SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

PRODUCTIVITY COMMISSION

INQUIRY

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

JUNE 2003

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 Productivity Commission's Inquiry into possible models for establishing national frameworks for the provision of Workers' Compensation and Occupational Health and Safety.

In August 2002, the Alliance made submission to the House of Representatives Standing Committee on Employment and Workplace Relations' Inquiry into Aspects of Australian Workers' Compensation. A copy of that submission is attached at Attachment A.

The Alliance strongly believes that every working person in Australia must be covered by a workers' compensation policy.

Recent changes to workers' compensation and occupational health and safety legislation around Australia have both delivered improvements and highlighted shortcomings.

Progressive changes to occupational health and safety legislation have delivered some significant improvements. Whilst legislation does not vary to any dramatic degree between jurisdictions, the Alliance considers the New South Wales Occupational Health and Safety Act 2000 and the Occupational Health and Safety Regulation 2001 represent best practice. It is manifestly self-evident that best practice should be implemented nationally.

The Alliance considers that workers' compensation legislation could be improved in all jurisdictions. Recent amendments to workers' compensation legislation have not resulted in improvements considered by the Alliance to be essential – for employees, employers and in the national interest. In its submission to the House of Representatives Standing Committee, the Alliance argued the need for harmonisation of workers' compensation legislation around Australia. The Alliance notes the current initiatives to advance harmonisation but is concerned that the legislation now under consideration in Queensland and New South Wales will be insufficient to address all our concerns.

Workers' compensation legislation was initially conceived at a time when employment was generally full-time and permanent. This employment paradigm has dramatically changed in recent years and with the changes to employment arrangements many workers are finding themselves inadequately protected at a time when they are most vulnerable, specifically when they are injured or fall ill as a result of their employment.

For the majority of the twentieth century, employment arrangements in the entertainment industry were in stark contrast to those in most other industries other than the construction industry. However, the changes to employment arrangements in the broader workforce that have occurred in the past two decades have meant that problems that were mostly unique to entertainment and construction have manifested themselves more broadly. The impact of the erosion of permanent employment together with increases in casualisation and fixed-term employment will need to be accommodated within twenty first century workers' compensation and occupational health and safety arrangements.

Some recent state based innovations warrant consideration for application in other jurisdictions, for instance, the Premium Discount Scheme and the proposed streamlined notification scheme (sometimes referred to as the Single Notification Scheme) in New South Wales.

The Alliance is of the view that the current workers' compensation arrangements, in certain circumstances, impose unreasonable compliance costs on employers, lead to inequities for injured workers in terms of benefits payable and increasingly cover fewer and fewer workers. Further, the current arrangements do not adequately facilitate the collection of comprehensive data, essential to the underpinning of research into occupational health and safety.

With an increasingly mobile workforce, it is more important than ever that a national framework that delivers consistency across the states and territories, especially in respect of workers' compensation, is developed and implemented.

The Alliance agrees with the Productivity Commission that occupational health and safety and workers' compensation is likely to be best managed at a state and territory level but that a national framework is essential to facilitate equity, establish best practice and accommodate the needs of a rapidly changing and increasingly mobile workforce as well as the needs of employers and employees operating across state and territory borders.

Industry Commission Inquiry into Workers' Compensation in Australia

In November 1992, the Treasurer, John Dawkins announced an inquiry into workers' compensation in Australia to be conducted by the Industry Commission. The Commission's report, *Workers' Compensation in Australia* (Report No 36), was released in February 1994.

The Report recommended that all "jurisdictions should adopt a common definition of a worker for the purpose of workers' compensation coverage"[1]. The Report went on to recommend that:

"Weekly workers' compensation payments should be based on a worker's pre-injury average weekly earnings (including penalties and any other allowances 'normally' received).

"Weekly compensation payments should be capped, for example at twice average weekly earnings in the relevant jurisdiction …

"Payment of employer superannuation contributions should continue while a worker is in receipt of weekly benefits."[2]

The above recommendations are supported by the Alliance and it is noted that in a number of jurisdictions, despite recent legislative amendments, many workers with workplace injuries or illnesses around Australia are denied such basic and reasonable consideration.

The Report also noted cost-shifting between workers' compensations schemes and Medicare and the social security system, saying "[a]s a general principle, where cost-shifting is identified action should be taken to prevent it. This principle holds regardless of whether costs are being shifted from employers to individuals or the community, or the other way."[3]

The inadequacy of data was noted:

"The Commission experienced considerable difficult in obtaining comparable injury and illness statistics from each jurisdiction to enable it to fully understand the extent and cost of workplace injury and illness. The available data generally were not comparable between states, nor was there comparability over time within jurisdictions. Identifying trends was thus extremely difficult … Note that *no comparisons can validly be made* using these statistics, and the Commission has not attempted to do so, since the data use different definitions, coverage, and reporting methods."[4]

The Commission also noted that specific information regarding accidents and not just injuries was required. "Knowing how many injuries there were to fingers and hands in one year is not very helpful. Rather, one needs to know what job the worker was doing, and how the accident occurred. In this way, processes and equipment may be designed to avoid the accidents which produce the most common injuries and illnesses."[5]

Industry Commission Inquiry into Occupational Health and Safety

In 1994, the Industry Commission conducted an inquiry into occupational health and safety in Australia. Its report, *Work, Health and Safety* (Report No 47) was released in September 1995.

In that Report, the Commission found that "the solution to achieving better OHS outcomes is to be found in a more faithful application of the principles for the regulation of health and safety enunciated in the Robens Report"[6].

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[1] *Workers' Compensation in Australia*, Report No 36, Industry Commission, February 1994, page xliii
[2] Ibid, page xliv
[3] Ibid, page xlvi
[4] Ibid, page 50
[5] Ibid, page 52
[6] *Work, Health and Safety – An Inquiry into Occupational Health and Safety*, Report No 47, Industry Commission, 11 September 1995, page xxxiv

Since the release of the 1995 Report, legislative change has been effected in many jurisdictions. In New South Wales, the occupational health and safety legislation was overhauled with the new Act coming into effect in 2000. As indicated in the Executive Summary, the Alliance considers that the NSW Act represents best practice in Australia and should serve as a template for other jurisdictions. Importantly, the NSW Act reflects the principles outlined in the Robens Report and is written in plain English. Equally importantly, a raft of regulations has been abolished and replaced with, what was termed during its drafting, a "combined regulation", the Occupational Health and Safety Regulation 2001. The only sector of the workforce now separately regulated is the mining industry. Again, the Regulation has been written in plain English and it is now possible for employers and employees with English language fluency to read and understand what is required in the workplace.

Conversely, the Act in Victoria has not been overhauled since the 1995 Industry Commission Report but a number of regulations have been amended instead. The result is that occupational health and safety in that state is governed by the following:

- Occupational Health and Safety Act 1985
- Dangerous Goods Act 1985
- Equipment (Public Safety) Act 1994
- Road Transport (Dangerous Goods) Act 1995
- Road Transport Reform (Dangerous Goods) Act 1995 (Commonwealth)
- Mines Act 1958
- Dangerous Goods (Explosive) Regulations 2000
- Dangerous Goods (Storage and Handling) Regulations 2000
- Dangerous Goods (Transport by Rail) Regulations 1998
- Equipment (Public Safety) (Incident Notification) Regulations 1997
- Equipment (Public Safety) (General) Regulations 1995
- Occupational Health and Safety (Asbestos) Regulations 2003
- Occupational Health and Safety (Certification of Plant Users and Operators) Regulations 1994
- Occupational Health and Safety (Confined Spaces) Regulations 1996 (S.R. No. 148/1996)
- Occupational Health and Safety (Hazardous Substances) Regulations 1999
- Occupational Health and Safety (Incident Notification) Regulations 1997
- Occupational Health and Safety (Issue Resolution) Regulations 1999
- Occupational Health and Safety (Major Hazard Facilities) Regulations 2000
- Occupational Health and Safety (Manual Handling) Regulations 1999
- Occupational Health and Safety (Noise) Regulations 1992
- Occupational Health and Safety (Plant) Regulations 1995
- Occupational Health and Safety (Lead) Regulations 2000
- Road Transport (Dangerous Goods) (License Fees) Regulations 1998
- Road Transport Reform (Dangerous Goods) Regulations 1997

The Alliance is strongly of the view that compliance with occupational health and safety legislation and regulation is best achieved when it is simple to access and easy to understand. The greater the range of legislative mechanisms, the less likely compliance becomes. This is especially the case for small businesses that typically do not have the resources to embrace complex legislation and regulations.

House of Representatives Standing Committee on Employment and Workplace Relations Inquiry into Certain Aspects of Australian Workers' Compensation Schemes

In 2002, the House of Representatives Standing Committee on Employment and Workplace Relations conducted an Inquiry into Certain Aspects of Australian Workers' Compensation Schemes. As indicated in the Executive Summary, the Alliance made submission to that Inquiry and a copy is attached.

In June 2003, the Committee released its report, *Back on the Job*. The Alliance notes that many of the findings of that Inquiry are relevant to the current Productivity Commission Inquiry.

The Alliance supports many of the findings and recommendations set out in *Back on the Job*. The following recommendations are particularly worth noting:

- The Committee recommended (in Recommendation 1) that the Workplace Relations Ministers' Council "conduct a study to identify the extent to which workers are currently not covered by any workers' compensation system, with a view to adopting a national standard that covers the widest possible number of workers".[7] The Alliance concurs with the Committee's view that "[t]here is a need to ensure that injured workers are not falling through the gaps when they are working in more than one jurisdiction"[8]. It is hoped that the Productivity Commission Inquiry will achieve the intention of Recommendation 1 and make recommendations about the manner in which the gaps that currently exist might be eliminated and that coverage is available to the widest possible number of workers.
- In Recommendation 3, the Committee urges the Workplace Relations Ministers' Council to "continue to work towards the introduction of nationally consistent Memoranda of Understanding between the jurisdictions to ensure that employees have equivalent workers' compensation cover when working in other jurisdictions".[9]
- The Committee's frustration about the inadequacy of workers' compensation data and the fact that data collection methodologies varied between the jurisdictions making comparisons impossible is reflected in Recommendation 4 which in part recommends that the Commonwealth Government "examine the need to extend the National Data Set for Compensation Based Statistics, to provide nationally relevant workers' compensation data that assists meaningful interjurisdictional comparisons for policy analysis and contributes to the development of a national framework"[10].
- The Committee recommended (Recommendation 6) that "a set of benchmarks and best practice for all aspects of workers' compensation" be developed "to ensure that the responsibility for assisting people suffering compensable injuries rests with the compensation authorities and not with taxpayer funded social security programs or the burden placed on the injured worker".[11] The Alliance concurs with the opinion expressed in the Report that "[s]ocial security was not established to subsidise insurance companies".[12]
- Definitional issues were also raised by the Committee. "There is also a need to develop an agreed position on a number of definitions, particularly that of employee, as there are a number of 'workers' not covered by a workers' compensation scheme, who may not have taken out an alternative forms [sic] of insurance."[13] The need to ensure that definitional issues are resolved to ensure workers are covered and covered consistently and do not become reliant on the Commonwealth in the event of an injury led to Recommendation 14, namely "that the Commonwealth Government support and facilitate where possible the development of a national framework to achieve greater national consistency in all aspects of the operation of workers' compensation schemes"[14].

The Alliance shares the Committee's concern that inadequate management of rehabilitation and return to meaningful employment takes an unacceptable toll on many injured or ill workers and additionally results in cost shifting to the Commonwealth. The Alliance concurs with the Committee's view that suicide should never be the outcome of a workplace injury or illness.

Slow Rate of Reform

In addition to the three national inquiries outlined above, there have been a number of reviews at a state and territory level in the past decade. Whilst considerable and commendable progress has been made as a result

[7] *Back on the Job: Report on the inquiry into aspects of Australian workers' compensation schemes*, The Parliament of the Commonwealth of Australia, June 2003, page xv
[8] Ibid, page xxix
[9] Ibid, page xv
[10] Ibid, page xvi
[11] Ibid, page xvi
[12] Ibid, page xxv
[13] Ibid, page xxix
[14] Ibid, page xviii

of these reviews, such as the overhaul of occupational health and safety legislation and regulation in New South Wales, it is of real concern that so many of the recommendations made in the national inquiries have yet to be implemented, no doubt in part prompting yet another national review.

Further, some current reviews are being undertaken – albeit in pursuit of commendable objectives – that again will leave many of the shortcomings highlighted over the past decade unrectified. For instance, the current endeavour to harmonise workers' compensation legislation to overcome cross border coverage issues may result in many workers who were falling through the gaps created by differently drafted state and federal legislation being captured whilst at the same time potentially creating new gaps because definitional issues – such as the definition of worker – are not being addressed simultaneously.

Given the three inquiries detailed above have, for the most part, reached similar conclusions, it is hoped that this Inquiry can achieve real change.

National Framework

The Alliance agrees with the thrust of the three national inquiries referred to above that occupational health and safety and workers' compensation are best handled at a state and territory level within a national framework that delivers consistency between the jurisdictions.

Working conditions vary between the jurisdictions. Some industries are over-represented in some jurisdictions and under-represented in others. This results from a number of factors including weather, geography, infrastructure, population density, presence of natural resources and so on. Consequently, management of occupational health and safety and workers' compensation, based on local knowledge and expertise, is more likely to be effective on the ground where it counts than would be the case with a one-size-fits-all approach that would be the case if the state and territory based systems were dismantled.

The potential disadvantage of a state/territory based system is likely to manifest itself in smaller jurisdictions having less expertise in industries that are under-represented in their particular jurisdiction. However, the Alliance believes that if occupational health and safety legislation and regulation is underpinned by the principles set out in the Robens Report and, as recommended in the Robens Report, national codes of practice are industry specific rather than generic, it should be possible for this potential shortcoming to be effectively managed.

A state and territory based system that achieves national consistency could be auspiced by the Federal Government with the cooperation of the states and territories. The current cross-border harmonisation discussions in respect of workers' compensation legislation demonstrates that a cooperative approach is possible. The role of the Workplace Relations Ministers' Council will be crucial to the achievement of national consistency.

The current lack of consistency, as the House of Representatives Standing Committee and the Industry Commission inquiry both concluded, results in less than ideal outcomes including the following:

- In the absence of a commonly adopted definition of employee, many workers find themselves without the benefit of a workers' compensation insurance. As noted in the Standing Committee's report, a nationally adopted definition should capture the greatest possible number of workers.

- Workers are treated differently in respect to benefits payable based solely on where they reside and work – clearly this is inequitable.

- Different approaches to benefits payable have resulted in a considerable degree of cost-shifting – to Medicare, the social security system, to workers and, in some instances, to employers.

- Current arrangements are unnecessarily complex for those working across borders and in some instances result in unfair imposts on employers where some employers are effectively required to cover some employees twice.

- Unfair competition arises for those employers working across borders who are able to take advantage of lower premiums in one state to the disadvantage of employment for residents in an adjacent state.

A national framework could deliver consistency and equity

The Alliance is strongly of the view that there is considerable inequity in the way in which workers' compensation schemes are constructed. For instance, in New South Wales, employers are charged premiums based on their total payroll. Yet benefits to injured or ill workers are paid on the basis of the relevant award rate. Whilst in the first six months of a claim this is not an issue for most employees working under paid rates awards, it is iniquitous for those engaged where the award is a minimum rates award and they are being remunerated at above award rates. As the earlier Industry Commission report noted, employees should be paid their pre-injury wages, including usual loadings, and superannuation payments should be continued during the period of their claim. Adequate regard must also be had to the loss of future earning capacity where relevant and the cost of domestic assistance must also be accommodated for those whose injuries or ill health make payment for such services essential.

Inadequate statutory weekly payments such as those incorporated in the New South Wales workers' compensation legislation should not be accepted on the basis that low weekly payments assist the viability of the scheme. The effect of inequitable benefits is simply cost shifting from schemes to the employee and often their family and to the public sector through the social security system and Medicare.

Employees conduct their lives on the basis of their income. The impact of their injury or illness is not confined to the injured or ill person. Their injury or illness impacts on their family and on the community. For those no longer able to sustain mortgage repayments because workers' compensation payments do not reflect their average weekly earnings, rather an award minimum or a statutory rate, the loss of a house causes immeasurable disturbance to the individual and to those reliant upon that individual's income. As the Standing Committee report noted, suicide should not be the outcome of a workplace injury or illness.

Workers' compensation insurance must be an insurance that pays the appropriate cost when claims arise. It should not be considered to be a safety net mechanism. When a person insures their house to its full replacement value and makes a claim, say in the event it is burned to the ground during a bush fire, it is expected the insurance company will make repayment to the value insured. Replacement of a three bedroom freestanding house will not be satisfied by a one bedroom apartment. The same principle should be true for workers' compensation insurance.

As the Standing Committee noted in its report, "While it is universally accepted that all workers are entitled to compensation for work related injury and disease, it is also important the coverage and benefits available to injured workers in Australia should not differ significantly depending on the industry or the jurisdiction."[15]

Concern about the cost of workers' compensation schemes and the experience of deficits in some schemes has resulted in some jurisdictions seeking to minimise benefits to ensure costs are contained. In the view of the Alliance this is not an appropriate solution. The more appropriate approach to managing workers' compensation schemes lies not in penalising injured workers but in better occupational health and safety management and effective enforcement that results in all those who should effect insurance policies doing so and not underinsuring.

An adequate national framework must address and ensure consistency in at least the following areas:

- Definitions;
- Premiums and tariffs;
- Benefit structures;
- Management of return to work programs;
- Reporting and data collection;
- Enforcement and compliance.

[15] *Back on the Job: Report on the inquiry into aspects of Australian workers' compensation schemes*, The Parliament of the Commonwealth of Australia, June 2003, page 7

A national occupational health and safety framework should incorporate the principles set out in the Robens Report. Importantly, legislation and regulations must be written in plain English. Industry specific rather than generic national codes of practice should be developed and resources to assist the development of national industry specific codes of practice must be provided where such codes are not are not already in place and to assist with ongoing review of such codes where they do already exist.

Workers' compensation fraud

The recent Standing Committee Inquiry into workers' compensation found that employee fraud is negligible, reflecting findings in New South Wales that led to benefit payments flowing to an injured worker within seven days of a case being notified. New South Wales determined that the cost of making payments to what might transpire to be fraudulent claims were far exceeded by the benefits in assisting the vast majority of workers to return to work quickly as those workers could be confident of an immediate income stream during their convalescence.

Unlike employer fraud, employee fraud is more easily detectable. Fraud can only occur by making a fraudulent worker's compensation claim. All claims are investigated and thus fraud is likely to be detected easily.

The extent of employer fraud has not been established with any certainty, a problem raised in many arena including the national inquiries referred to above. Employer fraud, however, would seem to occur in the following circumstances:

- Deliberate failure to effect a policy to avoid the premium;
- Deeming employees to be sub-contractors to avoid the premium;
- Under-insurance to minimise the premium;
- Inadvertent failure due to not understanding the definition of worker in the relevant jurisdiction;
- Fragmentation of businesses that have common ownership;
- Pressuring employees to not make a claim.

Moves to facilitate data sharing – for instance, with the Australian Taxation Office and state authorities responsible for the collection of payroll tax and so on – would assist, if implemented with appropriate mechanisms to ensure the provisions of privacy legislation can be honoured, in capturing more employer fraud than is captured at present. Such moves would, however, not necessarily capture those small businesses operating in the black economy where wages are paid cash in hand.

Definitional consistency

As noted above, there is a desperate need for definitional consistency across the jurisdictions. Not only is it inequitable that workers are treated differently from one jurisdiction to another as a result, it also creates confusion and can foster some inadvertent employer non-compliance.

The Standing Committee report cited the recent *Review of Employers' compliance with Workers' Compensation Premiums and Pay-roll Tax in NSW Final Report* which found that "the complexity of the legislative arrangements used to provide a definition of employees who are covered by workers' compensation cover is a significant factor in employers' non-compliance in that jurisdiction"[16].

[16] *Back on the Job: Report on the inquiry into aspects of Australian workers' compensation schemes*, The Parliament of the Commonwealth of Australia, June 2003, page 12

Data Collection

A continuing frustration with current occupational health and safety and workers' compensation schemes is the inadequacy of data collection. All three national inquires referred to above noted that data collection is inadequate in all jurisdictions.

In New South Wales, the impetus to streamline reporting and investigate the possibility of establishing a Single Notification Scheme arose as a result of the widely differing reporting compliance under the workers' compensation legislation and occupational health and safety legislation. It is clear that there are unquantifiable levels of non-reporting of both workers' compensation claims and occupational health and safety incidents and near-misses. What is also clear is that many employers are confused about reporting requirements and unaware of their dual obligations to report under both the Workplace Injury Management and Workers' Compensation Act and the Occupational Health and Safety Act.

Inadequate data collection results in inadequate data on which to base research that might lead to improved occupational health and safety outcomes. It clearly makes identifying trends impossible and it is likely that many issues are simply missed. For instance, the Alliance is aware of a number of accidents to fingers (including fingers being cut off) in the film industry in the past three years caused by removing guards when working with electric saws, none of which are reflected in WorkCover data. Many of the incidents involved sub-contractors. Whether lodgement of a workers' compensation claim was always appropriate is not known as some were self-employed rather than employees of an incorporated company. However, all the incidents should have been reported as an occupational health and safety occurrence.

Inadequate data collection highlights a lack of compliance by employers, some of which may arise from ignorance. It also highlights a lack of enforcement.

Injury management and return to work

Regrettably, injury management and the facilitation of early well managed return to work can best be described as being in its infancy.

The Standing Committee noted "that a significant proportion of the evidence received by this inquiry on rehabilitation is similar to evidence received by previous inquiries. Although this suggests a validation of findings, it is of concern that in the ten years since the Industry Commission's inquiry into workers' compensation, which included rehabilitation, there has been little movement in injured workers' and employers' concerns".[17]

That injury management has been an employer responsibility for decades makes this finding all the more alarming. What is of greater concern, however, is that while injury management is far from adequate in large stable workplaces, the changing dynamics of employment arrangements mean the situation may only worsen unless relevant authorities are able to implement effective education and training programs to ensure all employers are aware of their obligations, backed up by effective compliance strategies.

The majority of the members of the Alliance work freelance. Very few have the luxury of permanent employment with a large employer where, evidence suggests, injury management and return to work programs are currently the most effective. Nonetheless, the Alliance's experience of return to work programs in larger organisations is less than ideal. For instance, the Alliance regularly confronts employers who consider return to work programs to be too difficult to manage and view the matter as the responsibility of the insurer alone.

Of even greater concern is the plight of workers whose employment is characterised by short term engagements where return to work to previous or suitable duties might not be possible for a range of reasons including the fact that the work may no longer be in existence. A person working on a film or live theatre production is most likely to find that production has ceased by the time of their recovery. Principal photography on a typical Australian feature film will run for eight weeks and a typical state theatre company season will be twelve weeks. Even when that is not the case, the high degree of specialisation in work

[17] *Back on the Job: Report on the inquiry into aspects of Australian workers' compensation schemes*, The Parliament of the Commonwealth of Australia, June 2003, page 190

practices is likely to mean that suitable duties might not be available. For instance, a film technician like a grip (works with camera equipment and is often a rigger) or gaffer (works with lighting) might sustain a manual handling injury and consequently be unable to undertake labour that involves working with heavy equipment. Having regard to their injury, suitable duties may be available but those suitable duties may not be appropriate to the individual's skill base such as work involving word processing in the production office or making costumes in the wardrobe department.

Workers' compensation schemes were designed for a workforce that is predominantly in permanent employment. Patterns of employment are changing dramatically across the Australian workforce and workers' compensation and occupational health and safety must take account of those changes.

Whereas once the kinds of employment arrangements common in the entertainment industry were rarely found elsewhere, other than in industries like the construction industry, increasingly, the problems that have long been confronted by the entertainment and construction industries are becoming more common.

Alliance members reflect the full diversity of possible employment arrangements: permanent or on-going, fixed-term, and casual together with a plethora of non-standard arrangements. Increasingly, members are being expected to provide their services as self-employed workers, as owner-managers of their own business, be it incorporated or not – in other words, to provide their services as a sub-contractor, regardless of the actual relationship between the principal contractor and the worker. The use of labour hire is also increasing, particular in the live performance industry.

The changing nature of employment arrangements was discussed by John Buchanan of ACIRRT at the recent conference, *The Future of Work*, held in Sydney on June 12. "It is the ability to discard bits and pieces of the conventional obligations of the employer role that renders fixed-term employment, casual employment and dependent contractors attractive to many employers, and problematic for many employees."[18] Buchanan noted that while "declines in standard employment are evident in numerous OECD societies", the changes in Australia "appear distinctive". The trends in increased casual employment "which is a peculiar category of employment, deeply embedded in the institutional environment of Australia" and increased part-time employment "point to a particular path of development, anchored in the structure of Australian labour markets and in choices made by policy makers".[19]

Any national framework for occupational health and safety and workers' compensation must take account of the changing nature of employment patterns in Australia and ensure that all workers are covered appropriately regardless of the form of contract into which they enter with the employer. The challenges that rehabilitation and return to work pose in this changing environment cannot be underestimated. New models that take account of the fact that there may be no pre-injury job to which a person can return or that suitable duties cannot be found within the pre-injury employer's business will necessitate more lateral models. Group training organisations that arrange placements with multiple employers for apprentices may provide such a model.

Compliance, enforcement and awareness

Lack of compliance by employers can be deliberate, inadvertent, simply thoughtless or cultural – "it has always been done that way".

Deliberate breaches need to be dealt with by a dramatically improved enforcement program. The Alliance is of the view that the legislation is not being used to best effect. Penalties and a range of mechanisms such as publicising the breach are available but very rarely used in the industries in which Alliance members work. When breaches have no consequences it has hardly surprising that those employers seeking to cut corners will continue to do so.

The Industry Commission's 1995 Report Work Health and Safety made a number of recommendations with regard to more effective enforcement, including recommending that inspectorates in each jurisdiction "give a

[18] Ian Watson, John Buchanan, Iain Campbell, Chris Biggs, *The Future of Work – source material on Trends and Challenges in Australian Workplaces*, page 33, an abridged version of *Fragmented Futures: New Challenges in Working Life*, Federation Press, Sydney, 2003
[19] Ibid, page 19

higher priority to deterrence in the enforcement of their OHS legislation … focus on compliance with the duty of care … consider an immediate increase in maximum penalties … [and recommended] a system of on-the-spot fines for breaches of OHS legislation"[20]

The Alliance is supportive of the legislation in all jurisdictions incorporating these recommendations but notes that enforcement is crucial if the legislation is to have meaning in the workplace.

The Alliance is regularly confronted by occupational health and safety hazards that are not being rectified because there is a cost – often very small – involved or simply because adequate risk assessment has not been undertaken.

The film and television industry negotiated an industry safety code in 1983. High risk activities such as special effects and stunts meant the industry developed a keen understanding of the risks of the more obviously dangerous aspects of production. Generally, safety standards in the high risk areas of the industry are good but there remains much room for improvement. The high risk areas can result in and have resulted in fatalities – since the late 1970s a handful of technicians have died in helicopter and light aircraft accidents and a handful in the execution of stunt and special effects sequences. On the other hand, risk assessment of the less overtly dangerous aspects of production is far from adequate.

Film production companies often lease premises designed for other purposes on a short-term basis. It leads to problems that can range from inadequate lighting for persons in costume departments who are cutting and sewing, persons in construction departments working with medium density fibreboard without adequate extraction and ventilation in place to inappropriate seating being provided for persons working on location with laptop computers. A recent example is a continuity person who sustained an injury to her spine resulting from years working for consecutive employers in a position where she was required to use her laptop computer without a seat or table/bench/desk, often a gutter being the only place she was able to work. Stoicism on the part of the individual and no regard to her comfort resulted in an easily avoidable injury. The injury is such that she will need to retrain for another form of employment. In a freelance industry, the option for return to work with a pre-injury employer offering suitable duties is, as mentioned above, often not a possibility.

Combined with inadequate risk assessment are cultural issues.

The entertainment industry is identified by an attitude that "the show must go on". It leads to a "can-do" culture which, on the one hand, means Australia has cultural industries that produce world-class work but, on the other hand, means occupational health and safety and the well-being of employees are often subordinated in the interests of the final product. It has to be noted that this attitude is often shared by employees and employers. Entrenched work practices can be hard to overcome. And where employees are increasingly concerned about their occupational health and safety they can be perceived as whinging or needy.

Inadvertent breaches are often the result of employers not being aware of their obligations. Notwithstanding the fact that broad based occupational health and safety legislation has been in place in all jurisdictions since the mid 1980s, there remain a remarkably large number of, usually small or recently established, employers who are not aware of the detail of that legislation, their obligations and, in some instances, are unaware of the legislation itself.

The WorkCover Assist program in New South Wales is an example of the way in which state and territory governments can drive an enhanced understanding of workers' compensation and occupational health and safety. The program was implemented following the overhaul of the legislation in 2000 and 2001. Grants are available to unions and employer organisations to roll out training to their members and to undertake initiatives that enhance employer and employee awareness of their rights and obligations. The Alliance has been successful in achieving funding under this program both last year and this year. It is likely that it will be extended to next year. Now eighteen months on, the educational role remains daunting. Whilst this program was designed to maximise the role that unions and employer organisations can play in educating members, it is to be hoped that the longer term result will not be an abrogation of the educational responsibilities of

[20] *Work, Health and Safety – An Inquiry into Occupational Health and Safety*, Report No 47, Industry Commission, 11 September 1995, page xliii

WorkCover, rather it must be seen as an effective way that the role of the authorities can be augmented by industry.

Initiatives and incentives

Well constructed incentive initiatives can be a useful way to foster compliance and deepen understanding of legislative requirements.

The WorkCover Assist program in New South Wales has been mentioned above. The Premium Discount Scheme in New South Wales is another interesting program that has fostered enhanced occupational health and safety standards. Targeted principally at large high risk organisations, a secondary plank of the scheme targeted small business. The program has a life of three years. It could, however, serve as a model to develop some form of on-going incentive initiative.

Central to many employer complaints that the Alliance is aware of is that employers with a good health and safety track record are not rewarded while those who do not place the same emphasis on health and safety are not punished.

While industry based premiums are appropriate, workers' compensation schemes should also take account of the track record of employers and design both rewards by way of reduced premiums and penalties for poor performance that are given effect.

ATTACHMENT A

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 they 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.[21] 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

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

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.

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.[22]

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*:

[22] 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.

> "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).

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.[23]

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.

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

APPENDIX L REGULATORY DOCUMENTS

Note: Legislation and regulations are from time to time amended.

Commonwealth

Occupational Health & Safety (Commonwealth Employment) Act 1991
Occupational Health & Safety (Commonwealth Employment) (National Standards) Regulation

New South Wales

Occupational Health & Safety Act 2000
Occupational Health & Safety Regulation 2001
Dangerous Goods Act 1975 and Dangerous Goods (General) Regulation 1999
Roads Act 1993
Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999
Food Act 1989
Marine Safety Act 1998

Victoria

- Occupational Health and Safety Act 1985
  Dangerous Goods Act 1985
  Equipment (Public Safety) Act 1994
  Road Transport (Dangerous Goods) Act 1995
  Road Transport Reform (Dangerous Goods) Act 1995 (Commonwealth)
  Mines Act 1958

- Dangerous Goods (Explosives) Regulations 2000
- Dangerous Goods (Storage and Handling) Regulations 2000
- Dangerous Goods (Transport by Rail) Regulations 1998
- Equipment (Public Safety) (Incident Notification) Regulations 1997
- Equipment (Public Safety) (General) Regulations 1995
- Occupational Health and Safety (Asbestos) Regulations 2003
- Occupational Health and Safety (Certification of Plant Users and Operators) Regulations 1994
- Occupational Health and Safety (Confined Spaces) Regulations 1996 (S.R. No. 148/1996)
- Occupational Health and Safety (Hazardous Substances) Regulations 1999
- Occupational Health and Safety (Incident Notification) Regulations 1997
- Occupational Health and Safety (Issue Resolution) Regulations 1999
- Occupational Health and Safety (Major Hazard Facilities) Regulations 2000
- Occupational Health and Safety (Manual Handling) Regulations 1999
- Occupational Health and Safety (Noise) Regulations 1992

- Occupational Health and Safety (Plant) Regulations 1995
- Occupational Health and Safety (Lead) Regulations 2000
- Road Transport (Dangerous Goods) (License Fees) Regulations 1998
- Road Transport Reform (Dangerous Goods) Regulations 1997

Queensland

Workplace Health & Safety Act 1995 & Regulations
Explosives Act 1999 & Regulations
Child Protection Act 1999
Animal Care and Protection Act 2001
Food Act 1981
Standard Building Regulation 1993
Transport Operations Acts (various)
Transport Operations (Road Use Management – Fatigue Management) Regulation 1998
Transport (Road Use Management – Dangerous Goods) Regulation 1998
Weapons Regulation 1996

South Australia

Occupational Health & Safety Act 1986 & Regulations 1995
Commercial Motor Vehicles (Hours of Driving) Act 1973 and Regulations 1998
Dangerous Substances Act 1979 & Regulations 1978, 1998
Explosives Act 1936 & Regulations 1996
Harbours & Navigation Act 1993 & Regulations 1994, 1997
Motor Vehicle Act 1959 and Motor Vehicles and Motor Traffic Regulations
Firearms Act 1977 and Regulations

Western Australia

Occupational Safety & Health Act 1994 & Regulations 1996
Explosive & Dangerous Goods Act 1961 & Regulations
Marine and Harbours Act 1981
Road Traffic Act 1974 and Regulations
Firearms Act 1973
Weapons Act 1999

Tasmania

Workplace Health & Safety Act 1995 & Regulations 1995
Animal Welfare Act 1993
Dangerous Goods Act & Regulations
Food Act 1998
Maritime Legislation???
Traffic Act 1925
Firearms Act 1996

Northern Territory

Work Health Act & Regulations
Dangerous Goods Act & Regulations
Motor Traffic Legislation
Firearms Legislation
Maritime Legislation