

17 July 2020

Chairperson Parmjeet Parmar
Education and Workforce Select Committee
Parliament Buildings
Wellington

By email: Education.Workforce@parliament.govt.nz

Tēnā koe e te rangatira

Screen Industry Workers Bill – further questions for New Zealand Law Society

Thank you for the questions raised by officials assisting the Select Committee, relating to the recent submission from the New Zealand Law Society | Te Kāhui Ture o Aotearoa on the Screen Industry Workers Bill.¹

The officials' questions dated 29 June were referred to the Law Society's Employment Law Committee for their review. The Law Society's responses are outlined below.

Workers operating through commercial entities

1. *In para 9(a) you note that the bill does not appear to cover screen production workers that do not contract individually. You give the example of workers contracting through their own company or a contracting company. Do you have any particular views whether this issue arises through the use of the word "individual" or alternatively through the concept of "engagement"? (see for example section 431E of the Financial Services Legislation Amendment Act 2019).*

We consider the issue (that the Bill does not appear to cover screen production workers who do not contract individually) arises from the use of the word "*individual*" in the definition of 'screen production worker' (see section 11 of the Bill). Using the word "*individual*" appears to exclude a company creating a risk that contractors who choose to engage themselves through a company structure² will be excluded from the Bill.

The issue identified above is also linked to the concept of "*engagement*". If the definition of screen production worker was expanded to include an individual contracting through their company, further clarity could be achieved by defining the concept of engagement in a similar way as outlined by officials. Section 431E of the Financial Services Legislation Amendment Act 2019) states:

¹ NZLS submission on the Screen Industry Workers Bill, 25 May 2020:
https://www.lawsociety.org.nz/_data/assets/pdf_file/0004/146614/Screen-Industry-Workers-Bill-25.5.20.pdf

² Different to the definition of "person" which generally includes a company. Section 29 of the Interpretation Act 1999 states: "person includes a corporation sole, a body corporate, and an unincorporated body."

431E Meaning of engaged

A person (A) is engaged by another person (P) if—

- a) A is engaged directly by P (for example, if A is an employee or a contractor of P); or
- b) A is engaged indirectly through 1 or more interposed persons (for example, if A is an employee of another person who is a contractor of P).

Therefore, further to our initial recommendation (at paragraph 12(a)),³ the Committee may wish to consider the following:

- a) Amend the definition of a screen production worker in section 11 to include a company with only one employee or contractor.
- b) Include a meaning of “engaged” similarly to the Financial Services Legislation Amendment Act as set out above.

2. *While not directly linked in your submission, were you of the view that an approach similar to that adopted in section 51(1) of the Real Estate Agents Act 2008 is required in the circumstances?*

As noted in footnote 5 of our submission, section 51(1) of the Real Estate Agents Act 2008 provides that the written agreement between an agent and a salesperson is conclusive so far as it expressly states the relationship between them (whether as employee or contractor).

The Bill similarly states that an individual party (who is a screen production worker) to or covered by a written employment agreement stating they are an employee, is “conclusive proof” that person is an employee (or vice versa).⁴

The Bill also includes a proposed amendment⁵ to the meaning of ‘employee’ in section 6 of the Employment Relations Act 2000, adopting a similar approach to the position taken in relation to other legislation superseding the “real nature” test⁶ and confirming the conclusive nature of contracts as to employment status under the Real Estate Agents Act 2008.⁷ This will ensure consistency between the Employment Relations Act and the Bill. We do not consider that any further changes are necessary.

3. *Additionally, while we understand what is meant by “their own company” could you please clarify and provide some examples of what you mean by a “contracting company”? We would like to know if the distinction here relates to the degree of control over the company, for example the individual does not have complete control over the “contracting company” in the same way they do over “their own company”, or some other legal construct in the industry that you consider needs to be accommodated.*

³ Note 1 above, at [12(a)].

⁴ Clause 5(2)(a) of the Bill.

⁵ See clause 77 of the Bill which proposes to amend section 6 of the Employment Relations Act to include subsection (4A): “Nothing in this section applies to determine the employment status of a person who falls within the meaning of screen production worker in section 11 of the Screen Industry Workers Act 2020.

⁶ As set out in Section 6(2) of the Employment Relations Act 2000 which applies when determining whether a person is employed - the Court or Authority “must determine the real nature of the relationship between them.”

⁷ Section 6(4) of the Employment Relations Act 2000 states that “Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 2008...”

Use of the phrase “contracting company” (in paragraph 9(a) of our submission) was intended to include any company to which an individual may sub-contract through their own company, i.e. a further corporate layer between the individual undertaking the substantive work and the screen production company ultimately running the screen production. The phrase does relate to the degree of control but also other factors normally part of the “real nature” test such as the ability to make a profit (or lack of). Such an individual would have very little control over the contracting company for which they worked, yet they would be classed as an “engager” to another “engager” under the Bill (as it is currently drafted).

Allowing individual contracting during collective bargaining

4. *In paragraphs 21 – 25 of your written submission you note that the Bill allows an engager to continue to negotiate and form individual contracts with workers during bargaining. You also noted that this differs from the approach under the Employment Relations Act and risks undermining the bargaining process.*
5. *This feature of the bill is intentional because a prohibition on individual contracting during collective bargaining would mean that no screen production workers within coverage of a proposed collective contract would be able to take up new work until the bargaining was concluded. At the occupation level, collective contracts would cover all workers who do a particular type of work and those who engage them (rather than just workers and engagers who are members of bargaining parties). This feature also reflects the fact that even after a collective contract is formed, the relationship between screen production workers and engagers is still one of contract and an individual contract will still need to be formed for every engagement.*
6. *With that in mind, do you still consider that the bargaining process could be undermined to the same extent?*

Although we consider the bargaining process could still be undermined we do not consider the Bill needs adjusting. In essence, the ability to enter into an individual contract under the Bill is the same as the Employment Relations Act, where an employee who is a union member can be employed on an individual employment agreement while that employer is in a collective bargaining process (there being no current collective employment agreement). Such an employee would be covered by the collective employment agreement once it is concluded.

The reference in our submission to the Employment Relations Act⁸ concerned the “anti-undermining” provisions of that Act dealing with communications between an employer and employees during collective bargaining, rather than the ability to conclude an individual employment agreement while collective bargaining is underway.

The problem that still needs to be addressed is the risk of engager behaviour designed to undermine, delay or frustrate the conclusion of an enterprise level collective contract for the purpose of being able to continue to engage screen industry workers on individual contracts; see also our comment in relation to question 7 below.

⁸ Above n 2, at [24].

7. *Would your view be different depending on whether we are considering occupation level or enterprise level bargaining?*

Regarding enterprise level bargaining we suggest that consideration be given to providing additional safeguards or sanctions against adverse engager behaviour designed to delay/frustrate the conclusion of a collective contract. If an engager has a current project for which it is engaging screen industry workers, there may be an incentive for the engager to delay or attempt to frustrate the conclusion of a collective contract until after the project has completed.

We invite the Committee to consider this issue further.

Power to impose penalty

8. *In paragraph 39 of your written submission you raise a concern that section 56(2) may not be clear and might in fact prevent the negotiation of terms that relate to contractual penalties. We have assumed that by “contractual penalties” you mean penal rates or financial consequences agreed to by the parties for specific breaches under the contract – could you please confirm that is what you meant?*

As has been correctly noted, the reference to “contractual penalties” at paragraph 39 of the Law Society’s submission was intended to cover the financial consequences agreed to by the parties for specific breaches under a contract, for example by way of liquidated damages clauses.

However, on reflection, we note the purpose of section 56(2) appears to prevent the imposition of penalties under the Act by ‘another’ person (for example, by an arbitrator appointed by the parties to resolve a dispute), or for actions which are the subject of penalties under the Act (for example, if an engager fails to ensure that a contract has the required contents (under sections 16 and 20)).

Parties may prefer to use the arbitration process over the Employment Relations Authority process (to resolve a dispute). However, it is clear the Employment Relations Authority has the power to impose a penalty for various matters that the Bill specifies should be subject to statutory penalties. In those circumstances, we consider it would be inappropriate for an arbitrator (or any other private decision-maker) to impose such penalties. We agree that section 56(2) of the Bill makes this clear.

9. *The restriction in section 56(2) only applies “in relation to any matter to which this Act imposes a penalty” (see section 15, 20, 26(7), 29, 64 & 70), and is not intended to apply more broadly. In light of the italicised words above, do you still consider there to be a risk that the ability to negotiate contractual penalties may be inadvertently prohibited?*

On reviewing the matters for which the Bill imposes a penalty (as noted in the question above), the Law Society agrees it is unlikely that parties to a contract (either between an engager and a screen industry worker, or a collective agreement between an engager organisation and a worker organisation), would contractually agree on penalties for those matters which already attract penalties under the Bill. It is conceivable such a scenario may arise, for example if there was a bargaining agreement between an engager organisation and a worker organisation which provided there should be no industrial action during bargaining. However, the likelihood of such a scenario arising is unlikely to warrant specific attention in the Bill.

Access to workplaces

10. We have included a definition of “workplace” in section 10 of the Bill:

“workplace—

(a) means—

- i. a place at which a screen production worker works from time to time; and
- ii. a place to which a screen production worker goes to do work; but

(b) for the purposes of sections 66 to 70, excludes any building or any part of a building to the extent that it is occupied as a residence and is not being used as a production set”

Could you please confirm if your submission in paragraphs 53-56 and the recommended amendments were intended to build on this definition or were intended to completely replace it.

The intention of the Law Society’s initial recommendation to amend section 66(1) to include the words “screen production” before the word “workplace”,⁹ was to build on the definition of “workplace” (as set out in section 10 of the Bill). The objective of that recommendation was to ensure that entry to a workplace only occurs if the workplace is one where screen production work is undertaken. This objective could equally be achieved by amending the definition of “workplace” in section 10. If the Committee considers that a more appropriate option, we recommend the definition of “workplace” in section 10 is amended as follows (inserted words underlined):

“workplace –

(a) means –

- (i) a place at which a screen production worker carries out screen production work from time to time; and
- (ii) a place to which a screen production worker goes to do screen production work; but ...”

We also note this would avoid the need to amend section 66(1).

Conclusion

We hope these comments are helpful to the Committee. If further discussion would assist, I can be contacted in the first instance via the Law Society’s Law Reform Adviser, Amanda Frank (amanda.frank@lawsociety.org.nz).

Nāku noa, nā



Maria Dew QC
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⁹ Above n 2, at [56].