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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Submission of the

Construction, Forestry, Mining and Energy Union

(Construction and General Division)

to the

Senate Employment, Workplace Relations and Education

Legislation Committee

on the

WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

February 2005.

Introduction

There is no evidence that right of entry is an issue with employers generally. Retaining and developing employees is the top HR concern for employers in 2005, according to the latest report by Australia's largest recruitment and human resource consulting firm, Hudson.

The January-March 2005 *Hudson Report*[1] says 38% of managers it surveyed in 7800 Australian companies identified retention and development of existing employees as their key priority. The survey covers a broad range of industries, including construction/property/engineering. Only 3% of managers cited industrial relations management as their top priority.

Against this background, and under the pretext of balancing the rights of unions with the rights of employers, the Government seeks to impose extreme restrictions upon the right of unions to enter the workplace. Regardless of whether a particular workplace is regulated wholly or partly by Federal or State industrial laws, that is what the Government proposes to do.

In any discussion of "balance", it should be remembered that employers have the opportunity to put their point of view on industrial relations to employees at any time during working hours, without any union official being present or even knowing that a discussion (which may well concern the union) has occurred.

Even if there were no restrictions whatsoever on union rights of entry, no union would ever have the same opportunity as an employer to discuss industrial matters with the employees. Managerial and supervisory staff are interacting with employees throughout working hours every day of the week. Union officials obviously are not.

How then, can there be balance in a piece of legislation which virtually seeks to put the workplace out of bounds to union officials?

As the vast number of successful claims for underpayments show, many employers routinely breach awards and agreements. Yet the published cases do not reveal the full extent of underpayments, as they usually concern union members only. Nevertheless, the active policing of awards and agreements by unions is a proven means of ensuring that the greatest number of employees will receive their proper entitlements. This Bill seeks to drastically reduce that activity and to swing the balance completely in favour of those employers that set out to cheat their employees.

The Bill seriously impinges upon the freedom of association principles set out in ILO Convention 87 on Freedom of Association and Protection of the Right to

[1] Part Two - 2005 HR Priorities (au.hudson.com)

Organise. Moreover, the Bill makes a mockery of one of the Principal Objects of the Workplace Relations Act, viz:

> *"ensuring that employee and employer organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively;"* [2]

Section 280A - Objects of Part IXA

The Objects of the Bill illustrate the Government's intention to remove any semblance of balance from the right of entry provisions of the Act, and to limit as far as possible the ability of unions to operate effectively.

Object (a) purports to establish a framework that balances the rights of unions and employers to conduct their legitimate business. Employers are to be able to do so without *"undue interference or harassment"*. The Object fails to say that unions should be able to conduct their legitimate business in a similar fashion.

Object (a) equates union right of entry with interference or harassment. "Harass" is legally defined as *"To trouble, vex, torment, or confuse, as by continual attack or questioning"*.[3] The language of Object (a)(ii) implies that innocent employers are being subjected to torment and continual attack, etc. There is no suggestion that employers might interfere with union officials who seek to carry out lawful activities on premises where workers are employed.

To ensure that employers are not subjected to harassment or interference, entry permits can be held only by persons who *"understand their rights and obligations"* and who are *"fit and proper persons"*[4]. To be legally eligible to hold a permit, a union official must satisfy the Industrial Registrar on a range of matters set out in s.280F.

There are no corresponding prerequisites for employers and their representatives to carry out duties in connection with Part IXA. Whilst Object (c) seeks to ensure that employers understand their rights and obligations, the means by which this is to be achieved are not specified.

Considering the length and complexity of the Bill, the Objects which seek to ensure that people "understand" their rights and obligations are remarkably ambitious. The existing right of entry provisions of the Act run to five pages, and have generated considerable debate and litigation as to the rights and obligations arising under those provisions. The Bill is twenty nine pages in length, and in no way simplifies matters for the benefit of ordinary union officials and employers who will have to deal with each other under a far more prescriptive regime.

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[2] Section 3 - Object 3(g)
[3] Butterworths Australian Legal Dictionary (1997)
[4] s.280A(b)

Moreover, it is only a permit holder whose rights can be suspended or revoked where those rights are *"misused"*.[5] The Bill simply does not contemplate any suspension or restriction of the rights of particular employers who wilfully offend against the right of entry laws.

Far from balancing the rights of unions and employers, the Objects of the Bill are designed to restrict legitimate union activity in the workplace, and to allow aberrant employers greater opportunity to defraud their workers, whether union members or not.

This is contrary to one of the principal Objects of the Act, viz:

> *"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;"*[6]

Section 280F - Fit and proper person

The Industrial Registrar must not issue a permit to an official unless satisfied that the official is a fit and proper person to hold the permit.[7] This provision is discriminatory and unnecessary.

In determining whether an official is a fit and proper person, the Industrial Registrar must carry out a probing examination of the official's background. The person's history as both an official and private citizen in this country and overseas is to come under close scrutiny. The Industrial Registrar must have regard to a wide range of matters set out in s.280F(2), including *"(h) any other matters that the Industrial Registrar considers relevant"*.

Entry of premises is an inherent job requirement for most union officials. The Bill will require every union official whose duties involve entry to an employer's premises (i.e., most union officials throughout Australia) to submit to an investigation of their personal history. Apart from the privacy issues raised by this section, and whether there could ever be a just requirement for the wholesale investigation of union officials in a free and democratic society, the Bill does nothing to ensure confidentiality of the information gathered by the Registrar.

There is nothing to prevent the information being used for purposes other than satisfying the Registrar that the official is a fit and proper person to hold a permit. Personal information on union officials could be disseminated amongst other

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[5] s.280A(d)
[6] WRA s.3(e)
[7] s.280F(1)

governmental agencies, or fall into the hands of journalists, politicians and other individuals, to be used inappropriately.

The lack of any confidentiality and protection of personal information concerning union officials is to be contrasted with the provisions of the Workplace Relations Act which prescribe a custodial sentence of 6 months for identifying a party to an AWA[8].

Further, it is obvious that the task of screening applicants for permits will be very onerous on the Registrar. The work of the Registrar will be greatly expanded. The Commission is already struggling with a shortage of staff and funds. There will be inevitable delays in the processing of applications for permits and other related matters.

Section 280H - Revocation, suspension of permits

In a Bill that purports to be balanced, the consequences for a union that breaches the provisions of the Bill far outweigh the consequences for an employer that breaches those provisions. Indeed, the personal consequences for a union official who breaches the provisions far outweigh the personal consequences for an employer. The Commission can make orders, of its own motion or on the application of an authorised person, to restrict or suspend the rights of the union or officials of the union.[9]

If a union official *"or any other person"*[10] (presumably, any other person connected with the union) has ever been ordered to pay a penalty under the Act or any other industrial law, the official must declare it to the Industrial Registrar[11], and may consequently be refused a permit. The Registrar is not required to take into account any mitigating circumstances or how long ago the penalty was incurred.

A union that cannot enter an employer's premises may well become ineffective at that workplace or in the industry concerned. An official whose entry permit is suspended or revoked can lose his or her livelihood. Section 280H(6) is virtually a "three strikes and you're out" penalty for permit holders.

The worst thing that can happen to an employer who breaches the right of entry provisions is the imposition of a pecuniary penalty by the Court.

Section 281J - Hindering, obstruction etc

Section 281K - Unreasonable requests by occupier or employer

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[8] WRA s.83BS(1) & s.170WHB(1)
[9] Section 280J(1)
[10] s.280F(2)(d)
[11] s.280D(4)

Whereas action can be taken against a permit holder by the Industrial Registrar, the powers of the Commission in respect of occupiers and employers are exercisable only by the President, a Presidential Member or a Full Bench.[12] It will be a simple matter for employers to delay the entry of permit holders while the Commission, thus constituted, determines whether an employer has made a *"reasonable request"*[13] to a permit holder.

Unreasonable requests by an employer or occupier should be a breach of s.281J(4), not *"might amount to a breach"* as stated in the Note to s.281K(1). It is noticeable that *hindering, obstructing, refusing, unduly delaying,* etc, on the part of employers and occupiers are all far less prescriptive than provisions applying to *misuse* etc by permit holders.

Section 280N - Inspection of records

In industries such as the construction industry, where workplaces are mobile, records that would be useful to inspect and copy in the investigation of a suspected breach would not usually be *"kept on the premises by the employer"* or be *"accessible from a computer that is kept on the premises by the employer".*[14] This provides opportunity for delay, alteration and destruction of documents, etc.

An employer's capacity to obstruct and delay permit holders is further enhanced through the open-ended ability to impose occupational health and safety requirements.[15]

Section 280N - Inspection of non-member records

The Bill seeks to restrict the right of permit holders to inspect non-member records where there is a suspected breach[16].

For access to records of non-members, an application must be made to the Commission for an order that such records be produced.[17] An additional AIRC procedure for access to employment records for non-members would mean further delays and uncertainty.

Moreover, employer knowledge of an employee's union membership status would be necessary in determining whether the employer was legally obliged to produce such records in the absence of an order from the Commission. By seeking to identify members and non-members, the Bill will make members a "target" for

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[12] s.281K(3)
[13] s.281K(1)
[14] e.g., s.280N(4)
[15] e.g., ss.280R(2) & 281B(2)
[16] s.280N(4)
[17] s.280N(9)

anti-union employers, and will undermine the freedom of association provisions of the Act.

It is a misconception to regard the enforcement role of a union as being equivalent to some kind of "outside" body policing laws that ought properly be enforced by a "neutral" governmental agency. Union members and non-members alike rely on effective compliance as a protection for their ongoing entitlements. Unions in Australia have a very long history of providing effective compliance.

Central to the role of enforcement and compliance is the right to enter workplaces for the purpose of investigating suspected breaches. Diminishing that right not only reduces the rights of unions and their members, but also reduces the integrity of the system of awards and agreements as a whole. Widespread non-observance of industrial instruments has the effect of undermining the safety net and prejudicing the commercial position of those employers that do comply.

Employers who are parties to awards and various types of certified agreements are bound to apply them to union members and non-members alike. A union's interest in the observance of these instruments is not confined to ensuring that members are paid their correct entitlements.

If some lesser standard of enforcement were to apply to non-members, there would be a clear incentive for employers to engage non-members in preference to union members. Thus, the position of union members would be seriously prejudiced if the union were denied an effective role in the enforcement of the relevant award or agreement generally.

Sections 280P & 280Z - Limitation on rights - entry notices

A permit holder is required to give an *"entry notice"* to the occupier of the premises at least 24 hours, but not more than 14 days, before the entry. There are different types of entry notices according to the purpose of the proposed entry. An entry notice must specify the section that authorises the entry; the day on which entry is to occur; the particulars of any suspected breach; whether recruitment is a purpose of entry; plus a range of other as yet unspecified matters to be prescribed by the regulations.[18]

On any one day an efficient union official would visit the premises of numerous employers in the normal course of his or her duties. The proposed entry notices are obviously designed to swamp permit holders with wave after wave of paperwork, and to encourage employers to cavil with officials who seek to exercise their entry rights .

[18] s.280C(2)(b)

The requirement in s.280P(2)(c) for the entry notice to specify particulars of a suspected breach invites the alteration or destruction of material evidence. Whilst s.280Q provides for a union to apply to the Industrial Registrar for an exemption certificate, that application would necessarily involve delay and would be a further administrative burden upon the union.

Moreover, employees will be deterred from making complaints about breaches because, if full particulars must be given, it will be easier for the employer to identify the source of the complaint and to take retributive action against the employee(s) concerned. The fate of "whistleblowers" is well documented.

The right of an employer to require a permit holder to either:

- conduct interviews in a particular room or area of the premises; or
- to take a particular route to reach a particular room or area of the premises

is clearly intended to intimidate employees and to deny them the capacity to have discussions with the union without the employer knowing that they have done so. Furthermore, it facilitates surveillance of, and eavesdropping upon, employees and union officials who wish to have private discussions.

According to the Second Reading Speech, *"Repeated union entry to the workplace to recruit new members can result in non-members suffering unfair pressure and harassment".*[19] There is no evidence to support that assertion. Indeed, pressure and harassment would be a most unlikely way to convince a person to become a member of an organization. In fact, it is not unusual for members and non-members to say to union officials that "we don't see you often enough!"

The limitation on rights to enter for the purposes of recruitment (s.280Z) is simply designed to discourage union membership. The arbitrary limit of one recruitment visit in a period of six months contradicts any fair notion of freedom of association. In many workplaces there is a considerable turnover of employees, and unions will have a vastly reduced opportunity to recruit amongst these employees.

Moreover, there is a fine line drawn between holding discussions with employees and recruiting employees. Section 280Z(3) defines recruitment as *"encouraging employees to become members of the permit holder's union."* At what point does holding discussions with an employee who is eligible to join the union[20] become *"encouraging"* the employee to become a member?

This Section, like so many other provisions of the Bill, will result in unceasing litigation.

Sections 280U & 281D - Exclusion of rights under State industrial laws

[19] Second Reading Speech page 3
[20] s.280W(1)(b)

The Bill overrides State systems where the relevant employer is a constitutional corporation. According to the Second Reading Speech, *"In workplaces where both federal and State right of entry laws apply, confusion about rights and responsibilities may arise".*[21]

This ignores the fact that, in certain States such as New South Wales and Queensland, the majority of workers are entirely covered by State laws and industrial instruments. There is currently no confusion in those workplaces. A significant number of unincorporated employers will remain under State right of entry laws. The Bill will create a two-tier system where a single-tier system currently exists. Complexity and confusion will be the inevitable result.

Of course, the real reason for the Government's intrusion is that the right of entry provisions in every State jurisdiction are far more reasonable and balanced than those contained in the Bill.

Penalties

A string of heavy penalties apply for various contraventions of the provisions of the Bill. These are in addition to the revocations, suspensions and disqualifications laid down for permit holders for relatively mild infractions.

Whereas, under s.280H(6), a permit holder is subject to disqualification for minimum arbitrary periods (e.g., 5 years if the Registrar has taken action against a permit holder on at least 2 occasions), an employer who repeatedly offends against the provisions can continue to do so indefinitely without any form of disbarment.

The complexities of the Bill will almost certainly make the *"Electrolux"* matter and subsequent litigation look simple by comparison.[22] Yet ordinary union officials in the field will be required to *"understand their rights and obligations"* perfectly. There will be no room for a bona fide mistake on the part of a permit holder. Misrepresentations about right of entry will result in civil penalties.[23] The burden of proving reasonable grounds for suspecting a breach will lie on the permit holder.[24]

In circumstances where there can be no legal certainty about the validity of entry rights (given the vast number of qualifications and limitations laid down in the Bill), serious penalties and disqualifications are especially onerous, and are a strong discouragement to the exercise of those rights.

Prohibition on right of entry provisions in certified agreements

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[21] Second Reading Speech page 1
[22] NB: The *Electrolux* case did not concern right of entry.
[23] s.281L
[24] s.280V

At the present time it is common for right of entry provisions to be included in certified agreements to which unions are a party.

The Bill amends s.170LU of the WRA by requiring the Commission to refuse to certify an agreement if it contains a provision that allows a permit holder to exercise rights of a kind covered by the Bill.[25]

This means that, even if an employer and a union wish to agree upon arrangements more flexible and practical than those prescribed in the Bill, they will no longer be allowed to formalise such arrangements in their certified agreement.

No reason has been advanced for this interference with the rights of parties to make an agreement which they consider to be appropriate for a particular workplace. It would appear that the Government simply intends to dictate to the parties to certified agreements how they must "balance" their rights in relation to entry of premises.

In taking this "one size fits all" approach the Government seeks to impose its own ideology upon all parties to certified agreements. That, of course, is contrary to one of the principal Objects of the Act, viz:

> *"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;"*[26]

Conclusion

Instead of sowing a legal minefield in territory where the Government seeks to wage its ideological war against unions, the Parliament would better serve the public interest by rejecting the Bill in its entirety.

Prior to the enactment of the current entry provisions in 1996, right of entry was a relatively uncomplicated matter, and the rights of employers and unions were evenly balanced. By a combination of legislation and industrial instruments, union officials were entitled, at reasonable times, to enter the premises of an employer in their union's industry, for the purpose of interviewing employees and inspecting books, documents, works, etc.

A body of case law had evolved which provided clear guidance to unions and employers. Any disputes or instances of unreasonable conduct by union officials and employers could be dealt with expeditiously by the Commission.

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[25] Schedule 1 - Amendments - Item 2
[26] WRA s.3(b)

The entry provisions of Division 11A of the *Workplace Relations Act 1996* started the process of upsetting the balance which had been carefully struck between the rights of union officials and the rights of employers in regard to entry of premises.

The present Bill tips the balance completely in favour of employers, particularly those employers that are hostile towards trade unions. The Bill is a further manifestation of the Government's rabid anti-union philosophy.

Independent commentators have described how the Bill seeks to counteract various decisions of the Federal Court and the Commission concerning right of entry.[27] In other words, when the Government loses a case, it introduces legislation to substitute its decision for that of the court or tribunal.

If this Bill is passed, and subsequent court rulings displease the Government, further legislation will no doubt be introduced to counteract "wrong" decisions. The right of entry provisions will become lengthier and more complex. And they will become even more incomprehensible to ordinary permit holders and employers.

The only rational alternative is for the Government to drop the Bill and to utilize the basic democratic process of consultation with all interested parties. There needs to be, as far as possible, a consensus as to the appropriate entry rights for union officials. Suitable legislation, based on clarity, simplicity and balance, could then be prepared. Accordingly, this Bill should be either withdrawn or rejected.

[27] e.g., CCH Industrial Law News, issue 12, pps 6-7