

10 February 2020

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Screen Industry Workers Bill

Purpose

1. We have considered whether the Screen Industry Workers Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21870/21.8). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. We have considered the consistency of the Bill with s 14 (freedom of expression), s 16 (freedom of peaceful assembly) and s 17 (freedom of association). Our analysis is set out below.

The Bill

4. The Bill introduces a stand-alone legislative framework to govern contracting relationships in the screen industry. It enables screen industry workers and engaging organisations to collectively bargain contract terms and conditions at the occupation and enterprise level.
5. Screen industry workers are usually engaged as independent contractors, and s 6(1)(d) of the Employment Relations Act 2000 precludes the court from making a determination that a screen industry worker is an employee for the purpose of that Act. This Bill retains the status of screen industry workers as independent contractors, but provides an alternate means for these workers to organise and pursue their collective interests.
6. The Bill gives effect to the recommendations made by the Film Industry Working Group in October 2018 which involved representatives of companies and workers in the film industry. In particular, the Bill:
 - provides clarity about the employment status of people doing screen production work,
 - introduces a duty of good faith on parties to a workplace, along with other mandatory individual contract terms (e.g. the contract must be in writing and set out a process by which a worker may raise a complaint about bullying, discrimination, or harassment in the workplace),
 - provides a process by which worker and employer organisations can be registered and recognised to represent their members in collective negotiations,

- allows collective bargaining to occur at the occupation and enterprise levels, and
- creates processes for resolving disputes arising from contracting relationships or collective bargaining, while preventing workers from taking industrial action.

7. In doing this, the Bill makes some minor consequential amendments to the Employment Relations Act 2000.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

8. Clause 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
9. There are broadly three ways in which the Bill engages the right to freedom of expression:
- clause 13 imposes a limited duty of good faith on parties to a workplace relationship, in particular, requiring that parties not act in any way that will or is likely to mislead or deceive the other;
 - several provisions of the Bill dealing with the registration and regulation of worker and engager organisations require these organisations to provide a Registrar of Screen Industry Organisations (the Registrar) with information, and for some of that information to be published on the internet (e.g. cls 21 – 25, 35, 37, and 43); and
 - in bargaining, the Bill requires parties to bargain in good faith—including the provision of confidential information to the other party—and prohibits workers from engaging in industrial action if the action is intended to affect the outcome of bargaining (particularly cls 26, 28, and 30).
10. A provision which limits a protected right or freedom may be consistent with the Bill of Rights Act if the limitation is reasonable and justifiable in a free and democratic society under s 5 of that Act. The s 5 inquiry may be approached as follows:
- Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - If so, then:
 - Is the limit rationally connected with the objective?
 - Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - Is the limit in due proportion to the importance of the objective?²

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7 at [123]

11. Each of the three categories of limiting provisions are considered in turn:
- a. The purpose of the limited duty of good faith at cl 13 is to promote effective workplace relations. Effective working relationships require trust and confidence between the parties in the workplace. Misleading and deceptive actions undermine trust and confidence and are therefore antithetical to effective working relationships. Clause 13(2) of the Bill ensures that the duty of good faith is targeted narrowly to prohibiting misleading and deceptive actions. Misleading and deceptive actions could only be of low expressive value, while trust and confidence is fundamental to an effective working relationship. This intrusion on freedom of expression is therefore in due proportion to the objective of the limit.
 - b. The Bill requires worker and engager organisations to provide various forms of information to the Registrar, and for some of this information to be published. The objective of this limit is to ensure that only worker and engager organisations that are fit to act as representative organisations are registered, that organisations have the necessary mandate from members to initiate bargaining and ratify agreements, and that third party worker or engager organisations which may have an interest in a worksite are aware of which organisations that the Employment Relations Authority (the Authority) has authorised to initiate bargaining. These purposes are essential to the design of a fair and inclusive collective bargaining regime where multiple parties might have overlapping and competing interests.

The information the Bill requires be provided to the Registrar and the Authority is tightly connected to the criteria set out in the legislation that worker or engager organisations must satisfy to undertake various actions. The information the Bill requires be provided goes no further than is necessary to satisfy those obligations. The expressive value of the information the Bill requires be provided is low. It is largely administrative in nature and is not likely to be sensitive. In contrast, the independent oversight by the Registrar and the Authority ensures that parties act fairly, lawfully, and transparently. This intrusion on freedom of expression is therefore in due proportion to the objective of the limit.

- c. In bargaining, the Bill requires potentially confidential information be provided to the other party to the negotiation and prevents workers and engagers from taking industrial action. These two limitations are considered discretely below:
 - i. The requirement to provide information to the other party in bargaining replicates existing provisions in the Employment Relations Act 2000.³ The sharing of information enables the parties to understand the other's position and to substantiate bargaining claims. The Bill includes detailed safeguards to ensure that confidential information can be protected, and to the extent that any confidential information is required to substantiate a bargaining claim, ensures that that information must only be used for the purpose of bargaining and is otherwise kept confidential.⁴ The Bill explicitly does not limit or affect the Privacy Act 1993.⁵ The expressive value of information the Bill requires to be shared in bargaining is of moderate expressive value. However, the provision of the information is essential to ensure robust bargaining between

³ Section 34.

⁴ Clause 30(3)-(7).

⁵ Clause 30(3)(8).

parties, and the Bill effectively protects more sensitive interests. This intrusion on freedom of expression is therefore in due proportion to the objective of the limit.

- ii. The prohibition on industrial action is a core provision to the Bill. This provision gives effect to a key recommendation of the Film Industry Working Group, and was considered by the Working Group to be necessary to ensure that New Zealand remained internationally competitive in the film production industry. This objective is sufficiently important to justify some limit on the right to freedom of expression.

The limitation is rationally connected to the objective. If workers were able to go on strike or take other forms of industrial action, this could delay a project, which would affect New Zealand's international competitiveness. The limitation on freedom of expression in this case is significant. Clause 28 of the Bill bans all industrial action undertaken for the purpose of influencing bargaining. The withdrawing of labour is recognised as being of high expressive value.⁶ However, the current status of workers in the screen industry (independent contractors) precludes them from collective bargaining and the protections that exist around exercising industrial action. This Bill restores some collective bargaining rights to screen industry workers, despite their status as independent contractors, so far as is consistent with maintaining an internationally competitive film industry in New Zealand. This intrusion on freedom of expression can therefore be seen as being in due proportion to the objective of the limit.

12. We therefore conclude that any limits to the freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

Sections 16 and 17 – Freedom of Association and Freedom of Peaceful Assembly

13. Section 17 of the Bill of Rights Act affirms that everyone has the right to associate with others freely. The right to freedom of association pertains to the right to join an organisation to pursue a common purpose.⁷ However, the forming of mere contractual relationships between parties does not engage the right.⁸
14. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly. The choice of method, place, and time of peaceful assembly is integral to the free exercise of that right.⁹
15. The Bill generally sets out a framework by which screen workers and engagers enter into contractual relationships. Except as outlined below, these provisions merely regulate minimum contract conditions and the process by which industry participants bargain to enter into contractual relations. As such, these actions do not amount to the joining of an organisation to pursue a common purpose, and do not engage the right to freedom of association.

⁶ ILO authority.

⁷ *Turners & Growers Ltd v Zespri Group Ltd* (No 2) (2010) 9 HRNZ 365 (HC) at [72].

⁸ Above n 7 at [73].

⁹ *Brooker v Police* [2007] NZSC, 30 at [116] per McGrath J.

16. The limitation on industrial action at clause 28 of the Bill engages the right to freedom of association. The collective withdrawing of labour by workers is not only a form of expression but is also a manifestation of the freedom of association. Depending on the particular form that the industrial action would have taken if allowed (e.g. a picket), clause 28 could also be regarded as limiting the right to freedom of assembly.
17. Like freedom of expression, limitations on the freedom of association and assembly raised by cl 28 of the Bill may be consistent with the Bill of Rights Act if the limitations are reasonable and are justifiable in a free and democratic society under s 5 of that Act.
18. The rights to freedom of association, and peaceful assembly, as particular manifestations of expression, are intimately bound-together. The issues that need to be considered in determining whether cl 28 is justifiable as per s 16 and 17 of the Bill of Rights Act are identical to those outlined with respect to expression above in paragraph 11(c)(ii) of this advice.
19. We therefore conclude that the limits to the freedom of association and freedom of peaceful assembly imposed by cl 28 by the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

20. We have concluded that the Bill appears to be consistent with the rights to freedom of the Bill of Rights Act.

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