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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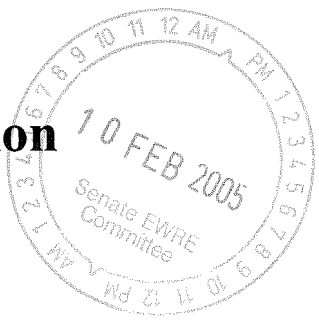
Queensland Government Submission



Senate Employment, Workplace Relations and Education Legislation Committee

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

February 2004

Executive Summary

The Queensland Government welcomes the opportunity to make this submission.

The *Workplace Relations Amendment (Right of Entry) Bill 2004* (the Bill) represents a radical reform of existing, federal right of entry laws. These proposed laws explicitly override State right of entry laws and thus impose the same radical reforms on the States. The Bill will interfere with the ability of union officials to monitor the effectiveness of State laws and otherwise carry out their statutory duties. The federal Government has made no attempt to consult with the States on these aspects and the Queensland Government continues to oppose such unilateral federal intrusions into State jurisdiction.

There is no indication that the federal Government consulted employers, employees or industrial organisations during the development of the Bill. The Queensland Government considers that tripartite cooperation and consultation are essential for successful industrial relations outcomes. In contrast with the federal Government, the Queensland Government initiated widespread consultation with all industrial stakeholders before implementing its industrial relations reforms in 1999. The Government continues to work constructively with these parties. Queensland's powerful economy and low unemployment attest to the outcomes achievable using this approach.

The Queensland Government is concerned that the provisions of the Bill unnecessarily and arbitrarily restrict employees' rights to collectively organise using representatives of their own choosing, contrary to Australia's international obligations. The Queensland Government is also concerned that the Bill will severely hamper the unions' legitimate and long-standing right to adequately represent employees and investigate breaches of industrial laws. In addition, the Bill will facilitate the identification of employees on the basis of their union membership, contrary to the principles of freedom of association.

Contrary to accepted practices of government policy implementation, there is no attempt in any of the federal Government's documentation supporting the Bill to explain why such significant changes are warranted.

For these reasons, the Queensland Government urges the Senate Committee to recommend that the Bill not be passed.

1. Radical reforms

1. The Bill represents a significant departure from long-established right of entry laws, which are relatively uniform across all Australian jurisdictions (including federal) at present. In short, the Bill will –

    a. facilitate the identification of employees on the basis of their union membership, contrary to the principles of freedom of association;
    b. prohibit unions from entering the workplace of a constitutional corporation without a federal permit, including state-registered unions performing state functions in workplaces with no federal coverage;
    c. impose onerous administrative requirements on the issuing of permits;
    d. severely hamper the unions' ability to investigate breaches of industrial laws by employers and their ability to hold discussions with employees; and
    e. cause confusion and compliance difficulties for employers.

2. Broadly, under existing federal and State laws, a union official who is authorised by the relevant industrial registrar, may enter a workplace for a specific purpose, i.e. to investigate suspected breaches of industrial laws and to hold discussions with employees. The relevant union must have coverage of the relevant workplace. During these visits, the union official may not cause unwarranted disruption to the employer and the employer must not hinder the official. To investigate suspected breaches, the official may interview employees and make copies of relevant documents such as time and wages records. Discussions with employees must be held during meal breaks or other non-working time.

3. Under the Bill, a union official may not enter the premises of a constitutional corporation unless they hold a federal permit. The first hurdle unions will face is determining whether an employer is a 'constitutional corporation' and therefore whether they need a federal permit. The corporate status of employers is often unknown to anyone outside the organisation because many employers operate under a trading name, not a corporate name. There are also categories of corporations whose status as a 'constitutional corporation' can be highly uncertain without an intimate knowledge of the corporation's activities, for example public

hospitals, local governments, universities and State government owned corporations. These institutions can fall on either side of the definitional line depending on their level of trading or financial activity.

4. The process of obtaining a permit is more bureaucratic and involved under the Bill than under existing federal and State laws. The federal Registrar has to assess whether the permit holder is a 'fit and proper' person against 8 criteria and may impose limits on where and when the permit is used, even if the person is assessed as fit and proper. Additionally, for the first time, unions can be banned from holding any entry permit at all, rather than just having the permit of one of their officials suspended or revoked. It is important to note that these laws will apply not just to unions operating in the federal sphere but to State registered unions wishing to enter workplaces covered only by State industrial laws and instruments.

5. The Bill restricts union investigation of suspected breaches to those breaches which affect union members directly. In undertaking the investigation, the union may only request the wage records of union members, not the wage records for all employees, as is currently the case. This will have the practical effect of obliging employers to keep two sets of wage records – one for union members and one for non-union employees. In addition, restricting unions to the investigation of breaches which only affect union members greatly diminishes the vital role they play in ensuring compliance with industrial awards and laws. The restriction will also impinge on employees' freedom of association, which is guaranteed under the *Workplace Relations Act 1996* (WR Act) in accordance with ILO Conventions. Freedom of association ensures that employees are not discriminated against or victimised because of their union membership. The Bill facilitates such discrimination by virtually requiring employers to keep separate records for union and non-union employees. The first essential step in discriminating against employees on the basis of their union membership is to know who the union members are.

6. In addition to the bureaucratic processes imposed on unions who wish to exercise their rights of entry, the Bill permits employers to impose additional requirements

about where discussions are to be held and even the route the industrial officer must take to get to that area. This will allow employers who are anti-union to use the process to intimidate employees, for example by choosing an area which requires employees to pass through the employer's work area.

7. The Bill creates other serious, practical difficulties for unions who attempt to hold discussions with employees. The Bill provides that if a union enters a workplace with the purpose of encouraging employees to join the union, they may only do so twice per year. It is unclear how this provision would operate. For example, it is unclear whether a union will breach the provision if it comes into a workplace to discuss employment matters with employees and, at the request of those employees, provides information on how to join the union. Considering that unions can be heavily penalised for breaching the Bill, these aspects should be made clear.

8. Currently, employers, unions and employees are able to determine their own right of entry arrangements through the agreement-making process. However, the Bill will prohibit such arrangements from federal certified agreements.

9. Existing right of entry laws, both State and federal, attempt to strike a reasonable balance between the rights of employees to be represented by their union and the rights of employers to conduct their businesses without undue interference. The Bill will destroy this balance by taking rights away from employees and unravelling long-established practices, for no apparent benefit to anyone.

2. Federal Bill's Adverse Impact on Employees

10. The right of employees to organise and bargain collectively, which is a fundamental feature of democratic societies and a core principle of the ILO, gives workers' representatives (i.e. unions) particular rights and protections based on their status as workers' representatives. Among these is the ability to access workplaces to speak to workers so that effective collective bargaining can take place and to ensure that terms and conditions which have been negotiated on behalf of workers are actually implemented by employers. Union right of entry to workplaces is therefore considered essential to the right of employees to organise

and bargain collectively. The only limit to this right that is considered to be justified is the right of employers to operate their business without unreasonable interference.

11. The *Right to Organise and Collective Bargaining Convention, 1949*, which Australia ratified in 1973, requires signatories to "encourage and promote the full development and utilisation of machinery for voluntary negotiations between employers or employer organisations *and workers' organisations* (emphasis added) with a view to regulating terms and conditions of employment by means of collective agreements." (Article 4). In furtherance of this objective, the *Workers' Representatives Convention of 1971*, which Australia ratified in 1993, entitles workers' representatives to the provision of facilities to enable them to carry out their functions promptly and efficiently, so long as this can be done without impairing the efficient operation of the undertaking concerned (Article 2).

12. It follows that measures which arbitrarily restrict union access to workplaces, on a basis other than the efficient operation of the relevant employer's undertaking, must also arbitrarily restrict the right of employees to collectively organise and bargain and may breach the above ILO Conventions. Because the federal Government gives no justifications whatever for introducing the measures in the Bill, the proposed new restrictions on union access could be described as arbitrary.

13. There is potential for the Bill to have an adverse impact on employees who wish to join a union. The Bill prohibits unions from visiting workplaces more than twice a year for the purposes of recruiting. As noted earlier, the operation of this aspect of the Bill is very unclear.

14. Many employees prefer their status as union members to remain unknown to the employer, justifiably because many employers are uncomfortable with union membership among their staff. The provisions in the Bill allowing unions to inspect the records of union members but not non-union employees, will obviously create difficulties for employees who wish to keep their union membership private. The restriction of unions to a particular part of the workplace may also impinge on the employee's anonymity, for example where the area chosen by the employer requires employees to pass through the

employer's work area. This may adversely affect the willingness of employees to speak to their union representative at such meetings.

15. Allowing employers to restrict union discussions to particular areas appears to contravene Article 2 of the ILO *Workers' Representatives Convention* mentioned above and is contrary to a Recommendation of the ILO that workers' representatives be permitted to enter any part of a workplace necessary for them to discharge their functions. Any breach of ILO Conventions would introduce an immediate inconsistency into the *Workplace Relations Act 1996*, the Objects of which include 'assisting in giving effect to Australia's international obligations in relation to labour standards'.

16. The Bill is likely to have a disproportionate impact on vulnerable workers, such as casuals, the young, migrant workers and the unskilled. For example, the restriction of recruitment visits to twice per year and general visits to employee's work breaks mean that some casual employees may never be in a position to meet a union representative. Non-award workers, whose need for protection from exploitation is often greater than most, will be unable to initiate a union visit to their workplace to investigate a breach, because this can only occur under the federal Bill if the union has a member at the workplace or the person eligible for membership works under an industrial instrument. Such workers include clothing outworkers, whose vulnerability to exploitative work practices is researched and well-known. By contrast, Queensland's laws allow unions to investigate a breach so long as the workplace has a member who is eligible to join the union.

17. Finally, in the deregulated labour market championed by the federal Government, it is imperative that employees maintain their ability to organise and bargain collectively, using representatives of their own choosing. This right is seriously threatened by the Bill's restrictive and highly interventionist approach.

3. Queensland's Right of Entry Laws

18. The approach underpinning the right of entry provisions in the IR Act balances the right of employees to have access to their union representatives in the workplace and the right of employers to conduct their businesses without undue interference.

19. The right of entry system established under the IR Act implemented the recommendations of the Industrial Relations Taskforce, established by the Queensland Government in 1998 to investigate the industrial relations system and make recommendations on reform. The Taskforce had representatives from the Queensland Government, employer organisations and unions and received over 200 written submissions. The Taskforce found that unions play an important role in the monitoring of industrial laws and that access to employees is vital to employees' effective representation. Its recommendations were aimed at facilitating these two aspects of the system without unduly hindering employers.

20. The provisions in the IR Act which implement this policy framework allow authorised union officials to inspect the time and wages records of members, eligible members and parties to Queensland Workplace Agreements provided the latter gives consent. No other records of the employer can be accessed.

21. Union officials with the power to inspect time and wages records must be authorised by the Industrial Registrar. The authorisation may be made conditional, suspended or revoked if the industrial officer exercises his or her right of entry powers unreasonably or inappropriately.

22. Before undertaking an inspection, the union official must notify the employer and produce their authorisation. While a union official may request and inspect information, the IR Act prohibits officials from requiring assistance from employers to conduct inspections. It is an offence for a union official to wilfully obstruct an employer or employee during working hours.

23. Union officials are also permitted to hold discussions with members and eligible members during working hours on matters related to the IR Act. They are not permitted to hold discussions on other matters during working hours.

24. The whole scheme of the right of entry regime in Queensland is essentially contained in four, simple provisions of the IR Act. This can be contrasted with the federal Government's over-regulatory approach, which takes up some 38 separate and complex provisions.

4. Lack of Clear Policy Objectives

25. The federal Government has not clarified its policy objectives in implementing the Bill. In excluding State right of entry laws, the Government says in its Second Reading Speech that it is fulfilling an election commitment to exclude the operation of State laws where federal right of entry laws also apply. However, the Bill goes well beyond this and excludes State laws even where federal laws have no application.

26. No sound reasons are provided by the federal Government for doing this. No problems in the operation of State right of entry laws are identified. No benefits of the new federal regime are put forward. The only justification provided in the supporting documents for excluding State laws is that their co-existence with federal laws *might* cause confusion. The Queensland Government is aware of only one case in the Queensland Industrial Relations Commission (QIRC), since the IR Act was enacted in 1999, where the issue was confusion between federal and state right of entry laws.

27. The Bill gives no reasons for severely restricting the long-established practice of unions to actively monitor the operation of industrial awards and laws. Again, no problems in the existing regime are identified to explain the changes nor are any benefits of the federal proposal identified. Instead, there are vague allusions in the Second Reading Speech to existing rights of entry being 'intrusive' and 'disruptive'. Such a radical change to long-established practices and laws as the federal Government proposes deserves more than vague allusions. Furthermore,

changing the law in the absence of any demonstrated need to do so is clearly contrary to basic tenets of government policy making.

5. Lack of Consultation and Cooperation

28. The federal Government did not consult with Queensland on the Bill, despite the fact that it limits the ability of persons authorised by the Queensland Government to monitor and enforce State laws. The Queensland Government registers its strong objections to the federal Government attempting to impose a so-called unitary system of industrial relations which ignores the laws, processes and policy positions of the States.

29. The Bill relies on the Commonwealth's 'corporations power' to expand federal jurisdiction. The Queensland Government reiterates its position on the use of the corporations power by the federal Government to establish national industrial relations laws, i.e.

    a. the scope of the corporations power is too uncertain to be relied upon as a foundation for a national industrial relations system;
    b. a national system based on the corporations power will result in a more complex system of overlapping jurisdictions than at present;
    c. the type of system proposed by the federal Government would extensively damage existing industrial relations institutions and the interests and trust of participants in the system; and
    d. industrial relations calls for a more balanced approach between employer and employee interests than that adopted by the federal Government.

30. Neither the Second Reading Speech nor the Explanatory Memorandum for the Bill mention any consultation having taken place with stakeholders during the development of the Bill. The Queensland Government considers that industrial relations requires tripartite cooperation and consultation if successful outcomes are to be achieved. The Queensland Government initiated widespread consultation with employees, employers, industrial organisations and the public before implementing its significant industrial relations reforms in 1999. The Government continues to work constructively with these parties. The fact that

Queensland's industrial relations system supports the most dynamic State economy in Australia is ample evidence of the success of this approach.

6. Federal Bill's Impact on Queensland

31. Under the Bill, unions will not be able to enter the premises of constitutional corporations unless the particular industrial officer is authorised under the federal Act to enter the premises or could be so authorised. State laws with respect to union right of entry are specifically excluded by the Bill.

32. Unions play a vital role in Queensland in monitoring compliance with State industrial laws and instruments. Compliance monitoring is essential because laws cannot be effective without adequate machinery to ensure their observance. In the 2003-04 year, Queensland's industrial inspectorate dealt with over 8,000 wage complaints, conducted 979 audit inspections and completed 579 prosecutions. This indicates that many employees are not receiving their lawful entitlements and that compliance activities remain essential. Compliance monitoring is a traditional role for unions, who undertook this task long before the federal government established an industrial inspectorate. By reducing unions' ability to participate in this activity, the Bill will only exacerbate the problem of employer non-compliance.

33. Unions who are unsure whether a business is a 'constitutional corporation' (and therefore whether they have a right to enter the premises of such a business) are likely to refer the matter to Queensland's industrial inspectorate in the event of a suspected breach, rather than go through the process of seeking federal authorisation and having to prove that the employer meets the definition of a constitutional corporation. Clearly, as a result, the Bill has the potential to increase the workload of Queensland's industrial inspectorate. The inspectorate not only monitors and enforces State industrial laws but also, under an agreement with the federal Government, federal industrial laws. The Bill could therefore have unintended service delivery implications for both jurisdictions.

34. In addition, by requiring State industrial officers to have a permit issued by the

federal Industrial Registrar before they can carry out their duties under State laws, and by allowing the federal Industrial Registrar to revoke a permit, the Bill intrudes on the Queensland government's prerogative to delegate the activity of compliance monitoring to officials of its own choosing.