

Departmental Disclosure Statement

Screen Industry Workers Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

7 February 2020

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Part One: General Policy Statement

Introduction

The Screen Industry Workers Bill introduces a workplace relations framework for contractors working in the screen industry. This framework will:

- provide clarity about the employment status of people doing screen production work; and
- introduce a duty of good faith and mandatory terms for contracting relationships in the screen industry; and
- allow collective bargaining at the occupation and enterprise levels; and
- create processes for resolving disputes arising from contracting relationships or collective bargaining.

The Bill provides workplace protections for screen production workers, while ensuring certainty and flexibility for our internationally-competitive screen industry.

Background

The Employment Relations (Film Production Work) Amendment Act 2010 amended the Employment Relations Act 2000 to address uncertainty about the employment status of film production workers, which arose in relation to The Hobbit films. This uncertainty stems from how employment status is determined under the Employment Relations Act 2000: if challenged, an individual's employment status is for the courts to determine using common law tests about the real nature of the relationship between parties.

The 2010 change provided certainty about film production workers' employment status by excluding them from the definition of an "employee" under section 6 of the Employment Relations Act 2000. The exception is if they are party to or covered by a written employment agreement that specifies they are employees.

Today, most film production workers are engaged as contractors, and cannot challenge their employment status. They therefore cannot access the rights and obligations of New Zealand's employment relations and employment standards system. One such right is the ability to bargain collectively, which allows groups of workers to jointly negotiate terms and conditions with the firms that hire them.

In 2018, the Government established the Film Industry Working Group, which was tasked with designing a model to allow film production workers to bargain collectively, without necessarily reversing the changes made in 2010. The Screen Industry Workers Bill gives effect to recommendations made by the Film Industry Working Group in October 2018, which were accepted in large by the Government in June 2019.

Employment status of screen production worker

The Bill provides continued certainty about the employment status of screen production workers. It does this by repealing the changes made in 2010, and instead providing more detailed definitions of "screen production worker" and "screen production". It says that people doing screen production work are employees if they are party to or covered by a written employment agreement specifying they are an employee, and therefore covered by employment law.

This means:

- screen production workers, according to the definition in this Bill, are employees if they are party to or covered by a written employment agreement specifying they are employees:
- screen production workers who are not employees are covered by this Bill (eg, can bargain collectively according to the Bill’s bargaining process, and have other rights provided by the Bill):
- for any workers in the screen industry who do not meet the Bill’s definition of a screen production worker, their employment status is determined by section 6 of the Employment Relations Act instead of this Bill.

Good faith and mandatory contract terms

The Bill introduces a good faith obligation for contracting relationships in the screen industry: parties must not mislead or deceive one another, or do anything that could mislead or deceive one another.

The Bill requires all individual contracts for screen production work between screen production workers and those who engage them to include certain mandatory terms.

All individual contracts must include a description of the process by which a complaint of bullying, discrimination or harassment in the workplace may be raised and how that complaint will be addressed.

In relation to termination, all individual contracts must also state what the notice period for termination is, and what payment (if any) must be made to the worker by the engager.

Collective bargaining

This Government is committed to restoring collective bargaining rights for screen production workers.

To allow fair and orderly collective bargaining, the Bill creates a framework that workers and engagers in the screen industry must use if they wish to bargain collectively. Bargaining will be possible at two levels: at the occupation level (for example, for all performers, writers, or production/post-production technicians) and at the enterprise level (for example, within a single production company or screen production).

Collective bargaining will produce “occupation-level collective contracts” or “enterprise-level collective contracts”. All collective contracts will have to contain certain terms (for example, pay, breaks, hours of work). Collective contracts will effectively set minimum terms for all the work they cover, which can be improved on in workers’ individual contracts.

Occupation-level collective contracts will apply to an entire occupation of workers (for example, all performers, all writers, or all production/post-production technicians). An important safeguard is that bargaining may only be initiated if the Employment Relations Authority is satisfied there is sufficient support for bargaining on the side of the initiating party. Another safeguard is that occupation-level collective contracts need to be ratified by way of a vote. All workers in the affected occupation are entitled to participate in this ratification vote regardless of union or guild membership. The occupations are defined in Schedule 3 of the Bill. They may be amended by Order in Council so the legislation can adapt to the emergence of new or more specialised occupations in the screen industry.

Enterprise-level collective contracts will operate in a different manner to occupation-level collective contracts. Both workers and engagers need to agree to initiate bargaining for an enterprise-level collective contract. Enterprise-level collective contracts are binding on signatory parties as well as workers within that enterprise who are members of a worker organisation that is a signatory party.

Individual contracts must not contain terms that are less favourable to workers than any term in an applicable occupation-level or enterprise-level collective contract. An enterprise-level contract must not contain terms that are less favourable to workers than any term in an applicable occupation-level collective contract.

Industrial action is not allowed during collective bargaining. This was unanimously proposed by the Film Industry Working Group because of the volatility and international mobility of the screen industry.

Effect on existing contracts

All contracts entered into before commencement of this Bill will have 1 year to comply with:

- the requirement to have a written individual contract that includes certain mandatory terms, and
- the terms in any relevant occupation-level collective contract.

Dispute resolution

The Bill provides processes to resolve disputes that may arise in the course of a contracting relationship or collective bargaining.

For contract disputes, the Bill clarifies that Employment Mediation Services will provide free mediation. The Employment Relations Authority can also make a determination to resolve a dispute if necessary.

For bargaining disputes, Employment Mediation Services will provide free mediation, and the Employment Relations Authority can make determinations. However, parties can request assistance from the Authority in the form of facilitation before seeking a determination.

For bargaining disputes that involve fixing a term in an occupation-level collective contract, parties must first attempt mediation and facilitation, and if those are unsuccessful, the Authority must fix the term using the Bill's final offer arbitration process. The final offer arbitration process is also available for fixing terms in enterprise-level collective contracts, however bargaining parties in this case can agree to use any other method to resolve such disputes.

Workplace access

The Bill provides for worker organisations to request access to workplaces where screen production work is taking place, but gives production companies the ability to refuse access if it would unreasonably impede screen production activity. This balances the need for registered worker organisations to access workplaces for legitimate business under the Bill, with avoiding unnecessary disruption to screen productions.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>New Zealand's screen industry: Great work, great workers, Film Industry Working Group, October 2018, accessible on MBIE's website: https://www.mbie.govt.nz/assets/4c8ac9afb6/recommendations-of-film-industry-working-group-to-government.pdf.</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Regulatory Impact Statement: A collective bargaining framework for screen production workers, Ministry of Business, Innovation and Employment, May 2019, accessible on MBIE's website: https://www.mbie.govt.nz/assets/253f6497a5/government-response-to-the-film-industry-working-groups-recommendations.pdf.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Regulatory Impact Statement identified above did not meet the threshold for receiving an independent opinion on the quality of the Regulatory Impact Statement from the RIA Team based in the Treasury. MBIE's Regulatory Impact Analysis Review Panel reviewed the Regulatory Impact Statement, and considered that the information and analysis summarised in the Regulatory Impact Statement met the criteria necessary for Ministers to make informed decisions on the proposals.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
Analysis on the size of the potential costs and benefits of the policy to be given effect by this Bill is included in section 5 of the Regulatory Impact Statement available on MBIE's website at: https://www.mbie.govt.nz/assets/253f6497a5/government-response-to-the-film-industry-working-groups-recommendations.pdf .	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
The Bill does not involve an enforcement role for regulators. Instead, any enforcement needs to be initiated by parties to individual and collective contracts. Regulator effort will be focused on ensuring all parties in the screen industry are informed about new legal requirements for individual contracts, and the entry into force of collectively-negotiated minimum terms. Worker organisations (eg unions and guilds) are also expected to play a role in enforcement, and have the ability to access workplaces for this reason.	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The following international obligations are engaged:

- The International Covenant on Civil and Political Rights (article 22 relating to freedom of association),
- The International Covenant on Economic, Social and Cultural Rights (article 8 relating to the right to strike),
- The International Labour Organization's (ILO) Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87), and
- The ILO's Right to Organise and Collective Bargaining Convention 1949 (Convention No. 98).

These obligations are engaged by the following features of the Bill:

- The bar on industrial action,
- Universal coverage of occupation-level collective contracts,
- An absolute duty to conclude a collective contract once bargaining has been initiated, and
- Compulsory arbitration,

These features of the Bill's bargaining model were unanimously recommended by the FIWG, and reconfirmed as essential during consultation while drafting the Bill.

During the development of the Bill, steps have been taken to minimise any potential inconsistency with international obligations. These mitigations are explained in the Minister for Workplace Relations and Safety's Cabinet paper seeking approval to introduce this Bill. MBIE has also consulted with the Ministry of Foreign Affairs and Trade, the Ministry of Justice and the secretariat of the International Labour Organization. However, the model is novel in New Zealand law and it is not possible to completely eliminate all risks of inconsistency.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Bill does not specifically impact rights and interests of Māori protected by the Treaty of Waitangi and, in the case of customary interests, also protected at common law.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice is expected to be available on the Ministry of Justice's website at: <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>The Bill creates the following criminal offence:</p> <ul style="list-style-type: none"> Section 65: Offence to mislead the Employment Relations Authority in the performance of its functions under Part 3, subpart 3 (relating to the process for initiating collective bargaining) or Registrar of Screen Industry Organisations. This reflects a similar offence in the Employment Relations Act for misleading the Registrar of Unions. <p>The Bill includes the following civil penalty provisions:</p> <ul style="list-style-type: none"> Section 15: Penalty for breaching workplace relationship obligations, Section 20: Penalty for failing to comply with individual contract requirements, Section 26: Penalty for breaching duty of good faith in collective bargaining, Section 29: Penalty for engaging in industrial action during bargaining, Section 64: Penalty for obstructing or delaying Authority investigation, and Section 70: Penalty for certain acts in relation to entering workplaces. <p>Civil penalties are sought by parties affected by the breach, not by any government regulator. Penalty levels in the Bill are analogous to those under the Employment Relations Act. The Bill also extends the jurisdiction of the Employment Relations Authority and the Employment Court to include matters arising under the Bill.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted on these provisions, and had no comments on them.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>Under the Bill, personal information may be collected by the Employment Relations Authority as part of the application process to initiate bargaining for an occupation-level collective contract (section 39).</p> <p>The Bill requires the Authority to invite submissions on an application to initiate bargaining for an occupation-level collective contract. If people want their submission to be factored into the Authority's decision about whether bargaining should be initiated, they will need to comply with any minimum requirements that may be prescribed by regulations. These minimum requirements will be the subject of further Government decisions, but they could include for example a requirement for the submitter to state if they are within a particular occupational group and whether they are a member of any worker/engager organisation. Submissions will not be disclosed to bargaining parties or made public.</p> <p>Imposing minimum requirements will be limited to that which is necessary to ensure the Authority receives accurate and relevant information about the level of support among affected workers/engagers for occupation-level collective bargaining to take place.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The Bill is based on recommendations made by the Film Industry Working Group (FIWG) to the government in 2018. Following Cabinet policy approval in June 2019, there has been further consultation with the FIWG on policy detail during drafting.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>Regulators and bodies who have (or may have) a role to play under the Bill have also been consulted. These are the Registrar of Unions, Employment Mediation Services, the Employment Relations Authority and the Employment Court.</p> <p>The following agencies have also been consulted: the Department of Prime Minister and Cabinet (Policy Advisory Group), Inland Revenue, the Ministry for Culture and Heritage, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Treasury.</p> <p>In addition, the Legislation Design and Advisory Committee, the Commerce Commission, the International Labour Organization and members of the FIWG have been consulted.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
Fees may be imposed to make applications to the Employment Relations Authority and Employment Court.	

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
Schedule 1: The terms and conditions of contracts entered into before the Bill is enacted need to be varied (if necessary) within 12 months to comply with the Bill's requirements. Section 49: Individual contracts entered into before an occupation-level collective contract is published may need to be amended within one year to comply with minimum terms in that contract. Section 55: Individual contracts entered into before an enterprise-level collective contract comes into force may also need to be amended to comply with minimum terms in that contract.	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
The Bill applies the protections afforded to members of the Employment Relations Authority under section 176 of the Employment Relations Act 2000 to any member of the arbitrating body convened under Schedule 4 to fix terms of a collective contract through final offer arbitration. This arbitrating body is chaired by a member of the Employment Relations Authority, but can also include members nominated by bargaining parties in equal numbers.	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
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The Bill creates decision-making powers for the Registrar of Screen Industry Organisations to register and cancel the registration of worker and engager organisations.

It also creates decision-making powers for the Employment Relations Authority to:

- Sections 40 – 42: Decide applications to initiate bargaining for an occupation-level collective contract, including who the bargaining parties are and which worker organisation will conduct the ratification vote,
- Section 46: Decide whether an occupation-level collective contract is suitable to proceed to a ratification vote,
- Section 58: Facilitate collective bargaining, including making recommendations that can be binding with all parties' consent, and
- Section 59: Make determinations about disputes or issues arising between parties to a workplace relationship or as part of collective bargaining, including to fix a term in a collective contract.

Powers to make delegated legislation

<p>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</p>	<p>YES</p>
<p>The Bill creates a power for the Governor-General to amend the list of occupational groups in Schedule 3 by Order in Council. This power is necessary to ensure the list of occupations in relation to which occupation-level bargaining may take place is kept relevant and up-to-date with changing work in the screen industry. Before the Minister makes a recommendation to the Governor-General to amend the list, the Minister must consult persons who appear, to the Minister, to have an interest in the Order.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>The Bill contains regulation-making powers to prescribe the:</p> <ul style="list-style-type: none"> • Section 21: Manner in which applications must be made to be registered as a worker organisation or an engager organisation, • Section 21: Information that must be provided when applying to be registered as a worker organisation or an engager organisation, • Section 23: Form of the certificate of registration for a worker organisation or an engager organisation, • Section 24: Information that must be provided in a worker organisation's or an engager organisation's annual return of members, • Section 37: Manner in which applications to initiate occupation-level collective bargaining must be made, • Section 37: Information that must be included in an application to initiate occupation-level collective bargaining, • Section 39: Manner in which submissions must be made on an application to initiate occupation-level collective bargaining, • Section 39: Minimum requirements that submissions on an application to initiate occupation-level collective bargaining must comply with, • Section 47: Manner in which notice must be given of a ratification vote for an occupation-level collective contract, and • Section 59: Form of an application for a determination by the Employment Relations Authority. <p>These powers are necessary because:</p> <ul style="list-style-type: none"> • They are matters of detail for which it is not appropriate to utilise Parliamentary time, • They will allow unforeseen matters that may arise to be addressed, and • They provide flexibility in how the Bill is applied. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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