

**OUTLINE OF SUBMISSION  
TO FAIR WORK AUSTRALIA**

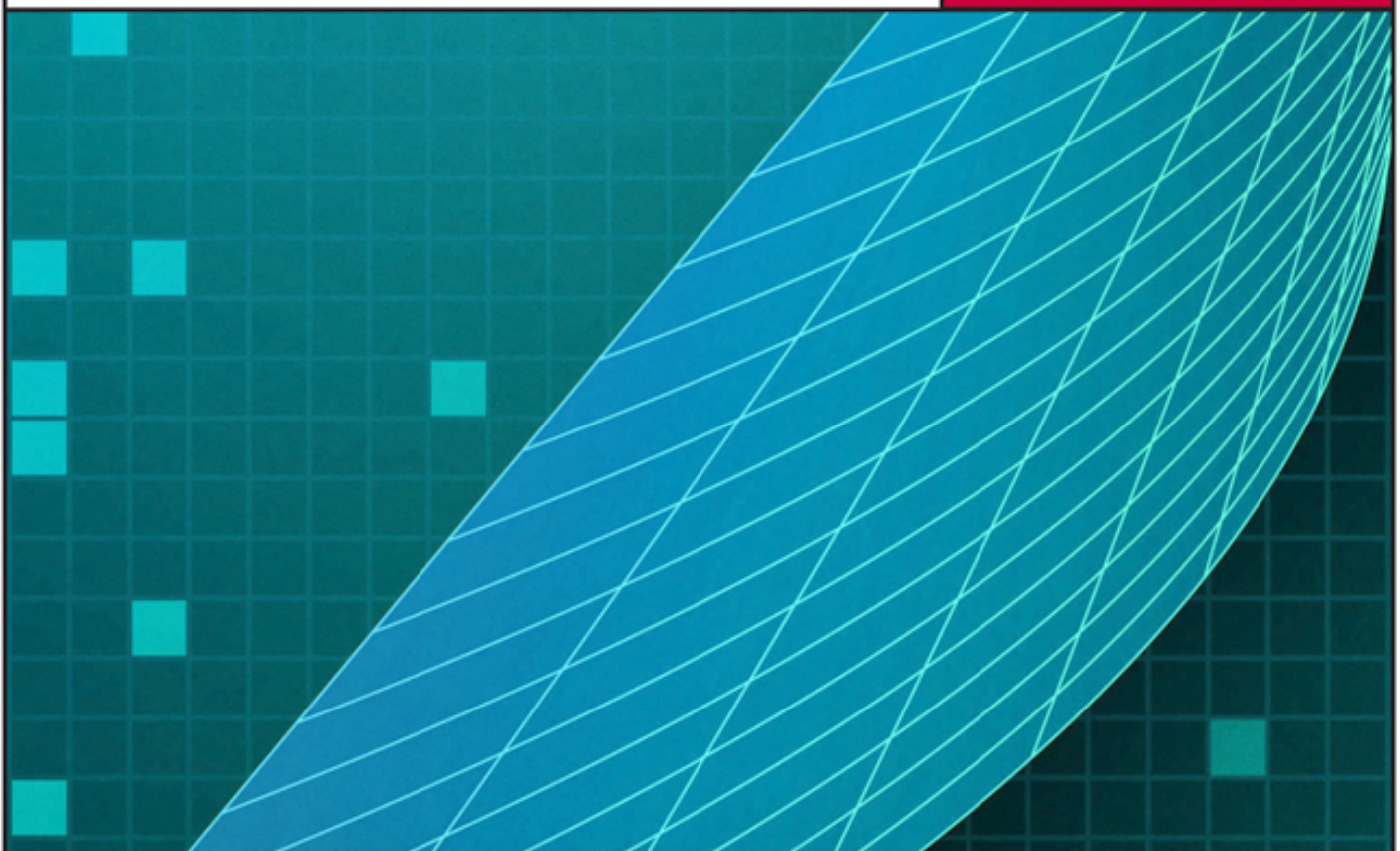


**C2010 / 3157**

**Appeal by Ai Group against decision ([2010] FWAA  
1401) of C Ryan re. approval of the Dunlop Foams  
(NSW) Collective Agreement 2009**

 **AUSTRALIAN INDUSTRY GROUP**

**21 April 2010**



# C2010 / 3157

## OUTLINE OF SUBMISSION

### 1. Overview

1. This is an appeal against a decision of Commissioner Ryan ([2010] FWAA 1401) to approve the *Dunlop Foams (NSW) Collective Agreement 2009*.
2. Commissioner Ryan has interpreted the *Fair Work Act 2009* (FW Act) to mean that the requirements and conditions in Part 3-4 do not apply “**at all**”:
  - Where a union official enters or remains on premises pursuant to a “**direct invitation**” to do so from the employer as occupier (para [13] of his decision); or
  - Where a union official enters or remains on premises pursuant to an “**implied**” invitation to do so from the employer as occupier (para [13]); or
  - Where the employer gives the union official “**permission to enter**” (para [14]).
3. Such an interpretation, we submit, is unworkable.
4. Ai Group also submits that Commissioner Ryan has adopted an incorrect interpretation of the provisions of the Act dealing with unlawful terms. An unlawful term cannot become a lawful term by characterising the term as an invitation to enter.

5. It is unlawful to include a provision in an enterprise agreement which gives a union official the right to enter to investigate complaints, hold discussions with employees, or exercise an OHS right, other than in accordance with Part 3-4 of the FW Act. Clause 44 in the Dunlop Foams enterprise agreement clearly offends this legislative requirement.
  
6. The right of entry and unlawful term provisions of the Act were the subject of extensive discussion and debate between the Government, Ai Group and unions during the development of the legislation and during the Senate Committee inquiry into the *Fair Work Bill*. A balance was struck between the competing interests and Ai Group believes that C Ryan's decision disrupts this balance and is inconsistent with the intent of the legislation.

## 2. **Ai Group’s standing to appeal and the reasons why FWA should grant permission to appeal**

7. Ai Group is pursuing this appeal as a “person who is aggrieved” by the decision of Commissioner Ryan, in accordance with s.604 of the FW Act.
8. Ai Group appears in the proceedings in its own right as well as on behalf of its member company – Pacific Brands Limited.
9. As set out in correspondence from Pacific Brands Limited dated 25 March 2010 (**Annexure A**), Pacific Brands Limited concurs with Ai Group on the grounds set out in the Notice of Appeal.
10. Section 604 of the FW Act states that *“A person who is aggrieved by a decision..made by FWA (other than a decision of a Full Bench or the Minimum Wage Panel).... may appeal the decision with the permission of FWA.”*
11. Paragraph 604(1)(b) states that *“Without limiting when FWA may grant permission, FWA must grant permission if FWA is satisfied that it is in the public interest to do so”.*
12. Ai Group submits that:
  - Ai Group is legitimately regarded as a “person who is aggrieved” by the decision of Commissioner Ryan; and
  - It is in the public interest for FWA to allow the decision to be appealed;

for the reasons outlined below.

## **Ai Group is a “person who is aggrieved”**

13. The Explanatory Memorandum for the *Fair Work Bill 2008* gives guidance on the meaning of the term “person who is aggrieved”. Relevant extracts are:

### **“Clause 604 – Appeal of decisions**

2320. *Clause 604 provides for an appeal to a Full Bench, with the permission of the Full Bench, in relation to certain decisions of FWA. This provision is modelled on the appeal provisions contained in the WR Act and its predecessors, and is intended to maintain the existing jurisprudence in relation to AIRC appeals, in particular the decision of the High Court in Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194.*

2321. *An appeal under clause 604 involves an appeal by way of rehearing. Although an appeal can and usually will be conducted by reference to the original evidence, the Full Bench is not limited to the evidence before the primary decision-maker and can admit further evidence (see subclause 607(2)).*

2322. *Regardless of the nature of the decision being appealed, the powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker.*

2323. *Where the original decision has involved the exercise of a significant level of discretion, the Full Bench should only intervene on the limited grounds set out in House v The King (1936) 55 CLR 488, namely that the decision-maker has:*

- *acted upon a wrong principle;*
- *been guided by irrelevant factors;*

- *mistaken the facts; or*
- *failed to take some material consideration into account.”*

*2324. Subclause 604(1) provides that any person who is aggrieved by a decision made by FWA, other than a decision of a Full Bench or Minimum Wage Panel, has standing to initiate an appeal. Any decision of FWA, other than a decision of a Full Bench or Minimum Wage Panel, is appealable. For the purposes of an appeal, a decision would include a decision to make an FWA instrument (see clause 598).*

*2325. In some cases the number of potential persons aggrieved by a decision could be large – e.g., where the decision has been to amend an award. The requirement for FWA to grant permission will prevent frivolous or vexatious appeals.* “

(Emphasis added).

14. Ai Group submits that the acknowledgment in the Explanatory Memorandum that in some cases there may be a large number of persons “aggrieved” by a decision of FWA, highlights that the test of whether a person is legitimately a “person who is aggrieved” is not intended to be an onerous one. As referred to in the Explanatory Memorandum, the requirement for FWA to grant permission, particularly where it is in the public interest to do so, prevents frivolous and vexatious claims.
15. Ai Group has a substantial interest in the decision of Commissioner Ryan being appealed, for reasons including the following:
  - Ai Group is a major registered organisation which represents employers in a wide range of industries including manufacturing, construction, ICT, automotive, printing, transport, labour hire and numerous others;

- Ai Group is a “peak council” within the meaning of the term defined in the FW Act and is formally recognised as a State Peak Council in the NSW Industrial Relations System;
- The proceedings are of relevance to all Ai Group members who have received a notice by union officials to enter their premises, or who may receive such a notice in the future;
- The proceedings are of relevance to thousands of Ai Group members who have enterprise agreements in place or who may wish to bargain in the future;
- Hundreds of Ai Group members are currently bargaining;
- The decision which the Full Bench makes will have a direct and substantial impact on a very large number of Ai Group member companies.

16. In *Australian Postal Corporation v CEPU* ([2009] FWA 599, SDP Acton, DP Hamilton and C Blair, 12 October 2009), the Full Bench considered the meaning of s.604 of the FW Act:

*“[8] The ability of a person aggrieved by a decision to institute an appeal was a feature of predecessor legislation to the FW Act, namely s.45(3)(d) of the Industrial Relations Act 1998 (Cth) and s.120(3)(g) of the Workplace Relations Act 1996 (Cth).*

*[9] The term “person aggrieved” in s.45(3)(d) of the Industrial Relations Act 1988 (Cth), which was relevantly similar to s.120(3)(g) of the Workplace Relations Act 1996 (Cth), was considered by the Industrial Relations Court of Australia in *Tweed Valley Fruit Processors Pty Ltd v Ross and Others*<sup>1</sup>. The Tweed Valley case concerned an enterprise flexibility agreement that Tweed Valley Fruit Processors Pty Ltd (Tweed Valley) had reached with its employees. The agreement was approved by a single member of the*

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<sup>1</sup> (1996) 137 ALR 70

*Commission. A union bound by an award binding Tweed Valley but not bound by the agreement sought leave to appeal against the member's decision to approve the agreement on the ground that the single member had failed to exercise his jurisdiction. The appeal was allowed by a Full Bench of the Commission. Tweed Valley then sought prerogative relief in the form of writs of prohibition and certiorari to quash the Full Bench decision.*

**[10]** *In the Tweed Valley case, Wilcox CJ and Marshall J said:*

*"There is no doubt that, in determining whether a person is a "person aggrieved" for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context. Gibbs CJ said as much in Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 184-185; 39 ALR 417. His Honour there referred to cases in which it had been held "that a person is `aggrieved' by an act which operates in restraint of what would otherwise have been his legal rights". But he also mentioned Attorney-General (Gambia) v N'Jie [1961] AC 617 at 634 in which the Judicial Committee of the Privy Council said that the words "person aggrieved" should not be subjected to a restricted interpretation; "they ... include a person who has a genuine grievance because an order has been made which prejudicially affects his interest".*

*In Tooheys Ltd v Minister for Business and Consumer Affairs (1981) 36 ALR 64; 54 FLR 421, Ellicott J at FLR 437 interpreted the description "a person who is aggrieved" in s 5 of the Administrative Decisions (Judicial Review) Act as extending, at least, to "a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public". He went on to say at FLR 437-8 that, in many cases, that grievance will be shown because the decision affects his or her existing or future rights but in other cases it may be less direct; it "may affect*

him or her in the conduct of a business or ... affect his or her rights against third parties".

*Gummow J followed Tooheys in Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124; 71 ALR 73 in holding that the applicant, a registered industrial organisation with members serving in ships of the relevant class, had standing to seek reasons for a manning notice given by the respondent. At FCR 133 his Honour pointed out, first, that the applicant had among its interests or objects the obtaining and maintenance of reasonable conditions of employment of its members; secondly, that it had been invited to participate in the relevant Manning Committee and had made submissions in regard to the manning notice and, thirdly, that the issue was one of safety and was "fertile ground for an industrial dispute".*

*The decision of Commissioner Redmond did not affect AFME/PKIU's legal interests. But the union had an interest in the decision beyond that of an ordinary member of the public. Its position was much like that of AIMPE in the case heard by Gummow J: it was concerned with the maintenance of members' conditions of employment, it had participated in the decision complained of by making submissions (pursuant to a statutory right: see s 170NB(2) of the Industrial Relations Act) and the decision was one containing potential for industrial disputation.*

*Having regard to these decisions, and the other authorities discussed by the judges who made them, it seems to us that the formula "person aggrieved" covers the position of AFME/PKIU in this case, unless there is something about this particular statute that indicates otherwise. The only thing mentioned by counsel is the restriction in s 45(3)(baa). But we do not see the existence of that restriction as an indication that Parliament wished the courts to interpret s 45(3)(d) more narrowly than they might otherwise have done. Section 45(3)(baa) deals with the right to pursue a merits appeal against a refusal decision. Section 45(3)(d) relates to the entitlement to raise a question as to whether a*

*Commission member has acted within jurisdiction. These are different questions. There is room for the view that a wider category of people has a legitimate interest in ensuring that the Commission acts within its jurisdiction than those who are directly affected by a particular decision, and so allowed to agitate its merits.”*

*[11] We were satisfied this authority is relevant to the meaning of the phrase “a person who is aggrieved” in s.604(1) of the FW Act. Further, we were satisfied Australia Post was a person who was aggrieved by Senior Deputy President Drake’s decision and, therefore, had standing to appeal against that decision.“*

17. Consistent with the *Australian Postal Corporation* and *Tweed Valley* cases, Ai Group is legitimately regarded as a “person who is aggrieved” because the decision of Commissioner Ryan prejudicially affects the interests of Ai Group and its members. Given Ai Group’s role as a registered organisation of employers, the grievance which Ai Group will suffer as a result of the decision is beyond that of an ordinary member of the public. Ai Group’s role encompasses representing employers to ensure that workplace relations laws are enacted and applied in a manner which preserves an appropriate balance between the interests of employers, employees and their representatives.
18. In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCAFC 386 (29 November 2002), the Full Federal Court considered an application by Ai Group to appeal a judgment<sup>2</sup> of a single judge of the Federal Court, in the context that none of the parties involved in the original proceedings had pursued an appeal.
19. The Majority (Goldberg and Finkelstein) decided that Ai Group as a non-party was entitled to pursue an appeal against Justice Kenny’s *Emwest* decision. The key factors which influenced the decision included:

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<sup>2</sup> *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2002] FCA 61 (2002) 112 IR 388.

- The importance of the issue under consideration – that is, the circumstances in which protected action could be taken (para [67]);
- The judge’s decision had the potential to effect adversely many employers (para [71]);
- The Australian Industry Group is a registered organisation of employers (para [71]);
- The Minister for Employment and Workplace Relations wished to intervene in support of Ai Group’s application for leave and, if leave was granted, in support of its appeal (para [71]);
- There is a longstanding rule of practice that a person not a party to a proceeding may, in certain circumstances, be given leave to appeal from an order or judgment (para [72]);
- The High Court cases show there is now a flexible approach to the identification of a ‘special interest’. The nature and subject matter of the litigation will dictate what amounts to a special interest. “Ai Group derives its special interest both from the representative character of the organisation, that is as an organisation representing employers who regularly enter into certified agreements with unions, and the fact that Emwest is one of the employer organisations that it represents.” (para [78]);
- The judge's decision had ramifications which travel far beyond the dispute that subsisted between Emwest Products Pty Ltd and the AFMEPKIU. The construction question which was required to be resolved, was capable of going the other way. It was highly probable that the matter would come before a Full Court and the case was an appropriate vehicle for that purpose (para [81]);

- The employers represented by Ai Group had a significant interest in having the construction question resolved by a Full Court (para [81]);
  - A justifiable controversy remained alive. Ai Group had sought to enliven the appeal process within the time limited for instituting an appeal. That Ai Group was not a party to the original decision, and that no party to the decision sought to appeal the order made by the judge, does not mean that the controversy had come to an end. The controversy remained alive while it was possible that some person, whether a party or not, might bring an appeal (para [87]).
20. Unlike the situation in 2002 with Ai Group member company Emwest Products Pty Ltd, Pacific Brands Limited t/a Pacific Dunlop is openly supporting Ai Group's appeal against the decision of Commissioner Ryan and is being represented by Ai Group.
21. Ai Group did not have the opportunity to participate in the original proceedings as the *Dunlop Foams (NSW) Collective Agreement 2009* was approved "on the papers". Pacific Brands Limited t/a Dunlop Foams did not seek Ai Group's advice or representation during the enterprise agreement approval proceedings before Commissioner Ryan. Therefore, we submit that Ai Group's non-participation in the original proceedings should not be given any weight in determining whether Ai Group is a "person who is aggrieved" by the decision.

**It is in the public interest for FWA to permit the decision to be appealed**

22. Paragraph 604(1)(b) of the FWA states that "*Without limiting when FWA may grant permission, FWA must grant permission if FWA is satisfied that it is in the public interest to do so*".

23. Consistent with Ai Group's Notice of Appeal, the following aspects support our position that it is in the public interest for FWA to grant permission to appeal:

- The appeal raises important points about the statutory construction of Chapter 3, Part 3-4 – Right of Entry, of the FW Act. Commissioner Ryan's view that the right of entry provisions of the Act do not operate at all whilst a person including a union official is entering or remaining on premises pursuant to an implied or direct invitation to do so from the employer as occupier, or where an employer has given "permission to enter", creates substantial doubt about the application of the requirements of Part 3-4 of the Act, in particular circumstances.
- The appeal raises important issues about the statutory construction of subclause 186(4) and subclauses 194(f) and (g) of the FW Act and, in particular, whether a right of entry provision in an enterprise agreement which would ordinarily be an unlawful term, can be characterised as an invitation to enter, and, as a consequence, be held to be lawful;
- Commissioner Ryan's decision, unless overturned, would have significant and widespread negative implications for the making of enterprise agreements in Australia. The determination of whether an enterprise agreement contains an "unlawful term" is integral to the statutory tests relating to the approval of all enterprise agreements, and central to the rights of parties to take protected industrial action.
- Commissioner Ryan's decision is creating substantial uncertainty in the bargaining process.
- The right of entry and unlawful term provisions of the FW Act were the subject of extensive discussion and debate between the Government, and representative bodies of employers and employees during the development of the legislation. The right of entry and unlawful term provisions were also the subject of intense scrutiny and debate during the Senate Committee inquiry into the *Fair Work Bill 2008*. Unions and

employer representatives held strong and competing views on right of entry and unlawful terms. In the legislation which was passed by Parliament, a balance was struck between the competing interests. Commissioner Ryan's decision disrupts this balance.

24. In correspondence dated 24 March 2010, FWA was advised of the Minister for Employment and Workplace Relations' intention to seek to make a submission in these proceedings given that the *"decision of Commissioner Ryan raises significant issues about the interaction of the right of entry provisions in Part 3-4 of the Act with sections 186 and 194 of the Act (which deal with unlawful terms of an enterprise agreement)"*.
25. The Minister's intervention in the proceedings highlights that it is in the public interest that an appeal be heard.
26. In correspondence to FWA dated 7 April 2010, the ACTU advised of its intention to seek to make a submission in these proceedings on the basis that *"The matter before the Full Bench will likely involve important issues regarding the proper interpretation of new provisions in the Fair Work Act 2009 concerning the content of proposed enterprise agreements, requirements for approval of those agreements and the nature of the rights contained in Part 3-4 of the Act"*.
27. The ACTU's correspondence support's Ai Group's argument that it is in the public interest that an appeal be heard.

### 3. Right of Entry

28. Commissioner Ryan has interpreted the FW Act to mean that the requirements and conditions in Part 3-4 do not apply **“at all”**:
- Where a union official enters or remains on premises pursuant to a **“direct invitation”** to do so from the employer as occupier (para [13] of his decision); or
  - Where a union official enters or remains on premises pursuant to an **“implied”** invitation to do so from the employer as occupier (para [13]); or
  - Where the employer gives the union official **“permission to enter”** (para [14]).
29. Such an interpretation, we submit, is unworkable.
30. It is extremely unclear from Commissioner Ryan’s decision what an employer would need to do to avoid giving a union official **“permission to enter”** or being held to have **“invited”** an official to enter (which, in Commissioner Ryan’s view, would result in the employer forfeiting their rights under Part 3-4 of the Act) yet still permitting the union official to enter as the employer is required to do under Part 3-4.
31. We acknowledge that it is not entirely clear in the legislation whether all of the right of entry provisions in Part 3-4 of the FW Act are intended to operate only in circumstances where the relevant occupier / employer chooses to insist that the union official complies with the requirements and conditions in Part 3-4 or in all circumstances where a union official enters for a purpose set out in Part 3-4 (ie. investigating a suspected contravention of the FW Award or a fair work instrument, holding discussions with employees, or exercising an OHS right).

32. Ai Group acknowledges that there are circumstances other than those referred to in Part 3-4 of the Act where a union official may enter premises, including:

- To represent a union member in a termination of employment interview;
- To bargain with the employer on behalf of those who the union official is a bargaining representative for;
- To represent union members involved in an industrial dispute;
- To meet with the employer about a particular matter.

33. A union official does not have a statutory “right to enter” for these other purposes, and therefore a union official can only enter with the agreement of the employer. However, even though a union does not have a statutory right to enter for these other purposes, employers are required to:

- Ensure that the dismissal of an employee is not harsh, unjust or unreasonable;
- Comply with good faith bargaining requirements; and
- Comply with dispute settling procedures.

34. In *Milos Vlach v Electrolux Home Products Pty Ltd* [2010] FWA 2435, SDP O’Callaghan of FWA rejected a union’s claim to be allowed right of entry for a purpose not set out in Part 3-4 of the Act, that is, to prepare evidence for an unfair dismissal case. FWA held that its powers did not extend that far. SDP O’Callaghan said:

*“[22] There is no provision in Part 3-2 which deals with unfair dismissal, which bestows on Fair Work Australia the right to make an order for access in the terms sought.*

*“ [23] To the extent that the order is sought by the AMWU in its own right, as distinct from the function of representing Mr Vlach, it provides for a right of entry which is clearly contrary to the provisions of Part 3-4 and the specific limitation on the powers which Fair Work Australia may exercise, in so far as these are set out in subsection 505(5).*

*[24] For the foregoing reasons, I am not persuaded that Fair Work Australia has the jurisdiction to grant an order of the nature sought by the AMWU.”*

35. In circumstances where a union official enters for a purpose set out in Part 3-4 (ie. to investigate a suspected contravention of the FW Award or a fair work instrument, to hold discussions with employees, or to exercise an OHS right), it would be unfair for the privacy and other protections for individual employees and employers set out in s.504 not to apply in circumstances where an occupier decides not to insist upon strict compliance by the union official with all of the requirements and conditions in Part 3-4. For example, such protections should still apply regardless of whether an employer decides to allow a union official to enter premises without 24 hours notice or without specifying the particulars of an alleged contravention of the Act or fair work instrument.
36. It would also be unfair for the following sections not to apply whenever a union official enters to investigate a suspected contravention of the FW Award or a fair work instrument, to hold discussions with employees, or to exercise an OHS right, regardless of whether the employer insists upon strict compliance with all of the requirements and conditions in Part 3-4:
- Section 500 which prohibits permit holders from intentional hindering or obstructing any person, or otherwise acting in an improper manner,
  - Section 503 which prohibits misrepresentations about things which are authorised under Part 3-4 of the Act.

37. Breaches of ss.500, 503 and 504 attract penalties of up to \$33,000 (see Part 4-1 of the Act) plus organisations and union officials can have their entry rights revoked, suspended or made conditional (see Subdivisions C, D and E of Part 3-4. Under Subdivision D, FWA is also required to revoke or suspend the entry permit of a permit holder if the Privacy Commissioner has, under paragraph 52(1)(b) of the Privacy Act 1988, found substantiated a complaint against a permit holder in relation to information or documents obtained during entry to premises (see s.510(1)(c)).
38. During the Senate Committee Inquiry into the *Fair Work Bill*, one area heavily focussed upon was the access of union officials to wage records of non-union members and the protection of employees' privacy. Following the inquiry, the Government introduced a series of amendments to the right of entry provisions of the legislation which were subsequently passed by Parliament.
39. The following extracts from the Supplementary Explanatory Memorandum highlights some of the amendments made and the intent of the amendments:

***“Item 12 – Clause 482***

***Item 16 – Clause 483***

*203. These amendments to the legislative notes after subclauses 482(1) and 483(5) clarify what protections apply to information or documents collected under the right of entry provisions.*

*204. Note 1 directs the reader to clause 504. Clause 504 prohibits any person from disclosing information obtained by a permit holder for a purpose not related to rectifying the suspected contravention or in other limited circumstances. Note 2 highlights that the use or disclosure of personal information collected by a permit holder under these amended clauses is also covered by the Privacy Act 1988.*

**Item 13 – Clause 482**

**Item 15 – Clause 483**

205. These amendments insert new subclauses 482(1A) and 483(1A) to provide that occupiers and employers are not required to provide permit holders with access to documents or records that are protected by another law of the Commonwealth or by a law of a State or Territory.

206. These amendments are intended to ensure that obligations under Commonwealth, State or Territory laws prohibiting the disclosure of sensitive information are not overridden by the right of entry provision. An example of such a law is section 58 of the Child Support (Registration and Collection) Act 1988 (the Child Support Act), which provides that an employer must not divulge information about the deduction of child support from an employee's wages. These new clauses mean that an employer will not have to disclose information in a record or document to a permit holder if that disclosure would otherwise amount to a breach of section 58 of the Child Support Act.

207. Proposed new clauses 483B, 483C, 483D and 483E, dealing with entry to investigate contraventions relating to TCF outworkers, also adopt this approach.

**Item 31 – Clause 504**

208. This item replaces current clause 504 of the Bill, which deals with the use or disclosure of documents in contravention of National Privacy Principle 2 (NPP2) in Schedule 3 to the Privacy Act 1988. New clause 504 is broader than the existing provision. It protects against the unauthorised use or disclosure of not just employee records but other information, including business plans or other sensitive information of employers.

209. The new provision prohibits permit holders from using or disclosing any information or document collected in the course of investigating a suspected contravention (including personal information within the meaning of the Privacy Act 1988) unless the use or disclosure is for a purpose related to the investigation or rectifying the suspected contravention. The new provision also sets out a number of circumstances where the use or disclosure of such

information for a purpose other than rectifying the contravention is not prohibited (paragraphs 504(a)-(e)). These exceptions are based on the exceptions that are provided for in NPP2 in relation to the disclosure of personal information under the Privacy Act 1988.

210. These exceptions include where the disclosure is:

- necessary to lessen or prevent a serious threat to public health and safety;
- required or authorised by or under law; and
- with the consent of the individual whose information is being disclosed.

211. Clause 504 continues to be a civil remedy provision under Part 4-1 (Civil remedies).

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**Item 18 – Clause 484**

214. This item clarifies that when a permit holder enters premises under clause 484, the entry must be for the purpose of holding discussions with employees or TCF outworkers who:

- perform work on the premises;
- are entitled to be represented by the permit holder’s organisation; and
- wish to participate in those discussions.

215. While entry must be for the purpose of holding discussions with this class of workers, it does not mean that if other workers choose to attend or participate in discussion that the entry is invalid or contrary to the Act.

216. The amendment also makes clear that the proviso that employees must wish to participate in discussions operates after entry – i.e., it ensures that an employee cannot be required or otherwise compelled to participate in the discussions. However, it does not mean that a permit holder must demonstrate before entry that there is a particular employee on the premises who wishes to talk to the permit holder.”

40. It is noteworthy, that some of the conditions in Part 3-4 of the Act are expressed as being mandatory and some are expressed in a manner which gives an employer the option of waiving the relevant condition. Conditions which are expressly stated as being able to be waived by the employer, in certain circumstances, include:
- The requirement for the permit holder to show his or her authority documents to the occupier (s.489(1)(a));
  - The conduct of interviews and the holding of discussions in a particular room or area nominated by the employer (s.492(1)(a)); and
  - The ability for the employer to nominate a particular route to reach the room or area where the interviews or discussions will be held (s.492(1)(b)).

41. In *Australian Building and Construction Commission v McLoughlin* [2007] AIRC 717, PR978057 and PR980005, SDP Watson suspended the entry permit of Mr Adrian McLoughlin, a CFMEU organiser, for 9 weeks and ordered that he undertake appropriate training. SDP Watson also made the following observations about the right of entry provisions under the *Workplace Relations Act 1996*:

“A Concluding Observation

*[227] The evidence in relation to many of the alleged abuses by Mr McLoughlin of the rights conferred by Part 15 of the Act reflected a tension associated with the exercise of the right of entry between Mr McLoughlin and employer representatives, with each side asserting its rights as understood by them. Those circumstances reflected issues concerning the exercise of right of entry which often arise between permit holders and representatives of the occupiers of premises of a type often brought to the Commission, for assistance under Division 9 of Part 15 of the Act (and the comparable provisions in Part IX of the Act, prior to the 2006 amendments). In most*

*instances conflicts of this type have been resolved and further conflict avoided through agreements of the parties reached with commonsense and goodwill on the part of each party and with the assistance of the Commission. Such agreed resolution often involves a better understanding of the rights and responsibilities of both parties in relation to the exercise of right of entry.*

**[228]** *Differing approaches to such conflicts concerning the exercise of the right of entry are evident in the circumstances, reflected in evidence, at the Cecil Street site on one hand and the Yarra Arts and St Leonard's sites on the other. In the case of the Cecil Street site, the evidence revealed initial conflict about the exercise of right of entry but the attainment, through discussion, of a protocol for right of entry by Mr McLoughlin which has been utilised and complied with on many subsequent occasions, without incident. The evidence in respect of the other sites is of the intensification of tensions concerning the exercise of right of entry, with an increased insistence by the parties on their rights as they understood them, and with Mr McLoughlin's failure to comply with requests by management associated with the right of entry reflecting, to some degree, a responsiveness by him to the requests of managers.*

**[229]** *Whilst occupiers have statutory rights and are entitled to make requests of permit holders attached to a right of entry under Part 15 of the Act, and permit holders are obliged by statute to meet all statutory conditions upon their entry, the making of such requests by occupiers in relation to each and every entry is not necessarily conducive to the orderly, responsible and productive exercise of the right of entry. As an example, the insistence on the production of a permit in respect of each and every entry, where the occupier's representative is aware of the identity of the permit holder and the fact that they hold a permit, whilst legally available, might serve no practical purpose, other than the assertion of statutory rights and insistence on statutory limitations upon permit holders. It may be noted in this context that s.758(1) of the Act, for example, does not require a permit holder to produce a permit for inspection upon the exercise of a right of entry. Rather, it requires the production of the permit upon request, with the legislature providing the*

*occupier with a right to ask for the permit. Such requests would be made where the production of a permit serves some purpose in ensuring the orderly exercise of the right of entry, rather than the production of the permit as a matter of course in relation to any entry under s.758 of the Act. Whilst the permit holder is obliged to meet the statutory conditions upon their right of entry and the occupier is legally entitled to its production upon request, in particular circumstances, commonsense involving some discussion of and common understanding of the rights and obligations associated with the right of entry might better facilitate the responsible and orderly exercise of entry rights. In some circumstances, the Commission might assist the parties in reaching a common position which overcomes and resolves tensions concerning the exercise of the right of entry through conciliation or, if necessary, orders under ss.771 and 772 of the Act. Recourse to assistance by the Commission, at an early stage, might avoid the escalation of tensions arising from the exercise of the right of entry and assist in furthering the statutory intention of avoiding disruptive entry into workplaces.”*

42. His Honour’s comments take account of the manner in which right of entry is often dealt with in workplaces where there is a good relationship between management and unions. In such circumstances, often employers do not insist that union officials comply with the “letter of the law” in respect of right of entry. However, as acknowledged by SDP Watson “*occupiers have statutory rights*” and “*permit holders are obliged by statute to meet all statutory conditions upon their entry*”.
43. The right of entry laws need to operate effectively in circumstances where there are harmonious relations between management and unions, and also for circumstances where union officials act inappropriately. Like in many other areas of society, laws are in place to ensure appropriate behaviour. The fact that a law is only breached in a relatively small number of cases, does not detract from the importance or effectiveness of the law.

44. Union officials have rights which extend beyond those of other persons who may enter premises. They also have responsibilities which accompany those rights. The responsibilities include complying with Part 3-4 of the Act.
45. Section 480 of the FW Act clarifies that the object of Part 3-4 is to “establish a framework for officials of organisations to enter premises that balances”:
- The right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of the FW Act, fair work instruments and OHS laws;
  - The right of employees and outworkers to receive, at work, information and representation from officials of organisations; and
  - The right of occupiers of premises and employers to go about their business without undue inconvenience.
46. Section 480 refers to a framework for officials to “enter premises” – not a framework applicable only when an employer does not grant permission to enter.
47. The Explanatory Memorandum for the *Fair Work Bill* states the following:
- “1918. Division 2 sets out when a permit holder may enter premises and the rights they may exercise while on those premises. Subdivision A allows a permit holder to enter premises for the purpose of investigating a suspected contravention of the Bill or a fair work instrument. Subdivision B allows a permit holder to enter premises for the purpose of holding discussions with members, and people eligible to be members of the permit holder’s organisation. Subdivision C sets out the mandatory requirements a permit holder must meet when exercising rights under either Subdivision A or B.*

*1919. This Division gives officials of organisations a statutory right to enter premises and exercise powers provided they satisfy various conditions. It is not intended to codify all of the ways in which entry can occur or provide an exhaustive list of the powers exercisable on the premises. The Division does not affect the ability of an occupier of premises to invite any person onto that premises, e.g., to meet with the employer about a particular matter.”*

(Emphasis added)

48. Ai Group submits that the wording in para 1919 above is unremarkable and is not inconsistent with Ai Group’s submissions. That is:

- Beyond investigating suspected contraventions, holding discussions with employees and exercising an OHS right (in respect of which conditions must be satisfied), there are other circumstances where entry of a union official could occur, eg. to represent a union member in a termination of employment interview; to bargain with the employer on behalf of those who the union official is a bargaining representative for; to represent union members involved in an industrial dispute; and/or to meet with the employer about a particular matter;
- Where entry occurs for a purpose other than investigating suspected contraventions, holding discussions with employees or exercising an OHS right, the agreement of the employer is required before the official can enter the premises;
- An occupier is entitled to invite or give permission to union officials to enter their premises, but if the purpose of the entry is to investigate a suspected contravention of the Act or a fair work instrument, to hold discussions with employees, or to exercise an OHS right, then the requirements and conditions set out in Part 3-4 of the Act have relevance.

49. During the Senate Committee Inquiry into the *Fair Work Bill 2008*, the following evidence was given by Mr John Kovacic, Deputy Secretary, Workplace Relations of the Department of Education, Employment and Workplace Relations (DEEWR):<sup>3</sup>

*“In regard to the issue of right of entry, the government is aware that several submissions raise issues concerning union right of entry to workplaces. Under the Fair Work legislation, unions will have to comply with strict conditions of entry. Sanctions apply to a permit holder who misuses entry rights or acts inappropriately. Importantly, where a union exercises entry for discussion purposes, it can only hold discussions with workers who want to participate in those discussions. Those discussions can only occur during meal times or during breaks. The union cannot compel workers to speak with them. In terms of compliance, unions have had a long-standing role under industrial relations legislation, including under Work Choices, to investigate suspected breaches of awards and to take recovery action to make sure employees receive their correct entitlements. The Fair Work Bill will restore the situation that applied until 2005—that is, that the permit holder can inspect documents relevant to investigating a breach of the award or the law. This does not mean that once the permit holder gets in they can copy anything they want; they can only inspect documents relevant to investigating a breach of the law that affects a member of the union. The bill includes new provisions which provide strong protection against misuse of information obtained by a union in the course of investigating suspected breaches. The bill has the effect for the first time of ensuring that the key principles in the Privacy Act 1988 apply to any personal information collected during investigations, even where the Privacy Act may not apply of its own force. This ensures that information cannot be used for ulterior purposes, such as to market union membership to employees.*”

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<sup>3</sup> Extract from the transcript of the public hearing on 19 February 2010

*A new feature of the bill is that a fine of up to \$6,600 for individuals and \$33,000 for unions will apply where information is misused, and any misuse is grounds for revocation of the person's right of entry permit.*

*The Office of the Privacy Commissioner has made a number of technical and practical suggestions for amendments to the bill, which will clarify and enhance the privacy protections applying to information collected and handled under the 'right of entry' and 'protected action ballot' provisions of the bill. These recommendations are currently being considered by the government."*

50. Nowhere in DEEWR's evidence was it stated that the conditions in the right of entry laws would not apply "at all" in all circumstances where an employer grants a union official "permission to enter" or is held to have "invited" an official to enter.
51. If Parliament had intended that the limitations and conditions in Part 3-4 of the FW Act not apply at all in circumstances where a union official enters when permission to enter has been granted by the occupier or enters pursuant to an implied or direct invitation to do so from the occupier, then logically this would have been expressed in the wording of this Part of the Act. Such intent is not reflected in the legislative provisions.
52. If Commissioner Ryan's view prevails it will be virtually impossible for FWA, a relevant Court, the Fair Work Ombudsman or the Australian Building and Construction Commissioner (ABCC) to ascertain whether a breach of the FW Act has occurred in circumstances where a union official did not comply with the conditions in Part 3-4 of the Act but entered for the purposes of investigating suspected breaches, holding discussions with employees or exercising an OHS right.

53. The 2009 (and current) version of the *Australian Government's Implementation Guidelines for the National Code of Practice for the Construction Industry* state that:

***“6.5 Right of entry***

***6.5.1 Parties tendering for Australian Government funded construction activity must ensure they and their subcontractors strictly comply with their right of entry requirements in accordance with the applicable legislation, court and tribunal orders, and industrial instruments. These right of entry requirements include those applicable to workplace relations and OHS&R. These procedures govern access to employer and employee records and/or the holding of discussions with employees.”***

54. Commissioner Ryan's construction of the Act would no doubt lead to coercion of employers by those minority of union officials who have demonstrated a disregard for right of entry laws and other workplace relations laws (eg. some union officials in the construction industry in Victoria and Western Australia) in an attempt to procure an ongoing “invitation” of “permission” to enter.

## 4. Unlawful terms

55. Regardless of FWA's view on the construction of the right of entry provisions of Part 3-4, Ai Group submits that it is unlawful to include a provision in an enterprise agreement which gives a union official the right to enter to investigate complaints, hold discussions with employees, or exercise an OHS right, *"other than in accordance with Part 3-4"* of the FW Act.

56. Section 186 of the FW Act states that FWA must not approve an agreement unless it is satisfied that *"the agreement does not include any unlawful terms"* (s.186(4)).

57. Section 194 of the FW Act states that:

*"A term of an enterprise agreement is an **unlawful term** if it is:*

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(f) *a term that provides for an entitlement:*

(i) *to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or*

(ii) *to enter premises to hold discussions of a kind referred to in section 484;*

*other than in accordance with Part 3-4 (which deals with right of entry);*

*or*

(g) *a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry)."*

58. The Explanatory Memorandum for the *Fair Work Bill 2008* clarifies the intent of s.194 of the Act:

## **“Clause 194 – Meaning of unlawful term**

826. This clause specifies the terms of an enterprise agreement that are unlawful terms.

827. Paragraph 194(a) provides that a discriminatory term is an unlawful term. The meaning of discriminatory term is set out in clause 195.

828. Paragraph 194(b) provides that a term of an enterprise agreement is an unlawful term if it is an objectionable term (as defined in clause 12).

829. Paragraph 194(c) provides that a term of an enterprise agreement is an unlawful term if it gives an employee, who has not completed the minimum employment period (clause 383) and who would be protected from unfair dismissal under Part 3-2 after completing that period (clause 382), an entitlement or remedy in relation to a termination of the employee’s employment that is unfair (however described).

830. For example, a term of an enterprise agreement would be unlawful if it purported to confer a remedy of reinstatement or damages on employees who were unfairly dismissed after at least three months of employment. As the minimum employment period is either six months for an employee who is working for an employer that is not a small business, or 12 months for an employee who is working for an employer that is a small business, a term of an agreement cannot purport to confer an entitlement or remedy on an employee who has only completed a period of three months of employment.

831. Paragraph 194(d) provides that a term of an enterprise agreement is an unlawful term if it excludes or modifies the application of the unfair dismissal provisions in Part 3-2. An agreement may supplement the unfair dismissal provisions, but it cannot exclude or modify the application of those provisions in a way that is detrimental to a person.

832. For example, a term of an agreement that purported to extend the minimum employment period to a period of 24 months would be an unlawful term because it modifies the application of Part 3-2 in way that is detrimental to the employee. However, a term of an agreement might provide that the employer must not dismiss an employee for poor performance except in

accordance with the employer's performance management procedure, as this term does not modify the application of the unfair dismissal provisions in a way that is detrimental to an employee.

833. Paragraph 194(e) provides that a term of an enterprise agreement is an unlawful term if it is inconsistent with a provision of Part 3-3 (Industrial action). For example, a term that purported to authorise or allow industrial action prior to the nominal expiry date of the agreement would be an unlawful term.

834. Paragraphs 194(f) and 194(g) provide that certain terms of an enterprise agreement dealing with right of entry are unlawful.

835. Paragraph 194(f) provides that a term of an enterprise agreement is an unlawful term if it provides for an entitlement that is inconsistent with Part 3-4 in relation to:

- entry to premises for a purpose referred to in clause 481, which deals with investigation of suspected breaches; or
- entry to premises to hold discussions of a kind mentioned in clause 484.

836. The right of entry framework provides balanced and appropriate processes and requirements for entry for these purposes that must be complied with.

837. Paragraph 194(g) provides that a term of an enterprise agreement is an unlawful term if it provides for the exercise of a State or Territory OHS right (as defined in clause 494) otherwise than in accordance with the right of entry provisions in Part 3-4.

838. It is intended that agreements can include terms allowing for union officials to enter the employer's premises for purposes other than those set out in paragraphs 194(f) and (g). An agreement might, for example, provide an entitlement to enter the employer's premises for a range of reasons connected to the terms of the agreement, such as:

- to assist with representing an employee under a term dealing with the resolution of disputes or consultation over workplace change; or

- to attend induction meetings of new employees; or
- to meet with the employer when bargaining for a replacement to the current agreement.

(Emphasis added)

59. As set out in Paragraph 838 above, “*It is intended that agreements can include terms allowing for union officials to enter the employer’s premises for purposes other than those set out in paragraphs 194(f) and (g)*”.
60. Paragraph 838 supports Ai Group’s argument that an enterprise agreement cannot include terms which allow a union official to enters premises for the purpose of investigating complaints, holding discussions with employees, or exercising an OHS right, “*other than in accordance with Part 3-4*” of the Act but, beyond those purposes, an enterprise agreement can include a term which gives a union official the right to enter premises with the agreement of the employer to, for example:
- “*assist with representing an employee under a term dealing with the resolution of disputes or consultation over workplace change*”; or
  - “*attend induction meetings of new employees*”; or
  - “*meet with the employer when bargaining for a replacement to the current agreement.*”
61. During the Senate Committee Inquiry into the *Fair Work Bill 2008*, the following questions on notice of Senator Abetz were answered in writing by DEEWR:

**“SENATE STANDING COMMITTEE ON  
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS  
QUESTIONS ON NOTICE  
INQUIRY INTO THE FAIR WORK BILL 2008**

*Senator Abetz asked in writing:*

**Question**

*Right of Entry*

*7. Can right of entry be expanded through enterprise bargaining?*

**Answer**

*An agreement cannot provide for entry of a type dealt with in the Right of Entry provisions of the Fair Work Bill 2008 (the Bill). Clauses 194(f) and (g) of the Bill would make such provisions unlawful terms. FWA may not approve an enterprise agreement unless it is satisfied the agreement does not include any unlawful terms.*

*Senator Abetz asked in writing:*

**Question**

*Right of Entry*

*17. Can enterprise agreement include greater power for ROE? My reading is that they won't, but can this be clarified?*

## **Answer**

*An agreement cannot provide entry of a type dealt with in the Right of Entry provisions of the Fair Work Bill 2008 (the Bill). Clauses 194(f) and (g) of the Bill would make such provisions unlawful terms. FWA may not approve an enterprise agreement unless it is satisfied the agreement does not include any unlawful terms.”*

62. The above written answers are available on the Parliament of Australia’s website  
([http://www.aph.gov.au/Senate/committee/eet\\_ctte/fair\\_work/qon/qon26.pdf](http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work/qon/qon26.pdf))

63. Clause 44 of the *Dunlop Foams (NSW) Collective Agreement 2009* is worded as follows:

### **“44 Right of Entry**

*An authorised NUW representative is entitled to enter at all reasonable times upon premises and to interview any employee, but not so as to interfere unreasonably with the Employer’s business”.*

64. Ai Group submits that Clause 44 is obviously an unlawful term. It entitles an NUW representative to enter “other than in accordance with Part 3-4”. It allows an NUW representative to:

- Enter regardless of whether the representative has a valid permit (NB. There is no definition of “authorised” and it cannot be assumed that the term “authorised” means that the representative has a valid permit<sup>4</sup> and is a “fit and proper person” to hold a permit<sup>5</sup>);

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<sup>4</sup> Section 481 only gives a permit holder the right to enter.

<sup>5</sup> Section 512 requires permit holders to be a fit and proper person to hold a permit.

- Enter for the purposes of investigating a suspected contravention of the FW Act or a fair work instrument without the official needing to reasonably suspect that a contravention has occurred<sup>6</sup>;
- Interview any employee, regardless of whether the employee agrees to be interviewed<sup>7</sup>;
- Interview any employee, regardless of whether the NUW is entitled to represent the industrial interests of the employee<sup>8</sup>;
- Enter the premises, with the employer having no right to request that the official produce his or her authority documents<sup>9</sup>;
- Enter at all “reasonable” times<sup>10</sup>;
- Enter without giving the employer at least 24 hours notice<sup>11</sup>;
- Interview employees, with the employer having no right to nominate a particular room or area for the interviews<sup>12</sup>;

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<sup>6</sup> Subsection 481(3) requires that the union official reasonably suspect that a contravention has occurred or is occurring. The burden of proof lies on the union official.

<sup>7</sup> Paragraph 482(1)(b)(i) only permits a union official to interview persons who agree to be interviewed.

<sup>8</sup> Paragraph 482(1)(b)(ii) only permits a union official to interview persons whose industrial interests the official's union is entitled to represent.

<sup>9</sup> Section 489 gives the employer the right to request that the union official produce his or her entry permit at any time while the official is on the premises.

<sup>10</sup> “Reasonable” is not defined but is likely to be interpreted as including working hours. Section 490 only permits a union official to enter for the purposes of holding discussions with employees under s.484 during mealtimes or other breaks.

<sup>11</sup> Section 488 requires that the union official give at least 24 hours and not more than 14 days notice.

<sup>12</sup> Section 493(1)(a) requires that a union official comply with reasonable requests of the occupier to interview employees in a particular room or area. Section 493(1)(b) requires that a union official comply with reasonable requests of the occupier to take a particular route to reach the room or area where the interviews will be held.

- Interview employees, with the employer having no right to nominate a particular route for the NUW representative to take to reach the room or area where the interviews will be conducted<sup>13</sup>; and
- Enter without setting out the particulars of the suspected contravention and other particulars prescribed in s.518 of the Act.

65. The title of Clause 44 in the enterprise agreement is **“Right of Entry”**.

66. Clearly the subject matter which the clause deals with is the same subject matter as dealt with in Part 3-4 (Right of Entry) of the FW Act.

67. Clearly the purposes of entry covered by the clause are the same purposes covered by Part 3-4 of the Act. As referred to earlier, the Explanatory Memorandum states that: *“It is intended that agreements can include terms allowing for union officials to enter the employer’s premises for purposes other than those set out in paragraphs 194(f) and (g)”*. (Emphasis added)

68. An unlawful term cannot become a lawful term by characterising the term as an invitation to enter. Accordingly, a **“Right of Entry”** clause, cannot become something else by characterising the clause as an invitation to enter.

69. As Counsel in *Re Porter*<sup>14</sup> put it: “the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck”.<sup>15</sup>

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<sup>13</sup> Section 493(1)(b) requires that a union official comply with reasonable requests of the occupier to take a particular route to reach the room or area where the interviews will be held.

<sup>14</sup> (1989) 34 IR 179.

<sup>15</sup> *Yasmin S. B. Cetin v Ripon Pty Ltd t/as Parkview Hotel* [PR938639], 25 September 2003, per Ross VP, Duncan SDP and Roberts C (*Cetin*), Para [62].

## 5. Undertakings

70. Section 190 of the FW Act gives FWA the ability to approve an enterprise agreement despite the fact that the approval requirements in ss.186 and 187 of the Act have not been met if the employer covered by the agreement gives an undertaking that addresses FWA's concerns.
71. Both Pacific Brands Limited and the NUW made submissions that Clause 44 of the enterprise agreement was intended to operate as a conditional invitation to enter (as referred to in para [19] of C Ryan's decision). Ai Group understands that such submissions were made after the Commissioner queried whether the clause was intended to operate as a conditional invitation to enter.
72. In this matter, Commissioner Ryan did not seek or receive undertakings about how the clause was intended to operate.
73. However, Ai Group submits that even if an undertaking had been given that the clause would operate as a conditional invitation to enter, such an undertaking would have been unlawful because:
- An unlawful term cannot become a lawful term through the giving of an undertaking. An "unlawful term" is defined in s.194 and such definition cannot be altered with an undertaking.
  - The undertaking would represent a "substantial change to the agreement" and hence breach s.190(3).

74. The provisions of the Act relating to unlawful terms are a central requirement of the bargaining framework and we submit that it is vital that all FWA Members remain vigilant in ensuring that no agreements are approved which contain unlawful terms.