

AFTER THE ELECTION: CHANGES TO SAFETY RIGHT OF ENTRY?

03 May 2019 | Australia

Legal Briefings - By **Anna Creegan, Rachel Lee and Rickelle Kenny**

The paucity of detail on the ALP's law reform agenda in respect of right of entry could mean one of two things. No significant reform is planned, or details of proposed reforms will not be released until after the election. We expect the latter is more likely.

AT PRESENT

Right of entry has been a flash point for industrial relations. In many cases it involves a workplace interface of industrial relations and safety issues.

Right of entry for safety purposes is one of the broader workplace entry rights available to permit holders. These entry rights are created in state and territory work health and safety legislation, and are acknowledged and regulated in the *Fair Work Act*.

This regime allows permit holders to enter a workplace to investigate a suspected breach of certain state or territory work health and safety laws, and to access records. The suspicion must be available to a reasonable person on the known facts. Permit holders are not required to give notice of entry unless the entry is to inspect employee records, in which case 24 hours' notice is needed. In some jurisdictions, a union permit holder can issue a provisional improvement notice, which creates a legal requirement to take action to address safety issues.

These rights come with responsibility. A permit holder's conduct is regulated on entry. A permit holder cannot hold discussions, provide general support to employee Health and Safety Representatives (**HSRs**), or engage in other activities outside their reason for entry. A permit holder may only enter the workplace during working hours, and must comply with the reasonable requests of the occupier to comply with any safety requirement that applies to the premises.

The object of this regime is to balance rights of organisations to investigate suspected contraventions, rights of employees to receive information and representation from union officials at work, and the right of occupiers and employers to go about their business without undue inconvenience.

Since 1988, successive governments have legislated to shift this balance. It is reasonable to expect that changes will continue, particularly given the broad and bold nature of the changes being proposed by the ALP across so many other areas of the *Fair Work Act*.

The reports of various inquiries in the last term of this government gave particular attention to right of entry for safety purposes. This might indicate bases for change.

UNDER AN ALP GOVERNMENT

In its law reform agenda, the ALP simply states it will 'protect employees' rights to access union representation at work, in reasonable locations, and at appropriate times'. It is clear that the ALP considers change is required to achieve this. The ALP does not specifically mention right of entry for safety purposes, but this has received attention elsewhere, and this may inform the ALP's approach.

First, in August 2018 a Senate Inquiry report recommended including in offshore petroleum safety legislation a right of entry to inquire into suspected safety contraventions (including additional contraventions identified during entry). The report recommended that the operator of the offshore workplace facilitate transport for the permit holder to the workplace, and that the cost of this transport be funded by an industry levy. If adopted, these recommendations would expand safety right of entry to offshore workplaces, and would remove historical barriers (cost, logistics) to permit holders entering offshore workplaces.

Second, in December 2018 the Safe Work Australia report on the review of model WHS laws (the Boland Report) recommended that 'Safe Work Australia and relevant policy agencies investigate how to best provide for a union official to access a workplace to provide assistance to an [employee HSR] without the need to hold an entry permit under the *Fair Work Act* or another industrial law'. It also recommended removing the 24 hour notice period for safety right of entry under WHS laws. The first recommendation is significant. It contemplates entry by union officials without an entry permit, in order to assist employee HSRs. The permit system is designed to control the conduct of entrants. A permit can be cancelled or suspended, or have conditions attached, if the permit holder breaches entry conditions. This is designed to ensure permit holders comply with legal requirements. HSRs have a wide range of powers under safety legislation. It is conceivable that union officials entering a workplace might assist with all or any of these. This would see a new regime for union entry outside the familiar parameters of the *Fair Work Act*. It is implicit in this recommendation that unions have a legitimate and central role in accessing workplaces to ensure workplace safety, outside the traditional right of entry regime.

The above recommendations are consistent with aspects of the ACTU's industrial relations law reform agenda. As per the proposal to expand right of entry to offshore workplaces, the ACTU proposes that workers have a general legal right to access union representation in the workplace, and that employers and occupiers be required to facilitate access to unions in all areas of the workplace (subject to there being no 'bona fide' safety concerns or unreasonable disruptions). And mirroring the Boland Report, the ACTU proposes dispensing with the requirement to give notice to access documents relevant to safety breaches and removing the requirement to hold an entry permit (in this case replacing permit requirements with a requirement for entry authorisation from the governing body of the union).

Joining the dots, it seems reasonable to expect change.

UNDER A COALITION GOVERNMENT

The Coalition's position on right of entry is no more detailed than the ALP position.

The Liberal Party has announced that it will:

- consult about changes to the *Fair Work Regulations* to modernise right of entry permits and end 'improper' access by union officials to construction sites; and
- amend the *Fair Work Regulations* to update right of entry notice forms to ensure that they specify right of entry rules.

In the October 2018 report of the Senate Inquiry regarding industrial deaths, Coalition Senators recommended a 'fit and proper person' test and other additional eligibility criteria for permit applicants.

We have no further detail on changes proposed by the Coalition, but it appears that there are none that would specifically address right of entry for safety purposes.

IN CLOSING

Employers and other persons conducting a business or undertaking have duties to ensure the safety of permit holders and persons at workplaces who are potentially affected by the conduct of permit holders. They need to consider issues raised by permit holders and ensure they are addressed as appropriate.

Safety professionals will have an important supporting role in this process. They should assist to implement a framework of risk assessments and other measures to ensure that union right of entry is accommodated without adversely impacting workplace safety, and that any safety issues raised by the permit holder are properly evaluated and addressed.

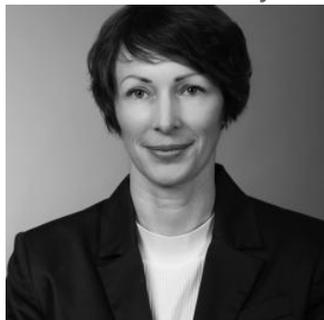
The ALP has been clear in its intention (if elected) to abolish the ABCC, which currently regulates right of entry breaches by unions and permit holders. And there is recent precedent for the successful prosecution of employers for failing to properly manage right of entry. The risk of non-compliance would seem higher in respect of safety right of entry, where in many cases, employers will have no notice of the proposed entry and limited time to prepare for it.

In this context, effectively managing right of entry, and safety right of entry in particular, is key for employers.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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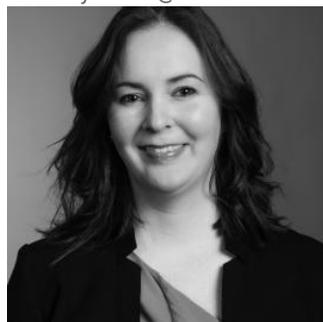
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