SUBMISSION

BY

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE

TO

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

INQUIRY INTO THE WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

NOVEMBER 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 appreciates the opportunity to make submission to the Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*. It is noted that the terms of reference have been drafted by excluding matters from the terms of reference rather than by identifying those matters that are to be addressed.

The Alliance made submissions to the Committee in respect of its Inquiry into the *Workplace Relations Amendment (Small Business Employment Protection)* Bill 2004 and to its Inquiry into the Provisions of the *Workplace Relations Amendment (Right of Entry) Bill 2004* in February 2005. In March 2005, the Alliance also made submission to the Committee's Inquiries into Independent Contractors and Labour Hire Arrangements and into Unfair Dismissal Policy in the Small Business Sector. A copy of those submissions is attached.

Additionally, the Alliance made submission to the Workplace Relations Legal Group of the Department of Employment and Workplace Relations regarding Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements in May 2005. A copy of that submission is also attached.

Consequently, the matters raised in those earlier submissions are not reiterated herein. Rather this submission looks at the aims of the *Workplace Relations Amendment (Work Choices) Bill 2005* (the Bill).

Those aims are as follows:

"The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
(b) establishing and maintaining a simplified national system of workplace relations; and
(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and
(d) providing a foundation of key minimum standards for agreement-making while ensuring that the primary responsibility for determining matters affecting the employment relationship rests with the employer and
employees at the workplace or enterprise level; and
(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and
(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:
    (i) employee entitlements; and
    (ii) the rights and obligations of employers and employees, and their organisations; and

(g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

(h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and

(i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or
social origin; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards."[1]

This submission considers how the objectives are addressed in the Bill together with the likely impact the Bill, if enacted, will have on those persons working in the media, entertainment and arts industries.

[1] *Workplace Relations Amendment (Work Choices) Bill 2005,* Schedule 1, Section 3, pages 4-5

High employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible, fair labour market

In principle there can be no objection to introducing legislation that will foster high employment. However, the arguments that assert the Bill will deliver high employment are little more than assertions and it is difficult to see how the provisions of the Bill will deliver the stated outcomes.

At the 34th Conference of Economists held at the University of Melbourne in September this year, Professor Mark Wooden of the Melbourne Institute of Applied Economic and Social Research put it this way:

"A stated objective of the reform agenda is to provide more jobs, but then is unable to deliver any proposal that will fundamentally help the unemployed to secure employment. Removing wage setting powers from the AIRC to a new Australian Fair Pay Commission is very unlikely to make much difference. Ultimately, creating more competitive wage structures for low-wage workers without damaging the incentive to work requires a fusion of welfare, tax and labour market policies. Simply changing the way minimum and award wages are set will, on their own, make little difference."[2]

The Alliance notes that much debate in regard to the manner in which the Bill will assist in reducing unemployment has focused on the removal of unfair dismissal provisions for corporations with less than 100 employees. The Bill also allows for corporations employing more than 100 employees to be exempted from unfair dismissal provisions if they wish to terminate employment because of "operational reasons", namely for "reasons of an economic, technological, structural or similar nature". It also extends the period before which applications for unfair dismissal might be made from three months' employment to six.

Thus, the Bill may address business organisations' concerns that unfair dismissal provisions discourage employers from engaging new employees and, although the Alliance is skeptical in this regard, lead to an increase in employment. Conversely, it will make firing people without reason much easier.

The Alliance also considers the improved living standards that are promised to flow from the Bill are more likely to be a mirage.

On 19 October 2005, Ross Gittens asked "Is the route to riches justified if people are being lost along the way?"[3] Gittens pointed out the problems caused when means are confused with ends. And this Bill does just that.

The Bill allows for cashing out of meal breaks, public holidays, penalty and overtime rates (and potentially payment for hours worked in excess of 38) and two weeks of

[2] *Australia's Industrial Relations Reform Agenda*, Mark Wooden, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Invited paper presented at the 34th Conference of Economists, 26-28 September 2005, University of Melbourne, page 15, available online at http://www.melbourneinstitute.com/people/mwooden/ace05_%20ir_reform_agenda.pdf.

[3] *An efficient ride up the garden path*, Ross Gittens, Sydney Morning Herald, 19 October 2005, available online at www.smh.com.au.

annual leave. This raises the obvious concerns that have been extensively aired in the media for the very many employees who are not in a position to bargain for adequate financial recompense for so doing.

However, there are also concerns for those who might be able to secure adequate financial recompense but not necessarily want the enhanced income it might generate at the expense of their personal lives. So many employees might "have much income to gain by continuing down the road of getting rid of nine-to-five days, overtime payments, weekends and public holidays. Trouble is, doing so put means ahead of ends. It focuses on the income, forgetting why we want it. It makes us the servants of factories and offices, rather than their masters. It robs us of our humanity, taking away our leisure and making us more like robots. The thing about robots of course is that they don't have families and don't need relationships to keep them satisfied with life. Humans don't just need leisure time, they need time off work at the same time as their spouse and while their children aren't at school. That's why weekends were invented, particularly Sundays."[4]

The Bill provides for employees to be required to work reasonable overtime hours – with the quantum of "reasonable" not defined – for potentially no additional income. It also allows for their core hours to be averaged over the year. Consequently, the Bill removes certainty of working hours from employees' lives. It is difficult to see how so doing will improve quality of life, nor achieve the better balance between a person's working and personal lives as claimed in the extensive media campaign promoting the changes.

Alliance members are likely to encounter problems across the spectrum of issues raised by the Bill. Take performers as an example.

Performers – actors, puppeteers, singers, musicians, dancers – have a profile in the community that often belies their standard of living and their negotiating power.

Annually, the media – television, newspapers, radio and magazines – devotes countless thousands of words and delivers thousands of images of performers. Nicole Kidman's life is constantly under a microscope. From magazine front covers to double page fashion spreads in the tabloids, she is rarely out of the public's eye. Stories about how much performers of international stature like Nicole Kidman and Russell Crowe can command for a role in a major feature film all assist in distorting the reality of the average performer's life.

The Kidmans and Crowes are the exception. Those with enduring roles in television programs like *Home and Away*, *Neighbours* and *Blue Heelers* are the lucky ones – they have regular work and the programs on which they appear have endured for years. Many other television programs have much shorter lives, like the recently axed *The Alice*. For those who appear in guest roles in television productions or support roles in feature films, life can be tough and many working performers are living very meagrely.

[4] *An efficient ride up the garden path*, Ross Gittens, *Sydney Morning Herald*, 19 October 2005, available online at www.smh.com.au.

That this is the case, however, is not really surprising. As a profession, actors are chronically and systemically underemployed. At any point in time over 90% of Australia's professional actors will not be working in their chosen profession. This is a situation faced by actors the world over. Unemployment amongst performers is structural in any country which seeks to have a vibrant entertainment industry.

To cast productions – film, television or performing arts – producers are reliant on a large pool of talented professional performers, available to commence work often at very short notice or conversely able to keep themselves available for a time months into the future. It is not uncommon for television productions to cast smaller roles one or two days before the artist is required to commence work. The same is true of television commercials. Major commercial musical theatre productions typically cast months in advance of the performers commencing work. For feature films, the key cast member whose engagement is crucial to securing finance might be secured with very tentative dates in the future (and obviously dependent on finance being secured). Other performers will typically be cast during the preproduction period – some may be cast and contracted months before they commence work, others days before they commence work.

On an Australian feature film, it is rare for more than four actors to be engaged for the duration of the filming schedule. It is also rare for a feature film schedule to exceed twelve weeks. Average Australian feature films have schedules of seven to eight weeks. An actor with a substantial supporting role may have only five days work on such a film. Those five days might be spread evenly across an eight-week schedule and obviously that actor must keep themselves available for those particular days of employment. Actors in minor roles may have as little as one day's work. Further, contracted dates often vary in response to changed circumstances that necessitate variations to the production schedule – for instance, weather conditions often prompt schedule changes.

Actors working in the live performing arts, as distinct from recorded media, are more likely to be contracted for a number of weeks and engaged by the week. Singers, on the other hand, are likely to be hired for a single performance.

A small handful of companies are able to offer full time employment to performers – The Australian Ballet, Opera Australia, the state orchestras, Sydney Dance Company. Otherwise work for performers in Australia is a fragile uncertain existence in a freelance industry.

An employment opportunity snapshot

Major musical theatre productions

Lion King auditioned approximately 4,000 people for 52 roles.
Some cast members were aware they were under active consideration for a role six months before auditions were complete and offers made.
Offers were made to all cast in February 2003. Rehearsals commenced in September 2003.
The production ran for more than 18 months in Sydney and is now running in Melbourne.

Performers for *Lion King* need to be able to act and sing particularly difficult vocal registers and be of a specific physical build, many need to be able to work with animatronics puppetry and many roles are ethnically specific, namely African. The casting requirements for *Lion King* were so prescribed that the audition period was longer than is the case for most major musical theatre productions. Performers auditioned for the Australian production in Australia, the Philippines, the United Kingdom, the United States, South Africa and in many Caribbean countries.

Typically, musical theatre productions cast and make offers approximately six months prior to the performers commencing work.

Rent auditioned approximately 3,000 people for 21 roles, 8 of whom were African American and others were Latino. All roles were for people aged under 30.

Showboat auditioned approximately 3,000 people for 64 roles of which 8 were child roles and 24 were roles for African Americans.

Theatre Companies with a Subscription Season

Companies with a subscription season will typically cast one or two performers in each of the productions that will form part of their subscription season between six and 18 months ahead in order that the key cast can be announced in their publicity and booking brochure. Typically, those performers will receive a three-month contract. The balance of the casting will be undertaken two months before the performers commence work, again typically a three-month contract. Cast sizes will vary but typically state theatre companies, like the Sydney Theatre Company, will mount productions with an average of eight cast members.

The characteristics of the entertainment industry mean that performers are often unemployed or underemployed, circumstances reflected by their income.

Table 1: Median Earned Incomes of Artists 2000-01 ($)

	Creative income	Total arts income	Total income
Actors & Directors	10,500	18,400	32,000
Dancers & Choreographers	12,900	23,600	26,000
Musicians & Singers	10,500	20,000	35,800

[5] *Don't Give Up Your Day Job – An Economic Study of Professional Artists in Australia*, David Throsby and Virginia Hollister, 2003, to be published by the Australia Council during 2003

Given a median income of $32,000 for all sources of income, clearly many performers are earning considerably less annually while on the other hand others are doing better. Given that some few performers annually earn amounts in excess of $100,000, and an even fewer number are able to earn in excess of $200,000 annually, the reality for the majority becomes evident.

Whilst median incomes are possibly a better reflection of the position for many performers, mean incomes show the impact of the higher earning performers.

Table 2 sets out mean income for performers and also shows income trends between 1986-87 and 2000-01. Whilst income from arts-related work spiralled downwards between 1986-87 and 1991-92 by 2000-01 it had recovered to 1986-87 levels. The reversal is likely to be due to enhanced minimum rates of pay that were achieved in the early nineties together with a dramatic increase in offshore film and television productions utilising Australia as a location.

Table 2: Trends in Artists' Mean Earned Incomes 1986-87 to 2000-01 ($ thousand per annum at constant 2000-01 prices)

	Income from all arts work			Total income (from all arts and all non-arts work)		
	1986-87	1992-93	2000-01	1986-87	1992-93	2000-01
Actors & Directors*	27.7	15.4	27.4	35.7	23.4	41.7
Dancers & Choreographers*			23.9			26.9
Musicians & Singers	24.0	24.0	27.6	34.5	32.3	41.1

* Note: Results for actors and dancers were combined in the 1986-87 and 1992-93 surveys.

Whilst it is often assumed that acting requires no financial outlay on the part of the performer, this is not the case as Table 3 demonstrates. Performers in live theatre, for instance, are generally required to provide their own stage makeup, musicians their own musical instruments. Further, to remain an employable performer takes on-going work and practice that requires classes in anything from pilates to music lessons, voice classes, singing lessons and the like. Expenses of the quantum set out in Table 3, whilst not large by comparison with some other enterprises, are a considerable impost when the median and mean gross income levels set out in Tables 1 and 2 and taken into account.

[6] *Don't Give Up Your Day Job – An Economic Study of Professional Artists in Australia*, David Throsby and Virginia Hollister, 2003, to be published by the Australia Council

Expenses Incurred in Art Practice 2000-01 ($)

	Mean	Median
Actors and Directors	6,400	4,100
Dancers and Choreographers	5,000	3,800
Musicians and Singers	7,300	3,500

Dancers, as can be seen from the above statistics, are in a particularly acute position. With a median income of only $26,000, they also face an almost certain need to change careers in their early thirties, having trained for the one career since childhood. At the time when most people in the community have established their careers and are contemplating acquiring a home or starting a family, dancers, from a disastrously low income base, will need to leave the profession and retrain with no capital base to underpin a career shift necessitated by age.

It is those performers, dancers and singers, at the bottom end of the income range for whom the Alliance is most concerned. Without their commitment to the arts and entertainment industries, those industries could not mount the live theatre, music, film and television productions that Australian audiences take as part of their cultural entitlement and that Australian governments have consistently supported for social and cultural policy reasons.

They are the most vulnerable when it comes to negotiating for the very reason that every employment opportunity is so valuable and the competition for jobs is unequalled in any other profession.

And performers do not enjoy the family friendly working hours many others at present take for granted. The performing arts requires performers to work at times when most of the community is not at work – performances are most appreciated by the general community during their normal leisure hours. Hence performers are working in the evenings and on weekends. They have already traded many of the things held most dear by the majority of the population – evenings and the weekend quarantined for family and friends. Combined with low annual incomes, the need for penalty rates to apply for Sunday performances is highly valued.

The Alliance considers that the Bill has not adequately addressed the diverse working arrangements that exist in Australia. It certainly does not reflect the flexibility of working arrangements already in place in the entertainment industry. Nor does it adequately recognise the fact that many in the community, including particularly performers, have very limited bargaining power.

[7] Ibid

By contrast with the circumstances of performers outlined above, the experience of film technicians offer another example of diversity of workplace practice.

Feature film production is reliant on a casual workforce. Film crews augment their income from working on feature films with work typically on television commercials, another sector reliant almost exclusively on a freelance workforce. As indicated above, Australian feature films have a shooting schedule that is typically between seven and twelve weeks. Large offshore feature films, on the other hand, may film for as long as six months. Television commercials offer work that can be for as little as four hours to an engagement numbering three or four days.

Until the early 1980s, feature film crews worked six day weeks, a scheduled day being ten hours with hours additional to ten worked when necessary. Dependent on script requirements, filming can be during daylight hours or at night. Filming often takes crews away from home for part or all of the shoot period. In the early 1980s, in search of a more balanced life, technicians negotiated with producers to restrict filming in cities of residence to five day weeks. Sceptics argued that the resultant extending shoot period would make filming in Australia uneconomic. However, the change to practice was adopted quickly and unproblematically. Productivity increased and safety improved.

When American film and television productions turned to Australia as an economic place to film in the latter half of the 1990s, they sought to import American practice – six day weeks comprising days of twelve hours (exclusive of meal breaks) with additional hours to be worked when required. Faced with threats that production would go elsewhere, some initially worked 'American' hours. Concerned about the well-being of exhausted technicians and unacceptable risks to safety occasioned usually by fatigue, the Alliance sought to wind back hours. Today, American productions work five day weeks in the city of residence of the majority of the crew and work twelve hours day inclusive of meal breaks.

Like performers, technicians are in a vulnerable negotiating position. Working in a freelance industry, every job is valuable as it cannot be known when the next one might come along. Consequently, technicians are best protected when all they need negotiate is their weekly above award/agreement rate, all other terms and conditions being covered in agreements and awards negotiated by the union. Crucially, it ensures that all technicians (and performers) are treated equally with respect to basic provisions like overtime rates, meal breaks, breaks between shifts, living away from home allowances, travel away from home provisions, and so on.

Performers need the protections provided by collective agreements in respect of circumstances not encountered in most other industries – for instance the right to not perform nude and the right to not smoke when performing.

Freelance journalists, like freelance technicians, undertake employment that can be very short in duration. Their employment can be remunerated in a number of ways other than by reference to hours worked – for instance, by the number of words in an edited article or by payment only if a photograph or completed article is accepted for publication.

Like technicians and performers, journalists often work hours that are anything but family friendly. Reporting on the news is not a nine-to-five matter. Journalists and photographers need to be where the stories are when they are happening. Radio journalists can be at work from 5am or anytime after. Newsprint and recorded media journalists can be required to work anywhere a story is breaking, be it Canberra during the firestorm or flying to Aceh on Boxing Day.

Underlying agreements and awards that address the full range of industry specific circumstances that might arise during the course of the engagement are essential safeguards for people whose employment comprises a series of short term engagements.

Additionally, the Alliance has a diverse membership comprising cinema workers, basketball players, outdoor recreation ground workers and many others whose employment is casual or atypical. Together, our membership constitutes what arguably must be one of the most flexible labour markets in the country with employees who for the most part have little bargaining power other than collectively.

What the Bill does not offer is the likelihood that the concept of fairness in the labour market will continue.

A simplified national system of workplace relations

The move to a national system of workplace relations is a sharp reversal of the trend of the past couple of decades during which the direction of industrial relations reform has been towards diversity. The benefits for many employers must also be doubtful. Few employers work within both the state and federal systems. Most small businesses operate within the state system and it is arguable whether dealing with the greater complexity of the federal system will be seen as an improvement. The number of businesses affected by multiple jurisdictions as a proportion of the number of businesses in Australia is undoubtedly quite small and typically they are large and well resourced.

This, however, is not true in the entertainment industry where businesses often work across jurisdictions. Typically, the complexities confronting entertainment businesses working in more than one jurisdiction are not to be found in industrial relations. Rather they relate to state based licensing and registration regimes, state based workers compensation systems and differing legislative approaches to matters as diverse as the employment of children and passive smoking and, notwithstanding the federal government's initiatives in pursuing uniform legislation, firearms and weapons legislation.

An economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act

As indicated above, working practices in the media entertainment and arts sectors are diverse.

Working hours vary dramatically. Work days can often be long with additional hours required to be worked at the end of the working day with little or no notice. Work

hours can vary from day to day and from week to week. Work can often be undertaken away from home – requiring overnight stays away from home or absences from home for weeks or months. The location where work is undertaken can vary from day to day and can require travel at hours when public transport is not available.

Such work practices impose costs for the employees, not the least being the manner in which provision for children is made.

The safety net of minimum wages and conditions does not in any way reflect the costs that might incurred in the course of securing income – costs that are not covered by the employer and not tax deductible such as child care and journey to and from work in the city of residence.

The arts and entertainment sectors require a workforce that comprises the highly skilled to persons with minimal skills – such as drivers and labourers. The level of skill does not determine the hours worked, the need to reach work locations at hours when public transport is not available nor the need to work away from home. Yet the safety net proposed in the Bill would in no way be adequate to enable a person to absorb necessary work-related costs. Indeed, the safety net proposed appears to assume a person undertaking a low skilled position during normal working hours in a location served by public transport. It does not take account of the diversity of working arrangements currently in place.

A foundation of key minimum standards for agreement-making while ensuring that the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level

Collective agreements and awards have provided the media entertainment and arts sectors with the means to offer fair and equal terms and conditions for employees whose work is predominantly freelance in nature in industries that are highly differentiated and individual.

Collective agreements also offer employers certainty regarding those terms and conditions. Many employers in these sectors need to raise finance ahead of securing personnel, to budget at a time when the terms and conditions under which they will engage personnel are not known in the absence of enterprise agreements or awards. The benefits of collective agreements and awards flow in both directions – certainty for employers and security for employees.

Australian Workplace Agreements (AWAs) assume a stable permanent workplace. They further assume corporations of sufficient size to retain permanent human resources departments. This is not a paradigm that applies to the majority of employers in the media entertainment and arts sectors. Most companies are simply not resourced to undertake individual negotiations – other than the threshold issue of over award/agreement weekly/daily rate of pay.

Crucially, rather than allowing the primary responsibility for determining matters affecting the employment relationship to rest with the employer and employees at the workplace or enterprise level, the Bill identifies “prohibited content” – matters that at

law are not allowed to be negotiated between the employer and employee and incorporated in workplace agreements. The Bill defines prohibited content: "The regulations may specify matters that are prohibited content for the purposes of this Act." Thus, at any time, the Government may introduce regulations that determine what matters constitute prohibited content. Effectively, the Minister has the right to introduce regulations prohibiting whatever he sees fit.

These provisions have the effect of placing the Government in the negotiations between employer and employee. It is difficult to see how such provisions will simplify industrial relations for employers. Uncertainty is the more likely result.

The provisions of the Bill do not improve on what currently exists. They add, rather than remove, layers of complexity and uncertainty.

Enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances

The Prime Minister and the Minister for Workplace Relations have consistently argued that one of the benefits of the Bill will be enhanced choice, particularly for Australian workers, for instance 'the choice to remain under the existing award system or entering into workplace agreements'. As Professor Mark Wooden noted, "Surely this is not much of a choice given the Government intends to continue to undermine awards, both through further restriction on the types of matters that can be considered in awards, and through the abolition of the no disadvantage test."[8]

Wooden went on to say, "it is not at all clear that the reform agenda is one which is particularly interested in promoting collective agreements. The Government has been concerned with the low level of coverage by AWAs and thus intends drafting legislation to encourage further interest in them by employers. But what if AWAs are not desired by workers? Currently, there do not appear to be measures that ensure that workers have the ability to choose between individual agreements and collective agreements. If the aim is to provide employees with real choices, then I am on Greg Combet's side – the right to bargain collectively needs to be protected. Further, the Government should have a vested interest in ensuring collective bargaining continues to flourish if it believes, as it is stated so often in the past, that enterprise bargaining has been fundamental to the productivity gains of the 1990s."[9]

The Alliance agrees with Professor Wooden. However, if as seems to be thrust of the Bill, the Government wishes to see a greater take-up of AWAs, the other question that needs to be posed is whether AWAs are attractive to employers. Given the low level of AWAs currently in place, the answer appears to be no. Forcing employers down a path they have demonstrated to be of little efficacy appears at best counterproductive.

---

[8] *Australia's Industrial Relations Reform Agenda*, Mark Wooden, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Invited paper presented at the 34th Conference of Economists, 26-28 September 2005, University of Melbourne, page 16, available online at http://www.melbourneinstitute.com/people/mwooden/ace05_%20ir_reform_agenda.pdf

[9] *Australia's Industrial Relations Reform Agenda*, Mark Wooden, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, Invited paper presented at the 34th Conference of Economists, 26-28 September 2005, University of Melbourne, page 16, available online at http://www.melbourneinstitute.com/people/mwooden/ace05_%20ir_reform_agenda.pdf.

Just what choice might mean for employees was articulated by the Minister for Workplace Relations on 23 October 2005 discussing the strike at Boeing at its Williamtown site on the ABC's Background Briefing, *Testing Industrial Relations*.

Workers at the Boeing Williamtown site near Newcastle have been on strike for almost 5 months. They're on individual contracts, and most have never been in a union before. Now they want the Industrial Relations Commission to authorise a secret ballot on the right to have a collective agreement. It's never been tried before, it's risky – and the obstacles are formidable.

Kevin Andrews: Well the nature of agreement is what the word suggests, it's an agreement. It's an agreement by both the employers and the employees. And in this case, if the employer doesn't wish to have a collective agreement, wants to continue essentially what are individual common-law arrangements, then the employer is entitled to do that, there's no change in what we're proposing from what the current situation is.

…….

Tom Morton: To go back to the Boeing dispute, when I went to talk to some of the workers on the picket line at Williamtown, they said to me, 'Most of us haven't been members of unions before, we didn't want to bring the union in. We tried for a year to negotiate with Boeing before we decided to bring the union in. Most of us could be better paid, we'd have no difficulty getting work elsewhere in the region, there's plenty of demand for the work we do, but we want to work on the F-18 jets here. All we want to do is to be given transparency by the company about what our terms and conditions of employment are, and that involves for us now seeking a collective agreement with the company.' Isn't that a justifiable aspiration?

Kevin Andrews: Look I understand what they're saying, but the reality is in the words, their words, which are used. 'There are other jobs we can go to if we don't like working on this job', but they're making a choice that they want to work on this particular job; the company is saying 'Well, working on this particular job involves this particular instrument of employment. We're happy to have you'. But the choice ultimately is theirs, and I mean here's a group of workers, as you say, can quite easily find another job.

Tom Morton: So effectively what you're saying is if workers want a collective agreement with an employer, the employer says 'No, we don't want to negotiate with them", they should get on their bikes'.

Kevin Andrews: What I'm saying is an agreement is an agreement, which means that both parties have to agree to it.[10]

In short, according to the Minister, choice will mean the choice to accept what the employer offers.

[10] Transcript, *Testing Industrial Relations*, Background Briefing, ABC, 23 October 2005,available online at www.abc.net.au.

The fact that Australian employees do not currently have an enforceable right to elect to work under a collective agreement if a majority of employees so decide is deplorable and in contravention of Australia's international obligations. The Government's advertising has suggested that the new Bill will enhance choice. However, the reverse is true. Not only will employees not have the right to work under the provisions of a collective agreement, the new Bill offers a future where the employee will be left to negotiate alone and where the choice is reduced to accepting or refusing a job.

And curiously, the Bill appears to be imposing a desire to see more employers adopt AWAs than is currently the case. It thus appears that choice is being restricted rather than enhanced for employers as well as employees.

Ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of employee entitlements and the rights and obligations of employers and employees, and their organisations

The current industrial relations framework allows for enforcement and the Alliance considers the greatly eroded opportunities for enforcement of rights on the part of employees and the need for employees to seek civil remedies is taking industrial relations back a hundred years.

It has long been acknowledged that providing advance notice and detailed information to an employer regarding a suspected breach may result in the destruction, concealment or alteration of relevant evidence. The Bill acknowledges the fact in its provisions allowing the Registrar to issue exemption certificates in the respect of the entry onto premises.

However, rather than recognise the problem at the outset, the Bill provides for it to be addressed only through an administratively complex mechanism by way of seeking specific exemption. How it might be proven that an employer is likely to do something in the future is a matter unanswered in the Bill. It is consequently likely that few exemptions will be granted and employees disadvantaged in the process, their only realistic redress being the costly one of fighting a case in the courts after evidence has been destroyed.

The operation of right of entry provisions in the Bill are also subject to clarification and potentially the introduction of additional restrictions notified by way of regulation.

It is difficult to see how these provisions balance the rights of employees with those of their employers.

Ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level

Rather than providing an effective safety net, the Bill provides for a bare minimum of conditions: a minimum wage, four weeks annual paid leave that can be cashed out to two weeks, twelve months' unpaid parental leave; personal/carer's leave and 38 hour ordinary time a week that can be averaged over twelve months.

Without the certainty of overtime penalties, with an expectation that employees will work reasonable hour of overtime and with the averaging provisions, these minimum safety net entitlements introduce the greatest level of uncertainty regarding working hours the Australian workforce has seen for decades. It may offer flexibility for employers but presents a spectre of considerable uncertainty for employees. It is difficult to see how these minimum provisions can be seen to be family friendly.

Supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes

The model dispute resolution provisions introduce the potential for the opposite. Given the Commission, in most circumstances, has no power to arbitrate, the likely outcome of following the model dispute resolution provisions will be a stalemate. The party with least negotiating power and the least capacity to take a matter to a civil hearing will be the employee. At this point, the choice offered for employees becomes clear – it is a choice of take it or leave it.

Ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association

The Alliance is concerned that the enforcement provisions in Part XA of the Bill reverse the onus of proof. Specifically, the Bill provides that:

"If:

(a) in an application under section 268 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and

(b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part; it is presumed in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise."

Assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; Respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin

The underlying proposition in this Bill is that employees and employers have equal bargaining power. This is manifestly not the case. Whilst those employees at senior management level or in with skills in short supply might have equal bargaining power, this is not the case for most Australians in the workforce.

It is spurious to assert that individual agreements and AWAs will enable employees to balance their work and family responsibilities within a framework where only five conditions are guaranteed and only a total of 18 (including the five allowable within awards) can be negotiated and where future regulation will determine what constitutes prohibited content.

As is noted in the Bill matters dealing with discrimination are in any event dealt with under other legislation. What distinguishes this Bill is that it removes the possibility of treating such matters as industrial relations matters capable of being arbitrated within the industrial relations arena, forcing employees to seek a more costly route in the event of breach by the employer of their obligations.

Assisting in giving effect to Australia's international obligations in relation to labour standards.

International Declaration on Fundamental Principles and Rights at Work
86th Session, Geneva, June 1998

The International Labour Conference …

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

Australia ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949, on 28 February 1973.

The Bill restricts employees' right to collectively bargain to those circumstances where the employer is amenable. Rather than assist in giving effect to Australia's

international obligations, the Bill specifically provides for circumstances wherein they can be avoided.

SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

WORKPLACE RELATIONS LEGAL GROUP
DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

REGARDING

PROPOSALS FOR LEGISLATIVE REFORMS IN INDEPENDENT CONTRACTING AND LABOUR HIRE ARRANGEMENTS

MAY 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 appreciates the opportunity to make comment on the proposals for legislative reforms in independent contracting and labour hire arrangements.

As the Department of Employment and Workplace Relations is aware, the Standing Committee on Employment, Workplace Relations and Workforce Participation (Standing Committee) is currently conducting an inquiry into independent contractors and labour hire arrangements. A copy of the submission made by the Alliance to that inquiry is attached.

Definition of independent contractors and employees

The Alliance supports the retention of the common law definitions of employee and independent contractor. Reservations about uncertainty are noted. However, common law has the single advantage of assessing relationships on the facts. Introducing specific definitions may appear to deliver certainty but will inevitably deliver unfair outcomes as employment arrangements vary significantly.

As noted in the submission the Alliance made to the Standing Committee, since the introduction of the Goods and Services Tax (GST) and the Australian Business Numbers (ABN), employees members of the Alliance have experienced increasing pressure to be engaged as independent contractors notwithstanding the fact that the nature of employment arrangements is unchanged.

Many members working in entertainment industry - film, television, live performance - have been advised that a job offer will not be forthcoming unless an ABN is supplied. This is particularly the case where employment offers are short term, for instance, a one day engagement for an actor of technician in respect of a television commercial, or a one night engagement for a musician or singer to perform in a club.

The Alliance recently surveyed our freelance journalist members and found that many were engaged as independent contractors, notwithstanding the journalists were of the view that the arrangements under which they were working were those of an employment relationship. Most were engaged by no more than two employers in any year and often for employers where the companies were related. The vast majority of members in such circumstances expressed a preference to being treated as employees and not as independent contractors. The most common reason advanced by employers for why they considered it appropriate to treat freelance journalists as independent contractors was that they were purchasing intellectual property and consequently the relationship was a contract for service rather than of service. It is worth noting that employed journalists enjoy split rights under section 35(iv) of the Copyright Act.

In *Zuijs v. Wirth Bros Pty Ltd*,[11] the court made clear that highly skilled workers may nonetheless be employees notwithstanding the fact that the employer is not sufficiently competent to direct all aspects of the work being undertaken. The case concerned a trapeze artist in a circus who sustained an injury from a fall. “Obviously the circus proprietors did have and could have no say in the precise timing and performance of the act, which, indeed, had been devised by the performers

[11] (1955) 93 C.L.R. 561.

themselves. They had been engaged as a team after demonstrating their routine to the circus management. The court found that the injured man was employed under a contract of service and was therefore entitled to workers' compensation. The judgment makes clear that:

> ' … a false criterion is involved in the view that if, because the work to be done involves the exercise of a particular art or special skill or individual judgment or action, the other party could not in fact control or interfere in its performance, that shows it is not a contract of service but an independent contract … The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.'"[12]

The judgment continued:

> "There are countless examples of highly specialised functions in modern life that must as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified. But those engaged to perform the functions may nevertheless work under a contract of service. The fact that the performance of a task depends on a natural gift or on some laboriously acquired accomplishment does not necessarily mean that the performer cannot be a servant. It is only in the most mechanical of operations that anyone can dictate absolutely the mode of performance. The nature of the task is not conclusive. An artisan may be an independent contractor while the most highly skilled technician is a servant. A skilled craftsman may have highly individual gifts and yet be under a contract of service. His value as a servant lies in his individuality and he frequently is employed just because he can exercise specialised skill which the employer of such a servant can direct the objective to which the servant's skill is to be addressed but he is powerless to control the manner in which the servant's skill is exercised."[13]

The decision has since been codified in the *Superannuation Guarantee (Administration) Act 1992* (Section 12 – a copy is appended to the Alliance submission to the Standing Committee, attached to this submission).

If the Department is mindful of adding certainty to the common law definition of employee, consideration could be given to codification in a similar manner in the *Workplace Relations Act 1996.*

The Alliance notes the proposal to introduce civil penalty provisions in the *Workplace Relations Act 1996* applying to hirers who deliberately attempt to avoid employer

[12] (1955) 93 C.L.R. 561 at 571 cited in *The Law of Employment*, James J. Macken, Greg McCarry and Carolyn Sappideen, The Law Book Company Limited, pages 12 and 13.
[13] (1955) 93 C.L.R. 561 at 571-572 cited in *The Law of Employment*, James J. Macken, Greg McCarry and Carolyn Sappideen, The Law Book Company Limited, 1990, page 13.

responsibilities by seeking to establish a false independent contracting arrangement. The Alliance supports this proposal.

Labour hire agencies

As noted in the submission the Alliance made to the Standing Committee, the Alliance supports the proposal that labour hire agencies be deemed to be the employer of labour hire workers regardless of whether the worker is engaged under a contract of service, save only where there is a direct employment contract between the labour hire worker and the host employer.

However, also as noted in the submission to the Standing Committee, the Alliance is most concerned that agencies other than labour hire agencies are not captured in any definition that might be developed in respect of labour hire agencies.

Actors, musicians, directors, designers and technicians are often represented by agents. In New South Wales agents are registered under the Entertainment Industry Act. Cinematographers, designers and technicians are also often registered with answering services, sometimes known as booking agencies. Agents, booking agents and answering services are not labour hire companies. Agents represent their clients, recommend them for positions/roles, negotiate above award rates of pay and terms and conditions of employment and act as the communication point for their clients. Effectively agents and booking/answering services act on behalf of their clients. The employment arrangement is then between the employer and the agent's client. Answering services do not negotiate on behalf of their clients.

The Alliance supports the proposal that labour hire agencies be regulated to ensure high standards are met by all players.

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.

SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY
WORKPLACE RELATIONS AMENDMENT (SMALL BUSINESS EMPLOYMENT PROTECTION) BILL 2004

FEBRUARY 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 (Alliance) welcomes the opportunity to make comment on the Workplace Relations Amendment (Protecting Small Business Employment) Bill 2004.

The Alliance is opposed to the Bill as it creates a category of employees who are determined only with reference to the size of the workforce of their employer. Importantly, the Bill assumes that small businesses do not have the capacity to meet redundancy obligations in the event such obligations arise, despite the fact that the evidence does not exist to support the premise.

The Bill will overturn the decision of the Australian Industrial Relations Commission (AIRC) in the Redundancy Case. That Case dealt comprehensively with the issues and the evidence and found that the argument that small businesses did not have the financial capacity to pay could not be supported.

In the Redundancy Case, the Commonwealth argued that small business is less able to bear the costs of redundancy payments than larger businesses, that to impose this obligation on small business would influence the hiring behaviour of small business, and adversely impact on the ability of small business to adapt to changing levels of demand, to the business cycle and to technological change.

The AIRC found that "the available evidence does not support the general proposition that small business has a relative lack of financial resilience and has less ability to bear the costs of severance pay than larger businesses. We accept that this is true of some small businesses, but the evidence falls well short of establishing, as a general proposition, that small business does not have the capacity to pay severance pay. Three considerations support our conclusion. The first is that small business is generally profitable. The second is that some small businesses make severance payments despite the absence of a legal liability to do so. A third consideration is the absence of evidence from those jurisdictions where the small business exemption does not exist, or in those industry sectors where it has been removed from the relevant federal award, that small business is less profitable or more likely to fail."[14]

The AIRC found that a large proportion, about 70 per cent, of small businesses are profitable, that "some 70 per cent of small businesses which reduced employment still made a profit" and found "a pattern of profitability amongst small businesses, regardless of whether the number of persons they employ is increasing, decreasing or static."[15]

The AIRC found that ABS data on small businesses decreasing employment but still profitable to be consistent with the findings of Bickerdyke, Lattimore and Madge in *Business Failure and Change: An Australian Perspective*, a Productivity Commission Staff Research Paper, published in 2000. That paper found that "while small business accounts for more than 97.5 per cent of all business exits, the single greatest reason for business exit is realising a profit … of the 7.5 per cent of businesses which exit in any year, only 0.5 per cent do so for reasons of bankruptcy or insolvency … [and] …

[14] Australian Industrial Relations Commission, PRO32004, pages 59 and 60.
[15] Ibid, page 61.

many business exits are anticipated years before they actually occur allowing for adjustment and a reduction of the costs of exiting."[16]

Thus given the matter has been so recently and comprehensively considered by the AIRC and a case for redundancy payments creating an unreasonable impost on small business not found, the Alliance can see no reason for implementing such a change in the absence of evidence to justify such a change.

Further, the proposed changes are arbitrary. By setting the threshold at a business engaging 15 persons is to assume a similarity between businesses that does not exist in reality. To assume that a business engaging 14 persons is fundamentally different from one that engages 16 cannot be substantiated. Similarly, assuming that a business engaging 14 persons is less profitable than one engaging 16 is equally arbitrary. The number of employees is only one indicator of business size and financial capacity. Just as the determination that small businesses are those that employ less than 15 employees is arbitrary, so will the impact on employees be arbitrary.

The Bill also assumes that small businesses have a stable workforce whereas this is not necessarily the case. A film or television production company or live theatre company may have a workforce of between two and twenty and then gear up for a particular production. For instance, a television production company may have a workforce of ten and then commence filming a program taking on a further 50 or more employees for the duration of production and then during postproduction winding back to approximately twenty and back to ten during the marketing and distribution of the program and the development and financing of the next. The cycle would then recommence. In such circumstances, the long term staff would be reliant upon when a redundancy occurred to be entitled to compensation. This may well be an unintended consequence of the Bill but it will be a consequence that is in effect arbitrary for the persons who may be made redundant during the development or marketing phase of a production.

The impact on a person made redundant is just as devastating for a worker employed in a workforce of less than 15 as it is for a worker from a workforce of more than 15. Indeed, in the AIRC case no evidence was submitted to the contrary.

The Alliance considers that poor policy is policy that is not based on evidence. The evidence that the requirement for all constitutional corporations to make redundancy payments to eligible employees is an unjustified impost on small business does not exist. Consequently, the decision of the AIRC should stand.

Small businesses do often struggle compared with larger companies that are better resourced to stay abreast of changes in regulation, comply with reporting requirements and so on. The burden of regulatory compliance often falls to the principals within small business detracting them from their core business. Redundancy occurs irregularly and rarely and often not ever in the life of any small business. Conversely, the red tape associated with compliance with such matters as fringe benefits tax, payroll tax, licensing regimes and so can consume considerable

[16] Ibid, page 61.

number of hours of work that do impact more onerously on small business than is the case with compliance by large companies.

The Alliance does not consider that the Bill will assist the viability of small business in any meaningful way at all but it will discriminate against those employees who work for constitutional corporations with less than 15 dependent employees.

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."[17]

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

[17] 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.

to the preoccupations of large and medium business, "having to do with business cycles, taxation, regulations and general economic conditions."[18]

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."[19] 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."[20] 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 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."[21]

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."[22] 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.[23] Conversely, the Australian Bureau of Statistics

[18] Ibid.
[19] *Small business employment*, Employment, Workplace Relations and Education References Committee, February 2003, page 134.
[20] Ibid.
[21] *Small business employment*, Employment, Workplace Relations and Education References Committee, February 2003, Recommendation 24, page 135.
[22] Ibid, page 137.
[23] *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.

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.

SUPPLEMENTARY 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 made submission to this inquiry into unfair dismissal provisions for small business.

The Alliance hopes the Committee will allow us the opportunity to make additional comment.

The Alliance does not, as set out in our earlier submission, support the establishment of two classes of employee based on the size of the workforce of their employer. However, in the event the legislation is amended, the manner in which the term small business is defined will be crucial.

The Alliance represents many people in the entertainment industry who work for differing sized employers. Importantly, the size of the business may also vary dramatically during the course of a production.

For instance, a film production or television series may start with as few as two people. During early pre-production the number of employees may rise to a handful and increase with the commencement of what is known as official pre-production to between five and ten persons rising through the course of preproduction to anywhere upwards of 40 employees. During production the number of employees will increase further and vary from day to day depending on the requirements of the individual production as new scenes are filmed each day. During postproduction the number of employees will reduce as production personnel finish their engagement and postproduction personnel are engaged to augment the picture editing crew. During part of the postproduction period, the number of employees may be as few as two and at other times it might be ten or more.

In live theatre, the numbers of employees might be steady at between two to ten depending on the size of the company with the numbers increasing during rehearsal periods, set construction and then levelling out during performance periods.

For some major companies, for instance, Cirque du Soleil, the numbers of employees can range from five to 400 depending on the phase of production.

It is therefore important to our members how small business is defined as currently the proposal is to define small business as one employing less than 20 people. For our members, it would indeed be unfortunate if an unfair dismissal claim could be denied simply because on the week the subject of the dismissal the production had reached a point wherein the number of employees fell below 20 when a matter of a week or more earlier the number of employees might have dramatically exceeded 20.

Further, it is important that when accepting an engagement employees have certainty about their future rights. The Alliance considers it would be unreasonable that a right assumed at the time of accepting and commencing employment could be withdrawn solely because the size of the workforce drops below 20.

The Alliance hopes that the Committee will take the above comments into consideration during its deliberations.