**SUBMISSION BY**

**MEDIA, ENTERTAINMENT & ARTS ALLIANCE**

**TO**

**SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE**

**REGARDING**

**INQUIRY INTO THE FAIR WORK BILL 2008**

**JANUARY 2009**

**The Media, Entertainment & Arts Alliance**

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

**Senate Standing Committee on Education, Employment and Workplace Relations**

**Inquiry into the Fair Work Bill 2008**

**Submission of the Media, Entertainment and Arts Alliance**

The Media, Entertainment & Arts Alliance (the Alliance) seeks to comment on two issues related to the Fair Work Bill 2008, specifically:

1. The exclusion of "high income employees", in certain circumstances, from the applicability of a modern award, and

2. Restrictions on bargaining.

Further, the Alliance has seen and endorses the submission made by the ACTU.

## 1. Exclusion of "high income employees" from application of award

The Alliance has a number of members that would fall into the definition of high income employees as set out in the Bill. Should the Bill be carried into law, these members would, for the first time, be stripped of the right to be covered by an industrial award.

The Alliance believes for the Parliament to remove long-standing legal rights of citizens is an extremely serious matter and one that should only be undertaken where it can be seen that real, material and on-going benefits will replace the loss of these long-standing rights. The Alliance believes that Parliament will not be able to show this is the case.

In addition, the current Bill throws up serious problems in how a high income employee is defined.

### Definitional Issues

Clause 328, indeed the whole of Division 3, refers to a "guarantee of annual earnings." However, it is clear that this is not the case.

Clause 330(2) makes it clear that the period can be for a period of less than 12 months. No minimum period is provided.

Clause 329(2) allows for part-time and casual employees to be high income employees. This is an absurdity. Forgetting the issue as to how anyone could guarantee the income of a casual employee, whose working pattern is unknown, there is also the issue of part-time employees. The Bill now introduces the concept of a pro-rata high income employee. This is a nonsense.

Two examples will suffice. Consider a person working half standard working hours on the minimum hourly rate to be classified as a high income employee, even though

they would earn $50,000 per annum. This amount is not a high income by anybody's definition.

As another example, consider the situation as set out above, except in this case the employee has a second part-time job that fills the other 19 hours per week for which he or she is paid $30,000 per annum. The employee's annual pay from both jobs is $80,000, well below the annual threshold, yet the employee is in a different situation to another employee on the same annual salary got from working for the one employer.

Clause 332(1)(c) provides that an employee's earnings will include "the agreed money value of non-monetary benefits". Even assuming, and the Alliance does not, that you can give a monetary value to a non-monetary benefit, the proposed wording allows this provision to be abused. While reference is made in clause 332(3) to "reasonable money value" it is the agreed part which triggers the clause. The clause does not provide for examples of non-monetary benefits which can be included.

**Conclusion**

The Alliance believes that the concept of excluding "high income employees" from modern awards is fundamentally flawed. Such employees are not excluded from enterprise awards, enterprise agreements nor the proposed National Employment Standards. Why as a matter of Government policy should they be excluded from modern awards?

The Alliance believes that Division 3 of Part 2-9 of Chapter 2 of the Bill should be deleted. If the Committee does not accept this view then, the Alliance believes that the following amendments need to be made.

- Clause 329(2) covering part-time and casual employees be deleted;

- Clause 330(1)(b) be amended to provide that the written agreement be on a prescribed form and filed with Fair Work Australia;

- That clause 330(2) be amended to include a minimum period of six months to trigger the exclusion;

- Clause 332(1)(c) and as a consequence 332(3) be deleted.

**2. Restrictions on bargaining**

The Fair Work Bill unfairly seeks to limit the parameters of the employment relationship and prohibits bargaining for improved unfair dismissal rights, improved union entry rights and prohibits the reserving of certain matters for negotiation at a future point in time.

Of concern is a lack of certainty regarding what matters might be prohibited. Alliance members work in a diverse range of employment sectors, albeit all captured within the media, entertainment and arts industries, many of which have unusual and sometimes unique characteristics.

The unusual and sometimes unique characteristics faced by Alliance members are illustrated by the Alliance members who are children aged 15 and under. Indeed, children can work in the entertainment industry within weeks of birth, television commercials being an example. Whilst child employment in the entertainment industry is regulated in some jurisdictions in Australia, it is almost completely unregulated in others, Western Australia for example and South Australia is only now considering regulating child employment. Consequently, it is important for child performers that industrial instruments can incorporate appropriate terms and conditions of employment, particularly in the absence of legislation or regulation in the jurisdiction of employment.

Performers are also the only category of person who need to be concerned about the clothing – or lack thereof – in which they might be required to undertake work. In many industries, clothing is an occupational, health and safety matter, or an identification matter in the instance of the need to wear a uniform. It is only in the entertainment industry where a person may be required to work semi-clad or naked. The right to negotiate the circumstances in which this may occur is a fundamental one.

Performers, particularly those from an Indigenous background, undertake employment that, in the absence of agreement negotiated in industrial instruments that compliance with relevant protocols will be observed, may expose them inadvertently or otherwise to being required to undertake work that is culturally inappropriate. The capacity to embed protocols established by third parties in industrial instruments can be a crucial protection.

In an industry often held captive to “name” casting, guidelines agreed between employer associations and unions that sit alongside and give further meaning to the Migration Regulations have proved invaluable in building a community of performers of international stature that far exceeds what otherwise might have been expected from a country the size of Australia. It has enabled Australia to build a skills base in film, television and the performing arts of technicians and creative practitioners second to none. It has also allowed the Australian music industry to grow and thrive, although as the Government acknowledged in the lead-up to the 2007 election, the Migration Regulations do need strengthening in this regard to ensure the detail contained in non regulatory agreements is better reflected in the Migration Regulations. Importantly, it has been industrial instruments that have ensured what was often government intention has been delivered in reality.

Codes of Ethics are central to the proper functioning of the media and are a feature of a number of currently registered agreements. Their continued existence should be guaranteed in enterprise agreements.

All can be usefully reinforced industrially and the Alliance hopes the Fair Work Bill will not in any way restrict the number of matters that can be freely bargained.

A safety net for most can never be a safety net for all and the capacity to bargain freely will ensure all workers have a safety net appropriate for their own circumstances.

The Alliance shares the concerns of a range of workers including those within media and entertainment industries, that the Bill does not cover independent contractors. The Alliance believes that independent contractors have for a long time needed better protection. The rate at which employees are being asked to work as independent contractors has escalated dramatically over the past decade to the detriment of those who find themselves unable to secure work except in the guise of subcontracting. If the Fair Work Bill is to exclude subcontractors, then, at the very least, the benefits conferred on employees in the Bill should be extended to subcontractors through separate legislation. Importantly, the capacity of employers to unilaterally determine whether a person will be treated as an employee or as an independent contractor – notwithstanding the nature of the work being undertaken – must be addressed.

These concerns are shared by other unions and the following comments are confined to the need for unions, employers, employees and independent contractors to be free to negotiate conditions regarding matters that are relevant to the sector in which they operate – matters that may not relate to any other sector in the country.