

## UNION RIGHTS OF ENTRY: THE NEW CONTESTED TERRAIN?

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### Abstract

One of the most significant changes made to the legal regulation of unions under the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth.)* was to rights of entry. Rights of entry are a fundamentally important apparatus for unions, not only for the purpose of communicating to, and accessing members, but also as part of the process of enforcing workplace terms and conditions. The changes to rights of entry have significant potential to marginalise and exclude unions. This paper traces the experiences of two quite different unions, revealing similar results. Rights of entry are increasingly becoming the new contested terrain, manifest in hostile employer approaches, attitudes and tactics.

## UNION RIGHTS OF ENTRY: THE NEW CONTESTED TERRAIN?

### INTRODUCTION

Upon its enactment, the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth.)* (WRA) made fundamental changes to the legal regulation of unions (Coulthard 1999). One of the key areas that has witnessed significant change and therefore has considerable potential to undermine and exclude unions from the workplace is union rights of entry. This paper undertakes a comparative case study, tracing the experiences of two quite different unions under the WRA in the context of rights of entry.

### THE WORKPLACE RELATIONS ACT AND UNION RIGHTS OF ENTRY: THE CHANGES

Union rights of entry under the *Industrial Relations Act 1988 (Cth.)* (IRA) were covered in section 286 and section 306. These provisions entitled union officials to exercise right of entry for the purpose of ensuring the general observance of the Act. Officials, as part of these rights, were also entitled to inspect and copy relevant documents. Despite these statutory provisions, union rights of entry were usually regulated by award conditions and therefore, were a vital part of the enforcement process. The policing role often afforded to unions in relation to right of entry within awards provided unique recruitment opportunities at the shopfloor level.

The WRA no longer confers rights of entry in awards. In fact, section 127AA of the WRA renders unenforceable, any award provision granting right of entry to unions. Rights of entry must be negotiated by agreement. Obviously, the extent to which rights of entry are reproduced in workplace agreements depends to a large extent, on the bargaining power of the various parties and therefore, the union's involvement and influence at the workplace.

The WRA repeals sections 286 and 306 of the IRA. Provisions for right of entry are now made exclusively by Division 11A, Part IX of the WRA. Under this division, rights of entry are subject to stringent requirements (s 285B,C), which may dissuade officials from entering workplaces in an effort to recruit members (Naughton 1997). Union officials are now required to hold a permit under the WRA to exercise right of entry (s 285A(1)). This permit entitles only the individual(s) named to exercise their right, and must be shown to the employer before entering a premises (s 285D(1)). In addition, officials must give employers 24 hours notice of their intention to enter (s 285D(2)). This latter condition marks a significant departure from the IRA, which allowed union officers to exercise right of entry without any *a priori* notification. This requirement is potentially debilitating for unions, since it significantly reduces their ability to take spontaneous action, thereby eroding the potential benefits of 'surprise visits' (Creighton & Stewart 2000; Ford 2000). Although the prescribed notice period required of unions is only short:

it is still of sufficient duration to enable those employers tempted or pre-disposed to engage in stratagems of evasion or concealment, to take action designed to frustrate or defeat, either temporarily or permanently, the declared purpose of the provisions (Ford 2000: 6).

The WRA provides that a right of entry permit may be revoked, on application, if the Registrar is satisfied that the holder intentionally hinders or obstructs any employer or employee, or acts in an improper manner (s 285A(3)). As at 30 June 2002, two permits had been revoked. This represented significantly less than the previous year, in which seven permits were revoked (AIRC 2002).

Section 285B of the WRA allows right of entry for the purpose of investigating suspected breaches, so long as the union has members employed at the premises (s 285B(2)). This entitlement is limited to working hours. Union officials are also entitled to: inspect and make copies of documents relevant to any suspected breach (s 285B(3)(a)); inspect or view work, material or

machinery relevant to any suspected breach (s 285B(3)(b)); and, interview during working hours, members and non-members (eligible for membership), about suspected breaches. The statutory provisions make it clear that a failure to agree on a place or time in relation to the production or copying of documents pursuant to section 285B does not constitute a hindrance or obstruction for the purpose of section 285A(3)). Consequently, disputes over the appropriate time or place for the inspection or copying of documents related to suspected breaches may become frequent causes of disputes (Ford 2000).

Section 285C of the WRA permits right of entry for the purpose of holding discussions with members and non-members (eligible for membership). Such discussions are subject to rigorous conditions. First, an award binding on the union must cover the work being done at the premises (s 285C(1)(a)). Secondly, unions can only hold discussions with those members and non-members who wish to participate. Thirdly, a union official may only enter the premises during working hours and discussions are to be held during meal-time or other breaks (s 285C(2)). This statutory provision provides unions with a new right. Such discussions were not permitted under the IRA. Rather, section 286 permitted union officials to enter a premises to interview employees; not to 'hold discussions' with them. This may be a fruitful opportunity for unions since discussions could take place under section 285C between officials, members and non-members for recruitment, bargaining and negotiation purposes (Ford 2000).

The powers of entry under sections 285B and 285C are conditioned by a new purpose requirement: that they may only be exercised for the purpose of investigating any suspected breach(es). Under the IRA, unions were free to exercise their right of entry simply for ensuring the general observance of the Act. This change is significant and reflects the intention of the legislature to definitively delineate the scope of the powers and entitlements of unions. It means that there is no longer a right for unions to inspect routinely to check compliance: there must first be a suspicion of a breach (Ford 2000). This requirement may drastically curtail the capacity of unions to monitor the legislation and enforce workplace arrangements, giving employers 'free reign' and potential opportunities to intimidate employees and exclude unions.

In sum, the changes to union rights of entry under the WRA diminish and erode the representative status and enforcement capacity of unions, by restricting their access to members and potential members. This may fetter employer power, resulting in a greater degree of managerial prerogative in the day-to-day operations of the workplace. It may also undermine union recruitment and organising initiatives, posing a threat to collective organisation in unionised workplaces.

## **A COMPARATIVE CASE STUDY**

This paper explores the experiences of two very different federally registered unions under the WRA, in relation to rights of entry. These experiences are drawn from a larger study of the impact of the WRA on union effectiveness (Pyman 2003). The unions' experiences were explored by conducting semi-structured interviews with both union officials and union delegates. The interviews were conducted in 2001-2002. A summary of the interview participants is shown in Table 1.

**Table 1: Interview Participants**

**SSU I**

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*8 Officials*

Victorian Assistant Secretary  
Victorian Assistant Secretary: Division A  
2 Victorian Organisers  
National Secretary  
National Assistant Secretary  
National Industrial Officer  
National Trainer

*4 Delegates*

Victorian Delegates

**MU I**

*Officials*

Victorian Secretary  
4 Assistant Secretaries  
5 Victorian Organisers  
Victorian Education Officer  
Victorian Industrial Officer  
National President

*5 Delegates*

Victorian Delegates

The characteristics of the two unions are described below.

**Service Sector Union I**

Service Sector Union 1 is a medium sized industry union covering semi-skilled workers. This union also covers managerial staff. The membership of the union in 2002 was approximately 65,000.

**Manufacturing Union 1**

Manufacturing Union I is a large occupational union with primary coverage of semi-skilled workers. This union also covers managerial staff. In 2002, the membership of the union stood at approximately 153,000.

**THE UNION'S EXPERIENCES: UNION RIGHTS OF ENTRY UNDER THE WRA**

Two qualitative data analysis techniques were utilised to explore the interview data and determine the significance of the responses. These techniques were: successive approximation and analytic comparison. Successive approximation involves probing the data to see how well the concepts fit the evidence and reveal features of the data (Neuman 2000). Analytic comparison however, uses the method of agreement and the method of difference to identify similarities and differences (Neuman 2000). Three key themes emerged from an analysis of the interviews with SSU I and MU I. These were: positive influences, negative influences and employer tactics.

**Positive Influences**

**Custom and practice:** A majority of officials in MU I only, identified positive influences of the right of entry provisions on custom and practice. These officials argued that the restrictions have forced them to place a greater reliance of self-sustaining delegate networks, rather than officials, in the processes of recruitment and retention.

## Negative Influences

**Custom and practice:** Officials in both unions reported negative influences of the right of entry provisions on custom and practice. Three common issues emerged. First, the restrictions in the WRA have redefined the role of organisers, impacting on how they use their time. Second, the restrictions have reduced the ability of the unions to address 'hot issues', because they must wait 24 hours before entering the workplace. Third, the vulnerability of organisers to legal remedies has increased under the WRA, due to the capacity of the Registrar to revoke permits. Despite this increased capacity to pursue the revocation of permits, only a small group of officials in one discrete division of MU I identified a change in custom and practice. As one Victorian Assistant Secretary explained:

We're getting far more challenges legally in terms of our permits. Employers are throwing that at us left, right and centre.

This response suggests that employer challenges to permits may be context specific, dependent on a range of factors such as work organisation, employer ideology, industry custom and practice and the tactics and strategies used by unions to enter workplaces.

**Union resources:** A majority of officials in SSU I only, identified negative influences of the right of entry provisions on union resources. The requirement that 'discussions' take place with members during specified meal breaks was found to place increased pressure on scarce resources, by limiting the ability of the union to bring members together at the local level. This has forced the union to expend greater resources on covert organising techniques, as a means of building a power base outside the workplace. MU I also identified the use of covert organising techniques such as off-site meetings to bring together members outside the workplace, yet, made no connection between this strategy and pressure on union resources.

## Employer Tactics

A majority of officials in both unions identified employer tactics as a key factor shaping the influence of the right of entry provisions. A small number of delegates agreed. A single common theme emerged: overt tactics designed to limit unions' access to members and potential members or exclude unions have had a profound negative impact on recruitment. Three dimensions of overt tactics were identifiable: lack of cooperation, the imposition of practical difficulties and limiting the mode of access. Common examples under each of these three dimensions were identified by the two unions.

**Lack of cooperation:** The two most common forms of uncooperative employer behaviour that emerged were the obstruction of union meetings and using security concerns as a justification to refuse entry. In relation to the obstruction of union meetings, a common tactic used by employers was to try and get a manager to 'sit in' on the union meeting.

**Imposition of practical difficulties:** Two examples of this tactic were identified by both unions. First, they identified a tendency by employers to call the police in during disputes. Interestingly, a majority of officials and delegates in both unions agreed that the police lacked adequate knowledge of union rights at worksites. Consistent with these criticisms, a Perth Magistrate recently argued the WA police lacked knowledge of union rights of entry. Following this criticism, WA police officers have received training in union right of entry laws (Workforce 2003). The presence of police during right of entry disputes accords with Peetz's (2002) classification of exclusivist relational measures: a decollectivist strategy that involves placing barriers in the way of workplace union activists and delegates. Second, increased supervisory or management presence was a common means used to place barriers in the way of the unions when exercising their right of entry.

**Limiting the mode of access:** Both unions also identified two common examples of this tactic. The first, and by far the most common example identified by all interviewees, was the placement of organisers in an employer designated room designed to intimidate members: for example, next to the Chief Executive Officer or the Human Resources Manager. The second example was the restriction of union meetings to certain areas. For example, in the case of MU I, interviewees reported that it was not uncommon for union meetings to be restricted to the workplace canteen.

The similarities identified in the discussion above indicate commonalities across different employers and different industries. For example, the most commonly recognised tactic was the placement of organisers in a specified room. This may suggest that employers, through trial and error or experience, have found this to be one of the most effective mechanisms for impeding union activity and reinforcing their opposition to unions. This is consistent with the research of Peetz (2002) who suggests that the simplest exclusivist relational measure of a decollectivising employer is to restrict or refuse union entry to the workplace. Interestingly, similar behaviour was documented in New Zealand following the introduction of the *Employment Contracts Act 1991* (Dannin 1997). Similarly, in the UK, anti-union employers have refused to allow unions' access to their premises for recruitment and organising purposes, to frustrate and resist union recognition campaigns (Gall 2002).

Despite the similarities identified by the two unions, both unions also reported unique examples of employer tactics within their industries, as summarised in Table 2.

**Table 2: Unique Employer Tactics**

SSU I	MU I
<ol style="list-style-type: none"> <li>1. Using privacy laws to restrict communication with non-members</li> <li>2. Prohibiting posters displaying union meeting times</li> <li>3. Prohibiting the handing out of union pamphlets in the lunch-room</li> <li>4. Rostering union members visits to organisers</li> <li>5. Sending out information packs to managers about how to deal with union officials</li> </ol>	<ol style="list-style-type: none"> <li>1. Using the 24 hour notice requirement to intimidate and threaten employees in relation to union involvement</li> <li>2. Introducing scattered meal breaks</li> </ol>

The unique approaches identified in Table 2 fall into the category of the imposition of practical difficulties suggesting that this was the dominant tactic used by employers to restrict union access to workplaces.

Unsurprisingly, both unions reported that overt employer tactics have been more frequently used where employers are ideologically opposed to unions. For example, as one official in SSU I stated:

I know in [Company X] they have actually been given a directive that they have to give an organiser a room and it is not to be the tea room.

Similarly, both unions identified employer tactics toward union right of entry as significant in shaping the industrial relations climate. Officials suggested, for example, that right of entry has become much more of a 'live' issue manifest in an increasingly hostile, pedantic and vigilant approach by employers, particularly during bargaining and industrial disputes. For example, as the National Secretary highlighted:

The right of entry becomes much more a flashpoint for us than it has in the past.

A key theme that emerged from the change in employer approaches was the symbolic influence of the legislation on the industrial relations climate. The statutory provisions were identified by both unions to have shaped the industrial relations climate, particularly employer thinking. The symbolism in the legislation itself was also held to be important: the provisions have given employers a greater opportunity to frustrate and resist attempts by unions to exercise their right of entry, reinforcing union marginalisation and exclusion. The following comments from officials in both unions highlight this sentiment:

The mood, the style, the tone and the Act – all those things have led to a way of thinking (SSU I).

It's an ideological thing. It's trying to send a message to the workforce about the illegitimacy of unions and the third party concept (MU I).

Both unions also found that employer approaches to rights of entry have shaped the industrial relations climate by engendering fear and intimidation amongst employees. Officials in MU I however, also reported that the 'game of right of entry frustration' by employers has been counterproductive in well-organised workplaces, because in some cases, it has spurred mobilisation and industrial action at the local level.

### **Effectiveness Implications**

The impact of the right of entry provisions on the two unions has been manifest in implications for their effectiveness in two areas: recruitment and enforcement.

**Recruitment:** A majority of officials and delegates in both unions reported that the restrictions on recruitment, particularly in non-union or weakly organised workplaces, were a key issue pertaining to their effectiveness in exercising right of entry. This was embedded in their explanations of the time and resources that were required to pursue such members. Consequently, both unions identified the use of covert, activist-oriented techniques, such as off-site meetings, in an effort to recruit members. SSU I also identified other responses consistent with the organising model of unionism: workplace mapping as a means to identify untapped membership potential; identifying activists, growing activist networks, building activist committees and diverting resources to education and training of delegates. These responses are to some extent a reflection of the union's position in its industry: it is marginalised as a result of fierce employer opposition and a lack of activism and militancy. These responses therefore, are also designed to build the collective confidence of members within the industry.

**Enforcement:** Officials in SSU I only, identified enforcement issues as a key implication. The union has responded to this in a pro-active manner, seeking to exploit the loopholes in the legislation. For example, the union has made greater use of time and wages inspections as a means for entering workplaces and communicating with members, as well as identifying non-members. The union has also exploited the provisions pertaining to the notice of intention to enter: the union will notify right of entry for a whole week in an attempt to retain a degree of surprise and spontaneity in workplace visits.

## DISCUSSION

An analysis of the interviews reveals overwhelmingly similar experiences across two very different unions, in relation to issues pertaining to rights of entry under the WRA. This is shown in Table 3.

**Table 3: The WRA and Rights of Entry: A Summary**

THEMES	SSU I	MU I
Positive Influences	x	✓
Negative Influences	✓	✓
<b>Employer Tactics</b>	✓	✓

The similarity among the two unions' experiences is particularly interesting in light of suggestions that the WRA was introduced by the Howard Government to destroy union militancy and strength in particular industries. The similar experiences of the two different unions seems to suggest that in relation to right of entry, there is a pattern of employer behaviour and a pattern of legislative influences.

The presence of hostile employer tactics and their associated negative impact on union effectiveness is the primary issue that emerges from the findings in relation to the unions experiences. Indeed, the unions' collective experiences reveal tactics that are increasingly designed to marginalise and exclude union involvement, by placing barriers in their path. In this regard, the tactics identified are consistent with recent research by Peetz (2002) exploring decollectivist employer strategies. Peetz (2002) identified two dimensions of such strategies: a real dimension and a symbolic dimension. Developing a matrix, Peetz (2002) identified exclusivist and inclusivist strategies on three real dimensions: employment practices, relational measures and informational measures.

Whilst the experiences of the two unions are not generalisable, they do reveal insights into employer approaches designed to minimise the influence and participation of unions in representing their members: a broader international phenomenon. The findings for example align with recent research by Gall (2002) in the UK in a study of employer opposition to union recognition. Gall (2002) adapted the schema of employer resistance developed by Roy (1980) in the US to identify three additional types of anti-union employer behaviour. The range of tactics revealed in this study fall neatly into the categories developed by Gall (2002). For example, Gall (2002) identifies one form of behaviour which he terms 'awkward stuff'. This strategy is designed to create obstacles to union recognition. The overt tactics identified in this study can be categorised under this approach. For example, the imposition of practical difficulties was the dominant tactic used by employers to hinder union rights of entry according to the two unions' experiences. Employer behaviour in this context ranged from using 'delaying tactics' to placing direct obstacles in the trajectory of unions.

**The consistency of the findings obtained in this study with other research on employer tactics in Australia and the UK, allows more general conclusions to be drawn regarding employer responses to the introduction of legislation. As discussed in the previous section, the employer responses identified by the two unions align with those of employers in New Zealand following the introduction of conservative, anti-union legislation. The WRA has most certainly been described as anti-union, and in this study, the symbolic impact of the legislation on the industrial relations climate was perceived to be critical. This reflects a broader international phenomenon, concerning the role anti-union legislation plays in facilitating anti-union responses and employer strategies. The experiences of the two unions do confirm long term experience in the US and New Zealand that the adverse affect of the legal framework on unions is far greater to the extent that it legitimises and facilitates effective employer resistance to union activities. Thus, the law governing unionism plays a crucial role in facilitating or deterring anti-union strategies (Bennett 1995).**

It is in this respect that the symbolic influence of law identified by the two unions also emerges as important. Consistent with Weeks' (1995) argument, the unions' experiences highlight that legal changes via statute law can have important symbolic impacts, creating effects beyond their immediate reach. The notion of symbolism refers to the values and ideas reflected in the law (Weeks 1995). Consistent with research in New Zealand and the US (Harbridge & Honeybone 1996; Chaison & Bigelow 2002), the WRA has served to 'de-legitimise' unions, having an adverse impact on their role, functioning and effectiveness. For example, the unions identified that the right of entry provisions have created a climate that has reinforced managerial prerogative and union exclusion. This change has occurred, according to these two unions, in tandem with changes in employer attitudes and behaviour.

## **CONCLUSION**

This paper has traced the experiences of two unions, in relation to rights of entry under the WRA. Upon its introduction, the legislation made significant changes to union rights of entry, imposing severe restrictions on the representational role of unions. Indeed, the statutory provisions downplayed and reduced support for the representational role of unions in communicating to, and accessing members, and their role in enforcing employment conditions. The findings reveal that the legislation has had both positive and negative influences on the two unions; yet, the negative influences outweigh the positive influences.

The primary issue that emerges from the analysis of the unions' experiences is the centrality of employer tactics. Indeed, the unions' experiences suggest that rights of entry are indeed contested terrain, characterised by hostile, anti-union employer approaches. The new style of employer behaviour that has emerged reveals common patterns of tactics, allowing more general conclusions to be drawn regarding the critical role of the law in shaping the actors responses: a strategic choice perspective (e.g. Kochan, Katz, McKersie 1994). This study reveals tactics that are consistent with the underlying themes of the WRA: union marginalisation and exclusion via the creation of individualised employment relationships that reduce the workplace and organisational power of unions.

From a union perspective however, the news is not all bad. The findings reveal that both unions have undergone adaptation. This has led to the adoption of new organising and recruitment techniques, typically by covert means. This pro-activity, and creative manipulation of the legislation, points to an ability to adapt in the face of external changes: a key theme underpinning the recent emphasis on self transformation and union renewal (e.g. Heery, Simms, Simpson, Delbridge & Salmon 2000). Nevertheless, the findings also point to the indeterminacy of the law; and more importantly for unions, the benefits of creative compliance (Mc Barnett 1988). Creative compliance by unions in this context involves using the law to their advantage in a way that ensures they meet their legal obligations, yet, contradicts the spirit of the law.

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