NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Screen Industry Workers Bill

25/05/2020

Submission on the Screen Industry Workers Bill

Introduction

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Screen Industry Workers Bill (**the Bill**).

2. The Bill introduces a framework for contractors working in the screen industry under a standalone piece of legislation. It is intended the framework will—

   (a) clarify the employment status of people doing screen production work; and

   (b) introduce a duty of good faith and mandatory terms for contracting relationships in the screen industry; and

   (c) allow collective bargaining; and

   (d) create processes for resolving disputes arising from contracting relationships or collective bargaining.[1]

3. This submission sets out the Law Society's comments and recommendations on a range of practical issues to ensure the Bill is clear and workable in practice and achieves the stated objectives.

4. The Law Society wishes to be heard.

General comments

Overlap with Fair Pay Agreement reforms

5. As noted in the background documents,[2] the Bill has parallels with work currently being undertaken in relation to Fair Pay Agreements (**FPA**) and dependent contractors,[3] and there is a risk of duplication:

   (a) The Government Response to the Film Industry Working Group's (**FIWG**) recommendations (**Response**) cautions that creating a specific arrangement for the screen industry could be seen to pre-empt other work on an FPA scheme.[4] However, the Response points to the possibility of creating a useful precedent (by building a bespoke regulatory regime for one industry first) and that film production workers are described as being in a unique position because of their ongoing exclusion from employee status in section 6(1)(d) of the Employment Relations Act 2000 (**ERA**).[5]

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1 Screen Industry Workers Bill, Explanatory Note, at p 1.

2 Including the Departmental Disclosure Statement, Regulatory Impact Statement, Film Industry Working Group recommendations and Government Response to the Film Industry Working Group recommendations.

3 The New Zealand Law Society comments on these recent consultations are available here: Designing a Fair Pay Agreement System, 27 November 2019: https://www.lawsociety.org.nz/__data/assets/pdf_file/0004/141790/l-MBIE-Fair-Pay-Agreements-27-11-19.pdf; and Better Protection for Contractors, 17 February 2020: https://www.lawsociety.org.nz/__data/assets/pdf_file/0003/143580/l-MBIE-Better-Protections-for-Contractors-17-2-20.pdf

4 Cabinet Paper: Government Response to the Film Industry Working Group's recommendations, at [55], p 9.

5 The carve-out is not wholly unique to the screen industry. Other industries also have separate legislative regimes governing employment status which is recognised by section 6(4) of the ERA. For

(b) The Regulatory Impact Statement notes that a broader FPA scheme could negate the need for a separate collective bargaining system for screen production contractors.[6]

6. The Committee may want to consider whether the wider work on an FPA system and better protections for dependent contractors could adequately address concerns about the film industry, without introducing an overlapping regime via the Bill.

Part 1: Preliminary provisions

Meaning of Screen Production Worker

7. A key aim of the Bill is to create certainty for screen production workers. However, to achieve certainty, the Bill must clearly define who falls within the meaning of a screen production worker.

8. A screen production worker is defined in clause 11 as:

> an individual who is engaged to contribute to the creation of 1 or more screen productions to which this Act applies (see section 12), and who undertakes the work in New Zealand; but *excludes* any individual who, in relation to that or those screen productions "only provides support services"; or is a volunteer (as that term is described in section 6(1)(c) of the Employment Relations Act 2000); or is engaged to do the work by an entity that does not primarily engage in work relating to the creation of screen productions.

9. Although extensive consultation with, and agreement reached by those working on the FIWG, appears to have resulted in a comprehensive definition (with notable exceptions such as support services),[7] the proposed definition may be restrictive in the following respects:

(a) The Bill provides coverage for the "screen production worker" and the "individuals" that sit within the occupational groups listed in Schedule 3 to the Bill.[8] Clause 11 of the Bill provides the screen production worker as an "individual". However, we understand that some screen production workers do not contract individually, but contract through their own company entity or are engaged through a contracting company with the production. That is, for many workers who will be affected by this Bill, the relevant entity is a company, not an individual. As presently drafted, the Bill does not appear to acknowledge this. We note the FIWG recommended specifying that only individuals doing screen production work (even though through a company structure) be on the worker side of collective bargaining.[9]

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example, any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and salesperson is that of employer and independent contractor: see section 51 of the Real Estate Agents Act 2008.

6 Above n 4, Annex 3, Regulatory Impact Statement: A collective bargaining framework for screen production workers, at [2.4], p 10.

7 Support services means "accounting, auditing, management, representation, legal, advertising, or similar services that have a contributing value or interest peripheral to the actual creation of the screen production".

8 The occupational groups listed in Schedule 3 include composer, director, game developer, performer, technician (post-production), technician (production) and writer.

9 New Zealand's screen industry: great work, great workers, Recommendations of the Film Industry Working Group to the Government, October 2018, at p 10.

(b) It is not clear whether some specialist support services within the screen production industry, for example production project management or administration are included within the definition.

10. Additionally, the definition of support services includes services "that have a contributing value or interest *peripheral* to the actual creation of the screen production". We note the word 'ancillary' is more commonly used to achieve the same general meaning. If the current definition of support services is retained, we suggest it would be clearer to use 'ancillary' instead of 'peripheral'.

11. The Law Society therefore recommends the definitions of screen production worker and support services are clarified.

Recommendations

12. We recommend the Committee:

(a) Clarify whether an individual engaged through a company structure is captured by the definition of a screen production worker. If they are to be covered as a worker, the Bill will need to be amended to ensure the definition of "screen production worker" applies to workers who are contracting through their own company or another company. This would ensure consistency with the recommendation of the FIWG as previously noted.

(b) Carefully consider if and how the definition of screen production worker may be amended to include others (not currently included) or whether further guidance is appropriate once the definition is applied and tested in practice.

(c) Amend the definition of support services (in clause 11(2)) so that it reads: "Support services means "accounting, auditing, management, representation, legal, advertising, or similar services that have a contributing value or interest *ancillary* to the actual creation of the screen production".

Part 2: Workplace relationships and individual contracts

General Duties

Obligation to act in good faith: clause 13

13. The definition of good faith in clause 13(1) is narrowly defined when compared with the duty of good faith under the ERA. This appears to be deliberate. We recommend a minor change (as noted below in relation to clause 16) to expand the duty of good faith to improve individual contract bargaining outcomes.

"Undue influence": clause 14

14. Clause 14 stipulates that "a person" must not exert undue influence on any screen production worker with the intention of inducing the worker to join or not join a worker organisation, participate in collective bargaining and the like. As currently drafted, clause 14 appears to cover any person – such as for example another screen production worker – who seeks to recruit members to a worker organisation (if "undue" influence is used). It is unclear if this is intended or whether the duty relates primarily to the engager (defined in clause 10 as "a person who engages 1 or more screen production workers (for example, a production company)". It would be helpful if this was clarified.

Individual Contracts

Providing an individual contract

15. Clause 16 sets out the requirements for providing a screen production worker with an individual contract. The following issues are noted:

    (a) Clause 16(2) requires an engager to provide a worker with a copy of their individual contract as soon as practicable after it is entered into. However, there appears to be no obligation to provide a copy in advance or to respond in good faith to any issues raised during the bargaining process. This could result in an individual contract being provided on a 'take it or leave it' basis by an engager. To encourage good faith bargaining, and to ensure parties are clear about what is being agreed to (before it is agreed), the Law Society recommends clause 16 is amended to include additional requirements that mirror the ERA when conducting good faith bargaining (as outlined below). Adding further obligations would ensure an individual has an opportunity to seek advice about the contract before agreeing to it.[10]

    (b) Clause 16(4) includes a 'better off overall' test.[11] We note that the concept of 'better off overall' is new to New Zealand though it is used in Australia under the Fair Work Act 2019. It is a practical approach that takes into account a wide range of individual circumstances relating to screen production contracts.

    (c) Clause 16(5) goes on to state that "to the extent that the worker's individual contract breaches subsection (4)(c), the contract is unenforceable". As currently drafted, subclauses (4) and (5) suggest that inferior aspects of the individual contract would become unenforceable, while at the same time not allowing the worker to claim the more favourable terms of the collective contract. We suggest this is clarified to ensure a worker obtains the benefit of more favourable terms in any collective contract, while also retaining more favourable terms in their own individual contract.

Recommendations

16. The Law Society recommends the following:

    (a) Amend clause 16(2) to include the following obligations as part of the duty of good faith or at the time of individual contract bargaining:

        (i) The engager to provide a copy of the proposed contract in advance to the worker.

        (ii) The engager to provide a reasonable opportunity for the worker to seek independent advice.

        (iii) The engager to listen to and answer questions asked by the worker, in good faith.

        (iv) The engager to provide a final copy of the contract to the worker after terms are finalised.

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10 This is similar to protections currently afforded to employees under section 63A of the ERA, recognising the inherent inequality of bargaining power between an employer and employee – comparable to an engager and a screen production worker.

11 Namely that if a collective agreement covers work to be done by the worker, the individual contract must include all applicable terms to the same or more favourable effect. It cannot contain any terms, either individually or in their overall effect, that are less favourable to the worker than the terms of the collective agreement (see clause 16(4)(c)).

(b) Clarify clause 16(5) to ensure a worker obtains the benefit of more favourable terms set out in any collective agreement, while retaining the more favourable terms in their individual contract.

Mandatory terms of an individual contract

17. Clause 17 requires an individual contract to include a plain language explanation of the process by which a screen production worker may raise, and the engager respond to, a complaint about bullying, discrimination and harassment in the workplace.

18. It is appropriate to provide a plain language explanation about the complaints process, but the Law Society suggests this would be better located in a separate policy document, rather than being in each individual contract. Doing so would enable flexibility for the engager to make mutually beneficial changes to policy following consultation rather than during individual contract negotiations. It would also be consistent with WorkSafe guidance on dealing with bullying.[12] The Bill could make it compulsory for the engager to provide the policy document at the same time as the individual contract.

Recommendation

19. That the plain language explanation of the complaints process is required to be provided in a supporting policy document, rather than in the individual contract.

Part 3: Collective Bargaining

20. There are several aspects of Part 3 of the Bill (in particular in Subparts 2 and 3) which are largely similar to provisions already contained in the ERA and the workability of such provisions is already known and tested. The following comments focus on clauses in the Bill that appear to be inconsistent with similar provisions in the ERA.

Collective bargaining must be carried out in good faith

Clause 26(4)(b)

21. Clause 26 sets out the duty of good faith during the collective bargaining process. Clause 26(4)(b) then states that "*nothing in this section prevents any engager from … continuing to negotiate and form individual contracts with workers during bargaining*".

22. As drafted, this would allow an engager to continue negotiating and forming individual contracts with workers while they are also represented by a workers' organisation during collective bargaining. This may risk undermining the collective bargaining process. The subsection also appears to contradict clauses 26(1)(e) and (f), which refer to the obligation to refrain from undermining, or doing anything that is likely to undermine, the collective bargaining representatives or the bargaining process.

23. While subclause (5) acknowledges that subclauses (1)(e) and (f), and the good faith obligations in clauses 13 and 14 must still be adhered to, it is unclear how these two competing interests will be resolved. This may cause uncertainty and an increased risk of litigation.

24. The Law Society also notes the ERA does not include any comparable provision. Section 32(6) of the ERA states that *"… this section does not prevent an employer from communicating with*

[12] See for example, an Anti-Bullying Policy Template at https://worksafe.govt.nz/topic-and-industry/bullying/.

the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4."

25. Further, section 4(6) of the ERA provides that it is a breach of the good faith obligations of an employer to "*advise, or to do anything with the intention of inducing, an employee (a) not to be involved in bargaining for a collective agreement; or (b) not to be covered by a collective agreement*".

Recommendations

26. If the intention is that clause 26(4)(b) does not apply to workers who are already represented by a worker organisation and in the bargaining process, we recommend this is clarified.

27. Alternatively, if the intention is for those workers represented by a workers' organisation to be included in clause 26(4)(b), we suggest the Committee consider whether the contradiction between clause 26(4)(b) and clauses 26(1)(e) and (f) can be resolved with further drafting amendments.

Clause 27 – Bargaining parties required to conclude collective contract

28. Clause 27 states that *"the duty to act in good faith in accordance with section 26 requires the* parties *bargaining for a collective contract to conclude a collective contract".*

29. We note this is inconsistent with the equivalent provision in the ERA. Section 33(1) of the ERA provides that: "*The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to*."

30. Therefore, as presently drafted, clause 27 creates a more stringent requirement on parties than that imposed by the ERA.

31. We acknowledge the more stringent requirement has likely been included to prevent 'surface bargaining', where a party may begin bargaining without any real intention of entering into an agreement. However, we consider the requirement in the ERA, to conclude a collective agreement unless there is a genuine reason based on reasonable grounds, would sufficiently address this concern.

Recommendation

32. Consider adding the words *"unless there is a genuine reason, based on reasonable grounds, not to"* to the end of clause 27, to provide consistency with the ERA.

Clause 28 – Industrial action prohibited during bargaining

33. Clause 28(2)(a) provides that "industrial action" includes 2 or more workers refusing to fulfil any terms of their individual contracts. As currently drafted, this appears to also include any refusal based on health and safety grounds.

Recommendation

34. Amend clause 28(2)(a) to include an exception that workers can refuse to fulfil the terms of their contract if the refusal is based on health and safety grounds.

Clause 34 - Minimum and maximum duration of collective contracts

35. Clause 34(1) stipulates that a collective contract is *"in force, as from its commencement date, for no less than 3 years".*

36. This clause applies to both occupation-level and enterprise-level contracts. If it is intended to apply to enterprise-level contracts, this may not be practicable. Enterprise-level contracts can apply within a single production company, or screen production. An enterprise level production company may not exist for 3 years.

Recommendation

37. Clarify whether the minimum duration of 3 years is intended to apply to enterprise-level contracts.

38. If so, given the potential for frustration of contract due to the company or production no longer being in existence, we suggest the Committee consider whether clause 34 be reworded in similar terms to section 52(3) of the ERA, to provide more flexibility and workability. Section 52(3) provides:

> "A collective agreement expires on the close of the earliest of the following dates:
>
> (a) the date specified in the agreement as the date on which the agreement expires:
>
> (b) the date on which an event occurs, being an event that is specified by the agreement as an event on the occurrence of which the agreement expires:
>
> (c) the date that is the third anniversary of the agreement coming into force."

Part 4: Dispute Resolution, challenges, reviews, penalties and offences

Clause 56(2): Power to impose a penalty

39. Clause 56(2) states that no person to whom the Bill applies "may confer on any other person the power to impose a penalty in relation to any matter to which [this Act] imposes a penalty". We are unsure what is meant by this clause unless, perhaps, the intent is to prohibit parties to a collective contract from agreeing that a party may be liable to a contractual penalty. This should be clarified.

Recommendation

40. If the intention of clause 56(2) is to prohibit parties agreeing to contractual penalties, we suggest this is clarified.

Clause 56(3), (4) and clause 59(1): Process to Settle Disputes to Be Agreed between Persons to Whom the Act Applies

41. Clause 56(3) provides that if there is a dispute between persons to whom the Bill applies "… it is a matter for those persons to agree on the processes to settle the dispute …". Subclause (4) then provides that if parties do decide to use the dispute resolution processes available under the Bill, the relevant provisions of the Bill will apply.

42. Further, clause 59(1) provides that a party to a workplace relationship or collective bargaining may apply to the Authority for a determination on any dispute.

43. It is not clear whether, if the parties cannot agree on the process to settle the dispute, a party may unilaterally apply to the Authority under clause 59(1). On the one hand, clause 56(3)

suggests that if the parties cannot agree to use the Authority, then the Authority will not be able to deal with the matter or make any determinations. On the other hand, clause 59(1) appears to envisage that a party can unilaterally apply. We recommend this inconsistency is clarified.

44. Generally speaking, it is desirable for the efficient resolution of disputes for there to be a backstop or default process for handling disputes if the parties cannot agree how the dispute is to be dealt with. Otherwise, deadlock, with no mechanism for breaking the deadlock, can ensue.

Recommendation

45. Clarify whether an application to the Authority is the default process for handling disputes if the parties cannot agree on what the process should be.

Clause 59(2), (3), and Schedule 4: Process Where "Final Offer Arbitration" Is Used

46. Clause 59(2), coupled with section 165 and Schedule 2 of the ERA, provides that in determining a dispute, the Authority has the full range of powers available to it under Schedule 2 (of the ERA) to do things such as summoning witnesses, calling for evidence, administering oaths, ordering costs, and exercising other related powers. It also provides that the parties may appear by representatives, and the Authority may order any person to appear before it or to be represented before it.

47. The provisions in Schedule 4 of the Bill then specify the process for "final offer arbitration": refer clause 59(4).

48. Clause 59(3) provides that "Despite subsection (2), the Authority must use final offer arbitration to determine the dispute if …" the dispute relates to bargaining for a collective contract and falls within the circumstances described in clause 58(3) (emphasis added).

49. What is not clear is whether, in the course of "final offer arbitration" (as provided for in clause 59(3)), the Authority may similarly call for evidence, administer oaths, issue a witness summons, and order costs etc as provided for in Schedule 2 of the ERA. The process described in Schedule 4 of the Bill does not include such processes. Yet the arbitrating body is required under Schedule 4 to have regard to, for example, "screen industry practices and norms", which might be the subject of contested evidence by witnesses or otherwise.

50. The use of "despite" in clause 59(3) might be taken as suggesting that clause 59(2), which applies Schedule 2 of the ERA to disputes under the Bill, does not apply. However, that is not clear. Neither is it clear whether sections 159, and sections 159A to 178 of the ERA apply to "final offer arbitration" (see clause 59(2)).

51. It is highly desirable this is clarified.

Recommendation

52. We recommend the Committee clarify whether the provisions of Schedule 2 of the ERA apply to the "final offer arbitration" process described in Schedule 4 of the Bill. We also recommend the Committee clarify whether sections 159, and 159A to 178 of the ERA apply to "final offer arbitration".

Part 5: Miscellaneous provisions and amendments to other Acts

Subpart 1 – Miscellaneous Provisions

Access to workplaces – entitlement to enter

53. Clause 66(1) provides that a representative of a worker organisation is entitled to enter "a workplace" for the purposes specified in the clause.

54. "Workplace" is not limited to "a screen production workplace". Neither is it expressly limited to a workplace occupied or controlled by an engager. This would apparently give an entitlement to enter any workplace in which a screen production worker is working, even though:

    (a) the workplace is not being used for the purposes of a screen production; and/or

    (b) is not controlled by an engager; and/or

    (c) the worker is not performing screen production activities in that workplace.

55. While sections of this subpart of the Bill (for example clause 68(1)(a)) might be interpreted as collectively implying that the workplace must be a screen production workplace and that the worker must be carrying out screen production activities, that is not clearly stated. Nor do the definitions of "workplace" and "person in control of the workplace" in clause 10 clarify the matter.

56. The Law Society recommends clause 66(1) is amended to include the words "screen production" before the word "workplace".

Access to workplaces – consent to access

57. Clause 67(1) provides that before entering a workplace a representative of the worker organisation who is entitled to enter under clause 66 must "*request* the consent of the person in control of the workplace" (emphasis added). Subclause (2) sets out limited grounds on which the person in control of the workplace may refuse consent to entry.

58. Although it is implicit and clearly intended, clause 67 does not explicitly say that the consent must be *obtained* before the representative enters. (The heading to clause 67 states "Representative of Worker Organisation Must Obtain Consent to Enter Workplace", but that is not reflected in the current wording of the clause.) In the equivalent provision of the ERA (section 20A(1)) a representative of a union must, before entering a workplace under the access provisions of section 21, "request *and obtain* the consent of the employer" (emphasis added).[13]

59. Provisions entitling persons to enter private property without consent, or requiring the owner/occupier to give consent to entry against their wishes, should be clearly expressed given the significant intrusion on individual rights.

60. The words 'and obtain' should be added to clause 67(1) to make clear that consent must be obtained, not merely requested.

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[13] This subsection does not apply to a union representative if there is a collective employment agreement in force with a coverage clause covering work done in the workplace, or bargaining that has been initiated for such a collective employment agreement.

Recommendation

61. We recommend the following:

    (a) Amend clause 66 (1) to include the words “screen production” before the word “workplace”.

    (b) Amend clause 67 (1) to include the words “and obtain” after “must request”.

Herman Visagie
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25 May 2020