proposed section 280A, the Bill is not balanced. The Bill does not address existing problems with the right of entry provisions. An ACTU survey suggests that a small proportion of employers still resist union right of entry to their workplace[3]. Employees covered by AWAs currently have no right to visits from a union at their workplace. This is discriminatory as it gives these employees lesser access to assistance and information than other employees. The Bill only partially restores AWA employees' access to unions at their workplace.

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[2] ILO *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 4th (revised) edition 1996 para 954

[3] Millward Brown, *National Survey of Workplace Issues 2002:* 16 per cent of 2,966 union delegates answered yes to the question: "Have officials from your union ever had difficulty entering your workplace?"

12. Right of entry fosters employee representation and participation at the workplace. In particular right of entry for the purposes 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.[4]

LEGISLATIVE BACKGROUND

13. Australian law regarding union right of entry was traditionally established through award provisions. From 1973 until 1996 legislation specifically provided for awards to contain right of entry provisions.

14. Since 1996 right of entry has been provided for through Division 11A of the WRA. The *Workplace Relations and Other Legislation Act 1996* made the following changes to the WRA:

- Allowed right of entry only for the purposes of investigating a suspected breach of an award, agreement or relevant legislation rather than for the general purpose of ensuring the observance of an award or Commission order;
- Abolished award-based right of entry, with section 127AA providing that any award or order giving union officers or employees the right to enter premises or inspect records and other things and interview employees was unenforceable.
- Replaces award-based right of entry with a right to enter to hold discussions with employees who wish to participate in these discussions;
- Provided that discussions with employees may be held only during breaks;
- Required at least 24 hours notice to be given to the employer of an intention to enter the premises.

15. The WRA does not currently limit inclusion of right of entry provisions in certified agreements, and it is common for agreements to include such provisions.

16. Since these changes, right of entry has been considered by Senate Committees on a number of occasions.

17. In 1999 a Coalition majority of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee recommended that changes to right of entry in the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999,* including requiring a written "invitation" from an employee and allowing the employer to choose the place where discussions take place, should be passed. However, Labor Senators opposed the measure, as did Senator Murray, who wrote:

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[4] see for example Iverson, R and Roy, P *A Causal Model of Behavioural Commitment: Evidence form a study of Australian Blue Collar Employees* Journal of Management 1994, Vol 20 No 1 15-41.

"This Schedule seeks to replace the right of entry provisions inserted by the Democrats and replace it with a variant of the right of entry scheme we rejected in the 1996 bill. It is an unnecessary and unacceptable impediment on the rights of unions to meet and recruit members, and as such is contrary to the general principle of freedom of association. The Democrats support unionism, whether of employees or employers. Collective representation is effective representation.

"The Schedule also contains provisions to deal with breaches of the right of entry scheme by union officials. Evidence from the Master Builders Association indicates that intimidation and unacceptable behaviour still bedevil the practice of entry and inspection of premises.

"It is vital for industrial democracy and good workplace practice that search and entry provisions are retained, but better practice is desirable. Unions are in a unique position, since they are the only private sector bodies allowed search and entry rights by law. Unions need to adopt best practice in search and entry as exemplified by the best of Government authorities that have this power. As a start in this direction, I believe a code of practice on search and entry ought to be developed by the Commission, in conjunction with employer and employee organisations."

18. The 2000 report of the Senate Standing Committee for the Scrutiny of Bills on Entry and Search Provisions in Commonwealth Legislation unanimously concluded:

"No evidence was put before the Committee to suggest that unions should not have a right to enter, but some dissatisfaction was expressed with the way in which the current provisions had 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."

19. The Committee's report on the Building and Construction Industry Improvement Bill 2003 recommended against passing the entire Bill, including the provisions concerning right of entry. Senator Murray made some recommendations that "would not water down the rights of unions":

- *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;*
- *Increase penalties to right of entry provisions under the WR Act 1996, to act as a deterrent.*

20. The ACTU submits that there is no evidence that the existing provisions unreasonably limit the rights of employers to refuse unions entry to their

premises. The current provisions are designed to safeguard employers and employees from harassment and interference, and promote responsible use of right of entry permits.

21. This submission addresses the following elements of the Bill:

- The legislative restrictions on entry for the purpose of holding discussions with employees.
- Limiting entry for recruitment purposes to once every six months per premises.
- The conditions on granting entry permits.
- The revocation and suspension of entry permits.
- The requirements that an entry notice be in a form to be prescribed to be given to the employer prior to the intended date of entry specifying the date on which entry will be made and the purpose for which it will occur (including details of any suspected breach or if recruitment is a purpose of the entry).
- Limiting entry for the purpose of investigating a breach to instances where there are reasonable grounds for suspecting a breach (with the onus on the union to make this out if challenged) and where the alleged breach relates to or affects the work of a union member and restricts access to records which relate to the employment of members, unless the Commission orders access be given to "non-member records".
- Requiring the union officer entering to comply with a reasonable employer request to conduct interviews in a particular room or area and to take a particular route to reach this room or area.
- Overriding state right of entry law in respect of constitutional corporations.
- Prohibiting the certification of agreements which provide for right of entry.

22. The ACTU is strongly opposed to the Bill and urges the Committee to recommend that it not be passed.

ENTRY TO WORKPLACES TO HOLD DISCUSSIONS WITH EMPLOYEES - FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

23. The WRA provides for two streams of right of entry by authorised representatives of unions: entry for the purpose of investigating suspected breaches of the WRA or awards and certified agreements; and entry for the purpose of holding discussions with employees. This part of the submission deals with entry for the purpose of holding discussions with employees.

24. As noted above, union entry to workplaces for the purpose of holding discussions is underpinned by freedom of association and the right to organise and collectively bargain.

25. Under the current section 285C(1) authorised representatives can enter premises to hold discussions with employees provided that work is being performed at that workplace pursuant to an award that is binding upon that union and there are employees employed at the workplace who are eligible to be members of the relevant union. The Bill proposes restrict unions' right to enter a workplace for the purpose of holding discussions with employees to only those employees whose employment is governed by an award, or a certified agreement employed at that workplace. Discussions with employees not covered by the award or agreement would not be authorised by the permit.

26. The ACTU submits that the extent to which employees enjoy meaningful freedom of association should not be dependent upon the type of industrial instrument that governs their conditions of employment. To restrict valid entry to entry for the purpose of discussion to only employees already governed by instruments that bind the union conflates the unions' interests in enforcing instruments to which it is a party with the broader interests of all workers to access to information and advice. It diminishes the legitimacy of discussions with employees, by making the right to hold discussions at the workplace subject to these tests.

27. Discussions between union representatives and employees often address issues not associated with awards, agreements and the WRA. In addition to occupational health and safety, other matters regularly include: employees' rights under anti discrimination legislation; professional/career development and training issues (particularly amongst apprentices and trainees); tax and superannuation matters, as matters affecting the industry in which the employees are engaged (economic conditions etc) as well as individual grievances.

28. Freedom of association is not about allowing people to pay membership fees to a union. It encompasses a wide range of principles to ensure that union membership is readily accessible and effective. ILO Convention 87 protects employees' and employers' right to organise. Unions are less accessible and effective if they are not able to freely communicate with members and potential members at their workplace. It is entirely reasonable for employees to discuss workplace issues while they are at work, rather than when they are at home with their families.

29. A union cannot conduct effective representation of employees for the purposes of collective bargaining if it does not have ready access to those employees, to ascertain employees views about what should be negotiated, and to report on the progress of negotiations.

30. The rights accruing to employees under ILO Conventions 87 and 96 are fundamental human rights and are not dependant upon the type of industrial instrument that governs the work performed at the workplace, nor on the frequency with which unions visit workplaces.

RESTRICTION OF RECRUITMENT VISITS TO EVERY SIX MONTHS.

31. The Bill proposes that entry to premises for the purpose of recruitment be limited to once every six months.

32. There is no justification for this restriction, or any explanation for choosing this particular limit. It amounts to banning recruitment at the workplace.

33. Normal Australian practice is for employees to have contact with union officials at the workplace. Members expect to be visited regularly by officials, and non-members expect to be recruited at the workplace.

34. It is common and understandable that union officials will have many conversations with prospective members before the decision to join is finalised. Proposed paragraph 280Z(2)(b) makes this impossible.

35. The six month rule also takes no account of the practicalities of modern workplaces, particularly the prevalence of casual employment and high labour turnover in many industries.

36. "Premises" is defined in section 4(1) of the WRA as including "any land, building structure, mine, mine working, ship, aircraft, vessel, vehicle or place". One visit to a high rise office building, large hospital or educational institution, or a mine spanning a vast area, every six months would not enable a union official to speak to all relevant employees even once.

37. Other employees who would not have any access to a union official during this one visit might include shift workers, those who work on weekends, and part time employees or those on leave who may not be there on the day.

38. The Minister's Second Reading Speech claims that "repeated union entry to the workplace to recruit new members can result in non-members suffering unfair pressure and harassment." This assertion is simply not borne out in experience, but in any event the WR Act provides an effective remedy in the event of such conduct through the provisions in Part XA (freedom of association) or section 285A(3) (revocation of a permit for intentionally hindering or obstructing an employer or employee, or acting in an improper manner). There have been few court cases under these provisions.

39. The Bill is also offensive in that, to enforce the six month restriction, it assumes that the employer has knowledge of the content of the discussions between the employee and the union official. Proposed section 280Z(2) refers to the conduct of the union official. While some conduct such as the distribution of membership forms is transparently recruitment oriented, the conduct of a "one on one" discussion between an official and a non-member is not so.

40. This Bill effectively authorises employer monitoring of these discussions, and would interpose the employer into the relationship between employees and the unions that represent them.

ENTRY TO WORKPLACES TO INVESTIGATE SUSPECTED BREACHES

41. It is poor public policy – and contrary to the objects of the WRA – to create barriers to the ready enforcement of awards and agreements.

42. The proposed restriction of union rights to investigate breaches of legislation, awards or agreements to cases which relate to union members is also a further step towards reducing the role of unions in the industrial relations system. It is incongruous that unions are prohibited from negotiating agreements which apply only to union members but will be confined to ensuring their observance only where union members are affected.

43. Unions are party to awards which apply to union members and non-members because the High Court has accepted, over and over,[5] 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 against union members.

44. If unions are to be able to protect their interest in the wages and conditions of non-members they need to ensure that all employees receive their correct entitlements under awards applying to them. To keep unions from doing this is to give employers even greater incentive to keeping their workplaces free of union members.

45. Removing the capacity for unions to assist non members with breaches will mean that these employees will have to rely solely on the federal inspectorate, which in recent years has shown little interest in pursuing prosecutions for underpayments of wages and entitlements.

46. The Right of Entry Bill is designed to override the role of unions as parties to awards and agreements in their own right, confining unions role to acting as agents of their members.

47. There are also practical difficulties in the implementation of these provisions.

48. Many employers will not know which of their employees are union members. Employees may choose not to have union dues deducted by their employer, instead paying directly to the union by direct debit or other means. Employees often believe that their employer will look unfavourably on union membership and involvement. Even if union members are not directly discriminated against, they may perceive that their union involvement will disadvantage their career.

49. The Bill exposes an employee's choice to be a union member to their employer by providing that only members can be fully assisted by the union in respect of a claim for breach of award or agreement.

50. The Commission has consistently upheld the right of union members to have the fact of membership withheld from their employer.

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[5] see Metal Trades Employers Association v Amalgamated Engineering Union (1935) 54 CLR 387

51. Limiting unions' workplace access to employees who are members (for the purposes of investigating breaches) or those covered by an award or certified agreement (for the purposes of discussion) is clearly in breach of our international obligations in respect of freedom of association and the right to bargain collectively.

ENTRY PERMITS

Issuing of permits

52. The ACTU considers that the proposed requirement for the Registrar to be satisfied that an applicant for a permit is a "fit and proper" person is unnecessary, onerous and discriminatory.

53. The Registrar currently processes a large number of applications for permits every year: 678 in 2001-2, 1144 in 2002-3 and 620 in 2003-4. This is currently done very efficiently, with over 95 per cent of applications finalised within 28 days.[6] The ACTU is concerned that the increased level of consideration and paperwork will lead to an increased workload and consequent delays, with no benefit to employers, employees or unions.

54. The ACTU submits that unions already ensure that their officers and employees have a good knowledge of their rights and obligations under industrial legislation, including in respect of right of entry, and that there is no demonstrated need for a requirement for formal training.

55. It is in the interest of unions to ensure that their officials conduct themselves professionally. This builds respect for the union in the eyes of its members and the employers they interact with, as well as avoiding the cost and inconvenience of legal action that may result if it is alleged that WRA provisions have been breached.

56. The Bill would also require that the Registrar take into account any offences or penalties under other laws, as well as any revocation or suspension of a permit under Commonwealth or state law.

57. Although the Registrar does retain a discretion, it is the clear thrust of proposed subsection 280F(2) that permits should be denied to union officials who have ever breached a very wide collection of laws.

58. The ACTU submits that these provisions are far too wide in their operation in that there is no requirement that the specific circumstances be taken into account or that there be any limit on the age of matters which may be taken into account.

Revocation and suspension of permits

59. The Registrar currently has the ability to revoke a permit if the person to which it was issued has, in exercising right of entry powers, intentionally hindered or obstructed any employer or employee or otherwise acted in an improper manner.[7]

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[6] *Annual Report of the Australian Industrial Registry 2003-04* p110

[7] WRA s285A(3)

The Commission also has the power to revoke a permit in order to settle an industrial dispute about the operation of the right of entry provisions, and may also make any orders it considers appropriate about the issue of any further permit to the person or any other person.[8]

60. The Bill expands the circumstances for revoking or suspending a permit or imposing conditions where the Commission is satisfied that a union or an official has abused the rights conferred by the right of entry provisions.

61. The Bill also provides for the Registrar to revoke, suspend or impose conditions on a permit, taking into account the same matters which must be considered in relation to an application for a permit.

62. There is no evidence that the current provisions for revocation of permits are inadequate, although the Government is clearly unhappy that tribunals - state and federal - decide matters on the evidence before them and not on the basis of prejudice. An examination of the cases shows that the current law is being enforced, frequently on the basis of quite technical infringements.

63. A small number of union officials have had their entry permits revoked. The Registrar revoked two permits in 2001-2, six in 2002-3 and seven in 2003-4.[9]

64. In one of these cases, a permit was revoked because of a "pattern of behaviour" which included not ensuring that the 24 hour notice had been received by management 24 hours before the entry, conducting short conversations with staff while they were working, holding a stop work meeting about a serious health and safety issue, arriving late, using heated language, delivering Christmas cakes to delegates, distributing leaflets and entering without giving notice for the purpose of inducing employees to stop doing work which had been diverted to the site because of industrial action at another site.[10]

65. The Commission has revoked permits on a number of occasions. It should be noted that in most cases applications for revocation are made by employers who are conducting a strategic campaign to remove or limit union involvement by their employees and/or are seeking to impose bargaining outcomes on employees through non-union agreements or AWAs.

66. The series of cases concerning BHP Billiton and William Tracey illustrate this point. As the Commission found in its first decision, Mr Tracey had been heavily involved in the union campaign against BHP's offering of AWAs to its workforce. The Commission cancelled Mr Tracey's permit for a period of six months, finding that rather than entering in relation to a suspected breach:

"...he entered the sites in connection with the dispute between BHP and the unions in relation to terms and conditions of employment of employees and in particular with the dispute about the offering to employees of workplace

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[8] WRA s285G(2)

[9] Annual Report of the Australian Industrial registry 2003-04 p110

[10] *The Australian Postal Corporation - and - Joan Veronica Doyle* PR948216 (25 June 2004 McCarroll DIR)

agreements including the campaign of the unions to encourage employees to refuse to sign such agreements." [11]

67. One might ask why Mr Tracey could not enter for the purpose of campaigning for collective bargaining, the promotion of which is a key plank of the ILO's fundamental labour standards. Mr Tracey could not enter under section 285C (discussion with employees) because the employees were not covered by a federal award.

68. Subsequently, Mr Tracey was issued with another permit, and once again BHP applied for its revocation. In this case the application was rejected on the grounds that Mr Tracey's conduct, on the evidence, had been appropriate.[12]

69. In a third decision, Mr Tracey's permit was revoked again because, on one occasion, he raised with BHP management some issues relating to the employment conditions of apprentices, which he was not entitled to do while on the premises pursuant to his permit.[13] The Committee is asked to consider whether or not unions should be limited to this extent in their ability to represent the interests of employees.

70. The cases involving Mr Tracey indicates that permits will be revoked even in circumstances where it can be shown that the activity engaged in by the union was well within what would be considered legitimate union activity in relation to promotion of collective bargaining and protection of employees' employment conditions.

71. On 24 March 2001, the then Minister for Workplace Relations, Tony Abbott, strongly criticised a decision of Justice Munro in relation to an application by the OEA to revoke the permits of two CFMEU organisers.[14]

72. The Minister's comments were reported as follows:

The IRC lacked impartiality in a recent case involving alleged physical violence by union organisers, reflecting a misplaced community tolerance for criminal conduct in the industrial relations arena, Workplace Relations Minister Tony Abbott told the HR Nicholls Society's 22nd conference in Melbourne on Saturday evening.

He said the Commission [in a s285A right of entry ruling by Justice Paul Munro] had found the two organisers acted improperly when they shoved and pushed management and staff whose premises they were entering (see Related Story 1).

But what particularly outraged the Minister was the Commission's finding that a press release by the Office of the Employment Advocate, announcing it was taking action against the organisers, was "prejudicial, tendentious and partisan".

Said Abbott: "To rephrase Churchill, this strikes me as a refusal to be partial as

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[11] *BHP Iron ore Pty Ltd - and William Warren Tracey* PR905041 (7 June 2001 Polites SDP)
[12] *BHP Billiton Iron Ore Pty Ltd - and - William Warren Tracey* PR917378 (6 May 2002 Polites SDP)
[13] *BHP Billiton Iron Ore Pty Ltd - and - William Warren Tracey* PR926632 (13 November 2002, Polites SDP)
[14] *Vivienne Daniels - and - Joe Patti* PR900753 (31 January 2001 Munro J)

between the fire brigade and the fire".

"In the community there is a tendency to discriminate between industrial and non-industrial criminality, because the former, they think, might be in a good cause".[15]

73. The facts of the matter are quite different, as can be seen from a reading of Munro J's decision, in which he dismissed the OEA's application on public interest grounds, taking into account the following:

- Although there was *prima facie* evidence of intentional improper action, the issue needed to be seen in the context the employer's decision to resist the union's exercise of its right of entry powers during a long-running dispute, since largely settled;
- The OEA made the application many months after the conduct was alleged to have occurred, without notification to the union;
- The OEA did not conduct a balanced investigation of the events in question before making the application;
- At the time of making the application the OEA issued a press release making a series of allegations about a campaign of harassment against the employer, seemingly ignorant of the facts of the long-standing disputation between the parties and a Federal Court settlement of most of those matters, including the operation of union right of entry, and without having raised those allegations with the union or the individuals involved;
- The OEA had made the application in order to relieve the employer of legal costs;
- The OEA declined to bring some evidence about its involvement, from which it could be inferred that it would not have helped its case;
- A hearing would be protracted and bitter, having already consumed substantial resources of the parties and the Commission and, given the time that had elapsed, witness credit would be subjected to "exacting tests';
- The Heads of Agreement negotiated between the union and the employer in the course of Federal Court proceedings would provide a quick and cheap means of securing a decision about issues that might arise in the future.

74. It should be noted that Munro J did not find the allegations of use of aggressive language and "invasion of personal space" proven, and specifically did not determine whether they amounted to intentional hindrance of the employer or acting in an improper manner. Nowhere in the decision was the behaviour of the organisers characterised as " physical violence", as alleged by the Minister, nor was there any suggestion of criminal behaviour which, in any event, is a matter for the police, not the Commission.

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[15] www.workplaceexpress.com.au 25 March 2001

75. Munro J ended his decision by making it clear that he did not approve the kind of conduct attributed to the organisers in the case and that holders of entry permits should conduct themselves with propriety. There was no suggestion from him that such conduct was justified because it was in a good cause, as alleged by the Minister, although the lack of clean hands by the company and the OEA were clearly factors in his decision.

76. In another case, a union official's permit was revoked because of conduct, including "appalling" language and assault (by knocking papers from a lawyer's hands) in the course of attempting to inspect documents in the office of the employer's legal representatives.[16]

77. An application to revoke the permit of an organiser in the building industry was refused because:

"The revocation of a right of entry permit is a serious step. It is one which would severely restrict an official such as Mr. Mitchell from carrying out his day to day work and may possibly endanger his livelihood as an official. In all of the circumstances of this matter, and most notably because I am not satisfied that the conduct complained of occurred as described in the application, or without initial provocation from Mr Thompson, I am not prepared at this time to do so. I will however make an order that I consider will serve to settle the dispute about rights of entry. It is to the effect that the CFMEU take all steps necessary to ensure that Mr.Mitchell:

- *takes note of the conditions required to be observed under the terms of his permit to enter;*

- *take action to fully comply with each procedural step should he again be allocated work by the CFMEU requiring him to visit the site."*[17]

78. The cases about revocation of permits confirm that the discretion to revoke is exercised carefully, and after giving consideration to all relevant factors, rather than in the mechanistic fashion proposed by the Bill. The cases also indicate that issues to do with right of entry generally arise in the context of wider disputes occurring at the workplace.

79. The removal of the Registrar's discretion with respect to minimum periods of disqualification where the permit holder has had their permit suspended by another Court or tribunal is particularly offensive. Where the other decision-maker may decide upon the facts to suspend the permit for a few days, the Industrial Registrar has no discretion but to follow the mandatory periods of disqualification regardless of the seriousness of the breach.

NOTICE OF INTENDED ENTRY

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[16] *IES Australia Pty Ltd - and - CEPU* PR934167 (15 July 2003 Grainger C)
[17] *HW Thompson Pty Ltd - and - CFMEU* PR908721 (6 September 2001 Harrison C)

80. The proposed requirement for written notice of entry specifying the date of the intended entry is unnecessarily onerous and is certain to impede reasonable union access to employees.

81. The requirement for the purpose of the intended entry to be specified in detail further limits the carrying out of legitimate union activity. This restriction prevents a union official from dealing with unanticipated issues that may arise while visiting a workplace or that emerge as a result of discussions with employees. This further reduces union right of entry to a formalised ritual of little practical effectiveness.

82. The requirement that particulars of the suspected breach be included on the entry notice is also unnecessarily onerous and is intended to limit the union official's ability to check whether all relevant legal obligations are being met. The union might be informed by a member of a particular breach which would, reasonably, give the union grounds to suspect other breaches, without being able to specify these.

83. In many cases, the particulars of the suspected breach will enable the employer to ascertain the source of the information to the union, which could lead to eventual retribution against the employee involved. It is common for employees to request a union to attend to investigate breaches on the understanding that the employer will be given no grounds to suspect that the union entry was consequent on an approach from employees.

84. The requirement to give the particulars the suspected breach, and the consequent illegitimacy of the entry if the discussions extend beyond this subject matter, infers a capacity for employers to monitor the content of the discussions between employees and union representatives. The problem with this provision is highlighted by the fact that it would apply to suspected breaches of the freedom of association provisions of the WRA, and to anti discrimination provisions of awards.

85. This requirement infers that employers or their representatives can be present at all discussions between employees and unions, to ensure that the purpose of the visit is the same as that stated on the right of entry notice. Employer presence at such discussion would compromise open communications between employees and union officials, impeding the union's capacity to assist employees with issues they may have with their employer.

WHERE DISCUSSIONS TAKE PLACE

86. The Bill proposes a requirement that a permit holder comply with a reasonable request from the employer to conduct interviews in a particular room or area of the premises and to take a particular route to reach that room or area. A request is not to be considered unreasonable because it is not the room, area or route the permit holder would have chosen. The Commission is able to resolve issues about where interviews or discussions take place only where the employer has made an unreasonable request.

87. These proposals are directed at overcoming a Commission decision in *ANZ Banking Group Limited - and - Finance Sector Union of Australia,*[18] which dismissed the bank's appeal against a decision holding that the union could walk through the worksite and approach employees at their workstations, although this was limited to two occasions.

88. In that case the Full Bench upheld the earlier finding that it was not up to the union to show that the bank's position was unreasonable, but that the Commission would determine the issue by finding a balance between "a right conferred by the Act and the conduct of the employer's business". The Full Bench held:

> *"The statutory right to an interview should not be negated and should be substantively implemented, and the Commission may make orders to facilitate that if a dispute occurs. We think it likely that the Commission has a broad discretion as to the location of an interview that it designates in any order, if it issues an order. Factors have to be balanced, and factors such as the need not to disrupt a business, privacy or health and safety considerations may conceivably lead to a range of locations for an interview being ordered, but always having regard to the need for the statutory rights to be substantively implemented."*[19]

89. It is common for employers to attempt to restrict the practical operation of right of entry by limiting the ability of union officials to speak to employees in meal areas and/or by confining them to a specified room where employees must go specifically to speak to the union. In many cases, the location specified for discussions or interviews enables the employer to identify any employee seeking to make contact with the union official.

90. The Commission has made a number of decisions concerning access by permit holders to contact with employees.

91. In *CFMEU – and – McConnell Dowell Constructors,*[20] the Commission ordered that the union be given access to the meal area.

92. In *Re MEAA*[21] the union was given access to the lunch room during the Tennis Open on condition the official remained at a table, so that employees could approach, rather than move around approaching employees. Following the Open, the Commission determined that union representatives could be confined to a dedicated room close to the meal area, with the right to enter the meal area to make announcements about the union's availability for discussions.[22]

93. In *TCFUA – and – Leading Synthetics*[23] the Commission determined that the TCFUA should be allowed to hold meetings in the lunch room because of the possibility of employees feeling intimidated from going to the training room to meet with the union.

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[18] PR951766 (8 September 2004 Watson SDP, Hamilton DP, Lewin C)
[19] *Ibid* para 40
[20] Print P6606
[21] Print R1193
[22] Print R5524
[23] Print R5518

94. In *CPSU – and – Telstra Corporation Limted*[24] the Commission declined to make an order permitting the union to hold meetings in the lunch room because the union's wish to use the lunch room was motivated by a desire to improve its "profile", the alternative offered by Telstra was reasonable, and the one previous occasion on which the lunch room had been used gave rise to difficulty because of competing interests in its use.

95. In *CFMEU – and Moranbah North Coal*[25] the Commission ordered that union officials be given access to underground crib rooms in a mine. An appeal on jurisdictional grounds was subsequently dismissed.[26]

96. It can be seen from the cases that, in dealing with disputes about access to employees, the Commission takes a balanced approach to the interests of all parties.

97. The effect of the Bill would be to allow the place for discussions to be determined by the employer, subject only to a reasonableness test, a significant limitation on the exercise of the Commission's discretion.

OVERRIDING OF STATE LAW

98. The Bill seeks to apply Commonwealth right of entry law to all constitutional corporations, including where unions registered under state law are operating in relation to state law or state industrial instruments.

99. The ACTU submits that this is an unwarranted intrusion into areas of state jurisdiction, strongly opposed by the state governments, who may challenge the Bill on constitutional grounds. The ACTU further submits that the Bill does not create a single statutory scheme – it creates confusion. It replaces simple, well understood state laws with a highly restrictive federal scheme (for the 35 per cent of corporate employers that are currently covered by state systems) while retaining different laws for small businesses that are not incorporated.

100. NSW Industrial Relations Minister, John Della Bosca, has said that restricting right of entry was a divisive political stunt and NSW didn't want conflict-ridden laws that would provoke lawless behaviour.

"Mr Howard and Mr Andrews are prepared to risk Australia's productivity and industrial harmony for the sake of ideology and question-time gamesmanship."[27]

101. Section 51 (xx) of the Constitution has been generally considered to authorise the Federal Parliament to legislate as to the industrial rights and obligations of persons employed by constitutional corporations[28] (that is, a foreign corporation, or a trading or financial corporation formed within the limit's of the Commonwealth).

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[24] Print S1028 (18 November 1999, Duncan DP)
[25] Print S6819 (3 July 2000, Hodder C)
[26] *Moranbah North Coal v CFMEU* 103 IR 267 (21 December 2000, Guidice P, McIntyre VP, Simmonds C)
[27] www.workplaceexpress.com.au
[28] *Victoria v The Commonwealth* (1996) 187 CLR 416

102. The precise scope of this authorisation has not been tested and there can be no certainty as to whether a constitutional challenge to the Bill, should it be passed, would be successful. However, this does not mean that it would not create areas of constitutional complexity, mainly in relation to the issue of whether or not an employer is a constitutional corporation, but also in relation to the scope of the application of the corporations power to employment-related matters.

103. Unincorporated employers, together with those which cannot be characterised as trading or financial, pursuant to the large body of case law which has developed on this subject, would still be subject to state right of entry law. At least 15 per cent of Australian employees do not fall within the scope of the corporations power, and this rises to one quarter in Queensland. This issue has obvious potential for causing employers significant inconvenience, at best, and extensive involvement in litigation, at worst.

104. The effect of overriding existing state laws in this way will be to seriously impede the operation of unions in relation to their responsibilities under state law. The Bill provides for right of entry significantly weaker than that applying in every state jurisdiction.

105. Although most states require some notice (most commonly 24 hours) of entry, none require this notice to be given in writing. No state confines the power to investigate breaches to those affecting union members, nor do they allow the employer to determine where discussions between employees and union officials take place. In Tasmania, South Australia and Western Australia right of entry provisions may also be included in awards.

106. All state laws currently restrict entry to officers or employees of a registered organisation and all require notice of intention to enter premises for the purpose of inspecting compliance with industrial instruments.

107. A Ministerial media release stated the following about the Government's intentions:

> *The Howard Government is proposing to amend the right of entry provisions of the* Workplace Relations Act 1996 *to exclude the operation of State right of entry laws where federal right of entry laws also apply and to introduce further measures to tighten up the right of entry regime.*
>
> *In the recent case of BGC Contracting v CFMEU, the Federal Court found that unions could gain entry to sites under state right of entry law despite the fact that all workers on the site were working under Federal law and the Federal system denied the union right of entry.*
>
> *The Minister for Employment and Workplace Relations, Kevin Andrews said today the Bill is consistent with the Government's policy that workplaces operating under the Federal system should not be subject to inconsistent elements of state systems.*
>
> *"It will restore certainty and end the loopholes and complex duplication that the BGC case has created."*

108. In the case referred to the facts were somewhat different, in that while most employees were employed under AWAs, a number were not. Absent a valid AWA, the employees were employed under state awards and state law. The Court held that state right of entry law was not excluded by federal law (which in any event, may not have applied) because it was directed at different purposes than federal law. However, it was also made clear that state rights could not be used in a manner which was inconsistent with the AWAs; for example, by employees stopping work to talk to the union official.[29]

109. It should also be noted that state tribunals are also prepared to revoke permits, as was done in the case of a WA CFMEU official who had interfered with a concrete pour. [30]

RIGHT OF ENTRY PROVISIONS IN AGREEMENTS

110. The Bill proposes to prohibit the certification of agreements containing right of entry provisions. This is an unwarranted interference with the ability of employers and employees to reach binding and enforceable agreements which govern their relationship with each other.

111. The current right of entry provisions in the WRA, and their state counterparts, are a form of minimum entitlement for employees and unions. They are commonly supplemented by provisions in certified agreements which are developed between the parties as appropriate to the type of work performed and the nature of the workplace.

112. 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 or enterprise level (subject to appropriate and fair minimum standards) 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) [31] on grounds that these matters are best left to bargaining, yet will intrude into the parties' agreement-making to frustrate collective bargaining.

113. Some attention has been given in recent times to the question of whether, following the High Court decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[32], the Commission has the jurisdiction to include right of entry provisions in agreements.

114. That issue was neither discussed nor determined in the *Electrolux* decision itself. At time of writing, the issue had been determined differently in a number of Commission cases, while an expected Full Bench decision in an appeal against the refusal of the Commission to certify an agreement containing a right of entry provision had not yet been handed down.

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[29] *BGC Contracting Pty Ltd v CFMEU* [2004] FCA 981 (29 July 2004) French J
[30] *Joseph Lee v McDonald and Buchan* 2004 WAIRC 12071 (21 July 2004, Gregor C)
[31] See for example Transcript 17 December PN 9146 – PN 9158 found at http://www.airc.gov.au/documents/Transcripts/171204c20034198.htm
[32] [2004] HCA 40 (2 September 2004)

115. This issue will be resolved through the ordinary processes of the Commission and the Court. If the Government is concerned to avoid uncertainty it should legislate to specifically allow right of entry provisions to be included in certified agreements.

116. While it is possible for employers to reach agreement about right of entry outside of the formal processes of the WRA, the reality is that such common law agreements are difficult and costly to enforce. The result is that should an employer decide, for any reason, that it wishes to change the previously agreed conditions under which union officials have access to employees at the workplace it would be able to unilaterally implement these changes. The union would then be in the position of having to seek an order for specific performance in the ordinary courts – a daunting prospect. A costs order would not remedy the breach adequately in such a case.

CONCLUSION

117. The ACTU submission against passage of the Bill is based on the following propositions which have been substantiated above:

118. First, there is no compelling evidence of wide-spread difficulties for employers associated with the operation of current right of entry provisions, although their restrictive nature makes it difficult for unions to operate effectively.

119. Second, the Registrar and the Commission have shown an ability to deal with inappropriate behaviour, including by revoking entry permits.

120. Third, the Commission is able to appropriately balance all competing issues in determining disputes about right of entry, including in relation to the place in which union officials can meet and hold interviews or discussion with employees.

121. Fourth, the role of unions as party principal to awards and agreements should continue to be recognised by continuing their role in investigating breaches, rather than confining their role to policing the entitlements of members only.

122. Fifth, the Bill does not create a single statutory scheme – it creates confusion. It replaces simple, well understood state laws with a highly restrictive federal scheme (for the 35 per cent of corporate employers that are currently covered by state systems) while retaining different laws for small businesses that are not incorporated.

123. Finally, the experience of hundreds of union officials confirms that union right of entry is a vital corollary to the right of employees to join unions and be represented by them. In many workplaces, employees are not confident about these rights and fear, often with considerable justification, that their employer will take a dim view of any union involvement.

124. Every day, thousands of union officials enter thousands of workplaces across Australia. The vast majority of these visits occur without incident and are arranged as a result of cooperation between the union and the employer. The rare exceptions to this are able to be resolved under existing laws.

125. The ACTU submits that the Bill will further limit the ability for employees to join and be represented by unions, as well as restrict the ability of unions to function effectively. The Committee is urged to recommend that the Bill not be passed.