SUBMISSION BY

MEDIA, ENTERTAINMENT & ARTS ALLIANCE

TO

SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE

REGARDING

INQUIRY INTO WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

JUNE 2007

The Media, Entertainment & Arts Alliance

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

Introduction

The Media, Entertainment & Arts Alliance appreciates the opportunity to comment on the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007.

Improvements to the Workplace Relations Amendment (Work Choices) Act 2005 are urgently needed to restore fairness in the manner in which workplace relations are implemented. The Alliance does not consider the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 addresses concerns that have been raised within the Australian community over the past year since what is now known as Work Choices came into effect and, more broadly, since the Workplace Relations Act 1996 restricted the number of allowable award matters.

Whilst welcoming the opportunity to make comment, the Alliance nonetheless regrets the very short timeframe within which comment is able to be made.

As the Government has recognised, the introduction of Work Choices made it possible for terms and conditions such as penalty rates to be effectively stripped away without monetary or other compensation. This Bill purports to address this situation and to introduce a "fairness test".

However, the Alliance has a number of concerns regarding the extent to which the Bill genuinely introduces fairness, including:

- the locking out of employees who entered into agreements prior to 7 May 2007 unless such agreements are varied after 7 May 2007,
- the failure to address terms and conditions other than protected allowable award matters,
- the ability of the Workplace Authority to make determinations without providing reasons,
- the inability of workers to query a determination of the Workplace Authority save than by recourse to the High Court,
- the manner in which agreements are to be considered, in particular with respect to the timely processing of agreements,
- the limiting of its provisions to those earning less than $75,000 per annum by reference to the hours of week an agreement covers rather than looking at the income likely to be earned during the course of a year,
- the increase in compliance costs for small and medium enterprises.

Covers only agreements entered into on or after 7 May 2007

It is estimated that at 31 March 2007, 747,000 Australian Workplace Agreements were in operation, representing approximately 8.4% of the workforce.[1] Those working under such agreements are not captured by the Bill unless their agreements are varied after 7 May 2007.

To date, the Workplace Authority, formerly the Office of the Employment Advocate, has not interrogated or analysed Australian Workplace Agreements lodged with the Authority to establish whether such agreements incorporate protected award matters. Rather, the Authority merely conducted some audits – audits which ceased last year.[2] It seems unreasonable and unfair that persons engaged under agreements entered into prior to 7 May 2007 are not to be protected by the Bill unless and until their agreements are varied.

Terms and conditions other than protected allowable matters

The list of protected allowable award matters is set out in subsection 354(4) of the Workplace Relations Act 1996:

"protected allowable award matters" means the following matters:

(a) rest breaks;
(b) incentive-based payments and bonuses;
(c) annual leave loadings;
(d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
(e) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);
(f) monetary allowances for:
(i) expenses incurred in the course of employment; or
(ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
(g) loadings for working overtime or for shift work;
(h) penalty rates;
(i) outworker conditions;
(j) any other matter specified in the regulations."

The Alliance considers that the list of protected allowable award matters is insufficient in its scope.

[1] See evidence given by Mr Peter McIlwain, Employment Advocate, in Senate Estimates on 29 May 2007, available at http://parlinfoweb.aph.gov.au/piweb/Repository/Commttee/Estimate/Linked/5447-3.PDF
[2] Ibid

The list does not include rostering, an issue of considerable concern to those who work in the entertainment industry.

Many of the issues regarding rostering – certainty regarding when a person is required to work – have been discussed extensively in the media and are also of concern to those in the entertainment industry along with other issues that are not so commonly encountered in the wider workforce.

Having the right to refuse unscheduled overtime is of concern, particularly for those with family responsibilities, as is the right to a minimum turnaround between the conclusion of one shift and the commencement of the next.

Also of concern is travel time. For those working in the entertainment industry, the workplace may change every day. How far a person is expected to travel before being remunerated is an issue of real concern. Similarly, provision of accommodation when working in a city in which the person is not resident is of concern when the engagement is for a short period of time.

If a person, say an actor or a makeup artiste, secures an engagement for two days' employment at a time three weeks hence, that person must then seek other employment that does not clash with the two day engagement. If the engagement can be changed with little or no notice and without monetary compensation by way of postponement or cancellation penalties, the person may suffer financial loss by having refused another engagement for reasons of it conflicting with the first commitment.

Other matters include matters that do not necessarily relate to remuneration but may do so.

For instance, the right to know in advance whether a performer is required to perform partially naked or naked or be required to smoke or work in circumstances where other performers will be required to smoke.

It is crucial for performers working in the audio-visual industry to know where and how their performance is to be used. Performers, rightfully, are entitled to further remuneration for the use of their performance, by way of royalties or residuals, when the production is exploited in additional markets or on additional platforms to the primary market and platform for which the production was produced. Importantly, performers are entitled to know in what context their performance will be used. For instance, whilst they might consent to perform in a particular film, they might not wish to consent to their performance or image being utilised in marketing or merchandising – for instance, a tie in with an alcohol or soft drink company to promote the production.

Workplace Authority determinations

The Alliance understands that the reasons an agreement is found to be satisfactory or otherwise will not be furnished by the Authority. In the event an employee wishes to contest the findings of the Authority, their only recourse will be to the High Court.

Such provisions cannot be considered to constitute administrative fairness or, indeed, substantive fairness as the Bill is purporting.

The Bill also contains provisions that enable the personal circumstances of an employee to be taken into account in assessing whether the conditions offered are fair. The personal circumstances of the employee are to be provided to the Authority by the employer and the employee is not able to themselves represent their circumstances to the Authority.

Again, the Alliance assumes these provisions, whilst no doubt well intended, have suffered in the drafting. They cannot be construed as representing administrative fairness.

Just how the Authority will determine whether the provisions of an agreement are fair, having regard to the employee's individual personal circumstances, is completely unclear.

The Bill also allows the employer to give a unilateral undertaking to make the agreement fair without affording the employee the opportunity of agreeing to the new provisions.

That the Authority will not need to set out its reasons in determining whether an agreement is fair or otherwise to either the employer or employee is of no assistance to either. For the employer being advised the agreement fails the fairness test, no direction is offered as to how it might be rectified. The impact of these provisions will fall unfairly on employees and on the owners of small and medium enterprises.

Timely processing

The Bill provides for employers to rectify unfair agreements within 14 days of notification by the Workplace Authority. However, there is no time frame imposed on the Authority.

By 28 May 2007, 21,345 agreements had been lodged with the Authority.[3] Consequently, the Alliance is most concerned about the time it will take before employees can establish whether the terms and provisions in their agreements are determined to be fair or otherwise.

[3] See evidence given by Mr Peter McIlwain, Employment Advocate, in Senate Estimates on 29 May 2007, available at http://parlinfoweb.aph.gov.au/piweb/Repository/Commttee/Estimate/Linked/5447-3.PDF

The Alliance understands 600 inspectors are to be engaged to scrutinise the agreements. However, by the time they have been engaged and trained, the backlog of agreements will have grown exponentially.

Income ceiling

It is estimated that approximately 90 per cent of workers on Australian Workplace Agreements will be captured by the introduction of the $75,000 ceiling below which agreements will be examined by the Workplace Authority to ensure that protected award matters are not waived without adequate compensation.[4]

However, the Alliance is concerned that the manner in which the $75,000 threshold will be measured will not capture many workers in receipt of an annual income below $75,000.

A person's income will be calculated by reference to the agreement in question. For those engaged full time, the matter is relatively straightforward.

If a person is engaged part-time, the test assumes full-time employment for the purposes of determining whether annual income will be above or below $75,000.

The Explanatory Memorandum gives the example of part-time employee Nick, working for Mick's Motor Mechanics Pty Limited for 20 hours per week at a rate of pay of $45 per hour. The example then calculates what Nick would earn were he to be employed full time, arriving at an annual rate of pay of $88,920. Thus, Nick's agreement will not be subject to scrutiny.

Presumably the Bill assumes that those earning in excess of $75,000 are earning a reasonable income and for that reason the agreements under which they are engaged will not be scrutinised.

What it does not accommodate is the fact that the Nick of the Explanatory Memorandum might not have any other income stream and would need the same kind of protection as all those earning less than $75,000. Nick may not have another income by virtue of not having a second job whilst preferring to have full-time employment or a second job to augment money earned in his first position. With his annual income of $46,800, Nick's agreement with Mick's Motor Mechanics Pty Limited should be captured if the Bill is to deliver fairness.

There are many people in the workforce, for instance, actors and film, television and live theatre technicians, whose working life is characterised by a series of short term engagements.

[4] See evidence given by Mr Peter McIlwain, Employment Advocate, in Senate Estimates on 29 May 2007, available at http://parlinfoweb.aph.gov.au/piweb/Repository/Commttee/Estimate/Linked/5447-3.PDF

In one week, a technician might be engaged on a television commercial for a period of two days, but secure no other work that week or the following. An actor might secure a significant support role in a feature film but that employment might total only twelve days spread over eight weeks. To calculate their annual income by assuming the daily rate of pay will be achieved five days a week, 52 weeks of the year would be to dramatically overstate their annual income and possibly ensure they are not afforded the protection set out in the Bill.

The Bill appears to assume that a person will commence employment and embark on a trajectory wherein their income will continue to rise year on year.

That is not the reality for many, and particularly not the reality in the entertainment industry.

An actor or technician might enjoy one good year earning above $75,000 to face a downturn in the industry in subsequent years – as has occurred in recent years, with employment in New South Wales hardest hit.

The Alliance questions whether the threshold is adequate to deliver fairness to employees and whether it takes adequate account of the circumstances of workers not engaged in full-time permanent employment in stable industries.

Compliance costs

The Alliance understands that prior to the introduction of this Bill, Harmers Workplace Lawyers analysed the costs related to record-keeping associated with the introduction of Work Choices. That work found the cost to small and medium enterprises was more than $950 million in employee time alone.

An unintended consequence of the current Bill is that compliance costs will likely rise further, imposing an unnecessary burden on small business in particular.

Conclusion

The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 has been put in place because the Federal Government has acknowledged that the Workplace Relations Amendment (Work Choices) Act 2005 is unfair.

Alliance members working in the circus industry have an intimate knowledge of safety nets. If a safety net is a safety net, it is safe. The concept of a stronger safety net is merely semantics. It is either a safety net or it is not. For Alliance members a safety net is the difference between life and death.

This Bill, like its predecessor, has holes in it. It is therefore not a safety net. A safety net could be introduced by repealing the Workplace Relations (Work Choices) Act 2005.