Chapter 7

Right of entry

7.1 Right of entry provisions in the bill have become a point of contention because of the view by some employers that a union's capacity to speak with members and potential members is potentially disruptive. Many employer organisations are fundamentally opposed to any change to the law which might assist employees to obtain advice and assistance from their union. In addition, employers see increased potential for disruption resulting from unions competing for membership in the workplace. The committee heard no information from employees which substantiates this line of speculation.

7.2 WorkChoices radically restricted union entry and inspection rights. The provisions were used by employers to frustrate and deny a union's access to its members and prospective members. A key change in the WorkChoices regime was to permanently remove the right of employees to meet with the union in the workplace where AWAs or a 'non-union' agreement was made. The TCFUA submission instanced the following:

> …at Feltex Carpets, in mid-2008, a union organiser was directed to meet with workers in the women's toilets area. The organiser was forced to stand in the doorway to the toilet, with female workers in the toilet area, and the male workers just outside.[1]

7.3 Yet it is clear that union access to workplaces is essential if the basic rights and entitlements of employees are to be protected. The role of unions in exercising this function has been an accepted feature of industrial relations for a hundred years. As Dr John Buchanan told the committee:

> The thing you have to remember when you are dealing with the evolution of labour law is Australia has had a bargain basement industrial relations system because our big space has been the vision of unions enforcing labour standards. If you go back to the classic labour law cases of Jumbunna, I think that was 1908, and the streamlined authority that came out of that the argument was unions were given the privileged position—it was recognised as a privilege position in the economy—because they enforced labour standards.[2]

7.4 Evidence of what happens when this tradition is threatened by deliberate attempts to weaken unionism was given to the committee at its hearing in Adelaide. SA Unions referred to the report by the Workplace Ombudsman which found 41 per

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1 TCFUA, *Submission 11*, p. 37. See also Ms Qi Fen, Asian Women at Work, *Committee Hansard*, 18 February 2009, p. 32 and tabled papers.

2 Dr John Buchanan, *Committee Hansard*, 18 February 2007, p. 42.

cent of 400 employers randomly audited were underpaying their staff. Mr Story advised the committee:

> …that this is what it has come to as a consequence of Work Choices and as a consequence of keeping unions out of workplaces, keeping them from doing their regular business of assisting with compliance with law. Now it is almost at the stage where it is as common to find a breach of employment rights, if you go around and audit them, as it is to find that someone is doing the right thing. There can be a lot of kerfuffle about whether someone's esoteric right is offended by someone going into a workplace and looking at records, but the truth is, by letting people go in there and look at those records, what is really found out is the day-to-day massive abuse of people's employment rights through underpayment of wages, lack of holiday pay, lack of penalty rates—all of those sorts of things. That is the issue. Never lose sight of what this legislation is trying to do. That is the bigger purpose, not these other factors.[3]

7.5 Ms Olivia Guarna from the Young Workers Legal Service supported this view, and stated that in the five years of operation it has recovered just over $500,000 in unpaid wages, entitlements and also in damages in sexual harassment and discrimination claims for young people.[4]

7.6 The CEPU described the current right of entry rules as being designed to 'have as many technicalities available to employers as possible to frustrate the union being able to get in and access its members.' Mr Dave Oliver, National Secretary of the AMWU told the committee:

> If an employer wants advice–any legal advice, advice on health and safety or advice on an industry issue–they can pick up the phone and get it. A representative from the Australian Industry Group can walk into the workplace unimpeded. Yet when an employee wants to get the same kind of access it is denied and it is hampered. So we see this legislation as going some way to open up, which will assist employees getting access to unions and advice in much the same way that employers do.[5]

7.7 In *Forward with Fairness*, the government promised to strike a balance between the right of employees to be represented by unions and the right of employers to run their businesses. The *Forward with Fairness Policy Implementation Plan* sets out the policy in detail. It states the policy position that right of entry laws will maintain the permit system, maintain requirements to give notice and comply with conduct requirements on site; and allow officials who have a right of entry permit to visit employees to hold discussions with them and with employees who are eligible to

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3 Mr Angas Story, SA Unions, *Committee Hansard*, 28 January 2009, p. 17.

4 Ms Olivia Guarna, Young Workers Legal Service, *Committee Hansard*, 28 January 2009, p. 18.

5 Mr Dave Oliver, AMWU, *Committee Hansard*, 19 February 2009, p. 34.

be members of the union. The bill facilitates these visits as well as entry by officials to investigate breaches of the law.[6]

Proposed changes

7.8 Part 3-4 establishes a framework for officials of organisations to enter premises for the purposes related to their representative role under the act and under state and territory OHS laws. A key difference is that right of entry will be based on a union's right to represent the industrial interests of the employees who work on the premises rather than whether the union is bound by an award or agreement applying at the workplace.[7]

7.9 Employer organisations maintained concerns about the basis for the right of entry, expressing the view that only permit holders or employee organisations covered by an award or workplace agreement should have that right. They fear the provisions will lead to demarcation disputes.[8]

7.10 DEEWR explained that right of entry will apply for the purposes of investigating breaches of the Act or a fair work instrument, as well as for the purpose of holding discussions on workplace issues. The department pointed out that this is consistent with current arrangements.[9]

Conditions of entry

7.11 Unions must comply with very strict conditions of entry as follows:

- they must hold a valid right of entry permit;
- the permit holder must give at least 24 hours' notice;
- the permit holder must set out the basis on which they have entry rights; and
- the permit holder must comply with any reasonable request from an employer that discussion take place in a particular place and that they take a particular route to get there.[10]

7.12 Sanctions will apply to a permit holder who misuses entry rights or acts inappropriately.[11]

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6 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 23.

7 DEEWR, *Submission 63*, p. 40.

8 See for example ACCI, *Submission 58*, Part 2, p. 206; AiG, *Submission 118*, p. 102-103; Stooke Consulting Group, *Submission 153*, p. 4.

9 Ibid.

10 Ibid, p. 41.

11 The Hon Julia Gillard MP. Minister for Workplace Relations, *House of Representative Hansard*, 4 December 2008, p. 89.

Union entry to hold discussions

7.13 Clause 484 allows a permit holder to enter a workplace for discussions when there are one or more employees whose industrial interests the union is entitled to represent. A union official can hold discussions only with workers who want to participate. The committee majority notes that this provision restores balance and existed in the pre-WorkChoices WRA.

Issues raised with the committee

7.14 Coalition senators and employer groups made much of a view that the right of entry scheme goes further than the election commitment.[12] The committee majority notes that they have ignored the details of the policy reproduced below which makes clear there is a right to meet with the union in non-working hours:

8. RIGHT OF ENTRY

Labor will maintain the existing right of entry rules.

Labor therefore will ensure that only fit and proper persons hold a right of entry permit and that permit holders understand the right to enter another's premises comes with significant responsibilities.

Under Labor, Fair Work Australia will ensure there are appropriate arrangements in place to enable duly authorised permit holders to meet with those workers who are eligible and who want to meet with them, in accordance with right of entry laws.

Right of entry laws balance the right of employees to be represented by their union with the right of employers to get on with running their business.

Right of entry laws allow union officials who have a right of entry permit from the Australian Industrial Registry to visit employees in three circumstances:

- To investigate breaches of industrial law, awards or agreements;
- To hold discussions with employees who are members or who are eligible to be members of the union; or
- To investigate breaches of occupational health and safety law.

Officials cannot enter an employer's premises without giving proper notice. They must follow reasonable directions from an employer when they are on an employer's site and comply with any occupational health and safety requirements that may apply to the site.

12 See ACCI, *Submission 58*, Part 2, p. 205; AiG, *Submission 118*, p. 98; Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 19 February 2009, p. 13.

An employer must not hinder a union official who holds a valid right of entry permit and who has entered their premises in accordance with right of entry law.

However a union official cannot abuse the rights and privileges that accompany a right of entry permit. A right of entry permit may be revoked where the Australian Industrial Registry determines that they are no longer a fit and proper person to hold a permit.[13]

7.15 This was evident to Professor Stewart who told the committee that critics were taking no account of the policy as a whole:

> It was never going to be possible to retain, word for word, the existing laws absolutely in their entirety. That was never going to be possible because the right of entry provisions were always going to be affected by other changes to the legislation. It is a matter of interpretation as to whether or not you think that is a significant departure. As I say, I understand why some employer groups, in particular, have claimed that it is a significant departure and I believe there is good reason for that if you look at the heading alone—not if you look at the policy as a whole.[14]

Committee view

7.16 The committee majority notes that under Work Choices (and the previous Act), a union had to be bound to an award or collective agreement, or have a member employed at the workplace who was bound to an agreement, if it was to enter a workplace to investigate a suspected breach. Similarly, the system restricted union entry to hold discussions with 'eligible' employees – that is, employees covered by an award or collective agreement that is binding on the union, and who are, or are eligible to become, members of the union.

7.17 Under the bill, right of entry will be linked to the right of the union to represent the industrial interests of the employee, rather than the union being party to or covered by the award or agreement. This decision is necessary because of the fundamentally different nature of awards under the Fair Work Bill.

7.18 Award modernisation brings together many awards into a single modern instrument. Modern awards generally bring together the scope of many (typically upwards of ten) old State awards (NAPSAs) as well as federal awards and enterprise awards.

7.19 Awards no longer have 'parties', as they are no longer made in settlement of a dispute. They can 'cover' unions, and this gives the union a right to enforce the award and to apply to vary it. Right of entry is instead linked to the union's right to represent

13 Forward with Fairness Policy Implementation Plan, p. 23.

14 Professor Andrew Stewart, *Committee Hansard,* 28 January 2009, p. 8.

the industrial interests of the relevant employees. (That is, its rules coverage, subject to any demarcation/representation orders that apply).

7.20 This change was necessary to ensure that the award modernisation process was not distracted or delayed (or completely derailed) by arguments over right of entry being linked to award coverage. This was a deliberate decision to ensure that modern awards were simple, 'stand-alone' instruments that dealt with minimum employment standards, and were not de facto complex and unnecessary demarcation orders. If right of entry had stayed linked to award coverage in the modern award framework, there would have been extensive debate and the creation of complex schedules replicating the extensive and complex union coverage clauses (in some cases dozens of clauses) from the original state and federal awards, including enterprise awards.

Demarcation disputes

7.21 As noted previously, the demarcation dispute issue has no basis in fact. It is speculation based on dredging of old memories, consistent with other fears held by employers, although it is difficult to know how seriously they are held across industry. When asked specifically about the potential for demarcation disputes, the AMWU responded:

> …I think the main demarcation issues have been done and dusted. There are clear understandings in industries, and where agreements cover at the moment, and we understand where the coverage boundaries are. There are areas here we cohabitate with other unions, if I could put it like that…[15]

7.22 This was supported by the LHMU which stated:

> …We have been fairly meticulous about working with other unions both by way of agreements and actual rule changes to each union's rules, to ensure that, rather than the overlaps—which, on paper, in rules, might seem to give a picture of confusion—both by way of agreements—there is complementary coverage rather than overlap. That is the way in which we have been working for probably the last 20 years. Maybe 15 to 18 years ago there was a bit of a spate of demarcations between unions that we were involved in. But we are confident that that can be minimised.[16]

7.23 The committee heard evidence that union demarcation disputes will be dealt with through the making of representation orders which will continue to be available under provisions regulating registered organisations. DEEWR advised that these provisions will be located in a separate Act dealing with organisations provided for in the forthcoming Transitional Bill. It indicated that representation orders will be available in a wider range of circumstances than at present.[17]

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15 Mr Dave Oliver, AMWU, *Committee Hansard*, 19 February 2009, p. 36.

16 Mr Tim Ferrari, LHMU, *Committee Hansard*, 19 February 2009, p. 53.

17 Mr John Kovacic, DEEWR, *Committee Hansard*, 19 February 2009, p. 63.

Committee view

7.24 The committee majority notes that any union demarcation issues will be addressed effectively using representation orders. The capacity of the AIRC to make these orders is in the Organisations Schedule (Schedule 1A) to the WR Act and is being retained (with the power to go to FWA). The intention is to retain that schedule and rename the Act through the transitional bill.

7.25 The Deputy Prime Minister has written to the COIL participants (including AMMA, AiG, ACCI HIA and others) in early January 2009 advising of this intention and seeking their views on any changes that should be made to those provisions to ensure certainty of existing union demarcation settlements and to ensure that the provisions are effective within the framework of the new Act. Consistent with its approach to consultation, the Government is consulting industry bodies and the ACTU.

7.26 A further protection in the bill is that permit holders must declare their eligibility to represent employees in their entry notice, including by referring to the relevant parts of the union's rules that give the union the right to represent employees. These rules clarify the industry scope and parameters around the employees that a union is entitled to represent.

Access to employee records

7.27 Employer submissions objected to provisions which they quite wrongly claimed to give unions carte blanche access to employee records. Union submissions supported the right for unions to inspect non-member records.[18]

7.28 Unions WA also told the committee that in their experience non-members may be underpaid as much as a union member and non-members gain the benefit of an inspection of time and wages records. Mr Robinson added that:

> In my 23 years in the union movement, I have never had nor ever heard of a complaint from a non-member – and non-members do complain to union secretaries, let me tell you – with respect to the inspection of records. In most cases they recognise the indirect benefit to them and I would refer you to submission no 7 from Mr Alex Falconer, in fact he highlights this very point in that brief submission.[19]

7.29 On the other hand a number of submissions raised particular concerns about inspection and copying of records.[20] The Minister has confirmed that right of entry and access to employee records will be the same as those that applied from 1988 to

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18 See CPSU-SPSF, *Submission 77*, p. 19.

19 Mr David Robinson, Secretary Unions WA, *Committee Hansard*, 29 January 2009, pp. 41-42.

20 See AMMA, *Submission 96*, pp.30-32; ACCI, *Submission 58*, Part 1, p. 37; ACCI *Submission 58*, Part 2, p. 209-211; Stooke Consulting Group, *Submission 153*, pp. 5-6.

2005 before WorkChoices. To further clarify concerns raised around access to member records, departmental officials detailed the change for the committee as follows:

> At the moment, post Work Choices, a permit holder is only allowed to inspect records that relate to their members when they go on site to investigate a breach. The bill proposes changing that to the pre Work Choices situation and there are a range or parameters and protections around that. They include, firstly, that fact that the records that are being inspected must be documents relevant to the breach; that is clause 482(1)(c). And, secondly, the clause I mentioned before about the need to identify the particulars of the breach, which is clause 518(2)(b).[21]

7.30 The department explained that the Privacy Act will apply to protect personal information of employees in records obtained by the union where the union is covered by the Privacy Act.[22] Where it applies, it prohibits the disclosure of personal information outside the primary purpose for which the information is obtained. Clause 504 provides another layer of compliance in relation to misuse of records and the permit holder risks the revocation of their permit in the event information is misused under section 510(1)(c).[23] DEEWR explained:

> New provisions in the Bill also allow for fines to be imposed against a person who uses or discloses employee records obtained while investigating a suspected breach in a way that contravenes the Privacy Act. These fines can be up to $6, 600 for individuals and $33, 000 for unions. The Bill also requires FWA to revoke or suspend all entry permits held by a permit holder who has breached these new provisions or has a Privacy Act complaint substantiated against them by the Privacy Commissioner.[24]

7.31 In response to concerns raised by Coalition senators about the protection of documents other than employee records about to be copied under 482(1)(c), officials stressed the wider protections (including sections 505, 508, 510, Division 4) available for the misuse of the right of entry powers in terms of accessing information which include revocation of a permit and other penalties.[25] The committee also notes that a person affected by a breach of the Privacy Act may complain to the Privacy Commissioner and a further penalty would be imposed via clause 510.[26]

7.32 The department further stated that they had difficulty envisaging a circumstance where commercially sensitive documents would be necessary for the

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21 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 22.

22 DEEWR, *Submission 63*, p. 42.

23 Ms Natalie James, *Committee Hansard*, 11 December 2008, p. 22

24 DEEWR, *Submission 63*, p. 42.

25 Mr Mark Cully, *Committee Hansard*, 11 December 2008, pp. 27-28.

26 Steve O'Neill, Miles Goodwin and Mary Anne Neilson, Fair Work Bill 2008, Bills Digest, no. 81, 2008-09, p. 66.

purposes of investigating a suspected breach of the act or instrument. Again they highlighted that these provisions have been in the act since 1996 and have not been an issue of misuse or abuse.[27] The DEEWR submission added:

> The department is not aware of any proceedings related to the alleged abuse of those provisions. However, the privacy protections contained in the Bill are stronger than those which existed prior to Work Choices Amendments.[28]

7.33 Since the bill was tabled the Minister has assured critics:

> We are allowing a right of entry permit holder to inspect only those documents that are directly relevant to investigating a breach of an award or the Act that affects a member of the union. Any claim this can be used to copy lists of names and addresses of employees is unfounded. Remember that this was the framework used for very many years, all the way to 2005. Privacy Act requirements apply and any misuse results in a significant fine and the cancellation of the permit.[29]

Privacy Act protections

7.34 The OPC welcomed the civil remedies included in the bill regarding the misuse of personal information by permit holders. It provided the following suggestions to clarify and enhance the privacy protections applying to information collected and handled under the 'right of entry' provisions on the bill:

- clarify that all organisations with permits to enter workplaces under the 'right of entry' provisions and collect employees' personal information are subject to the Privacy Act for that collection and handling of personal information;
- clarify that the collection of personal information under the 'right of entry' provisions is subject to the Privacy Act and not part of the current private sector 'employee records exemption' of the Privacy Act;
- the development of guidance material on good privacy practice for those organisations brought under Privacy Act coverage for the 'right of entry' provisions; and
- further consideration be given to clauses 504 and 510 to ensure they meet their objective to provide additional remedies for the misuse of employees' personal information obtained through the 'right of entry' provisions.

7.35 In addition the OPC advised that the purpose of the collection of personal information through the 'right of entry' provisions should more clearly reflect the

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27 Mr John Kovacic, *Committee Hansard*, 11 December 2008, p. 29.

28 DEEWR, *Submission 63*, p. 42.

29 Hon Julia Gillard MP. Minister for Workplace Relations, Speech to the Australian Industry Group, 8 December 2008.

stated intention that the information be 'directly' related to the potential breach.[30] It explained:

> The Office encourages organisations to take a narrow view of what information is necessary. Reducing the amount of information that is collected also benefits organisations in reducing the compliance costs of handling personal information and assists in meeting the obligation to keep information secure from loss or misuse.[31]

7.36 The government has already acknowledged the valuable advice from the OPC and the technical and practical suggestions for amendments to the bill. These clarify and improve the privacy protections applying to information collected and handled under the right of entry and protected action ballot provisions of the bill. The government has stated that it will carefully consider these recommendations.[32]

Committee view

7.37 The committee majority believes the fears expressed by employer groups in relation to right of entry and access to employee records are unfounded. It notes that changes to the right of entry regime: to allow union access to non-union employee records, where this is necessary to investigate a contravention, and allowing all employees to meet with their union in the workplace regardless of the form of agreement applying, are not new and existed in the pre-WorkChoices WRA (and for very many years before that) without the kinds of consequences that some employers have suggested to the committee would occur. These are also balanced with appropriate obligations and sanctions apply for misuse.

7.38 In relation to access to employee records, the committee majority emphasises that permit holders cannot copy anything they wish. They can only inspect documents relevant to a suspected breach. Privacy protections apply. Despite this issue being well canvassed in the submissions and hearings, the committee heard of no instance of misuse or abuse of employee records by a union and the department was not aware of any such allegation. It notes that the protections for personal information are stronger and more comprehensive under the Fair Work bill than WorkChoices and there are also heavier penalties for the unauthorised use or disclosure of employee records.

30 Ibid, pp. 3-4.

31 Ibid, p. 8.

32 Media release, Hon Julia Gillard MP, 'Government welcomes submissions to Fair Work Bill Inquiry', 2 February 2009.