Submission

to

Senate Employment, Workplace Relations and Education References Committee

Inquiry into unfair dismissal laws

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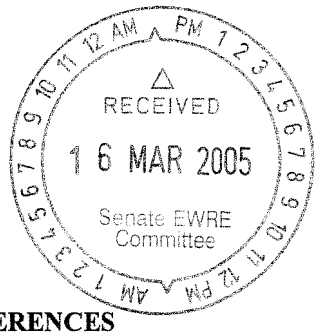

SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

INQUIRY INTO UNFAIR DISMISSAL POLICY IN THE SMALL BUSINESS SECTOR

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.

The Media Entertainment and Arts Alliance welcomes the opportunity to make submission to the inquiry into unfair dismissal provisions for small business.

The Alliance notes that the issue has been considered on a number of occasions in recent years. The Senate Employment, Workplace Relations and Education Committee Legislation Committee has inquired and reported into unfair dismissal legislation no less than five times since 1999.

The Alliance considers that any relaxation of the unfair dismissal laws to exclude small business from unfair dismissal provisions will discriminate against a class of employee purely on the basis of the number of employees engaged in their workplace.

The proposal is not dissimilar in its effect to the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004 which, if enacted, will restrict the rights to redundancy payment to those persons engaged in a workplace where the workforce is over 15. In this instance, however, small business, somewhat arbitrarily, is defined as being those businesses engaging less than 20 employees. In both instances, the turnover of the business is not considered. Nor has consideration been given to the numbers of employees in related entities.

As with the Workplace Relations Amendment (Protecting Small Business Employment) Bill, the Alliance is opposed to any amendment to unfair dismissal legislation that would create a category of employees who are determined only by reference to the size of the workforce of their employer.

The proposed amendments to the unfair dismissal legislation assume that affording employees the right to remedy in the event of an unfair dismissal represents an unsustainable impost on small business that is not supported by the evidence.

The Alliance is also unconvinced that there is any compelling evidence that removing small businesses from the legislation would achieve the Government's asserted outcome, namely the creation of an additional 77,000 jobs. Rather, it is more likely that employees would be discouraged from working for small businesses as such employment would be seen as offering less security and no access to remedy in the event of an unfair dismissal.

The Alliance supports the conclusions reached by Labor Senators in March 2003, namely that whilst acknowledging "small business has particular characteristics which affect employment practice, there has never been a strong case made for the proposition that employees in the small business sector should possess fewer rights and legal safeguards than people who work in other employment sectors."[1]

As with the discussion of access to redundancy payments, the Alliance considers that the issue of unfair dismissal is not germane to the concerns of small businesses. The principal concerns of small business have, for years, been found to be little different to the preoccupations of large and medium business, "having to do with business cycles, taxation, regulations and general economic conditions."[2]

In 2002, the Employment, Workplace Relations and Education References Committee conducted an inquiry canvassing issues pertaining to small business employment. In its report, *Small Business Employment*, released in February 2003, the Committee commented that compliance with employment related regulations was perceived by some "to be a major issue for small business and the costs, complexity and uncertainty can make small business reluctant to employ."[3] However, the Committee did not recommend exemptions for small business, saying "The committee does not consider that deregulation or an exemption or 'tiered requirement' for small business is an appropriate way of addressing the problem, because it would require compromise of important public interest objectives and also lead to the development of small business as a second class employer, exacerbating its difficulties in recruiting suitable, skilled staff."[4] This is a position with which the Alliance concurs. Further, the Alliance believes that nothing has occurred since that would warrant resiling from the view expressed by the Committee in 2003. Indeed, with unemployment declining since the time the report

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[1] Report of the Employment, workplace Relations and Education Legislation Committee, Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002, March 2003, page 15.
[2] Ibid.
[3] *Small business employment*, Employment, Workplace Relations and Education References Committee, February 2003, page 134.
[4] Ibid.

was released, the labour market has become more competitive. If implemented, exemptions such as those proposed in respect of unfair dismissal are now more likely than ever to lead employees to consider small business as a second class employer.

Rather than proposing exemptions, the Committee at the time recommended (Recommendation 24) "that the Commonwealth and state and territory governments develop a range of strategies, including software tools, information materials and training programs to assist small business to identify and understand their employment-related obligations."[5]

Dealing specifically with unfair dismissal, the Committee noted that the principal concerns expressed by small business indicated "the need for greater training and support, including clear information materials, both with regards to hiring staff and the dismissal process. Information materials should be disseminated through the small business network, including industry associations, accountants, BECs and ACCs, together with information to help employers determine whether they are likely to be covered by Commonwealth or state legislation. Internet-based information also needs to be more helpful than the current Commonwealth material."[6] Again, the Committee found that access to free information materials was the solution rather than the creation of two-tier system.

Only 0.3% of small businesses in Australia experienced an unfair dismissal claim during the period 1997 to 2001.[7] Conversely, the Australian Bureau of Statistics shows that there were 3,120,000 Australians, comprising 47% of the non-agricultural private sector workforce, employed by 951,000 small businesses – businesses employing less than 20 employees – of whom 2,160,000 were employed as wage or salary earners (that is, excluding the self-employed).

If indeed there is a genuine problem with the unfair dismissal provisions, a case has yet to be made. In any event, the incidence of unfair dismissal claims by comparison with the number of Australians who will be affected by the proposed amendments is out of all proportion. The proposed amendments offend principles of ensuring all Australians are treated fairly and fly in the face of evidence that no causal link can be found between unfair dismissal claims and loss of employment opportunities.

The Alliance has not been able to find any research undertaken by the OECD or the ILO that supports this thesis.

In Australia, the Full Bench of the Federal Court, in Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589, 16 November 2001, found that "In the absence of any evidence about the matter, it seems to us the suggestion of a relationship between unfair dismissal laws and employment inhibition is unproven."

Indeed, the only evidence of which the Alliance is aware is the evidence on which the government is currently relying, namely the work commissioned by the Department of Employment, Workplace Relations and Small Business – *The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses*, by Don Harding of the Melbourne Institute of Applied Economic and Social Research, October 2002. The Alliance notes, however, that this report has now been widely discredited, its methodology flawed, and notes that despite finding unfair dismissal provisions have led to the loss of approximately 77,000 jobs, unfair dismissal provisions were not reported as having any influence whatsoever on decisions to reduce staff number by almost 90% of the respondents to the survey underpinning the research. Contradicting the reports conclusions, rather than further job losses occurring, unemployment levels have now reached an all-time now being the lowest in 28 years.

In the absence of any compelling evidence that the unfair dismissal provisions are adversely affecting unemployment in Australia, the Alliance considers that the current proposal to create two classes of Australian employees by reference to the size of their workplaces is discriminatory, will make recruitment of skilled personnel by small businesses more, rather than less, difficult and, in the interests of natural justice must be opposed.

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[5] *Small business employment*, Employment, Workplace Relations and Education References Committee, February 2003, Recommendation 24, page 135.

[6] Ibid, page 137.

[7] *Unfair dismissal fact sheet*, LMHU, February 2002, based on Australian Bureau of Statistics and Department of Employment, Workplace Relations and Small Business, available online at http://www.lhmu.org.au/lhmu/news/580.html.