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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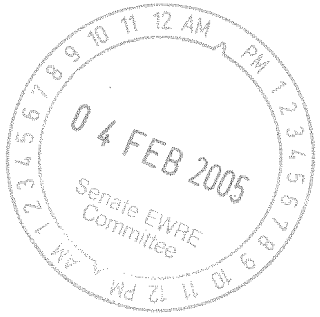

Senator Guy Barnett
Chair, Employment Workplace Relations and
Education Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Barnett

Attached please find a submission on behalf of the NSW Government to your Committee's Inquiry into the provisions of the *Workplace Relations Amendment (Right of Entry) Bill* 2004.

As you will see, the submission argues that the bill should be rejected for the following reasons:

- There has been no consultation with state governments
- There is no policy case for change
- There is no legal case for change
- The bill seeks to impose a centralised, 'one size fits all' approach on employers and unions.
- The bill aims to replace simple, effective and non-controversial NSW legislation
- The bill would create contradictions with existing federal and state legislation
- The bill breaches Australia's international obligations

Should you require any further information or clarification of issues raised in the submission, please contact Mr George Petrovic at the Office of Industrial Relations in the Department of Commerce on (02) 9020 4622 or by e-mail at George.Petrovic@oir.commerce.nsw.gov.au .

I trust that this submission will receive due consideration by the Committee. I look forward to reading your Committee's report.

Yours sincerely

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NEW SOUTH WALES GOVERNMENT SUBMISSION TO THE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

INQUIRY INTO THE

WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

FEBRUARY 2005

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Introduction and Overview

The *Workplace Relations Amendment (Right of Entry) Bill 2004* was introduced into the Federal Parliament on 2 December 2004. The Bill was referred to the Senate Employment, Workplace Relations and Education Legislation Committee, for consideration of issues relating to the primary elements of the Bill:

- The first element is the extension of Commonwealth power to override the operation of state right of entry laws, within the limits imposed by the Constitution. Under the amendment, a union will be able to exercise a right of entry only in accordance with new provisions of the Workplace Relations Act, with the constitutional limitation being that a union will still be entitled to enter premises for purposes relating to state industrial laws.

- The second element is to balance the rights of employers and employees in regard to the entry of union officials to workplaces, particularly to ensure that such entry does not interfere with the conduct of business. Employers and their associations have claimed that union officials continue to enter premises without sufficient cause. This is disputed by unions, whose officials claim that many workplaces do not maintain satisfactory standards of occupational health and safety practice.

The New South Wales Government submits that the Bill should be rejected, for the following reasons:

<u>There has been no consultation with state governments</u>

Despite aiming to override existing State legislation, there has been no consultation with the New South Wales government regarding the Bill.

<u>There is no policy case for change</u>

The federal Minister for Employment and Workplace Relations claims that the Bill firstly provides balance between employer/employee interests, and secondly that it is necessary to make clear to union officials what their obligations are in the workplace. No evidence of a lack of such balance in current provisions has ever been provided, and the New South Wales Government is unaware of any such evidence. Similarly, no compelling evidence of a lack of understanding by union officials of their workplace obligations is provided or known. If anything, the proposed legislation places a new and considerable burden on unions and their members, and appears to confer considerable discretion on employers as to who can enter their workplace and how they can do so.

In fact, this legislation is most notable for its lack of balance.

There is no legal case for change

The federal Government has been unable to demonstrate that inadequacies or contradictions exist in the operation of the current right of entry provisions of the Workplace Relations Act. Detailed consideration by various courts and tribunals has shown the current legislation to be practical and robust, with clear demarcation between relevant Commonwealth and state provisions.

The Bill imposes a centralised, 'one size fits all' approach

Even if the parties agree on their own right of entry arrangements, tailored to fit their enterprise, the Bill deliberately and specifically prohibits them from putting such arrangements in place in an enforceable certified agreement.

The Bill aims to replace simple, effective and non-controversial NSW legislation

Current New South Wales right of entry provisions are simple, effective and non-controversial. The amount of litigation in New South Wales courts and tribunals in relation to these provisions has been minimal.

The Bill would create contradictions with existing federal and state legislation

If passed, the provisions in the Bill would appear to be contrary to both some of the Objects of the WR Act, as well its Freedom of Association provisions. Most importantly, the proposed provisions would strongly contradict the Objects of current New South Wales legislation, with regard to both fairness and equity, and the role of unions.

The Bill breaches Australia's international obligations

The Bill appears to contravene Article 3 of International Labour Organisation Convention 87, Freedom of Association and Protection of the Right to Organise, 1948, as well as other international obligations. As such, the successful passage of the Bill could place Australia in breach of its international obligations.

Structure of this Submission

This submission is in four parts:

Part 1

This Part sets out relevant background information, such as the details of the Bill, the legislation it replaces, and the New South Wales legislation which the Bill will override. A table comparing these three pieces of legislation is at Appendix A. A summary of the right of entry provisions in the recently rejected *Building and Construction Industry Improvement Bill* 2003 is also provided.

Part 2

This Part analyses the policy and legal issues raised by the Bill, and its consistency with other sections of the *Workplace Relations Act* as well as the *Industrial Relations Act 1996* (NSW), which the Bill proposes to override. This part also considers whether Bill conforms with Australia's international obligations.

Part 3

This Part notes the current adversarial approach to regulating industrial relations between the Commonwealth and the states, and advocates a more constructive approach based on more extensive dialogue.

Part 4

This Part summarises the arguments advanced in this submission.

Part 1 - Background

1. What is the Federal Government proposing?

2. The Bill proposes to replace current Part IX of the WR Act with a new Part IXA – Union right of entry.

3. The Bill aims to regulate right of entry to workplaces by union officials. Right of entry is to take place in order to either:

   - Investigate suspected breaches of industrial laws or instruments.

   or

   - To hold discussions with employees regarding industrial or employment matters.

4. The Bill provides for such relevant matters as the issue of permits to enter workplaces, the circumstances under which permits may be suspended or revoked, prescriptions of the conduct of union officials in the workplace and the exclusion of State right of entry laws to the extent that they apply to constitutional corporations.

5. A considerable part of the Bill is constructed in the form of limitations on the right of entry.

6. The Bill also proposes the insertion of new sub-section s170LU(2B), which provides that the Commission must refuse to certify any agreement containing right of entry provisions.

7. Before examining the specific features of the Bill, it is noted that the objects of proposed Part IXA are as follows:

   (a) to establish a framework that balances:

   (i) the right of unions to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws and industrial instruments; and

   (ii) the right of occupiers of premises and employers to conduct their businesses without undue interference or harassment;

   (b) to ensure that permits to enter premises and inspect records are only held by persons who understand their rights and obligations under

this Part and who are fit and proper persons to exercise those rights;

(c) to ensure that occupiers of premises and employers understand their rights and obligations under this Part;

(d) to ensure that permits are suspended or revoked where rights granted under this Part are misused.

8. The specific features of the Bill are set out below.

9. Getting and keeping a permit to enter the workplace.

- Entry to workplaces is by permit holders only.
- A union may apply to the Industrial Registrar for a permit for one of its officials. The application must be in writing (s280D(1)).
- The Registrar may issue a permit to the relevant official (s280D(2)), however, the permit may be subject to limitations as to where and when it is used (ss280D(3) and 280E(1)). The permit may also be subject to limiting conditions imposed by the AIRC if the latter decides that the official has abused the rights conferred by this Part (ss280D(3) and 280J).
- The Registrar must not issue a permit unless she/he is satisfied that the relevant official is 'a fit and proper person to hold a permit' (s280F(1)).

10. To make this assessment, the Registrar must have regard to the following:

(a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;

(b) whether the official has ever been convicted of an offence against an industrial law;

(c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:

(i) entry onto premises; or
(ii) fraud or dishonesty; or
(iii) intentional use of violence against another person or intentional damage or destruction of property;

(d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in respect of conduct of the official;

(e) *whether any permit issued to the official under this Part, or under the repealed Part IX, has been revoked or suspended or made subject to conditions;*

(f) *whether a court, or other person or body, under a State industrial law, has cancelled, suspended or imposed conditions on a right of entry for industrial purposes that the official had under that law;*

(g) *whether a court, or other person or body, under a State industrial law, has disqualified the official from exercising, or applying for, a right of entry for industrial purposes under that law;*

(h) *any other matters that the Industrial Registrar considers relevant* (s280F(2)).

- Permits automatically expire three years after the issue date(s280H(1)).
- Application may be made to the Registrar to revoke, suspend or impose conditions on a permit. The persons able to make such applications are to be prescribed in the relevant Regulations (s280H(2)).
- In assessing such applications, the Registrar must have regard to the fit and proper person test set out at s280F(2).
- If the AIRC is satisfied that 'a union, or any official of a union, has abused the rights conferred by this Part, then the Commission may make whatever orders it considers appropriate to restrict the rights of the union, or officials of the union, under this Part' (s280J(1)).
- The Commission may make such orders on its own motion, or on application by an 'authorised person' (s280J(2)).
- The orders may include:
  (1) revocation or suspension of some or all of the permits that have been issued in respect of the union; and
  (2) imposition of limiting conditions on some or all of the permits that have been issued in respect of the union or that might in future be issued in respect of the union; and
  (3) banning, for a specified period, the issue of permits in respect of the union, either generally or to specified persons. (s280J(3)).
- Failure to comply with such orders incurs a civil penalty (s280J(4)).
- If a permit has been revoked, suspended or expired, it must be returned to the Registrar within seven days, on pain of civil penalty (s280K).

- If extra conditions are imposed on a particular permit by means of ss280H or 280J, the permit ceases to have effect until such time as the Registrar endorses those conditions on the permit (s280L).

11. Conduct in the workplace – investigation of breaches.

- A permit holder may enter a workplace if she/he 'suspects, on reasonable grounds that a breach has occurred, or is occurring' of a State or federal award, agreement or Act (s280M).
- These provisions do not apply to alleged breaches of AWAs unless the employee party to the AWA makes a written request to the union to investigate the alleged breach (s280M(2)).
- In order to enter the workplace, the permit holder must provide the occupier with an entry notice in a form provided for by the legislation (s280P(2)(a), s280C), 24 hours prior to entry. The entry notice must specify particulars of the suspected breach or breaches (s280P(2)(c))
- If the permit holder has entered a workplace to investigate a breach, they may inspect relevant material (s280N(2)(a)), interview employees (s280N(2)(b)) and inspect the employer's records with regard to union members (s280N(4)-(6)).
- The permit holder may inspect non-members' records subject to obtaining an order from the Commission (s280N(9)-(11)). The employer would no doubt be able to be represented and argue their case in the course of such an application.
- In some circumstances, the relevant union may apply to the Industrial Registrar for an exemption from the requirement to provide an entry notice (s280Q). To do so, the union is required to satisfy the Registrar 'there are reasonable grounds for believing' that entry with advanced notice pursuant to s280M, 'might result in the destruction, concealment or alteration of relevant evidence'.
- The permit holder must not enter or remain on the premises if he/she does not produce their authority documents on request (s280R(1)).
- The permit holder must not enter or remain on the premises if he/she fails to comply with a reasonable request by the employer to comply with a relevant occupational health and safety requirement (s280R(2)).
- The permit holder must not enter or remain on the premises unless he/she agrees to conduct interviews in the room/area of the employer's choosing, or unless he/she agrees to take the route chosen by the employer to reach the room/area chosen by the

employer. The employer's requests in this regard must be reasonable (s280R(3) and (4)).

- The permit holder must not enter or remain on the premises if he/she wishes to conduct activities other than investigation of the breach or breaches authorised by the permit holder's authority documents (s280P(4)). Thus, if the union official wishes to hold discussions with employees or recruit new members, separate authorities for each of these activities will be required.

12. Conduct in the Workplace – discussions with employees.

- A permit holder for a Commonwealth union may enter premises to hold discussions with employees (s280W(1)).
- A permit holder for a State union may enter premises to hold discussions with employees in relation to 'employment issues or industrial issues'. The employer of the employees must be a constitutional corporation (s280W(2)).
- Entry to hold discussions with employees may only occur during working hours, and then only during meal times or other breaks (s280X).
- In order to enter the workplace, the permit holder must provide the occupier with an entry notice in a form provided for by the legislation (s280Z, s280C), 24 hours prior to entry.
- Entry for recruiting purposes may only occur once every six months (s280Z(2)).
- The permit holder must not enter or remain on the premises if he/she does not produce their authority documents on request (s281B(1));
- The permit holder must not enter or remain on the premises if he/she fails to comply with a reasonable request by the employer to comply with a relevant occupational health and safety requirement (s281B(2)).
- The permit holder must not enter or remain on the premises unless he/she agrees to conduct interviews in the room/area of the employer's choosing, or unless he/she agrees to take the route chosen by the employer to reach the room/area chosen by the employer. The employer's requests in this regard must be reasonable (s281B(3) and (4)).

13. Exclusion of relevant state legislation.

- Rights of entry to investigate breaches under other laws or instruments (State or Commonwealth) are excluded (s280U).
- Rights of entry to hold discussions (including for recruitment purposes) with employees under other laws or instruments (State or Commonwealth) are excluded (s281D).
- These exclusions only apply when the employer is a constitutional corporation.

14. Prohibitions

- A permit holder must not intentionally hinder or obstruct people in the workplace (s281J(1)).
- A person must not refuse or delay entry to a premises by a permit holder authorised to do so (s281J(2)).
- A person must not hinder or obstruct a permit holder exercising their entry rights (s281J(4)).
- Employers may not make unreasonable requests of permit holders exercising their rights, and the AIRC may make relevant orders regarding the entry rights of the union concerned. The AIRC may make such orders on its own motion or on application (s281K).

15. Dispute settling procedures

- Notwithstanding the limitations on its powers in s89A of the WR Act, the Commission may use its conciliation and arbitration powers to prevent and settle disputes about the operation of this Part (s281N).

16. Employers and employees may not make agreements about right of entry.

- Agreements containing right of entry provisions may not be certified (proposed s170LU(2B)).

17. What will the Bill replace?

18. The predecessor of the *Workplace Relations Act 1996*, the *Industrial Relations Act 1988 (Cth),* contained very broad right of entry provisions for industrial organisations. Section 286 allowed unions to enter prescribed premises for inspection purposes or for interviews with employees during work time. The relevant union official was not however permitted to hinder or obstruct employees in the performance of work. No restrictions were

placed on access for recruitment purposes. These provisions are similar to those in the current New South Wales Act.

19. The *Industrial Relations Act 1988* provided that an officer of an industrial organisation was required to produce an authority if requested by an employer/occupier for evidence of their authority to enter the premises. There were no restrictions/conditions imposed on the eligibility for the possession of an authority other than the requirement to be:

> *an officer of an organisation authorised in writing by the secretary of the organisation or of a branch of the organisation to act under the section.*

20. These requirements are also nearly identical to current New South Wales right of entry provisions.

21. The original *Workplace Relations and Other Legislation Amendment Bill 1996* (WROLA) sought to remove provisions granting unions rights of entry to workplaces and make award provisions relating to the right of unions to enter workplaces unenforceable. The Bill attempted to replace these with a statutory right to enter only after a specific invitation was made in writing by a union member who was an employee at that workplace. The purpose of the visit was 'to ensure compliance with an award, order of the Commission or certified agreement' or 'to hold discussions' with union members.

22. In the Senate inquiry's report on the on the *Workplace Relations and Other Legislation Amendment Bill (No. 2) Bill 1996,* it was commented at clause 4.366 that:

> *the right of entry has been an important component of the compliance function. Rather than being a privilege, it is a part of the effective armoury to undertake compliance. In light of this there seems to be little rationale to limiting this to invitation only. Individual employees have an interest in ensuring that their standards are maintained without having their concerns subject to scrutiny by the employer. Small business, in particular, has expressed an interest in ensuring that their competitors are not using illegal means as a basis of competition with them. Unions have an interest in ensuring that sharp practices are not putting undue pressure on their members' wages and conditions. There is no rationale for making the nomination of an employee a precondition of the function.*

23. The report commented further at clause 4.367:

Not to recognise this and to assist the union discharge this function has no basis in logic or good public policy. This is particularly so in these times of budgetary austerity. What is the point of restricting unions from discharging a public function which is at no cost to the Government?

24. Following negotiations with opposition parties, the Bill was amended, and the WR Act now contains right of entry provisions similar to but more restricted than those contained in the IR Act 1988. These provisions are contained in Part IX of the WR Act, and consist of ss285A-285E of the latter.

25. Specifically, the WR Act now provides that union officials can, during working hours, enter a workplace where people who are members are working, for the purpose of investigating a suspected breach of the Act, an award or agreement or an order of the Commission that is in force and binds the union of which the official is an officer or an employee (s285B(2)). Alternatively, the purpose of the official's visit may be to hold discussions (s285C(1)), inspect wage records (or any other relevant document other than an AWA), or to inspect working conditions (s285B(3)).

26. Right of entry permits are issued to union officials by the Industrial Registrar and are subject to various limitations as follows:

- a union official must give the employer 24 hours' notice of his or her intention to enter the employer's premises (s285D(2))
- a union official is not entitled to enter or remain on an employer's premises unless he or she is able to produce the right of entry permit (s285D(1))
- right of entry permits expire when the union official ceases to be a union official or automatically after three years (s285A(2))
- union officials, in exercising their right of entry powers under Div 11A, must not intentionally hinder or obstruct an employer or employees or otherwise act in an improper manner (s285E(4)).

27. It is worth observing that the Senate report on the 1996 WROLA Bill noted that right of entry is a key part of any strategy to encourage and enforce compliance with industrial legislation. The Senate report articulates the key reasons for adequate entry rights for unions and employees:

- Ensuring that employees can have breaches investigated without having to notify their employer.

- Ensuring that businesses that do not comply with law do not have an unfair advantage over those that do.

28. The current and proposed Commonwealth right of entry provisions are compared in the table at Appendix A.

29. Overriding current state right of entry laws.

30. Divisions 4 and 5 of the Bill is of particular relevance to the New South Wales and other state governments. The proposed new section 280M(3)(e) of the Bill would limit state union officials to investigating suspected breaches under federal right of entry legislation. Proposed s281D has an identical effect in relation to right of entry to hold discussions with employees. All constitutional corporations would thus be subject to the federal right of entry system.

31. A constitutional corporation is an incorporated entity that has sufficiently significant trading or financial activities to come within the constitutional meaning of 'corporation' such as a proprietary limited company but not, for example, a partnership or sole trader.

32. Current New South Wales right of entry laws.

33. Part 7 of the *Industrial Relations Act 1996* (the NSW Act) contains right of entry provisions that regulate the ability of unions to enter workplace premises. These provisions are contained in six short sections of the NSW IR Act (ss 296-302).

34. Specifically, the NSW Act provides for:

- Discussions with employees during non-working hours with eligible employees (union members or employees eligible to become union members).
- The investigation of suspected breaches with at least 24 hours notice.
- The requirement for union officials to produce proof of their authority to enter premises.
- Prohibition of entry to residential premises without the permission of the occupier of the premises.
- Offences such as the hindrance of an employer or employees by an industrial officer, the hindrance of an industrial officer by an employer and entering premises while purporting to be an authorised officer.

- Empowerment of the New South Wales Commission to deal appropriately with an industrial dispute while not being able to confer additional right of entry powers not provided for by the legislation.

35. The NSW legislation has operated with minimal litigation or complaint from the industrial parties.

36. Building industry legislation.

37. In 2003 the Commonwealth government introduced the *Building and Construction Industry Improvement Bill* (the BCII Bill) in response to the recommendations of the Cole Royal Commission into the building and construction industry. The BCII Bill also contained new provisions for the right of entry of union officials onto construction worksites. This Bill was referred to a Senate committee and was subsequently rejected by the Senate Inquiry. The Bill lapsed when Commonwealth Parliament was prorogued for the October 2004 federal election.

38. The BCII Bill prescribed a restrictive scheme of right of entry for union officials and provided for the establishment and operation of the Australian Building Construction Commission (ABCC). The ABCC was designed, inter alia, to police the new right of entry regulations. The right of entry provisions contained in the BCII Bill are identical to the right of entry provisions contained in the *Workplace Relations (Right of Entry) Amendment Bill 2004* with the sole exception that the ABCC is not part of the latter Bill.

39. Like the present Bill, the BCII Bill provided that union officials could only enter workplaces once every six months for the purposes of recruitment, the employer had the right to specify where a union official could engage its members and the route to be taken by the union official to this location, entry permits had to be certified by the Industrial Registrar and union officials would need to be deemed as 'fit and proper' persons. The expiry and revocation of entry permits were also the same as in the Right of Entry Bill.

40. The Senate, in its report on the BCII Bill, rejected the right of entry provisions on several grounds, notably with regard to Australia's international obligations, Commonwealth versus State rights to regulate this area of industrial relations and unfairness and inequity. As we argue below, the current right of entry provisions should also be rejected on these grounds.

41. The Senate report[1] noted that the proposed right of entry provisions would curtail the rights of unions operating in the building industry:

> *...the right of entry provisions applying to premises and worksites under the coverage of the Bill will be limited. That is, they will become more restrictive than the opportunities afforded to union officials and members of their unions than is the case for all other employers and workplaces.*

42. The Senate further recognised the restrictions that the Bill would impose regarding the issuing of permits and the location for union interviews at the worksite. The Senate committee report noted the evidence of the ACTU[2] in stating:

> *The restriction of union officials to an area of the workplace determined by the employer, even to the extent of the route taken to get there, makes the task of effective representation virtually impossible, given that employees may find themselves in the position of being observed by the employer as they go to meet the union official in the designated place.*

43. The Senate committee[3] recognised this provision of the BCII Bill as 'inequitable... to workers in the construction industry'.

44. The committee also referred to the evidence of Robert Merriman[4], formerly of the Australian Industrial Relations Commission, who gave his opinion on the outcome of the proposed right of entry provisions:

> *Firstly, I would say it is unfair. I do not think it is necessary. If we can get the current act to the situation of having proper dispute-settling procedures – and I mean proper dispute-settling procedures that are enforceable by the Commission – and if we can give the Commission back the power that it had, that is all we need to do to resolve the problem of some of the figures that were quoted to me earlier. Going to the next step and imposing on the industry an absolutely different – and harsher, to go to the example – set of criteria will only create greater disputation. Every time it has been applied over the years, whether in the post office or wherever else, we have seen nothing but greater anarchy and ultimately the*

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[1] Senate Employment, Workplace Relations and Education Reference Committee 2004, *Beyond Cole. The future of the construction industry: confrontation or co-operation?* Canberra, p 67.

[2] ibid., pp. 67-8.
[3] ibid., p. 68.
[4] ibid., p. 68.

need to back down from that legislation in the interests of the operation of the business.

45. Furthermore the Senate agreed with the position of the joint state government submission[5] which suggested that:

> *The adoption of an interventionist, highly regulated, restrictive and punitive model under the Bill is unlikely to increase productivity and efficiency in the industry. Nor is it likely to increase levels of trust and cooperation in the industry. Instead, it will drive the parties into further levels of confrontation and litigation.*

46. The Senate Committee also considered the balance of Commonwealth and state industrial powers in this context. The Senate committee[6] concluded that:

> *...based on the evidence that the committee heard of the different problems, and the different industrial cultures around the states, it accepts that there are important functions which states must retain in regulating the industry and bringing about changes where necessary.*

47. The Senate clearly regarded these as serious matters, as suggested by the ACTU[7]:

> *The attempt to override state jurisdiction, resulting in state Parliaments and tribunals being unable to determine the conditions under which right of entry operates in respect of its own laws and awards, is another attempt to reduce industrial law to the lowest common denominator.*

48. The Senate Committee also examined the right of entry provisions in the BCII Bill from the perspective of Australia's international obligations. These obligations included the active International Labour Organisation (ILO) conventions which Australia has signed to and ratified. Noting that the Senate committee considered that the proposed right of entry provisions would restrict the rights of union officials, it went on to say:

> *Restrictions on the rights to communicate with members, and to investigate issues on their behalf, is contrary to Article 3 of ILO Convention No. 98, and is likely to result in further observations by the ILO. The committee supports the legitimate rights of unions to maintain these relationships. The new restrictions on right of entry*

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[5] ibid., pp. 68-9.
[6] ibid., p. 69.
[7] ibid., p. 69.

place too much weight on the rights of employers and give too little protection to employees' representatives to exercise their proper functions. These are to monitor the implementation of agreements that they are party to, including the payment of employee entitlements.[8]

49. The Senate Committee also acknowledged the evidence of Ms Stephanie Mayman,[9] then Unions WA Secretary, regarding the ILO Conventions:

> *These [right of entry provisions] prevent a union official from going about their lawful duty, which is to go onto work sites without causing undue disruption to the work and to recruit – which means to encourage workers to join unions. That is the rightful, recognised, international principle... We as international participants in the ILO recognise that principle, but we seem to consider in our laws or in the proposed Bill that that will be removed.*

50. The Senate Committee decided, from the evidence provided, that the right of entry provisions should be rejected, suggesting instead that

> *...collaborative management of a problem is preferable to introducing specific restrictions on some unions in contravention of [the] ILO principles and conventions.*[10]

51. The Committee rejected the BCII Bill, concluding that the Bill contravenes Australia's international obligations, restricts the rights of unions and is likely to result in increased disputation. The Bill lapsed in the Senate when Commonwealth Parliament was prorogued for the October 2004, federal election.

52. Given that the measures proposed in the BCII Bill are almost identical to those proposed in the current Bill, it follows that the criticisms made of the BCII Bill by the Senate apply, with no less force, to the current Bill.

53. In this connection a further important point should be made. As noted in paragraph 38 above, the BCII Bill was drafted in response to the recommendations of the Cole Royal Commission. This Royal Commission ran for 18 months, and took extensive evidence, inter alia regarding industrial practices in the building industry. Based on this evidence, Commissioner Cole concluded that there was significant union delinquency and intimidation of employers in the building industry.

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[8] ibid., p. 182..
[9] ibid., p. 182.
[10] ibid., p. 184.

54. For the record, the New South Wales Government and other states, strongly opposed the BCII Bill, as the joint state government submission clearly shows.

55. Whether one agrees with Commissioner Cole's conclusion or not, there is a clear nexus between what the Government regarded as unacceptable union behaviour in a particular industry on the one hand, and legislation specifically drafted in response to this perceived misbehaviour, on the other.

56. No such nexus supports the current Bill, which is directed at all industries.

Part 2 – Issues

57. This Part is intended to present an evaluation of the Bill in policy and legal terms, with particular regard the key matters identified in the Inquiry Terms of Reference. Also considered are (presumably) unforeseen effects of the proposed legislation, in relation to existing federal and state legislation, as well as Australia's international obligations. Lack of consultation with State governments is also considered. This Part begins with a discussion of the broad principles against which these evaluations will be made.

58. Policy Issues

59. Why a legislated right of entry?

60. Right of entry to workplaces is a long-standing feature of Australian industrial legislation. As can be seen from paragraphs 17-25 above, it has consistently been part of the WR Act and its predecessors, as well as the original Commonwealth industrial statute, the *Conciliation and Arbitration Act 1904*. Such provisions have similar longevity in the relevant State legislation.

61. These provisions flow from a recognition of the right of unions to organise collectively. The ability of unions to represent their workers and to continue to be robust and dynamic organisations is clearly contingent on regular and meaningful contact with their members, as well as workers who wish to become union members. Indeed, it is difficult to see how unions could effectively organise employees absent such contact. As such, right of entry provisions must, in our submission, be seen as a mechanism which gives practical effect to the right to organise. It follows that in the absence of such practical tools, the right to organise becomes nugatory.

62. The basic right to organise is well recognised in international law, and is enshrined in Article 11 of ILO Convention 87, which Australia signed in February 1973 (see Section 2.5 below). Interference with the right to organise would thus appear to breach what is recognised as a fundamental right.

63. In addition, Australian legislation recognises that right of entry laws give effect to the role which unions can play in ensuring compliance with industrial laws and instruments. This role was considered by the Senate Inquiry into the 1996 WROLA Bill, and its positive conclusions about this role are set out at paragraphs 22 and 23 above.

64. The *Industrial Relations Act 1996* (NSW) (the NSW Act) formally recognises the right of unions to organise and the various roles they play

in the workplace in terms of its Objects, and particularly s3(d), which says that one of the objects of that Act is:

> *(d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,*

65 As discussed at paragraphs 32-34 above, this recognition is given practical effect by means of ss296-302 of the NSW Act. These sections confer a broad discretion on the industrial parties and operate with minimal litigation. Industrial parties are also at liberty to develop right of entry regimes best suited to their needs by incorporating them in workplace agreements certified under the NSW Act.

66. It is against this background that the measures proposed in the Bill are evaluated in this Part. Specifically, it is the New South Wales Government's submission that, if the right of unions to organise is accepted, relevant legislation must be framed so as to make that right into a simple and readily accessible workplace reality. It is our strong view that current New South Wales legislation meets this criterion, and that any departure from the status quo must constitute a demonstrable improvement upon the latter. We now evaluate the proposed legislation against these tests.

67. Lack of policy coherence.

68. This Bill is one of a number that seek to address a large range of seemingly unrelated issues. It focuses narrowly on the rights and obligations of union officials in relation to right of entry, and, as is pointed out below, appears to be a reaction to two recent tribunal decisions.

69. The Government's ostensible goal is to:

> *... ensure that high productivity, increasing real wages, choice and flexibility remain the central focus of our workplace relations reform program'*
>
> (Coalition 2004 election policy document 'Flexibility and Productivity in the Workplace').

70. It is difficult to see how this Bill could deliver labour market flexibility and efficiency when it appears to be focused on the much narrower goal of making it more difficult for unions to organise collectively.

71. A clear example of the opposite approach in action is the successful delivery of the 2000 Sydney Olympic Games. To ensure a successful Sydney Games, the key players in the industrial relations arena agreed on a system to regulate the employment of workers at the Games. All parties worked towards an outcome of industrial harmony.

72. The vehicle for deliver this goal was a consent award between the parties made by the NSW IRC in January 1999. All accounts of the Games indicate that this award, and similar awards in other industries involved in the delivery of the Games, was a great success. It provided flexibility for employers, security for employees, and kept wages under control and at a reasonable level during a period when labour was at a premium.

73. The Bill takes a much narrower and far less cooperative approach. As such, it cannot be said to be part of a coherent and thoughtful approach to regulating the contemporary labour market.

74. Poorly constructed legislation.

75. This Bill carries forward the poor approach to regulation evinced in other parts of the WR Act.

76. Like Part VIA Division 3 which deals with unfair dismissals, proposed Part IXA purports to establish a right (in this case right of entry), and then expends many subsections circumscribing that right, and setting out numerous instances in which it **may not** be exercised. As such, the Bill may fairly be seen as an instance of substantial re-regulation, given the history of existing provisions set out at paragraphs 18 onwards. The result, as described by Professor Andrew Stewart is:

> *...(T)he provisions in Division 3 of Part VIA of the Workplace Relations Act and their attendant regulations are (much like the remainder of the statute) unnecessarily complex and unduly prescriptive. They are very hard for ordinary workers or managers to understand, necessitating legal advice for even the simplest procedures. Instead of simply empowering the Australian Industrial Relations Commission (AIRC) to deal with certain claims and providing broad guidance as to how to do so, as most State laws do, the legislation seeks to regulate each step of the process in ever-increasing detail. As is generally the way when Parliament tries to anticipate and counter every eventuality, this level of detail simply creates potential gaps and uncertainties for litigants and their lawyers to exploit...*

(Prof. Andrew Stewart, Submission to the Senate Employment, Workplace Relations and Education Committee Inquiry into the *Workplace Relations Amendment (Termination of Employment) Bill 2002* pp2-3).

77. In a similar vein, Professor Ron McCallum commented that the federal unfair dismissal provisions are:

> *... by any measure unnecessarily complex. The enactment of this Bill would shift State employees from simpler State unfair termination regimes to these federal provisions that are as complex as current taxation legislation....*

(Prof. Ron McCallum *The Future of State Employment Regulation in Australia*: Conference Paper ACIRRT 11th Annual Labour Law Conference 4 Apr 2003)

78. Given recent experience of Part VIA Division 3, it may be reasonably expected that the list of circumscriptions and qualifications of the proposed right of entry provisions would grow rapidly over their lifetime.

79 Obscure policy rationale.

80. The policy rationale supporting the proposed amendment is somewhat obscure, to say the least.

81. Minister Andrews' Second Reading Speech in support of the Bill refers to matters such as balancing the rights of unions and employers, the desirability of having a single legislative regime, confusion between State and federal laws, ensuring responsible conduct by union officials, limiting inappropriate union entry, ensuring that union entry is less disruptive and intrusive when it does occur, preventing union 'fishing expeditions', assisting both parties to better understand relevant rights and responsibilities, assisting employers to determine whether the requirements of the legislation are being complied with, and protecting non-members from suffering unfair pressure and harassment during recruiting campaigns.

82. A the time the Bill was introduced, Minister Andrews issued a Media Release (Ref KA017-4), claiming that the Bill 'will restore certainty and end the loopholes and complex duplication that (the BGC case) created'. As far as these can be understood, they appear to relate to legal issues, and are therefore dealt with in paragraphs 114-148 below.

83. Before commenting on these matters, it should be noted that the Bill is directed at all industries in all States, at all workplaces large and small (as long as the employer is a constitutional corporation), irrespective of

whether they are located in a metropolitan or regional area. The proposed legislation is to apply whether the relevant workplace is regulated by a state system or the Commonwealth system, or a combination of the two. It therefore seems reasonable to expect that the policy reasons supporting the Bill would be evident across the full range of these workplaces and industries, or alternatively, that some compelling policy principle with a similar range of application is valid.

84 The federal Government provides neither. Broadly speaking, no policy rationale demonstrating that changes to right of entry legislation are required is provided, let alone the compelling, wide-ranging case that changes on the scale proposed would seem to dictate.

85. Most importantly from the viewpoint of the New South Wales State government, there is no such policy rationale in relation to the New South Wales industrial relations system. Indeed it is difficult to see how the federal Government could ever be in position to develop such a rationale, given that it is a stranger to this jurisdiction, being respondent to no New South Wales awards or agreements.

86. Turning now to the specific matters raised in the Second Reading Speech, there is simply no evidence of a lack of balance between the relative interests of employers and unions, or for that matter, how such a lack of balance might manifest itself. There is a similar absence of evidence of confusion between state and federal laws. Indeed, the BGC case, described in Section 2.2 below indicates that the demarcation between State and federal eight of entry provisions is relatively straightforward.

87. In any event, the New South Wales Government has received no complaints about such confusion from industrial parties and we are not aware of litigation to this effect in New South Wales courts or tribunals.

88. Given the apparent absence of confusion between the jurisdictions, it is difficult to see how unions could exploit 'uncertainty' and 'vulnerability' to 'abuse' their rights to enter workplaces. Nonetheless, there is no evidence of such exploitation of which the New South Wales Government is aware.

89. There is a similar lack of evidence of widespread and enduring union misconduct in this area. Complaints of this nature are infrequent in the experience of the New South Wales Government, and there is no publicly available information that the federal jurisdiction differs significantly. As such, there seems to be no support for claiming that union entry to workplaces is inappropriate, intrusive or disruptive to an extent sufficient to warrant legislating across the length and breadth of all Australian jurisdictions.

90. The policy rationale for the Bill therefore remains obscure, to say the least.

91. Undermining the right to organise.

92. The right of unions to organise collectively has, to date, been well recognised in Australian industrial jurisdictions. It is also considered to be an established basic right internationally, as Part 2 below demonstrates. The Senate Inquiry on the Building and Construction Industry Improvement Bill also acknowledged this basic right (see paragraph 62 above).

93. This Bill appears to be intended to effectively curtail this right, if not bring recognition of it to an end. As can be seen from paragraphs 9-13 above, and the Comparative Table at Appendix A, the Bill would dramatically increase the administrative and legal requirements on unions, while increasing the rights of employers to unilaterally determine the way that the rights of unions are exercised in practice. This, as paragraphs 86-87 above shows, is to be done on the basis of a set of problems which appear to have no material existence.

94. Worse still, many of the requirements imposed on unions are onerous and unnecessary. For example, union officials seeking a permit are uniquely required to demonstrate that they are 'fit and proper persons', as assessed by the Registrar against a list of eight conditions. This does not settle the matter of fitness and propriety, as permits automatically expire three years after their issue, when the assessment process must presumably be conducted anew. It is difficult to imagine such requirements being imposed on the many other people who regularly enter workplaces such as customers, suppliers, tradespeople, contractors, meter readers, campaigning politicians and so on, yet such people are surely no more or less capable of causing disruption and harassment than union officials.

95. If the union official is finally able to gain access to the workplace, the employer can determine where she/he conducts discussions with members, and even the route that the official takes to that location.

96. The Bill also fails to have regard to the dynamic nature of the workplace relationship between unions and their members. At present unions are capable of responding flexibly and, where necessary, urgently if a particular situation or issue so demands.

97. The bureaucratic rigidities in the Bill promise to bring this situation to an end. For example, if a union official enters a workplace to hold discussions with employees, and it emerges during the course of the visit that relevant awards or agreements are being breached, the proposed legislation will

require the official to provide the employer with 24 hours notice of a workplace visit to address such potential breaches.

98. The proposed legislation thus creates barriers to unions' ability to respond to their members' needs. These barriers will be particularly attenuated in rural and regional areas, where access to members requires substantial travel and organisation.

99. In the New South Wales Government's submission, these requirements far exceed what is currently required by federal and State legislation, and what might be reasonably be expected to give meaningful effect to a right to organise. Indeed, given that the current provisions already give meaningful effect to this right, the proposed legislation can only be considered to reduce the effective operation of this right.

100. As such, the proposed legislation appears to be intended to significantly reduce the basic right of unions to organise collectively.

101. It should also be pointed out that being a member of a union which is able to organise effectively has tangible benefits. The most obvious example is the now well established wage premium paid by union-negotiated certified agreements (ie agreements negotiated and certified pursuant s170LJ of the WR Act), as opposed to staff-negotiated agreements (agreements negotiated and certified pursuant to s170LK of the WR Act).

102. Figures issued by Minister Andrews' own Department[11] clearly show that this premium has existed since the inception of the current federal system, and the Sept Quarter 2004 (the most recent figures available) show it to be 0.6% AAWI increase for agreements certified in this quarter (4.2%AAWI for s170LJ agreements vs 3.6% for s170LK agreements). In this way, union membership and organisation delivers a clear benefit to those employees who so choose.

103. By making union membership and organsation more difficult, these benefits are likely to become more difficult to deliver.

104 Applying failed building industry legislation to all industries.

105. As noted in paragraph 38 above, this Bill incorporates almost all the right of entry provisions of the Building and Construction Industry Improvement Bill, whose passage the Commonwealth has so far failed to achieve.

106. As has been pointed out above, the BCII Bill was the specific result of the Cole Royal Commission, based on the federal Government's adoption of

[11] Trends in Federal Enterprise Bargaining September Quarter 2004 - Department of Employment and Workplace Relations.

Commissioner Cole's conclusions about right of entry issues in the building industry.

107. There is no reason to assume that this approach can or should be carried over to the full range of industries and workplaces. Indeed, if Australian Bureau of Statistics industrial dispute figures are any indication, the building industry is an exception rather than a rule, and the Victorian building industry is an exception to the industry norm.[12]

108. This would appear to strongly suggest that right of entry issues might best be dealt with by the parties at industry or workplace level. It is therefore somewhat perplexing to observe that the Bill proposes an amendment to s170LU of the WR Act which prohibits the certification of an agreement which would attempt to do so.

109. In short, the Bill aims to impose a single right of entry regime on all industries, irrespective of the views or wishes of the relevant employees and employers. Not only that, but the regime to be imposed is based on the federal Government's views (whether one agrees with these views or not) of an industry with significant levels of conflict.

110. Regulating the norm by the standard of whether the Commonwealth perceives as the worst case is hardly a rational and considered approach to policy-making.

111. Employers will be forced to operate in two systems.

112. The stated intention of the federal government to harmonise and simplify industrial relations in Australia will in effect be negated by the proposed use of the corporations power. This is because for the first time, many businesses will be forced to operate in both the Commonwealth and state systems.

113. This added complexity is not limited to being involved in two jurisdictions, although this is in itself significant. The complexity is best demonstrated by the overly prescriptive nature of the Bill. This complexity should be contrasted with right of entry legislation in New South Wales which is limited to seven sections of the NSW Act (see paragraph 32). The provisions are simply stated and provide for a sensible and straightforward means of regulating right of entry. Certainly, since the enactment of the NSW Act in 1996, there have been very few disputes relating to right of entry and even fewer that have required a decision of the New South Wales Industrial Relations Commission. This in itself is ample evidence of the effectiveness of the New South Wales right of entry regime.

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[12] Industrial Disputes, Australia ABS Cat. No. 6321.0

114. Legal Issues

115. This section considers relevant legal issues, focusing particularly on two recent decisions which appear to have played some role in driving the introduction of the Bill. It is the submission of the New South Wales Government that these two decisions in no way justify the content of the *Workplace Relations Amendment (Right of Entry) Bill 2004*. These decisions are dealt with seriatim below.

116. BGC Contracting v The Construction Forestry Mining and Energy Union of Workers [2004] FCA 981

117. The BGC case involved an application by BGC Contracting to the Federal Court to seek confirmation that the CFMEU did not have any right of entry rights pursuant to Division 2G of the Western Australian *Industrial Relations Act 1979* (the WAIR Act). It was contended by BGC that because of inconsistency between the right of entry provisions in the *Workplace Relations Act 1996* (the WR Act) and those in the WAIR Act, section 109 of the Constitution operates to make the latter Act invalid in respect of right of entry law. BGC contended that because its employees were covered by federal individual Australian Workplace Agreements unions had no applicable rights of entry under state legislation.

118. This decision was the result of an appeal against a decision in the Western Australian Industrial Relations Commission that representatives of the CFMEU holding the requisite state authorisation pursuant to the *Industrial Relations Act 1979* (WA) were entitled to enter the BGC premises for the purposes of holding discussions with relevant employees.

119. In his decision of 2 August 2004, French J did not find any inconsistency between state and federal right of entry legislation. The Federal Court judgment confirmed that a state registered union has the right to enter premises for discussions with employees, notwithstanding that the employees are covered by AWAs made under the WR Act. This is because such employees are still eligible to become members of the state organisation.

120. In spite of the finding that the WAIR Act cannot authorise employees to stop work for discussions with union representatives when such action would be in breach of the AWA itself, it was found that state right of entry legislation is unaffected by federal law. In fact both statutes were found to be able to co-exist without difficulty.

121. Importantly, French J examined section 170VR of the WR Act which provides that an AWA prevails over state law to the extent of any inconsistency. However, because the state law does not attempt to

override or obstruct federal right of entry law, the state law was found not to interfere in any way with the operation of the federal statute. Certainly the aim of the state legislation is not to allow right of entry for the purpose of investigating breaches of a federal agreement, but rather extends only to breaches of state legislation. Significantly, French J noted that no manifest intention on the part of the Commonwealth existed in the Act to 'cover the field' on right of entry to the exclusion of state law.

122. Further, French J found that breaches of state law may or may not relate to employees under a federal agreement of any kind, and that it would be difficult to formulate adequate law that would exclude investigations into breaches of state law involving AWA employees. It was held that the WAIR Act referred to right of entry to 'premises' where 'relevant employees' work, and that this in no way excludes those employees who are parties to an AWA.

123. Taking this Federal Court judgment into consideration, it is difficult to argue for the necessity of using the corporations power to override state right of entry law where AWAs or other federal industrial instruments operate. Indeed, the primacy of federal law in this respect may lead to, or be the unwitting cause of, breaches of state law. Clearly, as referred to in the BGC judgment, there is no inconsistency between state and federal right of entry law. State provisions do not override or interfere with federal instruments and nor do they operate to obstruct employees from meeting employment commitments pursuant to their award or agreement.

124. In short, it is neither necessary nor desirable for state right of entry law to be overridden by that of the Commonwealth where state law does not interfere or hinder the federal statute. Section 109 of the Constitution, as emphasised by French J, provides inconsistency will exist where:

(i) one requires what the other forbids;

(ii) the state law imposes an obligation greater than that for which the Federal law has provided;

(iii) the state law would qualify, impair and, in a significant respect, negate the essential legislative scheme of the Federal law.

125. Clearly none of the above three requirements are met by the interaction between the two jurisdictions in the BGC case. Further, the intention of the federal law was not designed to supersede state legislation and it can therefore not be considered to be inconsistent.

126. It is therefore surprising that the Commonwealth would attempt to impose a right of entry regime on the states when there is no current inherent inconsistency.

127. When the bill was introduced, Minster Andrews claimed that this had been done following

> *a recent case in Western Australia where the Federal Court ruled unions could gain entry to sites under state right of entry law despite the fact that all workers on the site were working under a federal law and the federal system denied the union right of entry.*
>
> *Mr Andrews said today this Bill will restore certainty and end the loopholes and complex duplication that this case created.*

(Minster Andrews Media Release KA01704 'New Bills Give Certainty For Australians' 2 December 2004)

128. From the discussion in the foregoing paragraphs, it should be clear that this interpretation of the decision is not sustainable. For a start, it is not clear how 'the federal system denied right of entry', given that this was the central point of argument before the Court, which ultimately decided the opposite.

129. Most importantly, the decision did not 'create' the 'loopholes and complex duplication' claimed. The decision is based on well established authority concerning the interaction of Commonwealth and State legislation, as well as the operation of s109 of the Constitution. The decision merely applies these authorities in a straightforward manner to the relevant legislation and facts. Similarly, the respective effects of Commonwealth and State laws are clearly delineated in the decisions, compelling the conclusion that there cannot be 'complex duplication'.

130. ANZ Banking Group (ANZ) and Finance Sector Union of Australia – Victorian and Tasmanian Branch (FSU) – AIRC Print No PR951766 8 September 2004

131. This decision was the result of an appeal by the ANZ against orders by Commissioner Greg Smith in relation to right of entry protocol, pursuant to s285B of the WR Act, which deals with right of entry for the purpose of investigating suspected breaches.

132. Commissioner Smith had issued interim orders to the effect that FSU officials had the right to talk to employees about alleged overtime underpayments without regard to the employer's right of entry protocol, albeit being restricted to two visits in the six week interim period. On appeal, ANZ submitted that Commissioner Smith's order, or another similar to it, would be in breach of section 285E of the WR Act in that it would hinder or obstruct the employer or the employee.

133. ANZ further submitted that Commissioner Smith had no power to make such an order in relation to ANZ's general protocol on right of entry matters, because the dispute in question was confined to one particular ANZ location. ANZ submitted that there was no evidence that the ANZ right of entry protocol had caused any difficulties to the FSU in meeting with employees.

134. ANZ also submitted that the FSU should not be able to interview employees at their workstations because of possible contraventions of the *Privacy Act 1988* (Cth).

135. The Federal Minister intervened in support of the ANZ application, submitting that:

- Right of entry pursuant to section 285B(1) of the WR Act applies when the permit holder's purpose of investigating a suspected breach has a sufficiently objective connection with ensuring observance of the Act, an award, order or certified agreement.
- The express entitlements in section 285B of the WR Act are the only entitlements held by permit holders in matters involving a suspected breach and resort to the purpose and objects of the Act does not assist in resolving the matters in issue.
- Parliament did not intend to make an alteration of common law rights further than expressly declared or further than arises by necessary implication.
- A right to enter premises is no more than that and therefore there is no entitlement to walk through the premises flowing from this initial right.
- There is no indication in the Act that after a permit holder invokes their right to interview an employee, that that interview must be solely on the permit holder's terms.
- The employer's obligation is not to hinder or obstruct the interview and that this must be determined on the facts of the particular case and that 'it is primarily for the employer to say where at the workplace the interview will take place'.
- There is no difficulty about the FSU interviewing particular employees but rather the manner in which those interviews take place.
- In exercising the jurisdiction created by section 285G of the Act the Commission is required to consider whether the employer is permitting interviews to occur within the terms of the Act and 'for the Commission . . . to assist the parties to come to a practical

protocol to allow for the right of entry provisions under the Act to operate'.

- The rights set out in section 285B(3) of the Act should be a balance between the legitimate rights of unions with the rights of employers, employees and occupiers of premises.

136. It is worth here noting the considerable similarity between these submissions and the provisions of the Bill.

137. Leave to appeal against the Smith decision was not granted and the Minister's intervention was rejected, the issue not being deemed to be of significant enough importance to warrant further consideration. Specifically, the Full Bench determined that:

- right of entry under section 285 of the WR Act is not broad and is only for specified purposed under specific conditions
- the Parliament did not identify any further limitations that should be applied to right of entry pursuant to section 285C
- there is therefore no warrant for imposing further conditions upon the statutory right of entry
- there is also no warrant for there being a condition that the permit holder identifies a suspected breach to the employer
- there is no warrant for imposing a condition that an interview take place away from the work area
- the Full Bench did not agree that the location of any interview with employees should necessarily be at a location of the employer's choosing (certainly no such requirement is specified in the WR Act).

138. It was the view of the Full Bench that the exercise of a right of entry often involves a degree of cooperation between the relevant organisation and employer, directed to the statutory purpose of the right of entry, but in a manner that minimises any disruption to the employer's business and accommodates the employer's other obligations.

139. Accordingly, while the Commission will take into account workplace disruption, employee preference, and privacy concerns, these will not be at the expense of the right of entry generally, which should be 'substantively available'.

140. Once again, attention is drawn to the close fit between these findings on the one hand, and the manner in which the Bill proposes to put the opposite view into effect, on the other.

141. Taking the decision of the Full Bench into account, there seems little justification for the new section 280R of the Bill, which seems to have been drafted in direct response to the ANZ decision. This section would limit interviews with employees to a particular room or area of the premises of the employer's choosing. The section even goes as far as to allow the employer to direct a particular route to reach the place of interview.

142. Provisions such as these appear to be aimed at marginalising union presence in the workplace. Interviews could be limited to remote areas of the workplace premises and permit holders could be forced to use unusual entry and exit points. It would make union presence at the workplace appear unusual and atypical of normal workplace activity.

143. Further, while the employer request to conduct interviews at a place of their choosing must be a reasonable request pursuant to proposed section 280R(2)(b), this leaves the question open as to what is an even-handed directive of the employer and what is inequitable. This could lead to increased litigation and argument as to what is or is not reasonable, increasing costs to both business and unions alike. In short, such a provision is unnecessary and unworkable and should be rejected.

144. It can be argued that more sensible provision might require the employer and the permit holder or employees to consult and come to an agreement as to where interviews could reasonably and effectively conducted, minimising workplace disruption whilst maintaining the ability of authorised union representatives to meet with their members. However, the Bill does not support such an approach, and places all power at the disposal of the employer, unnecessarily promoting an adversarial approach to right of entry. As such, the proposed laws do not appear to be based on practical workplace realities or proven evidence of problems with the application of right of entry law.

145. Indeed, if agreement between the parties could be reached, proposed s170LU(2B) prevents such agreement from ever being part of an enforceable certified agreement.

146. In summary, these decisions do not, in the NSW Government's submission, support the current Bill.

147. The Commonwealth cites the BGC decision in support of the Bill, claiming that the decision has somehow created 'loopholes and complex

duplication'. In our submission, this claim is simply incorrect, as discussed at paragraphs 129-130 above.

148. The role of the ANZ decision in framing the Bill is less clear, however, as noted at paragraph 137 above, there is a striking resemblance between the provisions of the Bill, on the one hand, and the Commonwealth's submissions in the case, on the other.

149. A centralised, 'one size fits all' approach.

150. Proposed s170LU(2B) prevents the certification of any agreement pursuant to the WR Act if the latter contains right of entry provisions. Existing federal agreements are excluded by means of proposed ss280U and 281D.

151. Proposed ss 280U and 281D also specifically exclude the operation of any such provisions in a State award or agreement.

152. Thus, no matter how willing the parties might be to support such arrangements, the legislation will intervene to impose the regime it prescribes.

153. The Coalition parties have a long history of public commitment to enterprise based industrial relations regulation. They have a similarly long history of opposing what they usually term 'third party intervention' which would interfere with the ability of the parties to reach such arrangements. The WR Act reflects these priorities, as paragraph 166 below describes.

154. The practical effects of proposed ss280U, 281D, and 170LU(2B) are directly contrary to this policy position.

155. In the NSW Government's submission, the most damaging effects of these provisions will fall directly at the workplace level, at the heart of the relationship between employers and unions. In cases where the industrial parties (in either the federal or state systems) enjoy a good working relationship and have established their own right of entry arrangements as a result, these arrangements will abruptly cease to have effect if the Bill is passed.

156. Irrespective of the goodwill between the parties, the arrangements under which they conduct their day to day contact will suddenly cease to operate and will be replaced by far more formalistic, bureaucratic, and for the unions, far more onerous right of entry arrangements.

157. It is difficult to imagine how such a shift in the basic contact arrangements between the parties could not affect their broader industrial relationship,

and it is similarly difficult to imagine how that effect could be other than detrimental.

158. In this way, the Bill appears to threaten best practice working relationships, pushing the parties towards a working relationship closer to the 'lowest common denominator'. In many cases, such existing relationships are the product of long and painstaking work by the parties. Thus, irrespective of workplace or industry history and culture, the Bill seeks to impose a single, adversarial approach on the parties.

159. Any future arrangements which might be more appropriate for the parties are similarly foreclosed. The obvious message is that the parties need aspire to no more than the 'lowest common denominator'.

160. If anything, this is third party intervention *par excellence*.

161. The policy and legal arguments for doing so are obscure, as has already been pointed out above (see paragraphs 80-91). Other than claiming that the BGC decision 'creates loopholes and complex duplication' (see paragraph 128), the Commonwealth is unable or unwilling to say why it is in the public interest to actively prevent industrial parties from striking their own right of entry arrangements. It is similarly unable or unwilling to say why the (unstated) policy goal for which it strives is worth the price of threatening and undermining the many good working relationships between unions and employers, not only in their own jurisdiction, but in all Australian industrial jurisdictions.

162. Creating contradictions with existing federal and state legislation.

163. This section highlights contradictions that the Bill, if passed, would create with the Objects of the WR Act (s3), the freedom of association provisions of the WR Act Part XA, and the operation of the Industrial Relations Act 1996 (NSW).

164. Inconsistency with section 3 of the *Workplace Relations Act 1996*.

165. In line with clearly articulated Federal Government industrial relations policy, section 3 of the WR Act spells out the objects of the legislation, inter alia:

> *(b) ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level; and*

(c) *enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act;*

...

(e) *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;*

166. The Bill runs counter to all three of these clauses.

167. The Bill will ensure that the opposite intention of that articulated in (b) above will occur. Right of entry procedure and protocol will no longer be able to be sensibly negotiated in good faith by the parties at the workplace level, but will rather be placed largely under the control of the employer, with considerable administrative hurdles in place for potential permit holders. For example, the Bill gives the employer the prerogative to decide where interviews will take place between the permit holder and the employee (section 280R(3)(a)(i)) and to choose the route taken by the permit holder to gain access to that place of interview (section 280R(3)(a)(ii)).

168. In addition, there are numerous other provisions in the Bill that also undermine the ability of the parties to explore mutually acceptable outcomes. Not only do they prohibit such outcomes, but they entail cumbersome and unnecessary administrative procedures that will weaken proper investigation of industrial matters and the ability of unions to represent their paid members.

169. For example, section 280C of the Bill proposes that approval from the Industrial Registrar must be given before a specific right of entry can be granted. A form must be submitted noting the premises that are to be entered, the union that is being represented and any other matters prescribed by regulation. Section 280C(3) specifically proposes no limit on the information that may be required by regulation to be submitted for approval. Consequently, entry to investigate suspected industrial breaches will long be communicated to the employer before they can actually be investigated, rendering the right to enter a premises somewhat pointless.

170. Section 280M(2) of the Bill proposes that a permit holder has no right to investigate an AWA breach without a written request from the employee. There is no justification for this law, specifically why a signatory to an AWA should have to lodge a written request when parties to awards and other agreements do not. This will severely disadvantage signatories to AWAs

that are from non-English speaking backgrounds, not to mention those who are unaware of their rights and obligations or those who are unaware that their AWA is not being adhered to by the employer. It will essentially mean that AWAs are not open to the same and proper scrutiny as other types of industrial instruments.

171. The combination of largely prescriptive provisions and complex workplace realities are a recipe for confusion and difficulty. What does not appear to have been considered is the dynamic nature of the relationship between unions and their members. In other words, whilst entry to a workplace may be for the purpose specified in the appropriate Notice of Entry, there is no reason to suppose that union members or workers in the workplace will not expect or demand different or additional services or information during the visit.

172. For example, consider a situation where a union official visits a workplace for the purpose of investigating a breach but might at the same time be approached by non-members with inquiries about membership or recruitment. Questions immediately arise such as:

- How could the permit holder respond reasonably, without breaching the proposed legislation?
- Can the permit holder do something as innocuous as hand out membership forms while attending to other matters?
- Will the employer need to be present to monitor the content of such discussions to ensure there is no legislative breach?

173. Section 3(c) of the WR Act suggests that agreement should be reached on industrial issues at the workplace or enterprise level wherever possible. However, the Bill specifically requires, by amending section 170LU with a new clause 2B, that the AIRC must refuse to certify an agreement if it contains any reference to right of entry to the workplace premises. Thus, rather than promote the objects of the WR Act, such legislation promotes rigidity in not allowing employers and employees to consult and negotiate on workplace issues, one of which is the ability of employees to be adequately represented by their union and have grievances and industrial breaches addressed.

174. The Bill similarly flies in the face of Section 3(e). A suitable framework for ensuring compliance with industrial responsibilities and obligations is explicitly weakened by the proposed legislation that will ensure that investigations and meetings with employees are difficult and administratively cumbersome.

175. The Commonwealth Government's policy of not prosecuting breaches of legislation where less than $10,000 is owing to a worker has meant that over the last two years federal inspectors prosecuted only ten breaches of federal legislation Australia-wide. During the same period, New South Wales inspectors prosecuted nearly 450 breaches, and issued a further 260 infringement notices against employers who were caught breaking the law. While New South Wales inspectors have a robust enforcement framework, it is also notable that they assist in ensuring that approximately 60 per cent of investigations are resolved voluntarily by the employer without the need for penalties.

176. While the New South Wales Government has consistently delivered highly effective compliance and industrial education strategies and outcomes, the Commonwealth has failed to provide an effective compliance regime for its minimal employment standards. A move to the federal system thus appears destined to increase the number of employers who fail to meet their industrial obligations, whether through ignorance or with intent.

177. Inconsistency with Part XA of the Workplace Relations Act 1996.

178. Part XA – Freedom of Association - of the WR Act would also seem to be contravened by the Bill. The objects of this Part are set out as follows in section 298A:

> *(a) to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations; and*
>
> *(b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.*

179. In relation to clause (a), it is submitted that freedom to join an industrial organisation, or not to join, has to be accompanied by a complementary ability for unions to organise adequately in the workplace. Without the ability to use union membership to their benefit, the right to membership by employees is somewhat meaningless.

180. Similarly, the Bill is at odds with clause (b) of section 298A. Employees are not allowed to be interviewed by a permit holder at a place of their choosing. An employee under an AWA will be subject to different conditions than non-AWA employees for accessing union assistance regarding the conditions of their agreement.

181 Inconsistency with the objects of the NSW Industrial Relations Act 1996.

182. The NSW Act differs from its federal counterpart in number of significant ways.

183. In the first instance, the role of unions and their basic right to organise are explicitly recognised in the Objects of the Act. Sections 3(c) and 3(d) provide that the Act is intended to:

> *(c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,*
>
> *(d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,*

184. The WR Act contains no corresponding provisions.

185. Further, the NSW Act has fairness and equity as one of its explicit Objects. Section 3(a) provides that the Act is intended to:

> *(a) to provide a framework for the conduct of industrial relations that is fair and just.*

186. Once again, the WR Act contains no corresponding provision.

187. As has been argued above, the proposed legislation will have the effect of significantly inhibiting the ability of unions to organise in the workplace, and place an unfair burden on unions in terms of simply gaining access to their members and/or recruiting new members. As such, the proposed legislation will broaden the already existing differences between the two systems, notwithstanding the fact that it will constitute a significant encroachment of the New South Wales and other State systems.

188. This point becomes even starker when compliance issues are considered. As can be seen from ss3(c) and 3(d) as set above, the NSW Act envisages a significant role for unions in ensuring compliance with industrial legislation and instruments. The Bill will, if passed, strongly circumscribe such a role for unions. As such, the New South Wales Government and other State Governments will be placed in the invidious position of being able to legislate industrial relations matters, but their ability to enforce proper compliance with such legislation will be significantly limited.

189. Why override state legislation at all?

190. Even if it were conceded that there might be efficiency benefits from having a single system of industrial relations in Australia, or even a single right of entry regime, it is important also to consider the positive benefits in having separate systems. The federal division of power to deal with industrial issues is, after all, mandated by the Commonwealth Constitution. The Commonwealth should not be permitted to take over areas that are currently covered by state law if it cannot provide convincing evidence that there are real problems with the state systems as they presently operate and that its proposed solution would be superior.

191. This begs the question of whether the Commonwealth attempting to 'take over' large parts of the current state industrial relations systems (or at least the right of entry jurisdictions of the states, as presently proposed) is a sensible use of the Commonwealth's constitutional powers, *consistent with the public interest.*

192. The Minister's second reading speech in fact makes no genuine attempt to explain why it is desirable for state right of entry regimes to be largely extinguished. The Minister refers to the confusion inherent in having two right of entry regimes, and yet no less an authority than the Federal Court determined, in the BGC case, that no such confusion exists. The Minister also states that:

> *...as far as possible a single statutory scheme should apply across Australia.*[13]

193. There is simply no articulated reason to support such a statement.

194. The second reading speech also refers to the right of employers and occupiers of premises to conduct their business without undue interference or harassment. While this is a fair and reasonable expectation, there is no evidence that the New South Wales right of entry system provides anything otherwise, or for that matter, that the current federal provisions provide otherwise on a basis that warrants the overriding of the former by the latter.

195. Specifically, the speech makes no reference at all to any failings of the state systems, only to vague allegations of 'confusion'. The onus is on the Federal Government to prove inefficiencies or inequities in the New South Wales system. As present, none have been articulated.

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[13] Minister Andrews, Second Reading Speech to the Workplace Relations Amendment (Right of Entry) Bill 2004, 2 December 2004

196. The New South Wales Commission has a broad discretion to consider right of entry pursuant to sections 297-302 of the NSW IR Act. The proposed federal provisions are necessarily more complex because they are designed to exclude unions from the workplace and employees from accessing their representatives. The provisions relating to the investigation of suspected AWA breaches, gaining a right of entry permit, the AIRC's powers in relation to revocation of such permits and the fact that employers will have significant control over the interaction between union and employees will cause a great deal of concern, disruption and no doubt litigation.

197. It is submitted that by expanding the coverage of the federal right of entry system to those who presently have access to the New South Wales jurisdiction, the effect of the Bill would be to replace a relatively simple system with a more complex and centralised one. There is thus no obvious benefit in overriding state jurisdictions, and the federal Government has provided no coherent reasons for establishing a single regime for right of entry.

198. Australia's international obligations.

199. The right of unions to organise collectively is well recognised in international conventions and treaties.

200. Australia is a member of the International Labour Organisation and has ratified many of its conventions. Of primary importance is Australia's ratification of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) to which Australia became bound in February 1973. The main purpose of this Convention is set out in its Article 2:

> *Article 2*
>
> *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

201. This Convention goes on to say that:

> *Article 3*
>
> *1. Workers' and employers' organisation shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their*

administration and activities and to formulate their programmes.

2. *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 11

Each member of the International Labour Organisation for which this convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

202. Also relevant are:

- The Workers' Representatives Convention, 1971 (No. 135) which Australia ratified on 26 February 1993 and the Workers' Representative Recommendation 1971 (No. R143). This Recommendation provides guidance on legislation and practice regarding the rights and responsibilities of workers' representatives. Specifically, Articles 9, 12 and 17 of the Recommendations provide that:

  9 (1) Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.

  12 Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representative functions.

  17 (1) Trade union representatives who are not employed in the undertakings but whose trade union has members employed therein should be granted access to the undertakings.

- The Collective Bargaining Recommendation, 1981 (No. R163) which suggests that governments should 'facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations'.

203. As can be seen from the forgoing sections, the Bill has at least the potential to offend against all of these provisions to a greater or lesser degree.

204. In particular, Convention No. 87 provides that worker's organisations are entitled to organise their administration and activities and to elect their representatives in full freedom (Article 3), and further that public authorities are to refrain from any interference with this right (Clause 2 Article 3). Section 280F allows the Industrial Registrar, by means of the 'fit and proper person test', to determine who shall be a union representative for the purposes of the inspection of premises and visits to members of the union.

205. Thus far, Australia has enjoyed a good reputation for adhering to its international obligations, As Justice Michael Kirby[14] notes:

> *Australia has observed a consistent policy of obedience to the international obligations that are binding on it as a nation. Whilst Australia is party to a treaty .. it takes its international duties seriously. Unlike some countries, it does not ordinarily join, or remain in, international treaty systems until it is willing to fulfil the requirements that come with the treaty*

206. This Bill can only erode or even damage this reputation, above and beyond the criticisms already leveled at the collective bargaining provisions by the ILO Committee of Experts (*Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILO International Labour Conference 86th Session 1998 pp 222-225). It is regrettable that neither the Minister or the Government address this important issue in the Bill or the supporting material.

207. Conclusion.

208. This section has considered the Bill from a number of different viewpoints. Nowhere does a convincing rationale which would support the Bill emerge.

209. In summary:

- The States, key stakeholders in this policy, have not been consulted.
- There is no convincing policy rationale for the changes proposed.

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[14] Kirby J, 'Human rights and industrial relations', *Journal of Industrial Relations,* vol. 44, no. 4, 2002, pp. 562-78.

- There are no identified conflicts of law or other legal difficulties which would compel legislative amendments.
- The Bill imposes a centralized, 'one size fits all' approach on employers and unions.
- The proposed amendments appear to create significant conflicts with other sections of the Workplace Relations Act and the Industrial Relations Act 1996 (NSW).
- If passed, the Bill would significantly erode the basic rights of unions to organise.
- The Bill would, if passed, place Australia in breach of it international obligations.

210. In short, there is no compelling case that would convince the New South Wales Government that the Bill is worthy of support. If anything, there appears to be a compelling case to reject the Bill.

211. On this basis, we urge the Senate to reject the Bill.

Part 3 – A More Cooperative Approach to Change

212. Given that one of the Bill's aims is to override existing state right of entry legislation, it would seem appropriate to briefly reiterate the New South Wales Government's views regarding a unitary system of industrial relations. These matters were canvassed at some length in our submission to the Senate Inquiry regarding the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, however given the reappearance of provisions that would operate to similar effect in the instant Bill, it seems reasonable to conclude that the federal government has chosen to ignore these views, and similar views put by other States. As such, the New South Wales Government takes the view that this position should be pressed with renewed vigor and urgency.

213. The benefits of having separate state and federal industrial relations systems.

214. The New South Wales Government submission to the Senate Inquiry into the *Workplace Relations Amendment (Termination of Employment) Bill 2002* argued strongly for the maintenance of the state industrial relations systems. That Bill sought to use the corporations power to extend the federal unfair dismissal jurisdiction to cover employees and employers who have access to the state unfair dismissal jurisdictions, and proposed significant limitations on the discretion of the Federal Commission in dealing with unfair dismissal applications. Its scope in these respects is very similar to the current Bill.

215. In view of this, it is appropriate that the New South Wales Government again set out these arguments in detail so as to urge the rejection of this type of legislation, especially when it is proposed without due consultation and without due regard for its consequences.

216. Supporters of a unitary system of industrial relations in Australia generally base their arguments on efficiency grounds. In a paper issued by former Minister Reith in 2000, the case for changing the constitutional foundations of the Commonwealth industrial relations system had three objectives, one of which was 'moving away from the wasteful duplication and complexity involved in the application and maintenance of overlapping federal and state workplace relations systems'.[15]

217. The Paper went on to say:

> *The effectiveness of arrangements to provide for minimum wages and conditions is compromised by the enormous complexity of*

[15] Breaking the Gridlock, at page 1

having dual workplace relations systems and a multiplicity of awards operating in every state except Victoria...[16]

218. But efficiency is not the only goal that governments should strive towards. The Hon Murray Gleeson AC, Chief Justice of the High Court has said:

> *A federation, it must be said, is not a model of efficiency ... If efficiency were the main objective, there would be better ways of running a country than by a federal representative democracy.*[17]

219. In the case of industrial relations, efficiency is not and should not be the only objective. A 'fair go all round', a balancing of the sometimes competing objectives of employers and employees, is the main objective of an industrial relations system. Indeed, it is arguable that the dual system of regulating industrial relations that has been the norm in Australia for over a century has contributed to and promoted the importance of a fair go all round as the centrepiece of good industrial relations.

220. The former Minister for Industrial Relations in New South Wales, the Honourable Jeff Shaw, commented on Minister Reith's proposals in October 2000[18]. His view was that:

> *while there might be technical problems at the periphery with the dual systems, these are not of great practical import and do not create too much day to day difficulty.*

221. The real issue is the proposal to replace the systems put in place by Labor State Governments with the deregulated model of industrial relations preferred by the Federal Government.

222. A unitary industrial relations system is not an end in itself. Support for such a proposal depends on a political or philosophical judgment about how appropriately the proposed unitary system balances the tension between the demands of employers and the rights of employees.

223. This Bill makes no attempt to strike such a balance, choosing to merely introduce fundamental barriers to the ability of unions to organise effectively. It forces union representatives to climb administrative hurdles to gain access to the workplace, and once they are there, they are subject to the employer's demands as to protocol. It is quite possible that other staff who may wish to raise issues with the union, or to ask about

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[16] Breaking the Gridlock, at page 3
[17] Boyer Lectures 2000: The Rule of Law and the Constitution, 2000 at page 10.
[18] Radio National, Life Matters program, broadcast on 24 October 2000.

membership, will not even be aware that the union is present in the workplace.

224. Yet the Federal Government would seek to impose this regime on the states, possibly as the first installment of a unitary system.

225. However, as the Commonwealth well knows, there are limits as to how far it can go in achieving a truly unitary industrial relations system. Any industrial relations system the Federal Government establishes unilaterally on the basis of the corporations power will be limited in its coverage, with some businesses falling inside the federal system, and others outside it. This will perpetuate the dual system that the Federal Government claims is so burdensome to business.

226. High Court authority certainly suggests that a Commonwealth Government, relying on the Corporations power, could create an industrial relations system that covers a substantial proportion of Australian workplaces. This system would cover those employers who are corporations within the constitutional meaning of the latter term.

227. The Second Reading Speech to the Termination of Employment Bill of 2002 that sought to use the corporations power in relation to unfair dismissal coverage, envisaged that the takeover by the Commonwealth of state unfair dismissal jurisdictions as they apply to constitutional corporations would lead to the 'withering away' of the state jurisdictions, as they apply to all workplaces, incorporated or not.

228. Whether such an approach is likely to be successful is not clear. The 'reach' of the corporations power clearly does not extend to unincorporated entities such as sole traders and partnerships and their employees. Nor, seemingly, does it extend to being able to make industrial laws in relation to dependent or exploited contractors unless at least one of the parties is a constitutional corporation. Thus there will always be limits on the capacity of the Federal Government to create a truly unitary system that provides equality of access and appropriate protection for all Australian workers and their employers without the co-operation of all the states.

229. There is some particular irony in this, as many of the small businesses in whose cause the Commonwealth is purportedly legislating are precisely the sort of unincorporated enterprises which would not be 'caught' by any legislation founded on the corporations power.

230. Cooperation and consultation is the key to a unitary system

233. In view of the constitutional limits on unilaterally taking over the state industrial relations jurisdiction, it is strongly submitted that the Federal Government engage in meaningful consultation with the states on this issue.

232. The New South Wales Minister for Industrial Relations, the Hon John Della Bosca, MLC, is on the record as stating that the New South Wales Government has no ideological objection to the concept of a unitary system. However it is the nature of such a system that is at issue. The New South Wales Government submits that the Federal Government, since its election in 1996, has introduced a series of workplace relations Bills that demonstrates a move away from supporting the equilibrium between employer and employee interests (particularly where the latter are collectively organised or expressed) towards an increase in managerial prerogative. Such an approach is also demonstrated by the current Bill that significantly inhibits the ability of unions to organise and represent their members.

233. This approach is fundamentally at odds with the New South Wales industrial relations system in its current form, in letter and in spirit. The clear conclusion is that these changes will leave workers and employers currently subject to the New South Wales system, who have chosen to be in the New South Wales system, measurably and significantly worse off.

234. A unitary system based on, among other things, diminishing the rights of small business employees, interference in matters that should properly be decided between the industrial parties and generally shifting the balance of power to employers without any clearly articulated justification, will always be rejected by the New South Wales Government.

235. Clearly, a considerable amount of dialogue and discussion between the Commonwealth and the states is required before a common position can be contemplated.

236. For that dialogue to ever have a chance bearing fruit, the New South Wales Government's view is that the following things need to done:

(1) The dialogue must be between equals, rather than the Commonwealth attempting to bully the states into submission.

(2) Having a meaningful dialogue about the regulation of industrial relations is simply not possible while the Commonwealth attempts to make major changes to that regulation and in some cases, override existing State legislation, without consulting the states.

The legislative status quo should be maintained while dialogue is under way.

(3) As has already been pointed out, the New South Wales Government has major concerns about many features of the current Workplace Relations Act. We understand that many States, and indeed many users of the Act share those concerns. Meaningful dialogue is not possible without a recognition of, and a willingness to act on, these concerns. A willingness to make changes should therefore not be confined to State Governments, but must equally be borne by the Commonwealth.

237. As has been said on many prior occasions, the New South Wales Government is happy to engage in constructive dialogue with the Commonwealth about the regulation of industrial relations. However, unless that dialogue is conducted on these terms, it appears unlikely that the Commonwealth and the states will move beyond the present impasse, and real and lasting progress on this important issue will continue to elude us all.

Part 4 – Conclusion

238. The *Workplace Relations Amendment (Right of Entry) Bill* 2004 is the one of the latest in a long series of Bills that the Commonwealth Government has sought to advance since it was first elected in 1996. If anything, this Bill appears to move some way in the direction of reviving some of the features – perhaps more in principle than explicitly – of the 1999 *More Jobs, Better Pay Bill*.

239. However, while the latter Bill was part of a larger policy agenda, this Bill has arrived rather more suddenly, prompted to some extent by the respective AIRC and Federal Court decisions in *ANZ* and *BGC*. A further influence on the form of the Bill appears to have been the *Building and Construction Industry Improvement Bill* 2004, which lapsed in the Senate when Commonwealth Parliament was prorogued for the October 2004, federal election. The current Bill replicates most of the features of the latter Bill.

240. Beyond this, the rationale for the Bill remains elusive. The stated policy reasons for its introduction – inter alia, a lack of balance of workplace interests and a lack of understanding on the part of union officials as to their obligations - do not appear to be supported by the facts, and the Commonwealth makes no effort to place such facts in the public domain.

241. Further, the Bill appears to contradict some of the Objects of the Act of which it is to be part, as well the NSW Act with which it forces coexistence.

242. However, the likely practical effects of the Bill are very clear. Chief among them is legislative complication of the right of entry in all Australian jurisdictions. The burden of this complication falls most heavily on unions, who will have to carry a significant new administrative workload just to get in the door, so to speak, obey the instructions of employers regarding where they can talk to their members and how they get there, and be fit and proper people in order to exercise these heavily circumscribed rights. In the event that an official of a union is found to have abused these rights, the Bill contemplates the removal of a right of entry entitlement from all officials of the union, for a period to be determined.

243. Worse still, this is a 'one size fits all' approach, the Bill explicitly prohibits the certification of agreements containing alternate right of entry provisions. This is a particularly curious approach from a Commonwealth Government that has made bargaining the centrepiece of its industrial relations a system, with attendant rhetoric to the effect that the industrial parties are best placed to make their own workplace arrangements.

244. It is therefore difficult to interpret this Bill as anything other than an attempt to circumscribe the right of unions to the maximum possible extent. In this sense, the Bill appears to be more of an ideological exercise than the product of rational policy making.

245. The right to organise is well recognised and supported in international conventions, not a few of which bind this country and presumably its current Government. It is hardly surprising then, that enacting the legislation proposed in this Bill runs the risk of breaching these international obligations. Given the conspicuous absence of such considerations in the Bill or the usual explanatory material, this regrettably does not seem to be a matter of moment for the Commonwealth Government.

246. All of this makes it very difficult to support the Bill, and conversely, very easy to reject it. The New South Wales Government strongly urges the Senate to do the latter.

247. This said, it should be remarked that this Bill and the method of its introduction appears to us to be the antithesis of a rational policy making approach for Australian industrial relations. An absence of consultation and dialogue with the states, and a dictatorial approach to legislation are unlikely to deliver other than ad hoc and directionless change.

248. This strongly suggests that a less combative approach is more likely to be successful. Despite putting this view on other occasions with neither response nor success, we again suggest that more dialogue with the states is the only way to make changes that are likely to be rational and durable.

249. The New South Wales Government strongly urges the Commonwealth to enter such a dialogue.

APPENDIX A

COMPARATIVE TABLE
RIGHT OF ENTRY PROVISIONS

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
Getting and Keeping a Permit to Enter the Workplace	The Industrial Registrar may on application in writing by an organisation) issue a permit to an officer or employee of the organisation. A permit remains valid for three years unless it expires or is revoked or the holder ceases to be an officer or employee of the organisation concerned. A registrar may on application revoke a permit if satisfied that a permit holder has intentionally hindered or obstructed an employer or employee, or otherwise acted in an improper manner. The permit must be returned within 14 days If one or more permits issued to a person have been revoked, the Registrar must take that into consideration when deciding to issue a further permit. Permit must be shown on request.	The Industrial Registrar may, on an application in writing issue a permit to an officer or employee of an organisation. A permit may be subject to limitations as to where and when it is used, The permit may also be subject to limiting conditions imposed by the AIRC if it is determined that a permit holder has abused entry rights. The Registrar must not issue a permit unless he/she is satisfied that the relevant official is a 'fit and proper person' To make this assessment, the Registrar must have regard to the following: (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder (b) whether the official has ever been convicted of an offence against an industrial law (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:	The Industrial Registrar may on application, issue an instrument of authority to an officer or employee of an industrial organisation. The permit remains valid until it is revoked or the holder ceases to be an officer or employee of the industrial organisation. A registrar may on application, revoke the authority if satisfied that the holder intentionally hindered, or obstructed an employee or employer or otherwise acted in an improper manner in the exercise of any power. The permit must be returned within 14 days. An authorised industrial officer is obliged to produce the permit if requested to do so by the occupier or other person whom the permit holder requires to produce anything or answer any question.

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
		(i) entry onto premises; or (ii) fraud or dishonesty; or (iii) intentional use of violence against another person or intentional damage or destruction of property (d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in respect of conduct of the official (e) whether any permit issued to the official under this Part, or under the repealed Part IX, has been revoked or suspended or made subject to conditions; (f) whether a court, or other person or body, under a State industrial law, has cancelled, suspended or imposed conditions on a right of entry for industrial purposes that the official had under that law (g) whether a court, or other person or body, under a State industrial law, has disqualified the official from exercising, or applying for, a right of entry for industrial purposes under that law (h) any other matters that the Industrial Registrar considers relevant.	

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
		Permits automatically expire three years after the issue date. A fresh application must be made for each official after this time. Application may be made to the Registrar to revoke, suspend or impose conditions on a permit. In assessing such applications, the Registrar must have regard to the fit and proper person test. If the AIRC is satisfied that a union, or any official of a union, has abused entry rights, then the Commission may make whatever orders it considers appropriate to restrict the rights of the union, or officials of the union. Orders may include revocation or suspension of some or all of the permits that have been issued in respect of the union and banning for a specified period, the issue of permits in respect of the union, either generally or to specified persons. A permit holder must produce authority papers on request.	

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
Conduct in the Workplace – Discussion With Employees	A permit holder may enter the premises during work hours any premises where employees work who are members of the organisation for discussion. Discussion must take place during the employee's mealtime or other breaks.	A permit holder for a Commonwealth union may enter premises to hold discussions with employees. A permit holder for a State union may enter premises to hold discussions with employees in relation to 'employment or industrial issues'. The employer of the employee must be a constitutional corporation. Entry to hold discussions with employees may only occur during working hours, and then only during meal times or other breaks. In order to enter the workplace, the permit holder must provide the employer/occupier with an entry notice in written form. The permit holder must not enter or remain on the premises if he/she fails to comply with a relevant occupational health and safety requirement. The permit holder must not enter or remain on premises unless he/she agrees to conduct interviews in a room/area of the employers choosing, or unless he/she agrees to take the route chosen by the employer to reach the room/area chosen by the employer. The employer's requests in this regard must be reasonable.	An authorised industrial officer may enter, during working hours, any premises where relevant employees are engaged for the purpose of holding discussions in any lunch time or non-working time.

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
Conduct in the Workplace - Investigation of Breaches	A permit holder may enter, during working hours, any premises where employees work who are members of the organisation of which the person is an officer or employee where there is a suspected breach of the Act, an award or certified agreement that is in force. Permit holders are authorised to interview employees in connection with the suspected breach and are also entitled to inspect and make copies of any time sheets, pay slips or any other documents (other than an AWA) of a member or non member if they are relevant to the suspected breach.	A permit holder may enter a workplace if he/she suspects on reasonable grounds that a breach has occurred, or is occurring of a state or federal award, agreement or Act. A permit holder must provide entry notice in writing and this must specify in detail the particulars of the suspected breach or breaches. The permit holder must not enter or remain on the premises if he/she wishes to conduct activities other than investigation of the breach or breaches stipulated on the entry notice/authority documents. If the union wishes to hold discussions with employees or recruit new members, separate authorities for each of these activities will be required. A permit holder may only inspect non-members records if they seek and obtain an order from the Commission to do so. The permit holder must not enter or remain on the premises unless he/she fails to comply with a reasonable request by the employer to comply with a relevant occupational health and safety requirement. The permit holder must not enter or	An authorised industrial officer may enter, during working hours, any premises where relevant employees are engaged, for the purpose of investigating any suspected breach of industrial relations legislation, or of any industrial agreement that applies to any such employee. An authorised industrial officer is authorised to interview employees in connection with the suspected breach and are also entitled to inspect and make copies of any records and other documents kept by the employer that are related to the suspected breach including non members.

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
		remain on the premises unless he/she agrees to conduct interviews in the room/area of the employers choosing and agrees to take the route chosen by the employer to reach the room/area chosen by the employer. The employers request in this regard must be 'reasonable'.	

PROVISION	WORKPLACE RELATIONS ACT 1996	WRA (RIGHT OF ENTRY) BILL 2004	INDUSTRIAL RELATIONS ACT 1996
Notice	The employer/occupier of the premises must be given 24 hours notice of an intention to enter.	A permit holder must provide the employer/occupier In some circumstances, the relevant union may apply to the Industrial registrar for an exemption from the requirement to provide entry notice. To do so the union is required to satisfy the Registrar 'there are reasonable grounds for believing that entry with advanced notice might result in the 'destruction, concealment or alteration of relevant evidence'.	An employer/occupier must be provided with at least 24 hours notice. The Commission or the Industrial Registrar may waive the requirement to provide notice if satisfied that to give notice would defeat the purpose for which it is intended.