

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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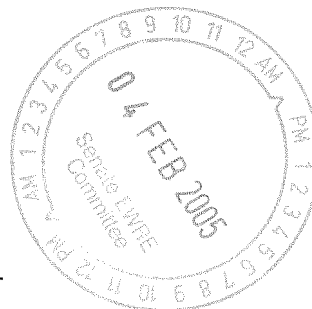
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*ACCI SUBMISSION
TO THE SENATE
EMPLOYMENT, WORKPLACE RELATIONS AND
EDUCATION COMMITTEE*

INQUIRY INTO THE

*WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY)
BILL 2004*

FEBRUARY 2004

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ACCI

- The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak council of business associations.
- ACCI is Australia's largest and most representative business organisation.
 - Through our membership, ACCI represents over 350,000 businesses nationwide, including:
 - Australia's top 100 companies.
 - Over 55,000 medium sized enterprises employing 20 to 100 people.
 - Over 280,000 smaller enterprises employing less than 20 people.
- Businesses within the ACCI member network employ over 4 million working Australians.
- ACCI members are employer organisations in all States and Territories and all major sectors of Australian industry.
- Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers and sole traders, as well as medium and larger businesses.
- Each ACCI member organisation, through its network of businesses, identifies the policy, operational and regulatory concerns and priorities of its members and plans united action. Through this process, business policies are developed and strategies for change are implemented.
- ACCI members actively participate in developing national policy on a collective and individual basis.
- As individual business organisations in their own right, ACCI members also independently develop business policy within their own sector or jurisdiction.
- ACCI therefore represents employers who are subject to and must comply with right of entry provisions

Summary of ACCI Submission

1. ACCI supports the Bill and believes that passage of this Bill will produce a more balanced framework of right of entry provisions in the *Workplace Relations Act 1996*.
2. In particular, ACCI supports measures designed to produce a uniform or unitary national system of right of entry provisions. At present there are multiple right of entry regimes that employers must manage and comply with, and this is undesirable.
3. The Bill will also assist in preventing and addressing abuse of right of entry provisions.
4. Right of entry should only be exercised where employees choose to be represented by trade unions in respect of a particular workplace matter; such an approach is consistent with the principles of freedom of association.

TABLE OF CONTENTS

ACCI ii

Summary of ACCI Submission iii

Right of Entry provisions in context..... 5

The property right of employers should be respected 6

The regulatory framework 7

The current Bill 10

Right of Entry provisions in context

5. Right of entry provisions were gradually inserted into awards in the early 20th century. An examination of the original decisions which gave rise to trade union right of entry rights reveals that they arose in the context of enforcement and compliance with award conditions.
6. Right of entry provisions have therefore played a role in the enforcement of one particular system of workplace relations - that based around awards. Awards gave registered organisations, and in particular trade unions, a central, guaranteed role within the workplace relations system.
7. As the workplace relations system changes, the centrality of that role is also changing. There is nothing immutable or essential about trade union right of entry. It is appropriate for the system of trade union right of entry to be changed as our contemporary workplace relations system changes. Australia has moved to a workplace relations system which is based increasingly around agreement-making at the workplace level, rather than the award based system in which right of entry emerged.
8. This is made all the more appropriate given the dramatic decline in the level of trade union membership in the last thirty years; only 17.5% of private sector employees are now members of trade unions. The vast majority of employees now choose not to be represented by trade unions in their negotiations with employers. This is another challenge to the ongoing role and relevance of trade union right of entry provisions.
9. Right of entry provisions must be recognised for what they are – legalised ‘trespass’, in circumstances where that ‘trespass’ is considered justified as a matter of public policy. They overturn fundamental notions of private property which are central to our economic and legal systems. As such, the public policy case for trade union right of entry should apply to the minimum extent necessary to achieve that policy objective.
10. In the modern economy, and with modern methods of transmitting information, it may be possible for the representative functions associated with right of entry to be exercised in a less obtrusive fashion, and where this can be done, it should be facilitated.
11. Abuse of right of entry is a serious concern for employers; right of entry involves legally sanctioned trespass and can be used as a vehicle to disrupt commercial operations and to pursue outcomes at odds with harmonious workplace relations.

12. It should be recognised that inappropriate and strategic use of right of entry provisions can be a tactic in securing industrial outcomes, including in regard to bargaining and wage claims.
13. Equally, however, it is entirely appropriate that employees be capable of being represented and assisted by trade unions in those situations where they choose to be represented by them, in their dealings with employers on particular workplace issues.

The property right of employers should be respected

14. The property rights of private enterprises should enjoy the same legal protections as enjoyed by other members of the community. These protections include protection from trespass and interference with the lawful operations of the employer.
15. The legal presumption in favour of the protection of private property from interference should inform all policy decisions regarding right of entry, and should be the foundation from which thinking on right of entry issues proceeds. This presumption requires right of entry to be restricted to the maximum extent possible and to be based on very solid policy justifications.
16. Underlying these property rights, there are often significant operational reasons which further support restrictions on right of entry to workplaces. These include:
 - a. Serious occupational health and safety concerns in many workplaces, in particular, manufacturing and construction workplaces, mean that access to those workplaces is tightly controlled and visitors must be monitored at all times.
 - b. In other workplaces, there are issues concerning confidentiality – either in respect of sensitive business information, or of particular production methods, which must not be disclosed.
 - c. Furthermore, there are also issues concerning the privacy wishes of employees. Employees may not wish to be disturbed or approached by trade unions or other service providers where that is not their wish, particularly in circumstances where the vast majority of employees have chosen not to be represented by trade unions. In contemporary society, people are increasingly competent at finding and selecting services they

wish for themselves, and may resent, rightly or wrongly, the intrusion of an approach from a trade union in their workplace.

The regulatory framework

17. At present, there are right of entry provisions in Commonwealth workplace relations legislation, and in state and territory workplace relations and occupational health and safety legislation. Employers therefore often have to navigate multiple, overlapping right of entry provisions. Such duplication and complexity is inherently undesirable in a regulatory sense.

Commonwealth legislation

18. Right of entry provisions are contained in Part IX of the *Workplace Relations Act 1996*. They provide right of entry for trade union officers or employees with a permit issued by the industrial registrar for two purposes: investigating suspected breaches of the Act, including awards, and for the purpose of holding discussions with employees.
19. Trade unions may therefore exercise right of entry for two broad purposes; firstly, for compliance or representative purposes, and secondly for the purpose of holding discussions with employees, which can encompass union recruitment activity.
20. Some of the key restrictions on right of entry contained in the *Workplace Relations Act 1996* are:
- a. 24 hours notice is required before entering premises (s.285D(2));
 - b. Right of entry may only be exercised during working hours (s.285B(3)(b));
 - c. Discussions with employees under s.285C may only take place during meal times and other breaks;
 - d. Right of entry may only be exercised by persons who have been issued with a permit by the industrial registrar.

State and Territory workplace relations legislation

21. In most states, there are separate right of entry provisions in state workplace relations legislation. Provisions vary from state to state; all

differ significantly from the *Workplace Relations Act 1996* (e.g. in respect of the period of notice required to exercise right of entry).

22. Employers therefore have to cope with multiple and potentially contradictory legislative regimes, permitting conduct which may not be permitted in other jurisdictions.
23. These differences have further been complicated by the decision of the Federal Court in *BCG Contracting v CFMEU* (29 July 2004, FCA 981). In that decision, the Federal Court held that right of entry may still be exercised under state workplace relations legislation, even where the employees employed at the workplace are engaged solely under federal industrial instruments (i.e. an Australian Workplace Agreement or Certified Agreement pursuant to the *Workplace Relations Act 1996*).
24. The effect of this decision is to create even greater difficulties for employers in managing these multiple sets of right of entry provisions – even in situations where state workplace relations legislation is of no relevance to a particular workplace, unions may still seek right of entry under state legislation. This is an unacceptable situation and one requiring remedy.

State and Territory OHS legislation

25. Separately, in some states and territories there are separate right of entry provisions that form part of state and territory OHS and workplace safety legislation. Although they are generally directed to a different purpose, compliance with OHS law and safety standards, they provide another avenue through which unions can seek to exercise right of entry. They are therefore relevant to any consideration of workplace relations right of entry provisions.
26. The conditions and restrictions on right of entry under State and Territory OHS legislation differs markedly from that found in either State/Territory workplace relations legislation or the *Workplace Relations Act 1996*. For example, in both the Australian Capital Territory and New South Wales, no notice is required to exercise right of entry under OHS legislation.
27. While admittedly different policy considerations have guided the creation of State/Territory OHS right of entry provisions, the potential for abuse these provisions must be noted in any reform of workplace relations right of entry arrangements, in particular where such legislation provides an easier or less regulated means of gaining entry. Measures to prevent

abuse of such provisions may become more necessary as reform of workplace relations right of entry progresses.

28. An analysis of State/Territory OHS right of entry provisions is attached (Attachment A).

Policy reform

29. ACCI submits that right of entry provisions should be reformed consistent with the following principles:
- a. They should be properly focused on representative (and associated compliance) functions, as sought by employees. There is no policy rationale for right of entry for union recruitment purposes.
 - b. Right of entry must be limited and exercised responsibly. Employers should enjoy sufficient protection from unwarranted interference with their operations. This requires the presence of tight controls on the exercise of right of entry and genuine sanctions where it is abused.
 - c. Ideally, right of entry provisions should be contained in a single legislative instrument, or in a set of harmonised instruments.
 - d. Right of entry should be exercised in as unobtrusive a manner as possible. Where representative activities can be effectively undertaken using electronic means, this should be encouraged.
 - e. Ideally, there should be one set of nationally consistent right of entry provisions for all workplaces. Separate, differing State/Territory right of entry provisions should be replaced by a single set of right of entry arrangements.
 - f. Trade union right of entry provisions should not apply to workplaces where employees have entered into their own industrial arrangements with their employer without reference to a trade union, unless the employee who is bound by these arrangements is a member of a trade union and seeks that union's assistance.
30. Right of entry provisions that take account of these principles would result in more balanced arrangements that are appropriate to the contemporary workplace relations system.
31. Abuse of right of entry remains a concern for many employers. Evidence of abuse of right of entry has for example been documented in the Cole Royal Commission into the building and construction industry.

32. It is appropriate that the Parliament consider what measures are necessary to produce a more balanced right of entry regime.

The current Bill

33. The current Bill is largely remedial and focused on moderate amendment to the right of entry provisions as currently contained in the *Workplace Relations Act 1996*.
34. In ACCI's submission the Bill, if passed, would produce improved and more balanced right of entry provisions. ACCI supports the Bill and considers the current legislative framework, as contained in the *Workplace Relations Act 1996*, to be insufficient to target and minimise abuse of right of entry provisions.
35. ACCI wishes to make clear that employers do not oppose trade union membership by employees within a framework of freedom of association. Nor do employers oppose the legitimate and proper role that trade union officers and employees have in the representation of their members. Neither ACCI policy nor this Bill interferes with these principles.
36. The Bill contains two key measures:
- a. It would override, to the extent constitutionally possible, state workplace relations right of entry provisions. Given the effect of the Federal Court's decision in *BCG Contracting*, this is a timely and necessary measure.
 - i) Even without the problems arising from *BCG Contracting*, the existence of multiple and inconsistent State, Territory and Commonwealth right of entry provisions is a significant problem in policy terms, and a single uniform right of entry regime is the most desirable outcome.
 - ii) It should be noted that the current Bill does not seek to extinguish State/Territory OHS right of entry provisions. It will be necessary to monitor use and potential abuse (if any) of these provisions if the Bill is passed.
 - b. It contains several measures that seek to improve and more appropriately balance right of entry provisions. ACCI supports these particular measures for the reasons outlined below.

“Fit and proper person” requirement

37. If passed, the Bill would include new requirements that persons seeking a right of entry permit must meet a ‘fit and proper person’ set (new section 280F).
38. Such a requirement is entirely appropriate. It must be remembered that the issuing of a permit provides the holder with a ‘license’ to commit a form of legalised ‘trespass’; it is important that such an important right is only exercised by persons of good character who can be reasonably expected to behave appropriately and lawfully. The new provisions would provide the Industrial Registrar with additional powers to refuse the issuing of permits where someone has a track record of abuse or of committing offences in relation to right of entry: this is an appropriate protection for those employers and their employees from possible abuses.
39. The proposed sections 280H, 280J, 280K and 280L provide additional powers and guidance to the Industrial Registrar on the circumstances in which permits may be revoked. The proposed provisions would provide the Industrial Registrar with additional options and guidance than the current sections 285A(3)-285A(6) and as are likely to result in improvements in the capacity of the Registrar to deal with right of entry abuses.

Investigating suspected breaches

40. The proposed new section 280P imposes additional requirements on trade unions seeking to exercise right of entry for compliance purposes.
41. The proposed requirements are appropriate. They would require unions to more specifically identify the alleged breaches of legislation or awards that they seek entry to investigate (proposed section 280P(2)). This requirement is appropriate to prevent abuse of compliance right of entry. The current system, which does not require unions to specify any suspected breach, is insufficient prevent abuses, and leads to so-called ‘fishing exercises’. The Bill will help prevent the general capacity of right of entry for compliance purposes being used for other, non-legitimate purposes.
42. The proposed Section 280R would also overcome an existing problem with right of entry, as highlighted by the recent *ANZ Banking Group v FSU* case in the Australian Industrial Relations Commission (PR951766). To exercise representative functions, unions do not require an unfettered capacity to ‘walk through’ particular workplaces. Right of entry should be exercised in a

manner that does not disrupt the operations of the business or jeopardise workplace safety and the proposed Section 280R will help achieve that aim.

43. There are also additional restrictions proposed on the capacity of trade union officers or employees from inspecting non-member records (proposed section 280N). Given contemporary privacy and freedom of association considerations, this is once again entirely appropriate.

Restrictions on right of entry for recruitment/discussion purposes

44. The Bill would place additional restrictions on trade unions seeking to exercise right of entry for recruitment/discussion purposes, including:

- a. No right of entry for this purpose if the business is a small business (employing 20 or fewer employees), none of whom are union members (section 280Y);
- b. That right of entry for such purposes can only be exercised once every six months (section 280Z).

45. As stated above, legislative assistance for trade unions in recruitment activities is questionable in and of itself. The measures proposed in the Bill would however ensure that such provisions operate in a more balanced fashion.

46. In particular, if a trade union has exercised right of entry for recruitment purposes, it is appropriate that some time elapse before this right can be exercised again. This will assist in preventing coercion or intimidation of employees and is consistent with broader freedom of association principles. These restrictions will of course leave the compliance right of entry capacities of trade unions intact.

Preventing right of entry provisions being included in other industrial laws or instruments (proposed section 281D)

47. ACCI supports this measure, which would assist in producing uniform, consistent right of entry arrangements across industry.

48. It would prevent trade unions from using industrial leverage or coercion to force employers into agreements which contain right of entry provisions at odds with the broader policy objectives of right of entry.

49. Right of entry is appropriately a legislative standard and should not be subject to processes of industrial disputation and bargaining.

Other measures contained in the Bill

50. The Bill contains additional measures, broadly directed towards the purposes of improved compliance with the provisions of the Act which govern right of entry, and ACCI supports these measures.

ACCI SUBMISSION - ATTACHMENT A - UNION RIGHT OF ENTRY UNDER OHS HEAD ACTS (January 2005)

State	OHS Act	Authorised Representatives Right of Entry	Notice required	Industrial Coverage
VIC	OHS Act 2004 (effective as of 1 July 2005)	<p>s. 87 Yes when: There is a suspected contravention of the Act or Regs where work is carried out by persons eligible to be members of that union.</p> <p>The suspected contravention relates to or affects work being carried out by union members.</p>	<p>s.88 No notice required All reasonable steps must be taken immediately on entering the premises to give a written notice describing the suspected contravention (approved by the VWA) to the employer and to produce the entry permit for inspection</p>	<p>s.87(c) Unions don't require industrial coverage. Persons eligible to be members of that union can be covered also.</p>
NSW	OHS Act 2000	<p>s.77 Yes when: Investigating any suspected breach of the OHS legislation. Authorised Reps can enter any premises they have reason to believe is a place of work where members of persons eligible to be members of that union work.</p>	<p>s.78 No notice required, however must notify the occupier of the premises of their presence as soon as reasonable practicable to do so, unless (a) to do so would defeat the purpose for which the premises were entered.</p>	<p>s.77 Unions don't require industrial coverage. Persons eligible to be members of that union can also be covered.</p>
QLD	Workplace Health & Safety Act 1995	No union rights of entry under QLD OHS legislation.		

State	OHS Act	Authorised Representatives Right of Entry	Notice required prior to Entry	Industrial Coverage
SA	Occupational Health Safety & Welfare Act 1986	No union rights of entry under SA OHS legislation.		
WA	Occupational Safety & Health Act 1984	No union right of entry under WA OHS legislation.		
ACT	Occupational Health & Safety Act 1989	s.77 Yes when: Suspects on reasonable grounds a contravention of the Act may have happened, may be happening or is likely to happen. The premises are a workplace where members of the organisation or people who are eligible to be members of the organisation work.	s.78 No notice required to enter the premises however must tell the occupier of the premises of their presence as soon as reasonable practicable after entering the premises unless to do so would defeat the purpose for which the premises were entered.	s. 77(b) Unions don't require industrial coverage. Persons eligible to be members of that union can also be covered.
TAS	Workplace Health & Safety Act 1995	No union right of entry under TAS OHS legislation.		
NT	Workplace Health Act 2004	No union right of entry under NT OHS legislation.		
C'wealth	Occupational Health & Safety (Commonwealth Employment) Act 1991	No union right of entry under Commonwealth OHS Act		

POWERS ON UNION RIGHT OF ENTRY

State	Powers on Entry for Authorised Representatives Under OHS Acts
VIC	<p>An authorised representative who enters the workplace may do any of the following but only to the extent that it is reasonable for the purpose of enquiring into the suspected contravention:</p> <p>s.89 Power to:</p> <ul style="list-style-type: none"> • Inspect any plant, substance or other thing at the place. • Observe work carried on at the place • Consult with any employer at the place about anything relevant to the matter into which the representative is enquiring. <p>s.90 s.90(2) An authorised representative is not entitled to exercise a power, expect with the consent of the employer/ or person who has management and control of the work, if the exercise of that power would cause any work at that place to cease.</p> <p>s.90(3) Authorised representative can warn employees if they reasonably believe there is an immediate & significant risk of serious injury or death to one or more employees.</p>

State	POWERS ON UNION RIGHT OF ENTRY
NSW	<p>s.81 For the purpose of investigating any suspected breach of the OHS Act, an authorised representative may:</p> <ul style="list-style-type: none"> • Make searches and inspections (take photographs, video and audio recording) • Require the production of and inspect any documents in or about those premises that directly affect or directly deal with the OHS of employees working at those premises. <p>s.106 s.106(1)(d) Authority to prosecute for an offence against this Act or Regs may be instituted:</p> <ul style="list-style-type: none"> • by the secretary of an industrial organisation of employees any member or members of which are concerned in the matter to which the proceedings relate.
ACT	<p>S.80 Authorised representatives may investigate the suspected contravention by:</p> <ul style="list-style-type: none"> • Inspecting or viewing work, materials, plant or systems at the premises. • Interviewing employees (industrial coverage not required, only membership eligibility) with their consent. • Taking measurements, making sketches, drawings or any other kind of record (including photographs, films, or audio, video or other recordings) at the premises. • Require the production for inspection of documents relation to OHS at the premises. Copies and extracts can be taken of these documents.

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NSW	OHS Act 2000	<p>s.77 Yes when:</p> <p>Investigating any suspected breach of the OHS legislation. Authorised Reps can enter any premises they have reason to believe is a place of work where members of persons eligible to be members of that union work.</p>	<p>s.78</p> <p>No notice required, however must notify the occupier of the premises of their presence as soon as reasonable practicable to do so, unless (a) to do so would defeat the purpose for which the premises were entered.</p>	<p>s.77</p> <p>Unions don't require industrial coverage. Persons eligible to be members of that union can also be covered.</p>
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