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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4 February 2005

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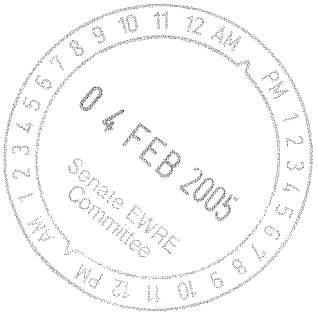

Dear Sir / Madam,

INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

I refer to the Inquiry by the Senate Employment, Workplace Relations and Education Committee (the Committee) Into the provisions of the Workplace Relations Amendment (Right Of Entry) Bill 2004.

Please find attached the Australian Manufacturing Workers' Union's (the AMWU) submission to the inquiry.

The AMWU would value the opportunity to give evidence at public hearing of the inquiry.

Yours faithfully,

DOUG CAMERON
NATIONAL SECRETARY

Attach.

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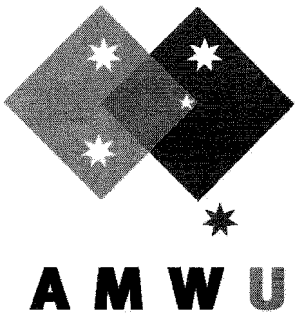
AUSTRALIAN MANUFACTURING WORKERS' UNION



SUBMISSION TO THE
SENATE EMPLOYMENT, WORKPLACE RELATIONS
AND EDUCATION COMMITTEE

WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

FEBRUARY 2005

A. INTRODUCTION

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make submissions to the inquiry of the Senate Employment, Workplace Relations and Education Committee (the Committee) into the Workplace Relations Amendment (Right of Entry) Bill 2004 (the ROE Bill).

2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU represents approximately 140,000 workers in a broad range of sectors and occupations within Australia's manufacturing industry. The union has members in each of Australia's states and territories.

3. The AMWU strongly opposes the passage of the ROE Bill. Fair and effective union right of entry is fundamental to Australia's system of industrial relations. As both the Federal Court and the Australian Industrial Relations Commission (the AIRC or the Commission) have recognised:

> "There is no doubt that the rights of entry and inspection of records [work, equipment, documents etc] are 'a vital part of the process of enforcement of awards, which in turn are at the very heart of the system of conciliation and arbitration'".[1]

4. If passed, the ROE bill would severely constrain the important public interest function played by unions in the enforcement of industrial laws and instruments. In addition, the ROE Bill would dramatically curtail the ability of unions to have discussions with employees about exercising their legitimate and internationally recognised right to freedom of association by joining a union. Neither of these results is in the public interest.

5. This submission identifies the AMWU's specific concerns with a number of aspects of the ROE Bill, including:

   - the new requirements for the issuing of right of entry permits;
   - the new provisions relating to the revocation or suspension of right of entry permits;
   - the changes to the power of permit holders in relation to the investigation of suspected breaches of industrial laws and instruments;
   - the new restrictions on discussions relating to union recruitment;
   - the exclusion of other powers of right of entry and in particular, those granted by state laws and federal and state certified agreements; and

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[1] *AFAP v East-West Airlines Ltd* (1992) 40 IR 426 at 427-428. The quote beginning "a vital part .." is from *AFAP* v *Ansett Transport Industries (Operations) Pty Ltd (No 2)* (1991) 36 IR 219 at 220. See also *Ross VP in KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004,* Sydney, 22 October 2004 [PR952656].

- the expanded civil penalties applying to permit holders.

6. The submission argues that the proposed amendments to the *Workplace Relations Act 1996* (the Act) are unfair, unnecessary and unjust. In addition it is argued that many of the proposed amendments will also offend Australia's obligations under International Labour Organisation (ILO) Conventions.

7. The AMWU concludes by urging the Committee to recommend that the Parliament should not pass the ROE Bill.

B. CONTENT OF THE ROE BILL

8. The proposed new provisions contained in the ROE Bill are unnecessary and unfair to unions, union members and employees generally. Rather than addressing any significant practical concerns or difficulties regarding the operation of Part IX of the Act, the government seeks instead, in the Minister's words, "to strike an appropriate balance"[2] between the interests of employers, unions and employees. Not surprisingly given the governments antipathy towards unions and unionism, the "appropriate balance" envisaged by the Howard Government is one that significantly increases the rights of employers and occupiers at the expense of employees and their representatives.

9. If passed, the provisions of the ROE Bill will inevitably delay and frustrate legitimate investigations of employer breaches of industrial laws and industrial instruments. The provisions would also significantly reduce the capacity of unions to discuss the benefits of joining a union with employees at their workplace. Indeed the provisions of the ROE Bill would appear to go so far as to directly undermine the objects of the Act, and in particular the objects 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*"[3]

and

> "assisting in giving effect to Australia's international obligations in relation to labour standards" (which notably includes rights of freedom of association, collective bargaining and workplace representatives)[4].

10. The AMWU urges the Committee to recommend that the Senate not pass what is an essentially ideologically motivated attack on the union movement. The government's political antagonism towards unions should not be allowed to endanger employees' enjoyment of the rights and benefits conferred by federal and state industrial laws and/or instruments. Nor should the government's hostility towards collectivism in the workplace be allowed to discourage or prevent employees from taking full advantage of their legitimate and internationally recognised rights to freedom of association and collective bargaining.

11. In the following pages the AMWU discusses a number of the union's *specific* concerns in relation to the ROE Bill's proposed amendments to the Act.

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[2] See the Minister's second reading speech.
[3] Subsection 3(e) of the Act.
[4] Subsection 3(k) of the Act.

B.1 The New Provisions Restricting the Issuing of Permits

12. The AMWU submits that the proposed new requirements relating to the Industrial Registrar (the Registrar) being satisfied that a permit holder is a "fit and proper person"[5] are inappropriate for the purposes of the issuing of a permit.

13. Specifically the AMWU is concerned that:

- There are no details of what will be considered "appropriate" training or who will be the provider of such training under paragraph 280F(2)(a).
- The requirement for consideration of "any other matters the Industrial Registrar considers relevant" in paragraph 280F(2)(h) introduces an unacceptable degree of uncertainty into the decision of the Registrar.
- The requirement that consideration be given as to whether any person has ever been ordered to pay a penalty under the *Workplace Relations Act 1996* or any other industrial law in respect of conduct of the official under paragraph 280F(2)(d) is unduly restrictive and may lead to unfair and inappropriate decisions to refuse to issue a permit.
- The proposed requirements will lead to substantial delays in the issuing of permits.

14. In relation to the consideration of matters contained in paragraph 280F(2)(d) regarding an order to pay a penalty under the Act, the AMWU notes in particular that such a consideration would appear likely to prevent at least one Presidential Member of the Commission from being issued with a right of entry permit if an application was made on that member's behalf under the proposed new scheme. In 2001 the Federal Court found that the conduct of his Honour Senior Deputy President Cartwright, when his Honour was still the Human Resources Manager of Telstra Ltd, caused Telstra Ltd to contravene section 298K of the Act at least 43,828 times. According to the Court, his Honour's conduct had prejudiced employees employed pursuant to awards and certified agreements in a "real and substantial way". Telstra was subsequently ordered to pay hundreds of thousands of dollars in penalties.[6]

15. It is not unreasonable to assume that conduct causing such a large number of contraventions of the freedom of association provisions of the Act would, in the ordinary course, be likely to exclude a union official from holding a permit under the proposed new right of entry scheme.

16. The AMWU submits that it is patently unfair and unjust that persons who are the subject of an application for a right of entry permit are required to meet a more

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[5] Proposed section 280F.

[6] See CPSU, Community and Public Sector Union v. Telstra Corporation Limited [2001] FCA 1364 and CPSU, Community and Public Sector Union v. Telstra Corporation Limited [2001] FCA 813.

onerous standard than persons entitled to continue to hold office as a Presidential Member of the Commission.

B.2 The New Provisions Concerning the Revocation and Suspension of Permits

17. The AMWU submits that the proposed new provisions relating to the revocation and suspension of right of entry permits are unnecessary and unfair.

Powers of the Industrial Registrar: Revocation, Suspension, etc

18. Under the current scheme in the Act, the Registrar may revoke a permit where a permit holder has "intentionally hindered or obstructed any employer or employee or otherwise acted improperly"[7]. The ROE Bill considerably widens the discretion of the Registrar.

19. The proposed new section 280H provides that where an application is made to the Registrar, the Registrar may take action against a permit holder to revoke, suspend, or place conditions on right of entry permits. In exercising such a power, the Registrar must consider the matters that the Registrar is obliged to consider when deciding whether a person is a "fit and proper" person to hold a permit. This includes, amongst other things, whether any person has ever been ordered to pay a penalty under the Act or any other industrial law in respect of conduct of the official and "any other matters the Industrial Registrar considers relevant". The AMWU submits such matters are problematic for the same reason the union submitted the matters are inappropriate in relation the issuing of a permit.

Powers of the Commission: Revocation, Suspension, etc

20. The proposed new section 280J provides that where the Commission is satisfied that a union, or any officer or employee of a union, has abused rights conferred by the new Part IXA, the President, a Presidential Member assigned by the President for such a purpose, or a Full Bench may revoke, suspend or place conditions on some or all of the permits that have been issued in respect of a union.

21. The revocation or suspension of all right of entry permits of a union would have an extremely serious effect on the capacity of a union to effectively represent the interests of its members.

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[7] Subsection 285A(3) of the *Workplace Relations Act 1996*

22. Further, the revocation or suspension of all right of entry permits of a union would necessarily lead to a substantial reduction in the monitoring of employer compliance with awards and agreements to which that union is a party. Such a reduction would significantly disadvantage employees whose employment is subject to the relevant awards or agreements.

23. It would be fundamentally unfair and unjust that in the case of the AMWU for example, 140,000 members of a union may be denied effective on the ground representation by their own elected officials and employees of the organisation to which they belong, because of what may well be an isolate example of conduct that a Presidential member of the Commission views as an "abuse" of rights under the Part.

24. Similarly, and considering the likely effect on the livelihood of the permit holder, it would be fundamentally unfair and unjust if a permit holder who had scrupulously adhered to the requirements of all of the various relevant industrial laws and instruments had their permit revoked or suspended because of the actions of another permit holder over whom he or she had no influence or control.

25. The AMWU further submits that the revocation and suspension provisions in the ROE Bill are unfair and unjust because:

- The provisions contain no express requirement that a union be heard in relation to the revocation of permits.[8]

- The provisions contain no adequate indication of what constitutes an "abuse of rights conferred by this Part" means or what factors should be taken into account where the Commission is to consider revoking the permits issued in respect of a union.

- Unlike the current regime regarding the deregistration of an organisation, there is no requirement that the Commission must consider whether it would be "unjust to do so having regard to the gravity of the matters"[9] concerned.

[8] Compare s.28(2) of Schedule 1B of the *Workplace Relations Act 1996* in relation to the cancellation of registration of an organisation registered under the Act.
[9] Compare s.28(3) of Schedule 1B of the Act.

B.3 Right of Entry to Investigate Breach

Exclusions of powers in relation to non-union members and parties to an AWA

26. Under the proposed new subsection 280M(1) a permit holder could only investigate a suspected breach where the breach relates to or affects either a union member or work being carried out by one or more employees who are union members. The proposed new subsection 280M(2) provides that a breach of an Australian Workplace Agreement (AWA) cannot be investigated without the written request of the employee party to the AWA.

27. In investigating a suspected breach relating to or affecting a union member or work being carried out by one or more employees who are union members, a permit holder would not be allowed to access records of non-union members[10] without a potentially time-consuming application to the Commission[11].

28. It has long been recognised that union members have a genuine and legitimate interest in the terms and conditions of non-union members: *Metal Trades Employers Association v. Amalgamated Engineering Union* (1935) 54 CLR 387 at 418, 419. (*Metal Trades Case*); and *R v. the Commonwealth Court of Conciliation and Arbitration ex parte Kirsch* (1938) 60 CLR 507.

29. As Rich and Evatt JJ recognised in the *Metals Trades Case*:

> *The practical interest of unionist employees in making such a demand is obvious. It is not made from motives of altruism, but for two important reasons of material interest. In the first place, if the employer is allowed to employ non-unionists at lower wages than in the case of unionists, there will be a direct inducement to the employer to employ the cheaper class of labour, and to dispense with, or not engage at all, the services of unionists. In the second place, the economic result of differing standards of wages for employees engaged in similar work in the same trade or industry is a powerful tendency towards the general adoption of the lower standard, because, under modern conditions of easy communication between all parts of industry, the tendency of the wages standard is to reach the lower level. Both these results of a lower wage for non-unionists are, or may be, disastrous to the union and its members, and may tend to produce great dissatisfaction and discontent.*[12]

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[10] See the proposed new subsection 240N(4).
[11] See the proposed new subsection 240N(9).
[12] 54 CLR 387 at 417.

30. Similarly Latham CJ in the same case observed:

> *Unionists may be concerned and apprehensive with respect to any matters which may affect the terms upon which their employers can afford to employ them. If other employers are at liberty to employ non-unionists at lower rates of wages, the competitive efficiency of employers employing unionists may be seriously prejudiced, and the continued employment of the unionists may be jeopardized. Employers of unionists may take the same view. It is to be expected that the opinions of those engaged in industry will vary upon this subject. Some will regard it as a matter of principle, others as a matter of interest.*[13]

31. For these reasons the AMWU submits that unions have a direct and legitimate interest in the terms and conditions upon which non-unionists are emloyed and should therefore be allowed to continue to investigate suspected breaches of industrial laws and industrial instruments in relation to non-members and workers on AWAs.

32. However, the investigation of suspected breaches of the law is not merely in the interest of union members, there is an obvious public interest in the monitoring of compliance with industrial laws and instruments of all employees, whether the employees are members of a union or not.

33. The AMWU submits that constraining the right of entry to employees who are currently union members is not in the public interest and will inevitably lead to non-compliance with industrial laws and instruments.

Inappropriate Notice Requirements

34. The proposed new subsection 280P provides that a notice of right of entry must contain particulars of the suspected breach or breaches. Only those breaches particularised on the notice may be investigated. Additional related breaches that may come to light as a result of investigations of a suspected breach may not be acted upon without a fresh notice.

35. Particularisation requires not only the identification of the instrument or area of the Act alleged to be breached but also the particular parts of the business or categories of employees affected by the alleged breach[14].

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[13] 54 CLR 387 at 403.

[14] See the explanatory memorandum at 1.49.

36. The AMWU submits that such changes will serve to delay and frustrate the information gathering process where a breach has in fact occurred.

37. In addition, the changes will mean a potentially hostile employer is considerably more likely to identify which employee or employees have approached a union with a suspected breach of the law or award. This will act as a disincentive for employees to have breaches investigated and a hindrance to the permit holder investigating the breach.

38. The proposed new subsections 280N(5) and (6) of the ROE Bill would have the effect of adding at least 14 extra days notice for documents or records which are not kept on the premises to be provided relevant to a suspected breach of an industrial law or instrument. The proposed new subsections also require the notice to provide documents following an actual physical inspection of the premises whereas a permit holder can presently give notice to produce documents or records without an inspection of the premises[15].

39. The AMWU opposes an additional time period applying to the notice to produce documents as against the public interest. The additional time period will at best frustrate and delay the investigation of a suspected breach of the law. At worst the requirement will encourage unscrupulous employers to alter, remove or destroy of documents and records.

"Reasonable" Suspicion

40. The proposed addition of the requirement for a permit holder to have "reasonable grounds" for suspecting a breach of an industrial law or instrument[16] and the associated assignment of the burden of proof in relation to those grounds[17] is an unnecessary and inappropriate restriction on permit holders.

41. In most circumstances, prior to exercising a right of entry, a permit holder will have few opportunities for the collecting of verifiable information regarding suspected non-compliance with the law. The AMWU submits that where a permit holder has a *genuinely held* suspicion that a breach of the law is occurring it is in the public interest that he or she should be in a position to exercise a right of entry to gather further information relating to that suspicion without the fear of the possibility of a subsequent revocation of the individuals permit or the permits of an entire union for failure to meet what a Commission member or Registrar decides is "objectively" suspicious.

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[15] See subsection 285B(4) of the Act.
[16] See the proposed new section 280M.
[17] See the proposed new section 280V.

42. The proposed additional requirements are likely to have a chilling effect on the investigation of suspected breaches of the law.

B.4 Limitations on Discussions With Respect to Recruitment

43. The ROE Bill prohibits a permit holder using his or her right of entry for the purposes of recruitment unless such a purpose was specified in the notice and the union has not entered the premises in the preceding 6 months for that purpose[18].

44. At a minimum, the restrictions will lead to arbitrary and absurd interactions between permit holders who have entered a site for a suspected breach of an industrial law or instrument and employees who may wish to find out more information about the benefits of joining a union (including possible representation for a breach of an industrial law or agreement) or the processes involved. Indeed, it is almost inconceivable that the provision will not lead to regular disputes and legal proceedings over its interpretation and application.

45. Furthermore, the proposed changes would effectively render a union almost totally unable to discuss recruitment with a broad range of employees including: shift workers; part-time employees; employees engaged by a labour hire firm as supplementary labour; casual and/or seasonal employees; and employees working at premises where there are regular and significant changes in the composition of the workforce.

46. The restrictions are simply not justifiable on public interest grounds, ignore the realities of the modern workforce and are contrary to Australia's obligations under ILO Conventions with respect to freedom of association and the right to organise.

B.5 Location of Interviews, Discussions Etc

47. The ROE Bill provides an employer with the right to determine where interviews or discussion are held with employees and the route that must be taken to reach the room or area where the interview or discussion will take place[19]. The right is subject to the requirement that the "request" be reasonable. Such a request can only effectively be challenged by the permit holder seeking an order pursuant to the proposed new section 281K.

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[18] See the proposed new section 280Z.
[19] See the proposed new subsection 280R(3).

48. Again it would appear that the effect of the proposed ROE Bill will be to delay and frustrate the investigation of a suspected breach of an industrial law or instrument and to discourage union involvement generally. At a minimum it is essential for the information gathering or meaningful discussions that a permit holder can meet with employees in an area that is suitable for such a purpose. This will often mean a room or area from which union members or those eligible to be union members cannot be observed or monitored by a potentially hostile employer.

B.6 Exclusion of Other Rights of Entry

49. With the exception of OH&S laws to be prescribed in the regulations[20], the Bill seeks to displace all other industrial laws and state industrial instruments where there is a right of entry.[21]

50. The proposed new subsection 170LU(2A) would prevent the certification of agreements under Division 4 of the Act where the agreement contains provisions which require or permit a union officer or employee to exercise a right of the kind covered by the proposed Part IXA (ie a right of entry).[22] The AMWU strongly submits that preventing the certification of agreements that contain union right of entry clauses is unnecessary and unfair. Employees, their unions and employers should be free to determine the contents of their own certified collective agreements without interference from the government.

51. The AMWU submits that this part of the proposed legislation is clearly in breach of ILO Conventions No. 98 - Right to Organise and Collective Bargaining. The ILO Conventions are discussed further in a later part of this submission.

52. In addition, the proposed new sections 280U and 281D would dramatically reduce the ability of state industrial systems to provide for a right of entry system that is appropriate for organisations, employees and employers operating under the relevant state laws, awards and instruments. It is the AMWU's view that it is not in the public interest that state legislatures and tribunals be so constrained.

B.7 Civil Penalties Applying to Permit Holders

53. Under the current provisions in the Act, a civil penalty is imposed if a permit holder when exercising his or her statutory powers in relation to the Part IX right of entry provisions intentionally hinders or obstructs any employer or employee.

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[20] See definitions in the proposed new section 280B.
[21] See for example, the proposed new subsection 170LU(2B), section 280U, section 281D.
[22] See the proposed new subsection 170LU(2B).

54. The proposed new section 281J provides that "a permit holder exercising, or seeking to exercise, rights under section 280M, 280N, or 280W must not intentionally hinder or obstruct any person, or otherwise act in an improper manner". Failure to comply with the new section 281J will attract a penalty of 60 penalty units.

55. The ROE Bill therefore seeks to expand the civil penalties applying to permit holders in two ways. Firstly, a permit holder may attract a civil penalty not only when exercising his or her statutory rights but also when *seeking* to exercise his or her statutory rights. Secondly, a permit holder may attract a civil penalty not only by intentionally hindering or obstructing an employer or employee but also when intentionally hindering or obstructing *any person* or otherwise acting in" an improper manner".

56. The AMWU submits that the application of the proposed section is uncertain and unfair. It is unclear for instance at what moment or in what way a permit holder may be "seeking to exercise" his or her rights under section 280M, 280N or 280W. On its face the provision would appear wide enough to apply to a permit holder who pushed in front of a queue in a union office when faxing an entry notice. It is also most unclear as to what "acting in an improper manner" means in the context of the proposed new right of entry regime. It is highly unsatisfactory that permit holders are exposed to civil penalty for failing to meet such a vague and uncertain standard of conduct.

57. The AMWU submits that the proposed new section 281J is vague, uncertain and inappropriate in all the circumstances.

C. ILO CONVENTIONS

58. The AMWU submits that the proposed ROE legislation contains provisions that are inconsistent with ILO Convention protecting the rights of workers and their representatives.

59. In this context, the AMWU notes that similar right of entry provisions in the Building and Construction Industry Improvement Bill were found to be in likely breach of Article 3 of ILO Convention No. 98 – Right to Organise and Collective Bargaining, 1949 by the Senate Employment, Workplace Relations and Education References Committee. In that inquiry the Senate Employment, Workplace Relations and Education References Committee found at paragraph 8.34 of the committee's report[23]:

> The committee accepts that directives about how and when employee representatives can meet members or to recruit members will restrict the rights of union officials. Restrictions on their 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 from the ILO. The committee supports the legitimate rights of unions to maintain these relationships. The new restrictions on right of entry place too much weight on the rights of employers and give too little protection to employee's 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. This is especially true for the more vulnerable members of the workforce including apprentices who, while they are not often union members, often request the assistance of unions when issues of OH&S or employee entitlements arise.

60. In addition to breaching ILO Convention 98 - Right to Organise and Collective Bargaining, 1949, the AMWU submits the ROE Bill if passed would be in likely breach of the ILO Convention No. 135 – Workers' Representatives Convention, 1971.

[23]The committee's report was titled: Beyond Cole – The Future of the Construction Industry: Confrontation or Co-operation June 2004.

D. CONCLUSION

61. The Howard Government's ideological obsession with unions continues to prevent it from proposing balanced and fair reforms to the industrial relations legislation.

62. The ROE Bill contains provisions which are designed to reduce the effectiveness and timeliness of the investigations of permit holders into breaches of industrial laws and industrial agreements. The ROE Bill also seeks to unnecessarily and unfairly restrict the ability of unions to recruit and organise members.

63. The AMWU submits the initiatives in the ROE Bill are against the public interest and in breach of Australia's international obligations with respect to internationally recognised labour standards.

64. The AMWU strongly urges the Committee to recommend that the Parliament should not pass the ROE Bill.