



## Workplace Relations Amendment (Right of Entry) Bill 2004

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## **Workplace Relations Amendment (Right of Entry) Bill 2004**

**Date Introduced:** 2 December 2004

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The main provisions under Schedule 1 come into effect 28 days after the Bill receives Royal Assent

### **Purpose**

The Bill repeals and replaces the [\*Workplace Relations Act 1996\*](#) (WR Act) provisions dealing with union right of entry to workplaces. Under the Bill, federal law will override state right of entry systems where the relevant employer is a constitutional corporation or the premises are in a Territory or Commonwealth place. The Bill imposes more stringent criteria before a person (a 'fit and proper' person) can be granted a right of entry permit and expands the grounds for the suspension and revocation of permits.

The Bill requires unions (officials or their employees) to have reasonable grounds for suspecting a breach of an industrial law or instrument before entering premises. Permit holders will be required to provide entry documentation to the occupiers of premises. The authority of the Australian Industrial Registrar is elevated both in respect of permits and entry documentation. Entry will not be authorised unless a permit holder complies with 'reasonable requests' of an occupier or affected employer to, inter alia, produce documents evidencing their authority to enter and to observe a specified route upon entry if directed.

Unions will be able to access the records of their members only, unless the Australian Industrial Relations Commission (the Commission) orders otherwise. A right of entry to investigate a breach of the WR Act will not apply to a breach of an Australian Workplace Agreement (AWA) unless the employee who is a party to the AWA makes a written request to the union to investigate the breach. Unions will be limited to two visits per year for the purposes of recruitment. Certified agreements will be prevented from containing right of entry provisions although employers will not be restricted to agreeing to union right of entry requests by consent.

### **Background**

Union right of entry to workplaces for the purposes of consulting with members and those eligible to become members has been seen as fundamental to the core purpose of trade union organisation, as lawyers Shaw and Walton have observed:

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It is plain that effective trade union organisation of employees cannot occur without access on the part of the union and its authorised representatives to workplaces in order to recruit non-unionists, to communicate with union members and take up their concerns and to police award prescriptions and occupational health and safety requirements by inspecting the workplace.<sup>1</sup>

While Professor Bill Ford has similarly held that,

Experience demonstrates that securing access to the employment records of employers is very important if unions are to play an effective role in ensuring the observance of awards and industrial agreements or investigating suspected breaches. Even more fundamental though is that they be given guaranteed access to employees at their place of work. Establishing and maintaining lines of communication with members and persons eligible to be members is essential to the successful and democratic operation of any registered organisation of employees.<sup>2</sup>

The International Labour Organisation (ILO) Convention 87, Freedom of Association and Protection of the Right to Organise which Australia has ratified, protects two basic rights: the right of workers and employers to form and join organisations of their choice and the organisational autonomy of trade union and employer associations.<sup>3</sup>

In interpreting the principles of freedom of association and the right to organise, the Freedom of Association Committee of the Governing Body of the ILO has held that:

Workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions, including the right of access to workplaces.<sup>4</sup>

Nevertheless, alive to the widespread changes in employer recognition of unions, the ILO also has recently observed that life has become harder for unions:

In recent years, across the world there has been widespread *deunionisation*, particularly in industrialised market economies ... there has also been an erosion of the strength of freedom of association. Some countries have made it harder to organise or bargain collectively, many have chipped away at bargaining rights and many have pushed collective bodies such as unions to a more marginal role in social policy.<sup>5</sup>

Nevertheless, unbridled intrusion can interfere with the conduct of business, and as Professor Bill Ford has also noted, balance is the key to facilitating entry and preventing intrusion:

the difficult policy problem [that] right of entry arrangements have always had to address – that of striking an appropriate balance between the interest unions have in, at the very least, monitoring compliance with the terms of industrial instruments and the interest employers have in carrying on business without unreasonable interference or interruption – remains the same [after the 1996 Act]. Under the federal industrial

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jurisdiction, union right of entry has traditionally been facilitated by award provisions, and more recently under provisions of certified agreements.<sup>6</sup>

At the other extreme to reasonable union entry based on notice is trespass. Employers as well as many unionists were offended by a number of ‘run-throughs’ organised by persons in Victorian unions in 2001. Targets of these incursions were the businesses of Johnson Tiles and Skilled Engineering. The incursions were, in essence, a response to employer replacement of direct labour with contract labour. Perpetrators were consequently charged on various counts, including affray, assault and damaging property. With the charges being upheld by the courts against participants and penalties determined, the rule of law could be seen to have been applied, as the community would expect.<sup>7</sup> But the episode also perhaps illustrates the value of a statutory right of entry to federal unions when exercised correctly (current entry protocols are outlined in the next section).

Changes to union entry into workplaces where employees are covered by federal awards, were effected through the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA). This Act changed union right of entry by:

- requiring officials to obtaining permits from the Industrial Registrar,
- providing advance notice to employers about an intention to enter business premises, and
- removing right of entry as an award matter, although union and employer resposdency to a federal award remained the pre-condition to entry, despite the intention of the WR Act to replace awards with other bargaining instruments [WR Act: s. 3(c)].

As the WROLA Act was passed with the support of the Australian Democrats, the right of entry scheme reflects an agreement on this subject reached between the Government and the Democrats in October 1996.<sup>8</sup> The initial WROLA proposal of allowing entry only upon an invitation from a union member was discarded under this agreement. Instead, union officials would only be able to enter business premises for specific reasons. They are that:

- they suspect a breach of the Act, an award or certified agreement, or
- they want to speak to or recruit employees.

In either case, union officials must have a permit from the Australian Industrial Registrar and they must give 24 hours notice, and the permit should be produced upon demand from an employer. Permits last for 3 years unless revoked, or the holder ceases to be an official/employee of the union.

An employer and union must be bound by the relevant federal award as a condition for invoking these legislative rights. The employer may apply to the Commission to have a permit revoked on the grounds that the holder has intentionally hindered or obstructed any employer or employee, or otherwise acted in an improper manner.

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In the case of a suspected award/agreement breach, some of the employees must be members of the union, otherwise the union has no right of entry.

In the case of entry to hold discussions with employees, a union may only enter premises where work is being carried on to which a federal award applies that is binding on the permit holder's union, provided that employees who are members or eligible to be members of that union work on the premises. If employees agree to hold discussions with the permit holder, such discussions may only take place during meal breaks or other work breaks. Employees and work cannot be obstructed.

If a union suspects a breach of the WR Act, an award or agreement, and provided the conditions are met, union representatives with a permit may enter premises during work hours and inspect any pay or time sheets, or other documents relevant to the breach, and speak to employees.

Union officials cannot inspect an Australian Workplace Agreement (AWA), or other documents not relevant to a suspected breach (such as taxation records). However, pay or time sheets can be inspected even if they concern work done under an AWA.<sup>9</sup>

The federal right of entry scheme was proposed to be amended under Schedule 13 of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (see [Senate Employment, Workplace Relations, Small Business and Education Legislation Committee report](#)).

The right of entry scheme was amended in 2003 to deny unions a right of entry to meet with employees.<sup>10</sup> This is on the grounds that the employer holds a conscientious objection certificate (based on religious conviction), where 20 employees or less were employed and none of these objected to the conscientious objection and none were union members. (These provisions are retained under the Bill: **proposed section 280Y**).

The Bill, in part, responds to two right of entry cases, one concerning interpretation of the right of entry provisions by the Commission, the second a Federal Court decision which concerned State right of entry law where the relevant employees worked under federal Australian Workplace Agreements. These cases are cited under the relevant parts of the main provisions of the Digest.

### **Other right of entry proposals**

A Senate Scrutiny of Bills Committee reviewed entry and search provisions afforded to Commonwealth agencies (such as for example, the Australian Taxation Office) under legislation in 2000. It proposed that entry be governed under the following principles:

- the grant of powers of entry and search by Parliament
- the authorisation of entry and search

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- the choice of people on whom the power is to be conferred
- the extent of the power granted
- the kinds of matters which might attract the grant of the power
- the manner in which the power to enter and search is exercised
- the provision of information to occupiers
- the protection of people carrying out entry and search, and
- other general principles<sup>11</sup>

While some of these principles may be applicable to union entry and indeed can be argued to have underpinned many provisions of the current Bill, union entry purposes are clearly limited compared to those of Commonwealth agencies, and their ‘search and seize’ powers are negligible compared to bodies such as law enforcement agencies. The principles for Commonwealth agency entry as set out in the Senate Scrutiny of Bills report also broached union right of entry. Its inclusion was due to the Master Builders Association and the Australian Chamber of Commerce and Industry (ACCI) taking the opportunity to raise the union entry issue. Their concern was to use the inquiry to formalise entry procedures and prevent unwarranted intrusion into business operations and ‘fishing’ expeditions. The Scrutiny of Bills Committee thus recommended:

The right of entry provisions in the *Workplace Relations Act 1996* should conform with the principles set out in Chapter 1 of this report.<sup>12</sup>

Yet, the current WR Act procedures for providing notice to employers under the permit system, preceding entry can also be used as union-avoidance measures, as the following example quoted in the Senate report into the ‘More Jobs Better Pay’ Bill 1999 highlighted:

In some extreme cases, employers have denied all entry rights to our union where the existence of award coverage is disputed. In other cases, employers have impeded inspection of records, imposed unacceptable restriction on access within the workplace, and allocated unsuitable venues for union meetings. The CPSU has been forced to use the (Industrial Relations) Commission or the Federal Court to resolve these matters. Orders have been obtained enforcing our rights. However, this has involved considerable expense and time. In the meantime, employers have been able to arbitrarily deny our members their right to see their union in the workplace.<sup>13</sup>

The Building and Construction Industry Improvement Bill 2003 also proposed changes to union right of entry in the building and construction industry. The Australian Building and Construction Commission (ABCC) was to be given notice of all intentions to enter and inspect before such entry occurs. This would enable it to attend and determine if the employer has committed any breach, and ensure the right of entry and inspection is properly exercised. The ABCC was to have the power to seek suspension or cancellation of permits to enter and inspect where such permits are abused. In addition, it would have the power to prosecute for a penalty in defined circumstances (see [Bills Digest 129-130](#),

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[2003-04](#) under chapter 9). This Bill lapsed when Parliament was prorogued for the 2004 federal election, although a similar bill is likely to be forthcoming.

### **Basis of policy commitment**

Restrictions on the federal right of entry scheme were canvassed in the Coalition's workplace relations policy for the 2004 federal election. The policy states:

A re-elected Coalition will introduce legislation to tighten up and clarify our existing right of entry laws to protect businesses, particularly small businesses, where unions seek to enter a workplace for an improper purpose.

In particular, a re-elected Coalition will introduce legislation to exclude the operation of State right of entry laws where federal right of entry laws also apply. Further proposed changes to the right of entry laws will require unions to comply with any reasonable request by an employer regarding where discussions between an employee and a union are to take place in order to limit work disruption.<sup>14</sup>

### **Position of significant interest groups/press commentary**

As noted above from employer contributions to the Senate Scrutiny of Bills report on right of entry in 2000, employers prefer to see union right of entry tightened. The ACCI has also commented:

ACCI welcomes the prospect of further, more fundamental reform to the Australian labour market and workplace relations system in 2005 noting that a fresh round of microeconomic reform (including labour market reform) is needed to strengthen the Australian economy. We support already announced moves to simplify collective and AWA agreement making, allow the term of some collective agreements to be extended to 5 years, give precedence to federal over state right of entry laws and clarify the right of employers to determine the location of union right of entry, preserve the small business exemption from redundancy payments, improve the operation of unfair dismissal laws, create an alternative voluntary mediation stream for dispute settlement, protect the status of independent contractors and confirm the legal status of certified agreements.<sup>15</sup>

The ACTU on the other hand criticised the following aspects of the Bill:

- a cumbersome and rigid set of requirements for unions seeking to enter workplaces including giving unnecessarily detailed information in a written notice
- lifetime bans from visiting workplaces for union officers that infringe the law's strict requirements - a more severe penalty than most drink drivers
- a limit on visiting workplaces to sign up new union members to just twice a year - this is a major restriction on the fundamental right of employees to join a union
- a ban on including 'right of entry' provisions in Certified Agreements even when employers consent to union access

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- limitations on the application of state right of entry laws. This will complicate rather than simplify existing state and federal industrial regulations, and
- allowing employers to determine where discussions between employers and employees are held. This could mean discussions are held next to the manager's office and could stop employees raising personal or sensitive issues such as bullying.<sup>16</sup>

State governments can be expected to also oppose the Bill's measures in so far as they override state right of entry provisions. For example, the NSW Minister for Industrial Relations, the Hon. John Della Bosca has claimed that the Federal Government's union right of entry restrictions were a 'divisive political stunt' designed to reignite a century old conflict:

It is aimed at provoking a fight, not producing a better result for the economy.<sup>17</sup>

These and other issues are likely to be raised in hearings of the Senate Employment, Workplace Relations and Education Committee in its inquiry into the Bill, which is required to report on the Bill by 7 March 2005.

## **Main Provisions**

### **Schedule 1 Amendments to the Workplace Relations Act**

**Item 2** inserts **new subsection 170LU(2B)** which provides that the Commission must not certify an agreement which contains a provision dealing with union right of entry within the meaning of Part IXA.

**Item 3** repeals the current right of entry provisions in Part IX and inserts a new Part IXA — Union right of entry.

### **Part IXA — Union right of entry**

#### **Division 1 – Preliminary**

**Proposed section 280A** sets out the objects of this Part, in addition to the general objects of the WR Act set out in section 3. These objects are to:

- establish a framework that balances the right of unions to represent their members in the workplace and the right of occupiers and employers to conduct their business without undue interference or harassment
- ensure that permit holders are fit and proper persons and understand their rights and obligations under this Part
- ensure that occupiers and employers understand their rights and obligations under this Part and

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- provide that permits are suspended or revoked when misused.

**Proposed section 280B** defines a number of terms used in this Part.

**Proposed section 280C** requires the Industrial Registrar to approve a form of entry notice in writing. Subsection (2) sets out the particulars that the form must include.

## **Division 2 – Issue of permits**

**Proposed section 280D** provides for the issuing of permits by the Industrial Registrar to officials (and employees) of unions who are named in applications by unions.

**Subsection 280D(3)** provides that the permit must include any conditions imposed by the Industrial Registrar (under proposed section 280E), and any conditions ordered by the Commission for abuse of the permit system (under proposed section 280J). Regulations may be made on a number of matters relating to the application.

**Proposed section 280E** provides that the Industrial Registrar may impose conditions on that permit which could include a limit on the range of premises to which a permit applies, or the time of day when entry may be made.

**Proposed section 280F** sets out the circumstances where an application for a permit must be refused. The Industrial Registrar must not issue a permit to an official unless the Industrial Registrar is satisfied that the official is a ‘fit and proper’ person to hold the permit. The criteria for whether a person is a ‘fit and proper’ person include:

- the official has received appropriate training about the rights and responsibilities of a permit holder
- the official has ever been convicted of a prescribed offence
- the official or any other person (such as the official’s union) has ever been ordered to pay a civil penalty under any industrial law in respect of the official’s conduct
- a previous permit issued to the official has been revoked or suspended under current or past right of entry provisions, or made subject to conditions, and
- the official’s right of entry for industrial purposes under a State industrial law has ever been suspended, cancelled, or had conditions imposed on it, or the official has been disqualified under a State industrial law from exercising or applying for a right of entry for industrial purposes.

**Proposed subsections 280F(3) and (4)** prohibit the Industrial Registrar from issuing a permit:

- where the issue is prevented by an order of the Commission under **new sections 280J or 281M** (**proposed section 280J** provides that the Commission can make orders where there is an abuse of the permit system and **proposed section 281M** relates to the powers of the Commission to settle industrial disputes about right of entry)

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- during a disqualification period specified by the Industrial Registrar under **new section 280H** (section 280H provides for the revocation and suspension of a permit by the Industrial Registrar), and
- where an official's right to enter for industrial purposes has been suspended under a State industrial law, or that person has been disqualified from exercising or applying for a right of entry permit under State industrial law.

### **Division 3 – Expiry, revocation, suspension etc. of entry permits**

**Proposed section 280G** provides that a permit remains in force for three years unless it is revoked or the permit holder ceases to be an official of the union before that date, whichever happens first.

**Proposed section 280H** provides for the revocation, suspension or imposition of conditions on permits by the Industrial Registrar. An application may be made by an authorised person (inspector or Employment Advocate official) or a prescribed person, possibly an employer.

**Proposed subsections 280H (4) and (5)** require the Industrial Registrar to revoke or suspend a permit, if the holder's right of entry for industrial purposes under a State industrial law was cancelled or suspended. Then, a period of suspension or revocation under **proposed subsection 280H(4)** must be for at least the 'minimum disqualification period': three months on the first occasion; 12 months on the second occasion and five years on the third and any subsequent occasion.

**Proposed section 280J** allows the Commission to make orders restricting the rights of a union or an official of a union, who has abused rights conferred under Part X1A. The Commission may:

- revoke or suspend some or all of the permits that have been issued in respect of the union
- impose conditions on some or all of the permits that have been issued in respect of a union or might in the future be issued in respect of the union, and
- ban the issue of permits for a specified period in relation to a specified person or in respect of the union generally.

**Proposed subsection 280J(5)** provides that the Commission's powers to make orders under this section may only be exercised by the President or, if the President directs, another Presidential member or a Full Bench.

**Proposed section 280K** requires a permit holder to return his or her permit within seven days of the permit's revocation, expiration and suspension or when conditions are imposed on the permit. A permit is not effective until conditions imposed are recorded on the permit by the Industrial Registrar (**proposed section 280L**).

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#### Division 4 – Right of Entry to investigate suspected breaches

**Proposed section 280M** sets out the circumstances in which a permit holder may enter premises to inspect a breach of federal or state industrial law, or a relevant industrial instrument.

**Proposed subsection 280M(1)** authorises a permit holder of a Commonwealth union to enter premises for the purpose of investigating a suspected breach of the WR Act or an award, certified agreement or order under the WR Act binding on the permit holder's union. Right of entry must only be exercised during working hours and in respect to premises where work is being carried out by one or more employees who are members of the permit holder's union and the suspected breach relates to or affects that work or any of those employees. Note that the recent review of Western Australian labour law by Professor Bill Ford recommended that access to non-member wages and time records be allowed to unions as the limitation:

had the effect of denying an organisation the opportunity to ascertain for example whether its members had been subject to “discriminatory” treatment in relation to (for example, over award) contractual payments or penalty rate (i.e. overtime arrangements)<sup>18</sup>

**Proposed subsection 280M(2)** provides that right of entry to investigate a breach of the WR Act does not apply to a breach of an AWA unless the employee who is a party to the AWA makes a written request to the union to investigate the breach.

**Proposed subsection 280M(3)** authorises a State union permit holder to enter premises for the purpose of investigating a suspected breach of a State industrial law, or a State industrial instrument that is binding on the permit holder's union under similar WR Act working time and union membership restrictions, where the employer of the employees is a constitutional corporation or the premises are in a Territory or Commonwealth place. A permit holder must have reasonable grounds for believing that there is a suspected breach. The provision counters the Federal Court's decision in *BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers* which ruled that a union had the right to enter a workplace according to Western Australian law, notwithstanding the fact that employees were covered by federal Australian Workplace Agreements (AWAs) which were silent on right of entry.<sup>19</sup>

**Proposed section 280N** specifies that permit holders may, after entering premises for the purpose of investigating a suspected breach:

- inspect machinery or materials
- interview employees who are members or are eligible to be members of the permit holder's union

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- require an affected employer to produce or allow access to any records relevant to the suspected breach other than non-member records.

**Proposed subsection 280N(5)** authorises a permit holder to issue a notice to require an affected employer to:

- produce or allow access to records (other than non-member records) relevant to the suspected breach at the premises or at another agreed place on a later day or days specified in the notice
- allow the permit holder to inspect and make copies of any of these records during working hours on a later day or days (after two weeks) specified in the notice.

**Proposed subsection 280N(7)** provides that the permit holder must show the employer documents evidencing the authority to exercise right of entry. **Proposed subsection 280N(8)** entitles a permit holder to enter premises during working hours for the purpose of inspecting and copying the records under a notice in subsection 280N(5). Under **proposed subsection 280N(9)** the Commission may order access to non-member records if satisfied that access is necessary to investigate the suspected breach. If the permit holder obtains an order under **proposed subsection 280N(10)** then the entry will be authorised by the order and will be subject to any conditions therein.

**Proposed subsection 280P(2)** provides that entry to premises under section 280M is not authorised unless the permit holder has given an entry notice to the occupier of the premises at least 24 hours but not more than 14 days before the entry and the notice identifies the particulars and specifics of the suspected breach or breaches. **Proposed subsection 280P(3)** provides that a permit holder is not authorised to enter premises under section 280M unless:

- where applicable, a copy of an exemption certificate issued under section 280Q is given to the occupier of the premises not more than 14 days before the entry.
- entry is on the day specified in the certificate and the premises are those specified in the certificate.

**Proposed section 280Q** allows a union to apply for a certificate exempting it from the notice requirements for entry onto premises under section 280M, subject to the Industrial Registrar being satisfied that there are reasonable grounds for believing that advance notice of entry might result in relevant evidence being destroyed, altered or concealed. Regulations may be made in relation to the form of application and the exemption certificate under **proposed subsection 280Q(4)**.

**Proposed section 280R** provides that entry is not authorised under this Division where the permit holder fails to comply with a request by an occupier or affected employer to:

- produce documents evidencing authority to enter

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- observe reasonable occupational health and safety (OHS) requirements applying to the premises
- conduct interviews in a particular room or area of the premises or to take a particular route to reach a particular room or area of the premises to conduct an interview, provided the request is reasonable.

This provision would appear designed to counterbalance the Commission Full Bench decision which determined that the ANZ Bank could not restrict the Finance Sector Union's right of entry by dictating the location of interviews between union officials and the Bank's employees.<sup>20</sup>

**Proposed section 280S** does not authorise a person to enter any part of premises that is used for residential purposes.

**Proposed section 280U** excludes all rights to enter under other industrial laws or State industrial instruments where there is or might be a right to enter conferred by this Division. This section does not exclude right of entry under an OHS law prescribed in

the regulations. The provision also counters the Federal Court's decision in *BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers* noted earlier.<sup>21</sup>

**Proposed section 280V** provides that the burden of proving the existence of reasonable grounds for suspecting a breach, as mentioned in section 280M, is on the person asserting the existence of those grounds.

## **Division 5 – Right of entry to hold discussions with employees**

**Proposed section 280W** sets out the circumstances in which a permit holder may enter premises to hold discussions with employees. **Proposed subsection 280W(1)** authorises entry by a permit holder who is a Commonwealth union official for the purpose of holding discussions with employees who wish to participate in those discussions provided the employees are members or eligible to be members of the permit holder's union and carry out work on the premises which is covered by an award or certified agreement that binds the permit holder's union.

**Proposed subsection 280W(2)** provides a similar authorisation in respect of State union permit holders to enter premises for the purpose of holding discussions on industrial matters with employees. However, under **proposed subsection 280W(3)** permit holders of State unions are not authorised to enter premises unless the employer of the employees is a constitutional corporation or the premises are in a Territory or a Commonwealth place.

**Proposed section 280X** provides that the permit holder is only allowed to enter under section 280W during working hours and may only hold discussions during the employees' meal-time or other breaks.

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**Proposed section 280Y** replicates the current denial of entry [WR Act: s.285C(3)] on religious grounds, that is if an employer:

- holds a conscientious objection certificate in force under section 180 of Schedule 1B to the WR Act which has been endorsed under **new subsection 280Y(2)** of Part IXA, or section 285C of the repealed Part IX of the WR Act, indicating that the employer is a practicing member of a religious society or order whose beliefs preclude membership of any other body, and
- employs 20 or fewer employees at the premises, none of whom are union members.

**Proposed section 280Z** provides that a permit holder is not authorised to enter premises or subsequent conduct on the premises under section 280W unless:

- an entry notice is given to the occupier at least 24 hours but not more than 14 days before the entry
- the notice specifies section 280W as authorising entry; and
- entry is on the day specified in the notice.

**Proposed subsection 280Z(2)** places further restrictions in relation to entry for recruitment purposes. The entry notice must specify that entry is for recruitment purposes and entry for this purpose does not need to be granted by the employer more than once in six months.

This provision would, in part, appear designed to counterbalance the Commission's Full Bench's decision in *ANZ*.<sup>22</sup> The Minister's [Second Reading Speech](#) suggests that repeated union entry for the purposes of recruitment can result in 'unfair pressure and harassment' hence the six month limitation between recruitment visits.<sup>23</sup> Presumably it would be still up to an unwilling recruit to walk out of the lunchtime meeting from the designated meeting area if entry for recruitment purposes was to be made available more often than six months.

**Proposed section 281A** provides that this Division does not authorise entry onto any part of a premises which is used for residential purposes.

**Proposed section 281B** provides that unless a permit holder complies with specified requests of occupiers or affected employers entry is not authorised under this Division to hold discussions. Specifically, a permit holder must comply with a request to:

- produce documents evidencing authority to enter
- observe reasonable occupational health and safety requirements that apply to the premises, and
- conduct interviews in a particular room or area of the premises or to take a particular route to reach a particular room or area of the premises to conduct an interview, provided the request is reasonable.

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**Proposed section 281C** provides that a permit holder's rights under this Division are subject to any conditions, including conditions imposed by the Commission or the Industrial Registrar, that apply to his or her permit.

**Proposed section 281D** excludes rights to enter under other industrial laws or State industrial instruments where there is a right to enter conferred by this Division, or where there would be a right to enter under this Division if the permit holder's right was not subject to any conditions or limitations. It does not exclude the operation of a right of entry under an OHS law prescribed in the regulations.

#### **Division 6– Contravention of civil penalty provisions**

**Proposed section 281F** allows an 'eligible person' that is an authorised person, who is an inspector or authorised officer appointed under the WR Act, a person affected by the contravention, or a person prescribed by the regulations to seek penalties for breach of Part IXA. The Court may order

- a pecuniary penalty: \$33,000 maximum for body corporates, \$6600 for individuals
- damages payable to a specified person, and
- any other order the Court thinks appropriate including an injunction.

**Proposed section 281G** prevents the court from awarding double penalties in respect of the same conduct.

#### **Division 7 - Miscellaneous**

**Proposed section 281J** prohibits the following conduct:

- permit holders intentionally hindering, obstructing or acting in an improper manner
- persons intentionally hindering or obstructing a permit holder exercising rights under Part IXA or refusing or unduly delaying entry to premises by a permit holder entitled to enter, and
- employers refusing or failing to comply with a requirement to produce documents under new subsections 280N(4) or (5). However a failure by a permit holder and an affected employer to agree on a place to provide access to documents for inspection does not constitute hindering or obstructing.

**Proposed subsection 281J(6)** provides that a person may be found to have hindered or obstructed a permit holder exercising rights by engaging in conduct before a permit holder enters the premises. For example, a person may contravene the provisions by concealing documents.

**Proposed section 281K** allows the Commission to make orders in respect of the rights of a permit holder under sections 280M (entry to investigate) or 280W (entry for discussions) if satisfied that the occupier of the premises has made a request to a permit holder under

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section 280R or 281B that is unreasonable. Orders that can be made include an order authorising access to premises for specified purposes.

**Proposed section 281L** prohibits a person from intentionally or recklessly giving an impression that the person is authorised to under the right of entry provisions to exercise particular rights.

**Proposed section 281M** permits the Commission to exercise its dispute settling powers to prevent and settle industrial disputes about the operation of this Part. Any order that the Commission makes cannot, however, confer rights that are additional to, or inconsistent with, rights exercisable under Part IXA.

**Proposed section 281N** provides that the Industrial Registrar may delegate any or all of his or her powers and functions under IXA Part to a Deputy Industrial Registrar.

## Concluding Comments

The Bill imposes severe conditions in respect of restraining unions to entering workplaces at six month intervals for the purpose of recruitment of future members. Professor Ford (cited earlier) has observed that entry for the purposes of discussions had, under the 1996 right of entry provisions conferred 'a new statutory right'.<sup>24</sup> It can be seen that this Bill now limits that right by distinguishing between entry granted for discussions with members and discussions for recruitment of new members. Other provisions of the Bill, such as the requirement for permit holders to be fit and proper persons would appear to be a reasonable development. Overall, the package of amendments could be seen, in light of the ILO's comments above about countries deunionising workforces, as 'chipping away' at union organisation and collective bargaining.

## Endnotes

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- 1 J. Shaw and C. Walton, 'A Union's Right of Entry to the Workplace', *Journal of Industrial Relations*, v.36(4), 1994, p. 546.
  - 2 William Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law', *Australian Journal of Labour Law*, Vol 13(1), June 2000, p. 19.
  - 3 U.N.T.S. July 4, 1950, articles 2 and 3.
  - 4 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, p. 192.

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- 5 International Labour Office, *Economic Security for a Better World*, ILO, Geneva, 2004, p. 249.
- 6 William Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law', *Australian Journal of Labour Law*, Vol 13(1), June 2000, p. 9.
- 7 P. Gregory and P. Robinson, 'Unionist Johnston jailed after Crown appeal', *The Age*, 28 August 2004.
- 8 *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill*, Chapter 6, (October 1996).
- 9 For a summary of right of entry provisions and how these work, see Department of Employment and Workplace Relations: *The Workplace Relations Act 1996 - A Guide to Employers' Rights in Relation to Industrial Action, Freedom of Association and Right of Entry*:  
<http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D3856%2526a0%253D0%2526a1%253D517%2526a2%253D624,00.html>
- 10 Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2003.
- 11 Senate Scrutiny of Bills Committee, [Entry and Search Provisions in Commonwealth Legislation](#), 6 April 2000, pp. 50–51.
- 12 Ibid, Recommendation 5, p. 90.
- 13 Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, *Consideration of the Provisions of the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999*, p. 264.
- 14 The Coalition's 2004 workplace relations policy can be found at: <http://www.liberal.org.au/documents/ACF748F.pdf> under the heading. 'Clarifying the right of entry', p. 8.
- 15 ACCI, 'New year's message — Business view of the next 12 months', *Media Release*, 31 December 2004.
- 16 Reported in 'Union right of entry proposals provoke strong reaction', *WorkplaceInfo*, ([www.workplaceinfo.com.au](http://www.workplaceinfo.com.au)), 3 December 2004.
- 17 Reported in 'Labor States consider High Court challenge on right of entry laws' *WorkplaceExpress*, ([www.workplaceexpress.com.au](http://www.workplaceexpress.com.au)) 3 December 2004.
- 18 W.J. Ford, *An Independent Review of the Amendments to the Industrial Relations Act 1979 made by the Labour Relations Reform Act 2002*, November 2004, p. 132.
- 19 Federal Court of Australia, *BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers (with Corrigendum dated 2 August 2004)* [2004] FCA 981 (29 July 2004).
- 20 Australian Industrial Relations Commission *ANZ Banking Group Limited v Finance Sector Union of Australia — Victorian and Tasmanian Branch*, PR951766, 8 September 2004.

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- 21 Federal Court of Australia, *BGC Contracting Pty Ltd v The Construction Forestry Mining & Energy Union of Workers (with Corrigendum dated 2 August 2004)* [2004] FCA 981 (29 July 2004).
- 22 Australian Industrial Relations Commission, *ANZ Banking Group Limited v Finance Sector Union of Australia — Victorian and Tasmanian Branch*, PR951766, 8 September 2004.
- 23 The Hon. Kevin Andrews, Second Reading Speech to the Workplace Relations Amendment (Right of Entry) Bill 2004, House of Representatives, *Hansard*, 2 December 2004, p. 5.
- 24 William Ford, 'Being There: Changing Union Rights of Entry Under Federal Industrial Law', *Australian Journal of Labour Law*, Vol 13(1), June 2000, p. 8.

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