SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND WORKFORCE PARTICIPATION

INQUIRY INTO INDEPENDENT CONTRACTORS AND LABOUR HIRE ARRANGEMENTS

MARCH 2005

The Media Entertainment and Arts Alliance

The Media Entertainment and 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.

Executive Summary

The Media Entertainment and Arts Alliance welcomes the opportunity to make submission to the Employment, Workplace Relations and Workforce Participation Committee Inquiry into:

- the status and range of independent contracting and labour hire arrangements;
- ways independent contracting can be pursued consistently across state and federal jurisdictions;
- the role of labour hire arrangements in the modern Australian economy; and
- strategies to ensure independent contract arrangements are legitimate.

The Alliance considers that the most efficient way to ensure that employment and contracting arrangements are legitimate and consistent across state and federal jurisdictions is to achieve national consistency in the definition of employee. If that can be achieved nationally, many of the current concerns regarding the legitimacy of contracting arrangements could be eliminated. It would also provide certainty of coverage in respect of many other areas of concern – for instance, it would give certainty regarding responsibility for workers compensation insurance.

Unfortunately, definitional issues abound and terminology is used differently both within jurisdictions and between jurisdictions.

The Alliance considers that were the definition of employee as set out in Clauses 3 and 8 of Section 12 of the Superannuation Guarantee (Administration) Act 1992 adopted, many of the issues relating to the contracting of independent contractors would be eliminated. The definition is set out at Attachment A.

Definitional divergence

In many reviews in recent years the lack of certainty regarding the definition of worker/employee and employer has been identified. For instance, to name only three, the need for national consistency was noted in the Industry Commission report, *Workers' Compensation in Australia* (Report No 36), released in February 1994; the House of Representatives Standing Committee on Employment and Workplace Relations' June 2003 report, *Back on the Job*, and in the Productivity Commission's *National Workers' Compensation and Occupational Health and Safety Frameworks Inquiry Report (Report No 27)*, released in March 2004.

Goods and Service Tax and Australian Business Numbers

Since the introduction of the Goods and Service Tax (GST) and Australian Business Numbers (ABN), the Alliance has seen a dramatic increase in attempts by employers to treat employees, especially those engaged on short-term contracts of service, as sub-contractors, notwithstanding that nothing in the employment relationship has changed. Rather ABNs are often seen as a way of avoiding obligations with respect to deduction and remittance of PAYG taxation instalments, and payments in respect of payroll tax, workers compensation insurance and, notwithstanding the definition of employee contained in the Superannuation Guarantee (Administration) Act, payment of superannuation entitlements.

Labour Hire Workers

The market is changing dramatically and changes to the structure of the workforce in the last two decades have result in a diversity of employment patterns. Full time permanent employment is no longer a reality for many in the workforce. It has never been a reality for the majority of the membership of the Alliance.

The vast majority of Alliance members work for more than one employer in any one year. Most do not receive even 80% of their income from one employer, rather their income is drawn from employment in a number of successive short-term contracts of service. Some are engaged full-time for short periods of time, some are permanent part-time, some are casuals. Nonetheless, the work undertaken is principally for their labour, be the person a journalist, an actor, a singer, a musician, a film technician, a live theatre or event technician, and regardless of whether they work front of house, box office, in a news room, on stage, back stage, on a set or at showgrounds or race-tracks or in cinemas.

Employment has not typically been achieved by answering job advertisements. Actors are typically represented by an agent. The same is true of others working in film and television such as designers and cinematographers. Film and television technicians typically register with an answering service that can answer queries about a person's availability. Others rely on informal networks and secure work on the basis of employer knowledge of their reputation and ability either arising from direct experience or recommendation.

However, increasingly, Alliance members who work in live theatre or on live events are sourced through labour hire companies. For instance, when Cirque du Soleil arrives in Sydney, the bump-in crew, bump-out crew, and the riggers will be sourced from labour hire companies. The same is true of riggers working on large film productions.

The Alliance supports the proposal being discussed in some jurisdictions (for instance, by WorkCover in New South Wales) for labour hire agencies to be deemed to be the employer of labour hire workers, regardless of whether the worker is engaged under a contract of service, except only where there is a direct employment contract between the labour hire worker and the host employer.

It should be made clear that agents – such as those agents registered under the Entertainment Industry Act in New South Wales that represent performers and others such as designers and cinematographers working in the entertainment industry – and answering services are not labour hire agencies and are not employers of those they represent. Rather persons represented by agents and listed with answering services are engaged directly by the employer under contracts of service.

Legitimate contracting of independent contractors

The Alliance considers the simplest approach to determining the legitimacy of independent contract arrangements is to determine whether the contract is a contract of service or a contract for service. It is the simplest test and common law, clarified by the provisions of the Superannuation Guarantee (Administration) Act definitions, as recommended above, would establish the legitimacy of any contract arrangement.

ATTACHMENT A

SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992 – SECT 12
Interpretation: employee, employer

(1) Subject to this section, in this Act, *employee* and *employer* have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

(2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.

(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

(4) A member of the Parliament of the Commonwealth is an employee of the Commonwealth.

(5) A member of the Parliament of a State is an employee of the State.

(6) A member of the Legislative Assembly for the Australian Capital Territory is an employee of the Australian Capital Territory.

(7) A member of the Legislative Assembly of the Northern Territory is an employee of the Northern Territory.

(8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

(9) A person who:

(a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force);

is an employee of the Commonwealth, the State or the Territory, as the case requires. However, this rule does not apply to a person in the capacity of the holder of an office as a member of a local government council.

(9A) Subject to subsection (10), a person who holds office as a member of a local government council is not an employee of the council.

(10) A person who is a member of an eligible local governing body within the meaning of section 221A of the *Income Tax Assessment Act 1936* is an employee of the eligible local governing body.

(11) A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.