In *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd* [2010] FWAFB 6021 the Full Bench found that the construction of the expression "*significant harm*" to a third party resulting from industrial action meant that an order suspending such action would only be available under section 426 of the FW Act in "*exceptional*" and "*very rare cases*".

In our view, demonstrating that the frequency of union visits has resulted in an unreasonable diversion of "*critical resources*" would likely be more difficult for an organisation than demonstrating "*significant harm*" had resulted from industrial action. We consider that it will be, for many organisations, an almost impossible test to satisfy before any orders can be sought from the FWC. The availability of this power provides, in our view, little comfort to occupiers in relation to the imposition created by officials exercising rights of entry on multiple occasions. This is particularly so given the much broader rights for unions in relation to meetings in meal and break rooms and the requirements to provide transport to and and accommodation at remote areas.

We recommend the proposed amendment be re-drafted to remove the word "*critical*" in the test. The test should just involve consideration of whether the frequency of visits results in an unreasonable diversion of resources. This would better balance the right of unions to represent their members in a workplace and the right of occupiers and employers to go about their business without undue inconvenience.

### 2.3 Location of interviews and discussions

Under the proposed amendment, if a union official and the employer cannot agree on the location of an interview or discussion, a union official would be entitled to conduct an interview or hold discussions in any room or area where meal or other breaks take place.

Holding meetings in meal rooms would likely give union officials access to the greatest available number of members or potential members. This proposed amendment would therefore create an incentive for union officials to not agree on meeting rooms or other areas.

A recent ABS survey has found that only 18% of employees are union members in their main job[1]. Allowing union officials to hold meetings in meal rooms, in any situation where they do not agree to an alternative location, is likely to cause undue inconvenience to the large number of non–union member employees in their meal and break times.

In many workplaces such meal rooms are not large. If a union official held discussions in such rooms during employees' meal or break times (as required by the FW Act) in many circumstances non-member employees would be unable to avoid overhearing such discussions, and may be forced to leave the meal room if they wished to avoid the union

[1]Australian Bureau of Statistics (2012) ' 6310.0 - Employee Earnings, Benefits and Trade Union Membership, Australia, August 2011 - Summary of findings'

official altogether. This is not consistent with non-union member employees' rights to freedom of association and rights to uninterrupted breaks from their duties.

This proposed amendment was not recommended by the Panel. Further, the proposed amendment is contrary to the Panel's recommendation that the FWC's power to resolve disputes about the locations of interviews and discussions be increased. Rather than increasing the FWC's power to resolve disputes, the amendments would, in effect, result in the FWC having no power to intervene in such dispute at all. If the parties were unable to resolve a dispute regarding the location of interviews and discussions it would always result in the union official having the right to hold such discussions in meal rooms.

We recommend this proposed amendment not be included. The harm this amendment is apparently designed to address could be better addressed by adopting the recommendation of the Panel. That is, by giving the FWC greater power to deal with disputes regarding the location of interviews and discussions.

### 2.4 Accommodation and transport arrangement in remote areas

The proposed changes would impose an obligation on occupiers to provide transport to union officials to sites, and accommodation at those sites to "*assist*" union officials in exercising their rights of entry. These changes are particularly relevant for organisations in the mining, oil and gas and construction industries.

Clearly, the requirement to provide such transport and accommodation is a significant benefit for unions. When exercising such rights, officials would have extensive access to members and potential members while being transported to and from such sites and at the accommodation. In such circumstances, employees (including non-members) would effectively be a "captive audience". It would be very difficult for non-union members to avoid such officials in mess facilities before and after shifts, in their breaks or when being transported to and from site.

The introduction of these rights was not considered by, or a recommendation of, the Panel in the Report. These provision of these rights would not properly take into account the right of occupiers and employers to go about their business without undue inconvenience. It also does not take into consideration the rights to freedom of association of non-union members when in mess facilities before and after shifts (and in breaks) or when being transported to and from site.

We recommend these rights not be included. In the alternative, we set out below our recommendations as to how these draft provisions should be amended prior to being enacted.

#### (a) Necessary for rights of entry

In the Second Reading Speech to the Bill, it was stated that the requirements to provide transport and accommodation would only apply in two circumstances. One was where the premises were not reasonably accessible other than by transport provided by the occupier. This implies circumstances in which the provision of such transport is necessary for the

exercise of rights of entry. The other was where the nature of the site means a union official is "*required to stay overnight*" and the only accommodation reasonably available is that provided by the employer.

The Bill is not consistent with this. The proposed amendments do not provide that it is a pre-requisite to the sections operating that the official be "*required to stay overnight*". It is only necessary that the provision of the accommodation would "*assist*" an official exercising rights of entry. In our view, there a wide range of circumstances in which the provision of transport and accommodation to union officials would assist but is not necessary in order for them to be able to effectively exercise rights of entry.

That is, even in circumstances where an official could be transported (or could transport themselves) to and from a site in one day (or an even shorter period), and could exercise their rights of entry in that time, an employer could still be required to provide accommodation as to do so would "*assist*" the exercise of the rights of entry. There is no limit included on the period during which the accommodation must be provided.

We recommend that, if the provisions regarding the provision of accommodation and transport be enacted, they only operate in circumstances where the provision of transport or accommodation is necessary for the exercise of rights of entry.

The period during which that accommodation must be provided should be limited to that necessary for the exercise of the rights of entry.

**(b) "Place" where accommodation is available**

The Bill provides that, in relation to accommodation, the sections apply in relation to premises located in a "*place*" where accommodation other than accommodation provided by the occupier is not "*reasonably available*".

The sections regarding accommodation operate irrespective of whether the sections regarding the provisions of transport operate. That is, it is not a pre-requisite that the sections regarding the provision of transport apply in order for there to be a requirement to provide accommodation.

Conceivably, this means an occupier or employer could be obliged to provide accommodation on a resources or construction site located within a half hour drive of a township. In these circumstances accommodation may be conveniently available in the relevant township but the only accommodation available at the "*place*" where the rights of entry are to be exercised is the occupier provided accommodation. This could result in the occupier being required to provide, or cause to provide, accommodation despite the availability of conveniently accessible alternative accommodation.

We recommend the amendments regarding the provision of accommodation be re-drafted to provide that the requirement to provide accommodation only operates in circumstances where there is a requirement to provide transport.

## 3. Anti-bullying measure

### 3.1 Uncertainty of operation

It is not clear what would constitute bullying under the proposed laws. Specifically, the conduct which would fall within the "behaves unreasonably" requirement is not clear, and the standard that must be reached in order to create "a risk to health and safety" is not clear. For example, it is not clear whether a risk of an anxiety attack or a mild, passing period of stress would satisfy this test. In our experience, this form of mild psychological reaction is the most common form of injury claimed in relation to alleged bullying, so this uncertainty falls squarely within the expected pattern of operation of these laws.

The proposed laws involve two uncertain expressions operating in conjunction with each other, resulting in very substantial uncertainty about the conduct that would fall within the operation of these provisions.

This uncertainty is inherent in this legislative scheme – it is not possible to define with any precision the conduct that would constitute bullying, and in many instances it is a matter that reasonable people may legitimately have different views of.

### 3.2 Multiplicity of actions

Unlike the existing unfair dismissal provisions in the *Fair Work Act*, which are concerned with a termination of employment that operates to bring the employment relationship to an end (subject to reinstatement), bullying will often occur during an ongoing employment relationship.

It is possible that a worker genuinely (but possibly irrationally) believes certain conduct to be bullying. This worker could make an application, which might be dismissed for a range of reasons including that:

(a) the conduct complained of is reasonable management action;

(b) this conduct it is not unreasonable; or

(c) the conduct does not pose a risk to the health and safety of the complainant.

Under the proposed laws, there would be nothing to stop a similar application being made in the future in relation to a continuation of conduct that is similar to the conduct that was originally complained of, and that was found not to constitute bullying.

This could lead to a multiplicity of actions by the same worker against the same business (and the same co-workers). The effect of this multiplicity of actions could be to impose pressure on the business and co-workers against whom the application is made to refrain from perfectly legal and reasonable conduct simply to avoid repeat unmeritorious applications being made. Indeed, repeated actions of this kind could constitute a form of bullying of those co-workers.

### 3.3 Volume of bullying issues

Bullying allegations are very easy to make, and it is generally accepted that the most trivial conduct can amount to bullying if it is engaged in repeatedly and systematically. We anticipate that these new provisions will be very heavily utilised and will add significantly to the workload of the Fair Work Commission. Even more importantly than this, we anticipate that executives who are responsible for managing people within organisations are already and will continue to be required to dedicate an increasing proportion of their time to managing bullying claims, many of which are not soundly based. We anticipate that this will divert people management resources, adding to the costs of running a business and reducing the opportunity for businesses to apply these resources to more constructive and strategic activities.

### 3.4 Rights of workers accused of involvement in bullying

The proposed laws (and other provisions of the Act) do not make clear who would have standing to appear in hearings in relation to an application under section 789FC.

It would seem obvious that the employer would have standing, and we would expect the relevant regulations and forms to make this clear.

However, there is no guidance as to the rights (if any) of a worker who is named or referred to in the application to appear and be heard in the hearing of the application

It would seem to be essential for workers who are alleged to be involved in the bullying to be heard, because the Commission would have power under section 789FF to make orders against or in relation to individual workers as well as the business.

This raises a further question – we are aware from our practice in this area that bullying allegations are able to be made mischievously and without proper grounds. Having an application of this sort made against you would be very stressful for an innocent worker. This worker might take the view that he or she should obtain legal advice in relation to the allegations, and will be liable to bear the costs of this advice. There is no mechanism for these costs to be recovered from an applicant who has made an application in bad faith.

Far from avoiding or controlling bullying in the workplace, these laws could provide a mechanism for workers to bully and harass each other.