



4 February 2005

Mr John Carter
Secretary
Senate Employment, Workplace Relations
and Education Legislation Committee
Parliament House, Suite SG.52
Canberra ACT 2600

Facsimile: 02 6277 5706

Dear Mr Carter

RE. WORKPLACE RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004

Ai Group welcomes the opportunity to express its views to the Senate Committee on the *Workplace Relations Amendment (Right of Entry) Bill*.

Registered organisations have an important representative role to play which is recognised within the *Workplace Relations Act*. It is an object of the Act that registered employee and employer bodies be able to operate effectively (s.3(g)).

Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry powers and retaining a right of entry regime which enables unions to represent their members effectively.

Ai Group's views on the Bill are set out below. The provisions of the Bill strike an appropriate balance, although amendments are suggested in a few areas.

Right of entry clauses in certified agreements

Since the High Court's *Electrolux* Decision¹, there have been a series of conflicting Australian Industrial Relations Commission (AIRC) decisions regarding whether or not certified agreement clauses dealing with right of entry are matters which pertain to the employment

¹ *Electrolux Home Products Pty Ltd v The Australian Workers Union and Ors* [2004] HCA 40.

relationship and hence can be included in a certified agreement. One such decision is *Re. Schefenacker Vision Systems Australia Pty Ltd AWU / AMWU Certified Agreement 2004* [PR952801]. In this decision SDP O'Callaghan refused to certify an agreement on the basis that various clauses of the agreement did not pertain to the employment relationship, including a right of entry clause. The decision has been the subject of an appeal before a Full Bench of the AIRC which was heard on 20 and 21 December 2004. The Full Bench has reserved its decision.

Regardless of what the Full Bench decides in the *Schefenacker* case, the provisions of the *Workplace Relations Act*, as amended by the *Workplace Relations Amendment (Right of Entry) Bill*, provide a comprehensive code for right of entry. Accordingly, it would appear to be unnecessary for right of entry provisions to be included within certified agreements.

Fit and proper person test

The Bill would continue to allow union officials to apply to the Industrial Registrar for an entry permit but would require the Registrar to be satisfied that the official is a fit and proper person to hold a permit (s.280F). A list of factors to be taken into account by the Registrar are set out in the Bill and include whether the official has received appropriate training, been convicted of various offences, or had his or her permit previously revoked or suspended. The factors to be taken into account are reasonable. Importantly, in most circumstances, the Industrial Registrar retains the discretion to decide whether it is appropriate to issue a permit to a union official.

Problems caused by the interaction of Federal and State right of entry laws

The current Federal and State right of entry provisions are not working effectively as highlighted by the *CSR Humes* case. In this matter, Mr Andrew Ferguson, the NSW Branch Secretary of the Construction and General Division of the CFMEU and two other union officials were found by Deputy Industrial Registrar Ellis to have intentionally hindered and obstructed the business of CSR Humes. The officials were found to have walked around the company's site encouraging employees to take part in a 30 to 40 minute stop work meeting.

In response to a decision of Registrar Ellis of 29 May 2001 (PR904755) to revoke his entry permit under the *Workplace Relations Act*, Mr Ferguson was quoted in the media as making the following comments:

"Ferguson said the ban would have no impact on his work as a union official. He said he went to building sites every day of the week and would continue to do so because he had a NSW entry permit and also had rights under powerful NSW OHS laws to enter premises. Any employer who tried to stop him entering a site would find workers going offsite to hold meetings, he said. But he doubted employers would try to restrict his access". ("IRC revokes CFMEU leader's entry permit" Workplace Express, 29 May 2001).

In a decision of 24 October 2001 (PR910502), a Full Bench of the AIRC overturned the

decision of Registrar Ellis to revoke the entry permit of Mr Ferguson and another union official on the basis that the Registrar was wrong in finding that the officials were exercising powers under the *Workplace Relations Act*. The AIRC held that the officials were exercising powers under NSW state legislation at the time – not the federal legislation.

The *Workplace Relations Amendment (Right of Entry) Bill* deals with many of the problems which have been arising regarding the interaction of Federal and State right of entry laws by:

- Preventing a union official from applying for a Federal entry permit during a time when the official has been disqualified under a State industrial law from holding a State entry permit (s.280F(4));
- Requiring the Industrial Registrar to revoke or suspend a union official's Federal entry permit for a "minimum disqualification period" if the official has been disqualified under a State industrial law from holding a State entry permit (s.280H);
- Permitting union officials with a State permit to enter the premises of a Constitutional Corporation for the purposes of:
 - investigating suspected breaches of State industrial laws or industrial instruments (s.280M(3)); and
 - holding discussions with employees covered by a State industrial instrument and eligible to be members of the official's union (s.280W(2));
- Excluding right of entry under State industrial laws (but not State OHS laws) where there is a right to enter under Federal industrial laws (ss.280U and 281D).

With regard to point 2 above, consideration should be given to amending the Bill to give the Industrial Registrar more flexibility to determine an appropriate length for the disqualification period. The proposed mandatory minimum disqualification periods set out in the Bill, which would apply to a union official who has had his or her State entry permit suspended or revoked under a State industrial law, have no relationship to the length of time that the official has been disqualified under the State law.

Orders by Commission for abuse of entry rights

S.285G(2) of the *Workplace Relations Act* gives the AIRC the power to revoke an entry permit for the purposes of preventing or settling an industrial dispute. The existing provisions are overly restrictive. The Bill would give the AIRC wider powers to revoke or suspend permits, impose conditions on permits, or ban the issue of permits for a specified period, where a union official or union have abused their entry rights. Such wider powers are appropriate.

Right of entry to investigate suspected breaches

S.285B of the *Workplace Relations Act* gives a union official the right to enter premises to investigate a suspected breach of the Act, or an award, certified agreement or order that is binding upon the official's union. The following deficiencies in the existing legislation need to be overcome:

- The Act does not require the union official to identify the suspected breach or even have reasonable grounds for suspecting a breach. This enables union officials to go on a “fishing expedition” which can cause significant disruption and cost to employers;
- The Act does not specify where the union official may interview employees about a suspected breach and problems have occurred from time to time where a union official has insisted that employees be interviewed in a location which is disruptive to the employer’s operations;
- The Act permits union officials to access employment records of employees who are not union members, regardless of whether the employees wish the union to access their records.

The Bill overcomes the above deficiencies in a sensible way. Appropriately, union officials would be required to set out the particulars of suspected breaches on the entry notice required to be given to the employer under the Act (s.280P(2)) and have reasonable grounds for suspecting a breach (s.280M(1)). Also, the employer would be entitled to specify a “reasonable” room or area for the union official to interview employees, with the AIRC having the power to make an order if the proposed location was unreasonable (s.280R(3)). Further, union officials would need to apply to the AIRC if they wished to view non-member employment records (s.280N(9)).

Right of entry to hold discussions with employees

S.285C of the *Workplace Relations Act* gives union officials the right to enter premises and hold discussions with union members and those eligible to be members, who are covered by an award that is binding upon the relevant union. The following problems need to be addressed:

- The Act does not specify where a union official may hold discussions with employees and sometimes difficulties have arisen where an official has insisted that the discussions take place in the lunch room rather than in a meeting room which the employer has made available;
- There are no limits on the number of times that a union can enter non-unionised workplaces for the purposes of convincing employees to join the union.

The Bill adopts a fair approach to determining the location where the discussions between the union officials and employees are held. The employer would be able to nominate the location for the discussions, but the location would be required to be “reasonable”. The AIRC would be empowered to make an order if the location proposed by the employer was unreasonable in the circumstances (s.281B).

The Bill would only enable union officials to enter premises once every six months for the purposes of recruiting union members (s.280Z). The restrictions in the Bill appear to apply regardless of the number of existing members in a workplace. Notwithstanding this, the Bill overcomes the issue of prime concern to Ai Group. That is, those workplaces where there are no union members.

Penalties

The Bill takes a balanced approach to penalties. Similar penalties apply to both employers and unions for breaches of specified provisions. The maximum penalties are \$33,000 for organisations and \$6,600 for individuals. These penalties are consistent with those which apply under most other sections of the *Workplace Relations Act*.

The Bill empowers the Federal Court to make a damages order where specified right of entry provisions have been breached by unions or employers. This is a new approach. For breaches of other provisions of the *Workplace Relations Act*, a certificate under s.166A of the Act must be obtained from the AIRC before damages are pursued in a relevant Court. Consideration should be given to amending the Bill to require that the AIRC conciliate to endeavour to resolve the matter (for a 72 hour maximum period as applies under s.166A) before a party can pursue damages. However, given the abuses of entry rights by unions in the construction industry identified by the Cole Royal Commission and the Recommendations of the Royal Commission, direct access to Court proceedings to pursue damages should apply in the construction industry as is provided for in the *Building and Construction Industry Improvement Bill 2003*.

Ai Group urges all political parties to support the passage of the Bill.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Heather Ridout', is written over a vertical line. The signature is cursive and somewhat stylized.

Heather Ridout
CHIEF EXECUTIVE