SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

HOUSE OF REPRESENTATIVES STANDING COMMITTEE

ON

EMPLOYMENT AND WORKPLACE RELATIONS

INQUIRY INTO ASPECTS OF AUSTRALIAN WORKERS' COMPENSATION

AUGUST 2002

Established in 1992 following the amalgamation of the Australian Journalists Association, Actors Equity and the Australian Theatrical and Amusement Employees Association (ATAEA), the Media Entertainment and Arts Alliance (the Alliance) is the industrial and professional organisation representing the people who work in Australia's media, entertainment and arts industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians, and technicians working in the film, television, arts and entertainment industries.

INTRODUCTION

The Media Entertainment and Arts Alliance welcomes the opportunity to make submission to this Inquiry.

The inadequacy of access to data, the inadequacy of available data and the fact data is collected differently in different jurisdictions means that the Alliance is not in a position to provide a

comprehensive response to the terms of reference. However, in the past few years a number of reviews have been undertaken by state governments that will provide useful background for the Committee and it is not the intention of the Alliance to summarise those findings in this submission. All reviews – including those in New South Wales, Victoria and Queensland – support the Alliance's position that while employee fraud is minimal, employer fraud is considerable and rarely prosecuted.

The Alliance is also, again largely because of the availability of data, unable to provide the analysis the inquiry is seeking in reference to the reasons behind differing safety profiles between different industries. However, it is evident that differing safety profiles are inevitable given the differing levels of risk between industry sectors. Furthermore, although the New South Wales Occupational Health and Safety Act 2000 "was designed to protect against human errors including inadvertence, inattention, haste and even foolish disregard of personal safety", accidents do occur even in sectors where hazards can be effectively eliminated or controlled.

In New South Wales the occupational health and safety and workers compensation legislation has been recently amended. The *Occupational Health and Safety Act* 2000 and *Occupational Health and Safety Regulation* 2001 give New South Wales the best legislative framework for occupational health and safety of any Australian state or territory. Arguably, it is the best legislative framework anywhere in the world. Whilst the Alliance has many concerns regarding recent amendments to the workers compensation scheme in New South Wales, it nonetheless provides comprehensive coverage for workers, superior in that regard to the legislation in several other jurisdictions. The Alliance is therefore concerned that this or any other Inquiry currently underway or anticipated in the near future might result in an erosion of the provisions of the New South Wales legislation.

Finally, the Alliance regrets that the terms of reference do not include an examination of interjurisdictional coverage. Until such time as state and federal workers compensation legislation is harmonised, workers will continue to face circumstances where, through no fault of their own nor, often, of their employers, they are not covered by a workers compensation policy.

INCIDENCE OF FRAUD AND NON-COMPLIANCE

Employee fraud

The Alliance is of the view that the incidence of fraud by employees is very low, largely because it is easily detectable. An employee can only perpetrate fraud by making a claim. The evidence substantiating the claim is then available and can be tested. The same is not true of employer performance.

Employer fraud and non-compliance

Identifying those employers who do not take out policies can principally only be determined by:

- establishing the employer does not have a policy when an injured worker tries to make a claim
- complaints to the workers compensation authority by individual workers or by unions
- workers compensation authorities undertaking random inspections.

Identifying those employers who under-insure is easier to establish because at least those employers hold policies, are therefore known to the relevant WorkCover authority and can become subject to an audit. The principal mechanism used by workers compensation authorities to ascertain underinsurance is by way of audits undertaken during targetted compliance blitzes.

In New South Wales the workers compensation legislation has recently been amended and consequently the performance of the scheme has been the subject of intensive research. The scheme was reviewed in light of the fact that it was accumulating a deficit that had to be better managed. The results of the investigations demonstrated the variance between employee and employer fraud. Employee fraud was so minimal that the scheme was redesigned and provisional liability introduced requiring insurers to accept claims within seven days unless there is good evidence that the claim is fraudulent. The change was designed to minimise the impact on injured workers. Importantly, it was supported by all parties and was introduced against background research that established the very low level of fraudulent claims made by employees would not have a detrimental affect on the financial viability of the scheme. Conversely, the level of employer fraud was and remains a matter of very real

concern as can be evidenced by WorkCover NSW's activity in respect of non compliance with premium payments.

Employer non-compliance is a significant issue, especially as It impacts adversely on employees when they are at their most vulnerable, namely when they are ill or injured. It is becoming an increasing cost to the schemes around the country and it is increasingly resulting in a shift of financial responsibility to the public sector, principally through employees being forced to rely on taxpayer funded sickness benefits. Yet, astonishingly, the level of prosecutions for employer non-compliance is remarkably low across all jurisdictions.

Employer non-compliance manifests itself in a range of breaches including:

- failure to pay premiums
- deeming employees to be independent contractors
- under-estimation of payroll
- misrepresentation of the nature of the enterprise to achieve lower premium ratings
- failure to process claims
- failure to take out policies in all the jurisdictions in which work might be undertaken
- failure to provide suitable duties for injured workers
- failure to provide access to quality rehabilitation and vocational retraining

Small Business

The Alliance is aware of a number of employers without workers compensation insurance. The practice is most common amongst small businesses. Unfortunately, there are no real barriers to a person setting themselves up in business as a live theatre producer or promoter nor as a film producer.

A handful of feature films are made every year (and some hundreds of short films) where the contract of employment defers part or all payment to a later date – usually to a point in time when the film makes returns at the box office. In 99% of cases, this day never comes. In 99% of cases, workers compensation insurance is not taken out. Needless to say such productions occur without the support of the Alliance and more often than not the Alliance only becomes aware of such productions when problems arise. Where companies are established to make such productions, a shelf company is bought and then disbanded when the production is complete.

In live theatre and concerts, the situation is more acute. Promoters set themselves up in business and engage performers for one or more concerts. Contracts are written that, nothwithstanding the facts of the relationship, endeavour to create an independent contractor relationship rather than a contract for services or an employment contract – thus superficially avoiding the need to take out workers compensation insurance, pay superannuation and other employee entitlements. In a sector that is identified by an unemployment rate of approximately 85% and where average yearly income is around $20,000 the need for income forces individuals to accept such conditions notwithstanding the fact they are aware of their potential exposure in the event of an injury.

Non Australian Business Entities

This business practice is not confined to those businesses engaging Australians. Many small businesses operating as promoters import performers from overseas and endeavour to engage those overseas performers in the same way. Under the Migration Regulations, the Australian sponsoring entity – usually the producer or the promoter – must consult with the Alliance. As a result, the Alliance is, in these cases, able to ensure workers compensation insurance policies are in place. With surprising regularity, the Alliance finds the company has no workers compensation policy in place at the time they make application to sponsor an entertainer from overseas to undertake employment in Australia, even though they might have been regularly or occasionally engaging Australians.

This practice also occurs with offshore film and television companies filming in Australia. Whilst such activities require the overseas company to be sponsored by an Australian entity and for that Australian sponsor to consult with the Alliance, there have been numerous instances of offshore companies coming to Australia utilising business class visas (and in too many instances with offshore companies making television commercials, tourist visas). The offshore company is thus able to avoid consultation

with Alliance, submission of employment contracts to the Department of Immigration Multicultural and Indigenous Affairs and then avoid compliance with much Australian legislation, including employee entitlements.

One example will serve to illustrate the point.

In November 1998, United Film and Television Productions, a UK company based in Bristol, filmed a dramatised documentary called *Earthquake* based on the Newcastle earthquake on the Gold Coast in Queensland. A number of British personnel travelled to Australia on business visas for the production. The majority of the crew were Australians engaged on the basis that all were deemed to be sub-contractors. The first the Alliance was aware of the production was when a member was killed during filming. The member was a stunt performer and died doing a high fall stunt. The production company did not have a workers compensation policy and argued that did not need to do so because the contract they had issued the performer declared him to be a sub-contractor and responsible for taking out any necessary insurances.

WorkCover Queensland then refused to make payment to the performer's widow. WorkCover Queensland argued, as had the production company, that the performer was employed as an independent contractor and should have taken out his own insurance.

The Alliance argued that regardless of what was set out in the contract, the facts of the case were that the performer was an employee and should have been covered by a workers compensation policy taken out by the production company. The Alliance pursued the case for almost two years and in the end the Court agreed with the Alliance's position and the performer's widow was awarded the maximum possible payment available to her as a widow. The Alliance is not aware whether WorkCover Queensland subsequently pursued the production company.

It is manifestly self-evident that if a considerable number of companies are arranging their affairs in a manner that allows themselves to misrepresent their position in such a way as to avoid taking out cover it is a cost to the scheme. Equally, under-reporting of payroll or simply not effecting insurance cover is a cost to the scheme. Whilst the Alliance is aware that in some jurisdictions the authorities are vigorous in investigating non-compliance, for instance the new data mining software now being used by WorkCover NSW, the incidence of prosecutions is alarmingly low. So long as those less scrupulous in the business sector believe it is possible to avoid payments with no penalty, the practice will continue, at a cost to the taxpayer and at an appalling cost to workers who are injured or fall ill working for employers who avoid their most basic responsibilities.

SAFETY PERFORMANCE AND CLAIMS PROFILE

The non-compliance by employers impacts on the information available about safety performance. Where employers are not covering employees for workers compensation because they have endeavoured to construct the relationship as one other than an employment relationship, the employee often believes they are unable to make a workers compensation claim and do not do so, thereby wearing the costs themselves or, as indicated above, resorting to sickness benefits.

Anecdotal evidence indicates that the Alliance is aware, for instance, of many more injuries in the film and television industry than can be substantiated by WorkCover NSW. In recent meetings with the authority, the Alliance discussed several incidents of which WorkCover was unaware including injuries that resulted in the lost of one of more fingers sustained by film construction department crew members. Not only is there under-reporting of injuries, there appears to be considerable under-reporting of near misses and significant events that did not result in an injury but could easily have done so.

Consequently, a look at the premium rates for film and video production in New South Wales at first glance indicate an industry with a good safety profile. The rate for 2002-2003 is 1.08. Given the complexity of film production and the range of locations and circumstances in which employees find themselves – often working in a different environment every day – the premium rate is surprising when compared with say, libraries at 2.04, museums at 2.33 and recreational parks and gardens at 4.44. Whilst the latter three sectors are identifiable by a pronounced incidence of manual handling injuries they are also more likely to have stable, permanent workplaces and workforces and large employers

(often municipal or state government entities), employers that are likely to ensure compliance with workers compensation and occupational health and safety legislation. By contrast, film and video production is identified by a freelance or casual workforce, short term engagements (television commercials can be filmed in as little as a day, most feature films in less than ten weeks), companies established for a particular production and arrangements whereby many employees are expected to characterise themselves as independent contractors. Consequently, there is a higher level of non-compliance in respect of workers compensation and under-reporting leading to a statistical profile that is likely to be better than is the case in reality.

With highly mobile freelance and casual workforces, education and training becomes a serious issue. In the film and television industry and the live theatre and concert industry, there is little formal training of any kind, including training in respect of occupational health and safety. Notwithstanding the problems this presents, the Alliance is strongly of the view that education is the best strategy to raise safety standards amongst employees and employers alike and more rigorous prosecution of non-compliant employers an essential plank of any strategy aimed at improving workers compensation and occupational health and safety compliance amongst employers.

EXTRATERRITORIALITY PROVISIONS

Alliance members regularly work in states or territories that are not their home state. Equally, they may be engaged by a company resident in another state or territory and then undertake their employment in states in which neither the company nor the individual are resident.

The Alliance is finding that the black holes created by extraterritoriality provisions result in employers being unable to insure employees for workers compensation.

For a workforce that is required to be highly mobile, this is an issue of considerable concern.

This issue arises regularly for employees who are engaged for a live theatre or concert tour or who work on a film or television production where filming is undertaken in more than one state.

In some instances, it has not proved possible for employers to take out a workers compensation policy. Greatest difficulties arise with Queensland and Western Australia. For instance, where an interstate/overseas employer employs a worker in Queensland and in another state and/or country, that worker may not be eligible to claim workers' compensation in Queensland.[1] Depending on the circumstances including where the worker normally resides, where the first work is undertaken (for instance a tour might commence in Queensland and then continue to other states), an employer may be unable to effect workers compensation cover for their employee for the work undertaken in Queensland at all.

Issues of normal place of residence in respect of both the employer and the employee, where the work is undertaken and where the contract was agreed can make ensuring adequate coverage is effected and then making a claim in the event of an incident complicated and sometimes impossible.

At Appendix 1 are case studies that illustrate the impact the current arrangements can have on individuals.

The Alliance recognises that in most jurisdictions and at the federal level there is an impetus for workers compensation schemes to remain state or territory based, a position that the Alliance does not oppose. However, there is an urgent need for the issues arising from a lack of harmonisation between the legislation to be addressed. All persons working in Australia are entitled to protection in the event of work related illness or injury, regardless of where the work is undertaken, their usual residence and that of their employer. It is simply unfair that because their injury occurred say in the ACT rather than in New South Wales or South Australia, they can find themselves exposed with no means of sustaining themselves other than by resorting to the public purse and sickness benefits.

[1] Information provided by WorkCover Queensland available on line at http://www.workcover.qld.gov.ay/public/htm/main.htm#employer

APPENDIX 1

THE IMPACT OF EXTRA TERRITORIAL PROVISIONS IN STATE AND TERRITORY WORKERS COMPENSATION LEGISLATION

Case One

A 26 year old trapeze artist, B, was employed by Club Med Australia in Byron Bay. Whilst in that employment he was contacted by his supervisor and told that head office (in Sydney) were wondering if he would be interested in a job in Club Med Malaysia. B indicated he would be willing to accept the position and subsequently had a number of phone conversations with representatives of Club Med Australia from their head office in Sydney.

B was offered the position, accepted it and resigned his job with Club Med Byron Bay.

Club Med Australia head office arranged and paid for B to travel from Sydney to Melbourne to say goodbye to his family and then arranged and paid for his ticket to Malaysia.

On arrival in Malaysia, B signed a document which purported to be a contract of employment. Whilst there, he sustained a serious shoulder injury which prevented him from working for an extended period of time and he contacted the Alliance with a view to obtaining workers compensation.

Club Med Australia directed the accounts and receipts for medical expenses be sent to their Sydney office and a number of B's medical expenses, including an operation, were paid by Club Med Australia.

However, Club Med Australia denied any responsibility, arguing they had not employed the worker. Rather, they claimed their role was merely to recruit workers for overseas Club Med venues and even denied their role as an agent.

Proceedings were brought against Club Med Australia, Club Med Malaysia and WorkCover NSW in its role pursuant to the Uninsured Liability and Indemnity Scheme.

The Alliance and its solicitor briefed a Queen's Counsel and argued that the contract of employment was executed in New South Wales, there having been the basic elements of a contract of offer, acceptance and consideration, and that Club Med Australia was involved as the employer or, in the alternative, as the agent for Club Med Malaysia. Under these circumstances, Club Med Malaysia would be deemed to have been "for the time being present" in New South Wales.

The matter was finally settled out of court but not without some considerable loss for B.

Case Two

Alliance member, "N", was engaged, pursuant to a written contract signed by him, in Sydney (in May 1999) to play the role of Peter in the David Williamson play *The Department* for the State Theatre Company of South Australia. The role involved performances in South Australia and touring in other Australian states and territories.

N had been a South Australian resident all his life until six months prior to signing the contract in question. Rehearsals took place in South Australia in June 1999. The show then toured through parts of South Australia, New South Wales and the Australian Capital Territory. On 11 August 1999, N was injured.

The injury was not the result of a traumatic incident. Rather, N felt the onset of pain in his back as he was sitting in a low "school chair" on stage. The following day, he was unable to perform and made a claim upon the employer's insurer, MMI.

In September 1999, MMI advised that the claim had been rejected on the basis that there was not the required territorial nexus between his employment and the State of South Australia, as required by the *Workers' Rehabilitation and Compensation Act* 1986 and, in particular, s.6 of that Act.[2]

N's solicitor instructed a barrister to prepare a detailed advice on whether he would be entitled to compensation in South Australia or the ACT or, alternatively, in New South Wales (on the basis N was employed by a party who was uninsured in New South Wales and that it would therefore be appropriate to invoke the provisions of the Uninsured Liability and Indemnity Scheme).

N could only succeed if he satisfied the provisions of s.6 of the Act, which would mean that he would either have to be:

1. based in South Australia, or
2. not usually employed in any state but employed in South Australia and not protected against employment-related disabilities by a corresponding law in another state.

1. Based in South Australia

Note 4 to s.6 of the South Australian Act defines "based in" as meaning that the worker's "usual place of residence is in the State". The authority of Stylianos Selamis v WorkCover NZI Workers' Compensation (SA) Pty Limited [1997] SAWCT 36, says that "all the circumstances, including a worker's past residential history" have to be considered and that the worker's connection with the place in question "was a settled one, such that the natural inference is that his usual place of residence (in other words his home) is in South Australian rather than elsewhere".

As N had lived in Sydney, albeit at no fixed abode, for six months prior to accepting the offer of employment, the barrister's advice was that it was unlikely a court would regard it as a natural inference that his home was in South Australia.

2. Not usually employed in any state defence but employed in South Australia and not protected against employment-related disabilities by a corresponding law in another state

The barrister advised that N would not be able to recover under this provision because a worker is "usually employed in the state" if 10% or more of the worker's time at work is, or is to be, spent in the state. As this was a touring company, it followed that N was not entitled to claim under this provision.

The potential injustice of the Extraterritorial provisions of the Workers' Rehabilitation and Compensation Act 1986 was identified by the Court of Appeal in South Australia, in particular, by Lander J in *Karen Dawn Smith v NZI Workers Compensation (SA) Pty Ltd*:

> "I draw Parliament's attention to the circumstances of this case. Unless the section is amended, any worker who lives outside South Australia but who is employed in South Australia and his duties of employment require that worker to perform more than 10% of his or her employment outside the State of South Australia is not entitled to benefits under this Act in that the worker suffers a disability, even if that disability arises out of an injury suffered in South Australia."

Further the ACT law did not provide N with any protection because s.7A(4)(b) of the Workers Compensation Act 1951 (ACT) prohibits the payment of compensation to "a worker of any other Territory or State" (see ACT provisions attached).

---

[2] Section 6 of the Act states that the Act applies if there is a nexus between the worker's employment and the State. Section 6(2) says a nexus is established if:
(a) the worker is usually employed in the state and not in any other state; or
(b) the worker is usually employed in two or more states but based in the state.
Section 6(3) adds that a nexus exists if:
(a) the worker is not usually employed in any state; but
(b) the worker is employed in the sate or the worker's employment involves (or is likely to involve) recurrent trips to and from a base in the state, and the worker is not protected against employment related disabilities by corresponding law.

Section 7A(2)(c) says that a worker is a worker of the state "in which the worker was hired for or otherwise taken into employment".

In New South Wales, it might have been possible for N to receive compensation if it could have been established that either the employer had a place of employment in New South Wales or was for the time being present in New South Wales (see s.13 of the NSW provisions).

Where a contract of employment was contracted in New South Wales, this can be sufficient to bring the worker within the terms of s.13.[3]

In N's case, the employer was "never present in New South Wales".

N's solicitor and the Alliance had to advise N that he would be unsuccessful in each jurisdiction.

Case Three

A well-known actor, T, was employed by a production company (a partnership comprising an Australian company based in Victoria and an American company based in New York) in New South Wales to perform a major role in the Sydney production of *Showboat*. During the course of the run of Showboat, O started to experience pains in his left arm. He complained from time to time to the Stage Manager but the condition did not prevent him from working.

The season closed in Sydney in November 1997. C had six weeks off and the show moved to Victoria. The production company that had employed C ceased to exist (because the American partner company had gone into liquidation) and a new contract was entered into with the same individuals operating under a different corporate identity. A couple of weeks after the season opened in Victoria, C's biceps tendon ruptured, causing excruciating pain, requiring treatment and preventing him from continuing in the role. The season closed shortly thereafter.

A dispute arose as to whether this injury is compensable under the laws of New South Wales or Victoria. On one view, there may be a nature and conditions claim in New South Wales for which the employer's New South Wales insurer is liable. However, the frank injury occurred in Victoria. If the claim were brought in Victoria it may have been successful but it may have been significantly reduced on the basis that a former employer (the New South Wales employer) contributed to the injury (notwithstanding that the individual employers were the same in both states). A further complication, however, arose from the provision that prohibits the recovery of compensation in that state if a right to compensation exists in another state.

This matter was eventually settled out of court in New South Wales, again at a level less than T would have normally been entitled to anticipate.

[3] Helmers v Coppin [1962] ALR 359; Starr v Douglas [1994] 10 NSWCCR 457