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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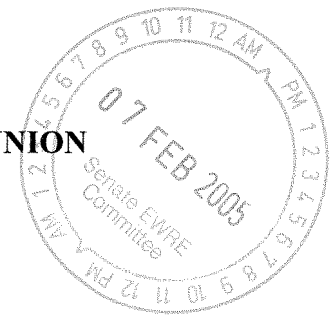

AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

SUBMISSION TO THE INTO THE PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

February 2005

INTRODUCTION

1. The Australian Rail, Tram and Bus Industry Union (RTBU) is an organisation of employees registered pursuant to the Workplace Relations Act 1996 (the "Act").

2. In accordance with the provisions in the Act, the RTBU operates under a set of registered rules. An important rule is Rule 5 which establishes the Objects of the Union. Not unexpectedly, that Rule includes a wide range of objectives including *to improve, protect and foster the best interests of its members* (R5(a)), *to provide for the protection and safety of its members* (R5(b), *to assist members or their families in distress* (R5(f)), *to formulate and carry into operation schemes for the industrial, social, recreational, intellectual and general advancement of members* (R5(g), and *to assist members by all reasonable and proper means, to address any and all grievances* (R5k).

3. As a registered organisation, the RTBU is legally bound to accept the rights and obligations afforded to Unions through, inter alia, the Act. Section 3 of the Act establishes its objectives. Those objectives include *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* (s3(e)), *ensuring freedom of association* (s3(f)) and, *ensuring that employer and employee organisations registered under this Act are representative of and accountable to their members and are able to operate effectively* (s3(g)).

4. It is a recognised international human right that people shall be free to organise collectively in Trade Unions. This recognition, of course, extends beyond the mere formation of a Trade Union and includes the capacity to be able to operate effectively and to collectively bargain with employers. This fundamental human right is recognised in, inter alia, ILO Convention 87 on Freedom of Association and Protection of the Right to Organise. Australia is a signatory to ILO Convention 87. In that respect it is noted that s3(k) of the Act states that one of its objectives is *assisting in giving effect to Australia's international obligations in relation to labour standards.*

5. The capacity – indeed the right - of the RTBU (and other Unions) to pursue the objectives in its Rules, to accept the rights and obligations of legislation, and to operate within a framework of fundamental human rights is heavily dependant on it being able to meet and communicate directly with its members and/or potential members and also with the relevant employer/s. The extent that this right is unreasonably hindered represents an attack on the legitimacy of the Union in a manner that is inconsistent with Australia's oft stated commitment to human rights and democracy.

6. It is the submission of the RTBU that the provisions of the *Workplace Relations Amendment (Right of Entry) Bill 2004* place further unreasonable and unnecessary legal restrictions on the right of Unions to enter the workplace in order to meet, communicate or represent the industrial interests of their members or potential members. Further, not only does this Bill place additional barriers on a Union's right of entry, but, to the extent it permits such entry, it imposes unreasonable and unnecessary impediments on what a Union may do upon obtaining entry.

7. The RTBU calls upon this Committee to recommend to the Senate that the Bill be rejected in its entirety.

8. This submission seeks to outline a brief background to the development of Right of Entry provisions, to outline where the Bill places additional unreasonable and unnecessary barriers on a Union's Right of Entry and conduct in the workplace, and to set out a number of reasons why this Bill contains unreasonable and unnecessary provisions and thus why it should be rejected by the Senate.

THE BILL

9. Up until 1996, where circumstances were such that formal provisions governing a Union's right of entry into the workplace were seen as necessary, they were established in Awards. The nature of such provisions were determined by the Commission after hearing submissions from the relevant parties.

10. An example of such a pre 1996 provision can be found in the then *National Building and Construction Industry Award 1990* (Print J4733). Clause 43(1) of that Award stated: *The secretary or branch secretary or any other duly accredited representative of the union shall have the right to enter any place or any premises where employees are employed at any time, during normal working hours or when overtime is being worked, for the purpose of interviewing employees, checking on wage rates, award breaches or safety conditions or regulations so long as they do not unduly interfere with the work being performed by any employee during working time, and provided that they present themselves, with their authority as prescribed by this award, to a representative of site management prior to pursuing their union duties on site.* Subclause 43(2) sets out the format of the certificate of accreditation from the relevant union.

11. The provisions in the building and construction industry, as shown in the award, reflected a common sense approach. A Union Official could enter the workplace to meet with the employees on a broad range of matters including investigating award wages and conditions and/or safety matters. The Union Official was required to inform management of their presence, including providing their accreditation and to not unduly interfere with work being performed. There were no artificial barriers or bureaucratic hurdles to leap simply to undertake the day to day task of a Union Official in performing his/her duties.

12. In 1996, upon the election of a Coalition Government, the Workplace Relations Act 1996 was enacted. This Act made a number of substantial changes to the provisions covering Right of Entry. The changes included removing right of entry provisions from awards (s127AA) and providing for Right of Entry provisions in the Act (Part IX, Division 11A). The Act provided for the issuing of permits by the Registrar, the revocation of those permits, and the right of a permit holder to enter the workplace for certain reasons and under specified conditions. For example, a permit holder is obliged to give an employer at least 24 hour's notice when the holder intends to enter the workplace and discussions may only be held during meal or other breaks. Penalty provisions for certain breaches of the Act were also introduced. In other words, relative to the arrangements in place prior to the introduction of the Act, a regime was put in place that sought to make it more difficult for a Union Official to perform his/her day to day work and to make it easier for an employer to adopt and maintain an anti-union position in the workplace.

13. Since 1996, the Federal Government has, on two occasions, attempted to place even more restrictions on the right of a union official to enter the workplace. The first occasion was in 1999 with the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, and the second occasion was with in 2003 with the Building and Construction Industry Improvement Bill 2003. Both these Bills were rejected by the Senate.

14. The Workplace Relations Amendment (Right of Entry) Bill 2004 will have a compounding effect on the already unreasonable and unnecessary provisions in the current Act. It will introduce a series of changes such as:

- Certified Agreements shall no longer be able to contain right of entry provisions (s170LU). This is in addition to the current situation where awards cannot contain right of entry provisions. As such, the content of right of entry provisions are monopolised by the Federal Government through legislation irrespective of whether the parties to a certified agreement regard such provisions as being desirable in an agreement.

- The creation of a number of broad and ambiguous grounds upon which a union official can be denied a right of entry permit or have restrictions placed upon the operation of that certificate (ss280D-280F). This includes the somewhat nebulous notion of not being a "fit and proper person", lacking what is regarded as "appropriate training", or having been ordered to pay a penalty under another industrial law. This latter restriction raises the issue of paying the penalty twice, thus raising the legal principle of double jeopardy.

- The expansion of the circumstances upon which a permit can be revoked or suspended, including the creation of a minimum disqualification period (ss280H – 280L).

- The narrowing of the grounds upon which a union official can enter a workplace to investigate a breach of an award etc. (s280M). This includes a provision that any suspicion of an award breach be based on "reasonable grounds" (whatever that means in this context), that the workplace in question has union members and that the official cannot view the records of non union members (subject to s280N(9)).

- The narrowing of the right of entry for the purposes of recruitment (s280Z(2)). A union official may only enter the workplace once every six months for the purposes of recruitment.

- The overriding of right of entry permits from State Industrial Authorities (s281D).

- Petty administrative provisions are provided for the conduct of a union official upon entry to the workplace (s280R). This includes provisions concerning where the union official may meet with employees and the "particular route" taken to get there.

15. The summary of changes as identified in point 14 above, when taken together with the current provisions in the Act, and compared with the pre 1996 situation as shown in points 9 and 10 above reveal that a number of unreasonable and unnecessary impediments exist to the right of entry. A union official requires a permit to be issued by the Industrial Registrar; this permit can be denied or restricted for a variety of reasons; the permit can be revoked or suspended for a variety of reasons; notice must be given to enter a workplace; restrictions exist on the capacity to efficiently and effectively determine that an award or other industrial instrument is being observed: restrictions are placed on the ability of a union official to enter a workplace for the purposes of recruitment; and upon entry to a workplace issues such as the appropriate meeting room and route to that room are regarded as appropriate provisions for legislation.

COMMENTS ON THE BILL

16. The RTBU reiterates the comments made in points 2-6 above, namely that the right of a union official to enter a workplace is a fundamental part of his/her work and a critical component of a union's capacity to pursue its aims and objectives. This in turn is consistent with the objects of the Act and Australia's commitments to various international conventions on human rights. This Bill seeks to place a range of unreasonable and unnecessary restrictions on that right of entry. It follows, in our submission, that the Bill is inconsistent with the objects of the Act and Australia's obligations under various international conventions that concern the right of citizens to organise collectively and to collectively bargain with employers.

17. The Bill represents another attempt to undermine the role of unions in the workplace by placing an increased number and variety of barriers in the path of effective and efficient union representation.

18. The Bill not only ignores but seeks to undermine the fact that the right to union membership is more than simply the possession of a membership card. Employees who are union members are entitled to be represented by their union and they are entitled to communicate with and meet with their union official in the workplace from time to time as necessary. To hinder that is to effectively deny the employee his/her rights as a union member. In *Davids Distribution Pty. Ltd. v National Union of Workers* ([1999] FCA1108 13 August 1999), a Full Court of the Federal Court stated: *That which is protected by such legislation is more than the right to be a member. It is the right to participate in protected union activities, including the taking of collective industrial action against an employer to seek to obtain better industrial conditions."* [par.107}. This statement was endorsed by North J. in *Australian Workers Union v BHP Iron Ore Pty. Ltd.* ([2000] FCA 39 31 January 2000] where the Judge also noted that if references to union membership in Part X of the Act were narrowly construed *The concept of union membership.....would be a mere shell* [par. 46].

19. In a judgement in 2002, the European Court of Human Rights stated: *It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers* (Wilson, NUJ & others v United Kingdom 30668/96, 30761/96, 30678/96 2 July 2002). The Court went on to say: *It is the essence of the right.....that employees should be free to instruct or permit the union to make representations to their employer. If workers are prevented from doing so the freedom to belong to a trade union becomes illusory.* The Bill on union right of entry currently before the Senate is the antithesis of this statement by the European Court of Human Rights. Rather that protect the rights of union members to have their union represent them, the provisions of this Bill endeavour to weaken and frustrate such rights.

20. There are no reasonable grounds for the introduction of such draconian legislation against unions. There is no evidence to show that unions have in any way, shape or form "abused" their right to enter the workplace. Indeed the evidence is to the contrary.

21. In the 3 years 2001 to 2004, the Registrar has only revoked 15 permits – an average of 5 per year (Annual Report, Industrial Registry 2003-04, p. 110). The annual report also shows that over that period 1884 permits were issued. Over the 3 year period, the percentage of permits that were revoked was .007%. That is a tiny proportion of the number of permits in circulation. On any reasonable basis, this cannot warrant the action taken by the Federal Government in this Bill.

22. The RTBU has, at present, has some 40 full time officials who would possess right of entry permits. None of those officials have been the subject of applications to the Industrial Registrar for the revocation of those permits.

23. Since 1996, there has been only one incident where an application has been made by an employer to revoke the permits of 2 officers of the RTBU. That was in 1997 and upon hearing the matter, the Industrial Registrar declined to revoke the permits. It should also be noted that the application was made by the employer – the then Public Transport Corporation of Victoria – during a period of industrial disputation with the employer and the then Kennett Government over an enterprise agreement and the application should be seen in that context. In any event, the Registrar dismissed the application.

24. With respect to the applications to revoke permits, the RTBU supports the position of the ACTU that: *It should be noted that in most cases applications by* (sic) *revocation are made by employers who are conducting a strategic campaign to remove or limit union involvement by their employees and/or are seeking to impose bargaining outcomes on employees through non-union agreements or AWA's* (ACTU Submission, par. 31).

25. The Bill provides plenty of scope for a determined employer to indulge in brinkmanship and game playing. For example, what constitutes "reasonable grounds" for suspecting that an employer is breaching an award. Further, what constitutes a "reasonable request" with respect to the room provided to a union official by an employer and the route to that room. These provisions provide scope for industrial disputation and for long and expensive proceedings before the Industrial Relations Commission.

26. There is no evidence that unions have used the right of entry provisions with respect to suspected breaches of awards etc. to go on what the Minister refers to in the second reading speech as "fishing expeditions"

27. The notion of confusion between Federal and State industrial laws reflects a recent and pragmatic approach by the Federal Government to industrial law. For example, when the Act was passed in 1996, it included a new s111AAA (and it still does). This section was designed to frustrate endeavours by unions to seek federal coverage at a time when in some states they were endeavouring to move from the state to the federal system. At that time, the priority of the Federal Government was to keep them in the State system. Now, following a change in certain state governments, the federal government has adopted the opposite view. The fact is that the motive for overriding state right of entry laws in certain respects is not for reasons of consistency and certainty but because the state laws are more employee friendly than the federal laws.

28. The Bill is an unreasonable and unnecessary intrusion into the ability of the parties to certified agreements to determine the content of such agreements.

29. With respect to awards, Unions are respondents in their own right. Unions are "party principals" to awards. In that regard, unions and their members have a real and valid interest in ensuring that employers abide by award wages and conditions regardless of whether the relevant employees are union members or not. To the extent that an employer can avoid it award obligations it undermines the force of the award and thereby become a threat to the wages and conditions of all employees covered by that award. For that reason, amongst others, it is important that where a union suspects a breach may be occurring, regardless of whether it involves union members or not, the Union needs the right to pursue the matter in an efficient and effective manner. This Bill seeks to deny a Union that ability.

30. The Bill defines an "officer" in relation to a Union as "a person who holds an office in the union" (s280B). The RTBU rules provide for a large number of officers – the majority of whom are honorary and are therefore employees of an employer. The Bill begs the question of its impact on honorary officers of the RTBU. Does the Bill mean that an employee of an employer who holds an honorary position in a union cannot discuss industrial matters with his/her fellow employees or represent them before the employer unless he/she follows the provisions in the Bill? If so that would create the absurd notion that whilst a group of employees could sit in a meal room discussing a range of union related matters, the union delegate/employee (who holds a union office) could not participate in the absence of adhering to the provisions of the Bill. On the other hand, a delegate of the Union who does not hold the position of an "office" would face no such problems. This Bill permits such confusion to exist.

31. The Bill also refers to a "premises". This is broadly defined in s3 of the Act. In the context of the rail industry (and, no doubt, many other industries) the definition raises some important considerations. For example, a railway station would be a 'premises" under the Act. But it is also a public facility. Does the Bill mean – and indeed the current Act – that an officer of the RTBU cannot enter his/her local railway station unless he/she follows the provisions of the Bill? Or, if he/she can enter for the non union purposes, does it mean that if, whilst waiting on the station platform the officer is approached by a member who works at that station, the officer is to decline to talk to the member. This would be an absurd situation. The Bill permits such confusion to exist.

SUMMARY AND CONCLUSION

32. The effect of this Bill is to make it even more difficult for a union official to enter the workplace. It is clearly anti-union in its scope and operation and contrary to the right of an employee to enjoy the rights associated with being a union member. In this respect, it continues the trajectory adopted by the current Federal Government since the enactment of the Act in 1996.

33. The Bill is inconsistent with the objectives of the Act and contrary to Australia's obligations in accordance with international labour conventions.

34. There is no objective or evidentiary basis for the provisions in the Bill. Nowhere does the Federal Government move beyond the realm of rhetoric and provide some rational basis for its provisions. The reference in the second reading speech to balancing the rights between unions and business with respect to right of entry can only be made on the basis of a skewed vision of the term "balance".

35. The Bill reflects the political and ideological predisposition of the Federal Government against unions and employees and in the interests of employers.

36. The Bill continues the swing of the pendulum of workplace power in favour of employers and away from employees.

37. For the various reasons contained in the submission, the RTBU seeks that the Senate Committee recommend that the Senate reject the Bill in its entirety.