

**IEU SUBMISSION TO THE SENATE  
EMPLOYMENT, WORKPLACE  
RELATIONS AND EDUCATION  
REFERENCES COMMITTEE**

**INQUIRY INTO THE PROVISIONS OF THE WORKPLACE  
RELATIONS AMENDMENT (RIGHT OF ENTRY) BILL 2004**

**FEBRUARY 2005**

## INTRODUCTION

1. The Independent Education of Australia (the IEU) has prepared this submission for the Senate Employment, Workplace Relations and Education References Committee's Inquiry into the provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004.
2. Having had the opportunity of reading the ACTU submission to this Inquiry, the IEU wishes to place on record its support and endorsement of the ACTU's submissions and our opposition to the Bill.
3. The ACTU submission to this Inquiry is detailed and exhaustive – it addresses the various provisions of the Bill and sets out strong and cogent arguments against its passage through parliament on a number of bases, including:
  - diminishing the working and human rights of Australian citizens;
  - weakening the important role of the Australian Industrial Relations Commission which has historically been the independent arbiter of disputes between employers and employees;
  - being intrusive and divisive in relation to the operation of industrial right of entry laws in state jurisdictions;
  - failing to give due and appropriate recognition to unions as parties principal to awards and most certified agreements;
4. The IEU believes that the rationale for this Bill is not justified and that it seeks to further reduce the rights of unions to organize, represent and bargain effectively in workplaces on behalf of members. If enacted, the Bill will have ramifications for all workers, as many of the measures sought are part of the current government's broader industrial agenda to limit the roles and rights of trade unions.

5. The IEU believes that the existing legislative provisions provide employers with capacity for redress should they believe that union officers have behaved unreasonably in exercising their right of entry to their premises.
6. **The IEU is strongly opposed to the Bill and urges the Committee to recommend that it not be passed.** Proposed legislation seeking to diminish union right of entry has been considered previously by Senate inquiries and the IEU has opposed such legislation. The IEU believes that this Bill seeks to create another entry point for the government to impose its anti-union agenda, and to dilute further the safety net and “fair go” structures that underpin the existing legislative framework of the Act. The impact on our members would be significant, should this occur.
7. In the absence of a Bill of Rights, the IEU is strongly supportive of an appropriate legislative regime being in place which assures that the fundamental human and working rights of all Australians can be protected through legal means. The IEU does not believe that this proposed legislation provides such assurance, but instead will weaken such rights.

## **AUSTRALIA'S INTERNATIONAL OBLIGATIONS - ILO CONVENTIONS**

8. Australia is a signatory to the Eight ILO Conventions identified by the ILO's Governing Body as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member States. These include the Freedom of Association and Protection of the Right to Organise Convention, 1948 (C87) and the Right to Organise and Collective Bargaining Convention, 1949 (C98).
9. Article 2 of C87 requires that *'workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules*

*of the organization concerned, to join organizations of their own choosing without previous authorization.'*

Article 8(2) of C87 provides that *'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.*

Article 11 of C87 requires that *'Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.*

The following is an extract of the ILO's explanatory note to these conventions:

### **FREEDOM OF ASSOCIATION AND EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING**

*All workers and all employers have the right freely to form and join groups for the promotion and defence of their occupational interests. This basic human right goes together with freedom of expression. It is the basis of democratic representation and governance. Those concerned need to be able to exercise their right to influence matters that directly concern them. In other words, their voice needs to be heard and taken into account.*

*Workers and employers can set up, join and run their own organisations without interference from the State or one another. Of course, they have to respect the law of the land - but the law of the land, in turn, must respect the principles of freedom of association. These principles cannot be set aside for any sector of activities or group of workers.*

*The right freely to run their own activities means that workers' and employers' organisations can independently determine how they best wish to promote and defend their occupational interests. This covers both long-term strategies and action in specific circumstances, including recourse to strike and lock out. They can independently affiliate to international organisations and cooperate within them.....*

10. As pointed out in the ACTU's submission, the ILO's Freedom of Association Committee has held that *'Workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions including the right of access to workplaces'*<sup>1</sup>

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<sup>1</sup> 234<sup>th</sup> report, Case No 1221, para 114 in ILO Official Bulletin Vol LXV11, 1984, Series B, No.2)

11. The IEU believes that the Bill breaches these ILO Conventions or at least, does not conform to their spirit. It would be reasonable for citizens to see this as a contradiction of public policy given that this government has committed Australia to the war in Iraq on a number of grounds including the provision of protection to Iraqi citizens so that the institutions of a democracy – presumably including industrial democracy - and fundamental human and civil rights can be established in that country.

## **BACKGROUND TO THE IEU**

12. The IEU is a federally registered organisation pursuant to the provisions of the *Workplace Relations Act 1996* and operates in the non government education industry which comprises Catholic and other independent schools, pre schools and kindergartens, English and Business Colleges. The union's membership of approximately 60,000 consists of teachers, principals, teacher aides, education support staff, clerical and administrative staff and other ancillary staff such as cleaners and grounds and maintenance staff.

13. The IEU and its branches and Associated Bodies are party to numerous awards and certified agreements. The awards and agreements applying to schools in Victoria, the ACT and the Northern Territory are federal awards. Other federal awards to which the union is a party cover English and Business Colleges across most states and the ACT.

14. The IEU is strongly committed to an orderly and fair approach to industrial regulation for all education workers. The union is also open and responsive to a flexible system of industrial relations which recognises the particular history, ethos, organisational and professional practices of the various educational institutions in our sector. This is evident in the

substantial number of awards and certified agreements negotiated by the union under the present system of industrial relations.

15. The non government education sector is a significant and diverse one. In the schools area alone there are approximately 2,670 non government schools, of which approximately 1700 are Catholic Schools. There are approximately 1350 system and individual employing authorities. The sector employs approximately 80,000 staff (FTE). Non government schools are often affiliated with groups which have particular educational, ethnic or religious philosophies.

16. Approximately one third of schools in the non government schools sector operate in the federal jurisdiction. Colleges which provide English Language Intensive Courses for Overseas Students (ELICOS) are respondent to federal awards. There are approximately 90 of such accredited institutions operating in the non government sector. Of the significant number of child care institutions in which the IEU has coverage approximately 65 are respondent to a federal award.

## **THE BILL**

### **Unfair and Divisive Legislation**

17. The clear intent of the Bill is to restrict unions from accessing members and potential members, limiting them from actually visiting workplaces, talking to workers about the role of the union, seeking to enrol them into the union, representing their professional and industrial rights and discussing with them issues related to their wages and conditions of work.

18. The IEU believes that the proposed right of entry provisions are unfair and are intended to further shift the balance of power in favour of employers

and to limit the access of employees to their representatives in the industrial relations system. It is important to note that employers are not similarly limited from meeting with and seeking the advice of their employer body representatives such as Chambers of Commerce in the workplace or elsewhere and neither are such bodies required to meet the same stringent requirements as set out in this Bill.

19. What this proposed legislation does is perpetuate the government's prejudicial attitude and language against unions to the community. It is - and is intended to be - divisive and to create apprehension and negative views about unions within the community. This is evident in the Minister's second reading speech in comments such as "*this uncertainty can leave employers vulnerable to abuse of unions' statutory right to enter the workplace*"<sup>2</sup> and "...*stringent criteria must be satisfied before a person can be granted a right of entry permit, so that only 'fit and proper persons' may be permit holders*"<sup>3</sup>; and "...*a requirement that a union must have reasonable grounds .....to prevent 'fishing expeditions' by unions ...*"<sup>4</sup>

20. Such language is provocative and does nothing to build an industrial relations environment of trust and respect of both unions and employers within the community in accord with the ILO Conventions referred to above. Many workers reading such statements could rightly talk about their work experiences with employers who have treated them and/or their colleagues in anything but a "fit and proper" way – many employers would not be able to meet a number of similar tests set out in s280F(2) of the Bill relevant to union officials.<sup>5</sup>

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<sup>2</sup> Second Reading Speech Workplace Relations Amendment (Right of Entry) Bill 2004

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> p8 Schedule 1 Amendments Workplace Relations Amendment (Right of Entry) Bill 2004

## **Issuing, Revocation and Suspension of Permits**

21. There is a fundamental requirement for IEU officials and organisers to know and understand the work of their members and the culture of their workplaces (in the main, non government schools) in order to appropriately address their industrial and professional needs. A very significant number have been former teachers and schools assistants and understand the requirements which schools have in relation to union visits. All of them have received training with regard to their rights and responsibilities under industrial legislation.
  
22. Were a problem to arise or a complaint be made by a school authority about the actions of an IEU official in regard to their right of entry, the current provisions of the Act provide the Registrar or the Commission to deal with the matter, including the revocation and suspension of the entry permit. This quite draconian proposed legislation is not necessary. The union regards the notion of “fit and proper” within the Bill in relation to the issuing of a right of entry permit as unnecessary and discriminatory.
  
23. The IEU believes that it is harsh and inappropriate that union officials who infringe the rigid requirements of the proposed legislation can have their right of entry permit suspended or revoked permanently, resulting in the possible loss of their livelihood. Yet union officials are often dealing with issues such as employers knowingly being engaged in the underpayment of wages, harassment of staff, serious OHS breaches and closure of workplaces and loss of jobs and entitlements when their business fails – often with none being brought to account if it were not for the union asking the hard questions on behalf of their members.

## Union Meetings in the Workplace

24. Of particular concern to the IEU is the freedom given to employers to determine where union officials shall meet employees, even to the minutiae of designating the route to take to the room chosen by the employer.<sup>6</sup> This is subject only to a reasonableness test by the Commission.
25. Such restrictions on union representatives in the workplace (should entry be achieved) provide further frustration to unions and disadvantage to vulnerable employees. The IEU is concerned that meetings may only take place in areas specially designated by the employer as it provides the opportunity for unscrupulous employers and the employers most likely to be insisting on compliance in respect of invitations to observe and monitor access to the union representative and thus be able to identify and target vulnerable employees.
26. It is worth noting that recently in Western Australia the IEU (ISSOA) maintained, on appeal, the right to meet with members in staff areas<sup>7</sup>. The Union advanced this case against the Catholic employing authority because of a change in culture where union representatives found themselves restricted to remote and isolated parts of the school, without reasonable access to holding discussions with staff. The Full Bench upheld the relevant state legislation and the union's application. Under the proposed Bill, such fundamental issues of fairness and reasonableness in meeting with members and eligible members could legally be disregarded.

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<sup>6</sup> ..if an affected employer or the occupier request the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, are or route that the permit holder would have chosen" (Section 280R(4) of the Bill)

## Notice of Intended Entry

27. The proposed legislation requires unions to give written notice of entry to an employer specifying the date of the workplace visit. Such a provision is currently the provision federally, but is not the case in other jurisdictions and in any case is unreasonable, likely to be unworkable and will hinder access to the union for members and eligible members in the workplace. It is custom and practice for IEU officials to speak to the union rep in the workplace by phone to determine the most suitable date for a union visit. This requires further negotiation with members and the school management and checking with school timetables. When determined, the workplace rep advises the principal of the proposed visit. It is common for such arrangements to shift because of the complexity and variety of activities which can arise in a school in a relatively short period of time. The requirement to confirm the time and purpose of the meeting in writing will be cumbersome and frustrate the work of the union on behalf of its members.
28. The proposed legislation limits workplace visits by unions for the purpose of signing up new members to twice per year. The IEU believes that this is a breach of the ILO Conventions referred to above and will act as a major restriction on the fundamental right of employees to join a union.
29. The union believes that it is not reasonable to compartmentalise the union's work into elements such as recruitment, investigation of breaches, discussion with employees, workplace bargaining etc. for the purpose of workplace visits. Such visits could involve meeting with a group from a couple of members to over 100 members at any one meeting – clearly the discussion will canvass those matters of concern raised by members and may go beyond the advised agenda.

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<sup>7</sup> WAIRC 10127/2003

30. The union is strongly opposed to the requirement in the proposed legislation to provide in writing on the entry notice the particulars of a suspected breach. There are many instances where this would break a confidence from members, make them vulnerable to retribution from the employer and/or provide advance warning to the employer to cover the problem.
31. The Union is strongly opposed to the provision which requires that the Union may only investigate a breach which relates to or affects the work of any of the employees who are members of the Union. Given that non members are entitled to the conditions and protections of Awards and Agreements, it is fundamentally important for the union, as a Party to those Awards and Agreements, to defend and protect their integrity from breaches by employers.
32. The Union is strongly opposed to those provisions in the proposed Bill (Inspection of records) which allow the identity of members and non members to be made known to the employer. Under the current legislation, in determining whether there has been a breach, the records of all employees can be inspected by the union, regardless of their union status. In the proposed legislation, a union official is required to make an application to the Commission for access to non-member records. In identifying the non-members in this way, it also becomes clear to the employer who are the union members. There are many members of the union who would not want their union membership known to their employer but who would strongly support the union having access to the records of all staff to ensure that the integrity of their award or agreement is not being undermined by underpayment to non-members,

## Federal Legislation to Override State Laws

33. In relation to constitutional corporations (which could include most non government schools in the country), the legislation seeks to “*exclude the operation of State right of entry laws where federal right of entry laws also apply*”.<sup>8</sup> Given that existing right of entry legislation in State jurisdictions is stronger than this proposed federal legislation, unions will be impeded in carrying out their responsibilities to members under state laws. This could mean that in terms of the IEU’s right of entry into most, if not all, non government education institutions in NSW, QLD, SA, WA and Tasmania, the provisions of this federal Bill (if passed into law) would be the relevant legislation. State Right of Entry laws would no longer be relevant.

34. The ACTU makes this clear in its submission - “*although most states require some notice (most commonly 24 hours) of entry, none require this notice to be given in writing. No state confines the power to investigate breaches to those affecting union members, nor do they allow the employer to determine where discussions between employees and union officials take place. In Tasmania, South Australia and Western Australia right of entry provisions may also be included in awards.*”<sup>9</sup>

35. The IEU believes there is no evidence of problems or calls from these jurisdictions for federal laws to override State legislation – quite the opposite. Indeed, at the present time, State governments are strongly opposing the federal government’s proposals and are indicating they may mount a constitutional challenge in the High Court.

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<sup>8</sup> Second reading speech

<sup>9</sup> February 2005 ACTU submission to the Senate Inquiry into the Provisions of the Workplace Relations Amendment (Right of Entry) Bill 2004. p15

36. The existing provisions in respect of right of entry are restrictive to the extent that there is no right to enter if there is no award in place and serve only to frustrate the ability of unions to gain access to members and to advise potential members that they are eligible to join the union. The proposal that the union have an invitation from a member merely targets vulnerable members. It is inefficient and cumbersome and will impede open relations between parties. Reasonable timelines involved in dispute and issue resolution between parties will be undermined because of the time lag in balancing the suitability of meeting times and the requirement for formal invitation. Vulnerable employees will be placed under significant duress and safeguards to protect the anonymity of the employee making the request will, in small workplaces, be useless.
37. Restrictions on the right to inspect documents and records at the workplace for suspected and identifiable breaches and only as they relate to the employment of union members merely provides protection to unscrupulous employers.
38. Of considerable concern under the proposed legislation is the capacity for an employer to seek revocation of a permit on the broadest of grounds – ie “*an abuse of rights*” (s280J). Clearly such applications may include applications for revocation of rights where subjects of discussion in meetings with members are allegedly inconsistent with the form of the notice to employers. Such highly artificial distinctions are impractical and designed to frustrate unions in their ordinary operation. A mature industrial democracy should have legislation without highly punitive clauses which give unequal rights to one side of the bargaining table. The IEU believes this to be the case with the provisions related to the issuing, revocation and suspension of permits.

### **Right of Entry Provisions in Certified Agreements**

39. The IEU across all jurisdictions has respectful and robust relationships with most employing authorities of non government schools. It is the Union's view that as the Parties to the various Awards and Agreements, whether or not a matter which is negotiated and agreed (or is duly arbitrated by the Commission) should be in those industrial instruments, is a matter for the Parties. The Union does not support the prohibition of certification of agreements containing right of entry provisions. It should be said however, that at the present time, the Union is not party to any Agreement containing such a provision. This is because the current legislation, while restrictive in some provisions, does not impede the Union's capacity to effectively represent its members.

## **Conclusion**

40. The IEU urges the Committee to reject the passage of the Bill.