Submission

to

Senate Employment, Workplace Relations and Education
Legislation Committee

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

Submission no: 12

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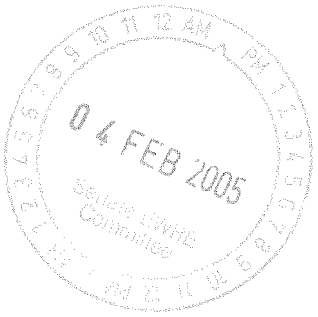
WITH YOU AT WORK

4th February 2005



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Mr John Carter
Committee Secretary
Senate EWRE Committee
Parliament House
CANBERRA ACT 2600

ATTENTION: MS RUTH CLARKE

By email: - eet.sen@aph.gov.au

Dear Mr Carter,

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

Please find enclosed our submission to the Inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004.

Please do not hesitate to contact me on (02) 9264 1691 should you require further information.

Yours sincerely,

Alisha Hughes

ALISHA HUGHES
INDUSTRIAL OFFICER

LABOR COUNCIL
New South Wales
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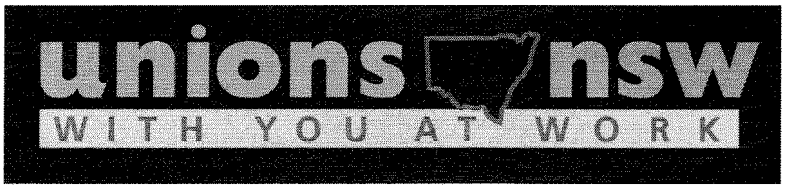
Senate Employment, Workplace Relations and Education Legislation Committee

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



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Introduction

On the 2nd December 2004, the Workplace Relations Amendment (Right of Entry) Bill 2004 was introduced into Parliament.

This submission is in response to the Senate Employment, Workplace Relations & Education Committee's inquiry into the Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004.

The two elements to the Bill to which these submission relate, are as follows:

The first element is the extension of the 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 OHS practice.

Unions NSW supports and adopts the submissions made by the ACTU in this inquiry. This submission supplements the ACTU's submission with particular reference to New South Wales.

Definitions

Unions NSW	–	Labor Council of NSW
ACTU	–	Australian Council of Trade Unions
The Committee	-	Senate Employment, Workplace Relations and Education Committee.
IRC of NSW	–	Industrial Relations Commission of NSW
The Bill	–	Workplace Relations Amendment (Right of Entry) Bill 2004.

The New South Wales System

Unions NSW also supports the submissions made by the New South Wales Government in this inquiry. In particular, Unions NSW emphasises the statement that there has been no discussions in regards to this legislative change with key stakeholders in New South Wales, despite this legislation aiming to override substantial elements of the Industrial Relations Act 1996.

Further, we concur with the proposition that the Bill appears to contravene Part XA – Freedom of Association of the Workplace Relations Act 1996, by limiting the ability of the union to visit and recruit members. The Bill is effectively victimising employees whom are union members by not allowing them to utilise the full extent that such membership entails. Unions NSW also supports the proposition advanced by the NSW government that the Bill would create a conflict with the objects of the Industrial Relations Act 1996.

Unions NSW also supports and places significant importance on the arguments by the New South Wales Government in regards to the question raised "Why override the state legislation at all?" There is simply no evidence to suggest companies that operate in the New South Wales system conduct their business with interference and / or harassment from authorised industrial officers. All evidence in New South Wales

points to a co-operative environment that exists within the legislative framework of the Industrial Relations Act 1996.

Chapter 5, Part 7 – Entry and Inspection by officers of industrial organisations, of the Industrial Relations Act 1996 sets the provisions for Right of Entry. The provisions are set out below:

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296 Definitions

(1) In this Part:

"authorised industrial officer" means an officer or employee of an industrial organisation of employees who holds an instrument of authority for the purposes of this Part issued by the Industrial Registrar under section 299.

"employees' records" includes records of the remuneration of employees, part-time work agreements with the employees or other records relating to the employees that are required to be kept by the employer by or under the industrial relations legislation or an industrial instrument.

"officer" of an industrial organisation includes any person who is concerned in, or takes part in, the management of the organisation.

"relevant employee" , when used in connection with the exercise of a power by an authorised officer of an industrial organisation, means an employee who is a member of the organisation or who is eligible to become a member of the organisation.

(2) This Part does not confer authority on an authorised industrial officer to enter any premises for the purposes of holding discussions with employees or of an investigation if:

(a) the persons employed at that place are employed by a person who holds a certificate of conscientious objection under section 212 (3)

because of membership of a religious society or order (such as the Brethren), and

(b) none of the persons employed at those premises are members of an industrial organisation, and

(c) there are no more than 20 persons employed at those premises.

297 Right of entry for discussion with employees

An authorised industrial officer may enter, during working hours, any premises where relevant employees are engaged, for the purpose of holding discussions with the employees at the premises in any lunch time or non-working time.

298 Right of entry for investigating breaches

(1) 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 the industrial relations legislation, or of any industrial instrument that applies to any such employees.

(2) For the purpose of investigating any such suspected breach, the authorised industrial officer may:

(a) require any employer of relevant employees to produce for the officer's inspection, during the usual office hours at the employer's premises or at any mutually convenient time and place, any employees' records and other documents kept by the employer that are related to the suspected breach, and

(b) make copies of the entries in any such records or other documents related to any such suspected breach.

(3) An authorised industrial officer must, before exercising a power conferred by this section, give the employer concerned:

(a) at least 24 hours' notice, except as provided by paragraph (b), or

(b) in respect of any requirement to produce records or other documents that are kept elsewhere than on the employer's premises—at least 48 hours' notice.

(4) The Commission or the Industrial Registrar may, on the ex parte application of an authorised industrial officer, waive the requirement to give the employer concerned notice of an intended exercise of a power conferred by this section if the Commission or the Industrial Registrar is satisfied that to give such notice would defeat the purpose for which it is intended to be exercised.

(5) If the requirement for notice is waived under subsection (4):

(a) the Commission or Industrial Registrar is to give the authorised industrial officer a warrant authorising the exercise of the power without notice, and

(b) the authorised industrial officer must, after entering the premises and before carrying out any investigation, give the person who is apparently in charge of the premises the warrant or a copy of the warrant.

299 Provisions relating to authorities issued to officers

(1) The Industrial Registrar may, on application, issue an instrument of authority for the purposes of this Part to an officer or employee of an industrial organisation of employees.

(2) An authorised industrial officer is required to produce the authority:

(a) if requested to do so by the occupier of any premises that the officer enters, or

(b) if requested to do so by a person whom the officer requires to produce anything or to answer any question.

(3) The authority:

(a) remains in force until it expires or is revoked under this section, and

(b) expires when the person to whom it was issued ceases to be an officer or employee of the industrial organisation of employees concerned.

(4) The Industrial Registrar may, on application, revoke the authority if satisfied that the person to whom it was issued has intentionally hindered or obstructed employers or employee during their working time or has otherwise acted in an improper manner in the exercise of any power conferred on the person by this Part.

(5) An application for the revocation of an authority is to set out the grounds on which the application is made.

(6) A person to whom an authority has been issued under this section must, within 14 days after the expiry or revocation of the authority, return the authority to the Industrial Registrar for cancellation.

Maximum penalty: 20 penalty units.

300 No entry to residential premises without permission

An authorised industrial officer does not have authority under this Part to enter any part of premises used for residential purposes, except with the permission of the occupier.

301 Offences

(1) An authorised industrial officer must not deliberately hinder or obstruct the employer or employees during their working time.

(2) A person must not deliberately hinder or obstruct an authorised industrial officer in the exercise of the powers conferred by this Part.

(3) A person must not, without lawful excuse, fail to comply with a requirement of an authorised industrial officer under this Part.

(4) A person must not purport to exercise the powers of an authorised industrial officer under this Part if the person is not the holder of a current authority issued by the Industrial Registrar under this Part.

Maximum penalty: 100 penalty units.

302 Powers of Commission

The Commission may deal with an industrial dispute about the operation of this Part, but does not have any jurisdiction to make an award or order conferring additional or inconsistent powers of entry or inspection.

These provisions are clear and easily understood by union officials and employers alike.

Unions NSW submits that there is little or no evidence to suggest wide spread abuse of right of entry provisions throughout industries. This can be substantiated by the number of union officials whom hold a right of entry in New South Wales against the number of matters in the IRC of NSW that contest right of entry. (Including revocation of permits)

In New South Wales alone, Unions NSW has 64 affiliates, whom combined employ a over 1000 persons classified as authorised industrial officers for the purpose of Chapter 5, Part 7 of the Industrial Relations Act 1996. Such persons hold and utilise such right of entry permits on a regular (if not daily) basis. In addition, we would estimate that on average, 120 new right of entry permits are issued each year.

In 2004, there was only one application for the revocation of such permit made to the IRC of NSW. That matter is currently before the Registrar, with no outcome having been determined at present. In 2003 there were two applications made by

employers for the revocation of a right of entry permit. The outcome of those two applications being that no permit was revoked as the matters were withdrawn.

This suggests that there is no evidence for or a need for any change to the Right of Entry provisions in New South Wales. This further emphasises the co-operative environment that exists within the state system and that there is little to no confusion about the role of the authorised industrial officer, in attending premises.

Unions NSW also submits that there is no evidence in NSW for the need of such a stringent requirement for the issuing of permits or non-issue of permits as those set out in the proposed Section 280F.

Case Study One

In 2003, the New South Wales Ethical Clothing Trades Council (ETEC)[1] produced a 12-month report on its activities to the Minister for Industrial Relations in NSW. The report focused on *"action taken by the clothing industry during the period of 12 months after the commencement of this section to improve compliance in the industry with obligations to ensure outworkers in the clothing trades receive their lawful entitlements".*

Whilst the report deals with compliance in regards to the Homeworkers Code, the Retailers Ethical Clothing Code of Practice and the Occupational Health and Safety Act 2000, it also deals with the compliance of the appropriate award, the Clothing Trades (State) Award. (An award of the IRC of NSW)

Case study One of the report shows a Cabramatta based employer breaching award provisions and working employees over 70 hours per week as well as paying some employees as little as $5.50 per hour.

The Union entered the premises to investigate suspected breaches of the award, pursuant to the Industrial Relations Act 1996, and found that union members and non

[1] New South Wales Ethical Clothing Trades Council 12-month Report 2003

union members alike were receiving wages and conditions significantly below the Clothing Trades (State) Award. This was subsequently rectified and the employees now receive the appropriate rates and conditions.

If the proposed changes outlined in the Bill in regards to the union only being able to investigate breaches which relate to union members, many employees at this site would still be on wages and conditions lower than those employees that are members of the union, thus leading to continued exploitation of these workers. Further identifying and singling out union members in this way will act as an incentive for employers to discriminate against those union members or favour non-union workers.

Unions NSW also finds it absurd that an industrial instrument to which the union is a party – that encapsulates both union members and non-members can only be enforced for union members, by the Union. To restrict union protection to union members alone guarantees the creation of a market incentive for unethical entrepreneurs to intentionally exploit, defraud and intimidate non unionists.

The TCFU (with its proactive policing approach and its specialist enforcement personnel) has emerged as the body primarily responsible in practice for securing compliance with existing provisions aimed at the protection of outworkers, a development confirmed by uncontested evidence before a range of parliamentary investigations (such as those conducted by the Australian Senate, Economic and References Committee).

These parliamentary investigations have been complimented by a series of industrial tribunal enquiries (both federal and state), which together have unearthed further uncontested evidence of appalling exploitative practices inflicted upon vulnerable (predominately female) outworkers throughout the textile, clothing and footwear industries. In part the award simplification conducted before a Full Bench of the Australian Industrial Relations Commission concluded that these outworkers required special protection in light of the voluminous uncontested direct evidence about their gross exploitation.

Case Study Two

Another example of how the right of entry provisions work effectively can be found in case study four of the New South Wales Ethical Clothing Trades Council 12-month report.

A clothing manufacturer in Canterbury (in New South Wales) were paying their employees below the appropriate award rate, incorrect superannuation amounts and did not keep proper time and wages records. After the TCFUA utilised their right of entry and advised the employer of their statutory requirements, an outcome was reached where the employees (both union and non union) were paid correctly.

If the proposed Bill was passed and the union was to notify in writing to the employer, the particulars of the suspected breach, the ability of the union to appropriately address all issues that may arise in one visit would be limited.

Under the proposed Bill the situation may arise where the Union issues one notice stating "underpayment of weekly award wages", then as a result of the proposed Bill a second notice and a second visit is required to inspect the records for the "underpayment of a first – aid allowance" or "underpayment of superannuation" etc.

These are particularly onerous and time-consuming provisions, (Section 280P) for both representatives of the union and the Company. Further, we submit that this would in fact cause greater disruption for businesses.

It should also be noted that in the last example the manufacturer was replacing 'Made in China' labels with 'Made in Australia' labels without substantially altering the product. The TCFUA contacted the ACCC in relation to this issue, and to date there has been no outcome as to the complaint.

Case Study Three

A final example of how the proposed Bill will lead to greater inequities is that of the cleaning industry in New South Wales, of which the LHMU has coverage. Within this industry, (in Metropolitan Sydney) it is estimated that approximately 80% of those members are from a non-english speaking background, with a large proportion of those persons with limited written and verbal skills. The cleaning industry also has quite a high turnover of staff each year.

In order to effectively offer membership of the union to potential members in the cleaning industry, there is a requirement to visit the site more than once in a six-month period. This is due to the fact that employees expect to be visited and recruited into the union at their workplace. Limited english skills of persons in the industry also contribute to the main reason for site visits as conversing with members or potential members over the phone is quite difficult. Communication of all workplace issues is easier in a group situation where one employee may be able to act as an interpreter for all other employees. In addition, in industries such as this where there is a high turnover of staff, to give all employees a chance to become members of the union, the union may require to visit the site several times within a six month period.

The LHMU in New South Wales in utilising right of entry provisions, not only sees the role as the offering of membership to the union, but the Union also uses it right of entry as an educative and preventative role for employees and employers.

It should also be noted that if the Bill is to pass and employers are allowed to dictate where discussions are to take place and the route that the authorised union official is to take to that room, the purpose of the visit will be unable to be fulfilled. Further, it will allow for the employer to place the union official in a room where employees are required to walk past their employers office in order to talk to the union about joining. This itself may lead to the employee feeling intimidated, or that if they visit the union official, they are in danger of losing their job.

It is Unions NSW's submission that such a provision is intended to frustrate the purpose of the right of entry provisions and is effectively a prohibition on the recruitment of union members in a workplace.

Conclusion

This Bill has been advanced without prior consultation and input from key stakeholders in the New South Wales jurisdiction.

There is no evidence to suggest that the NSW system requires any changes, which effectively limit the activity of union officials in using their right of entry permits. The New South Wales right of entry provisions are clear and concise, and if this Bill is to be passed, would conflict with the objects and provisions of the Industrial Relations Act 1996.

The proposed Bill simply seeks to attack the rights of working people and to stop unions effectively recruiting and carrying out existing functions, which protect members and non-members wages and conditions of employment. The Bill continues to weigh the "equilibrium of rights in industrial relations" more heavily in favour of the employers.

Unions NSW oppose the Bill and urge the Committee to recommend that the Bill not be passed.