SUBMISSION TO SELECT COMMITTEE SCREEN INDUSTRY WORKERS BILL

24 MAY 2020

INTRODUCTION

This is the submission of the New Zealand Writers Guild – Puni Taatuhi o Aotearoa (NZWG) to the Select Committee in support of the Screen Industry Workers Bill (Bill).

TABLE OF CONTENTS

ABOUT NZWG

NZWG is the professional association and registered trade union of New Zealand script writers. NZWG is committed to working in a way that adheres to the spirit and the principles of the Treaty of Waitangi. NZWG is a member of International Affiliation of Writers Guilds, Council of Trade Unions, WeCreate and is part of the Film Industry Working Group.

NZWG support all the recommendations made by the New Zealand Council of Trade Unions in their submission on this bill.

NZWG is the screen sector body representing the professional interests of writers in the fields of film, television, theatre, radio, comics and new media. NZWG members include most of the professional script writers working in New Zealand.

Below are the NZWG aims and objectives relevant in this submission on the Screen Industry Workers Bill – full aims and objectives are found in our constitution:

- To protect, represent and further the interests of New Zealand writers;
- To be the national and international voice of New Zealand writers;
- To establish, maintain and improve minimum conditions of work and rates of compensation for writers;
- To provide communication, negotiation, conciliation, arbitration, information and advisory services for the benefits of members in their relationships with employers, production companies, producers, other writers or anyone else in relation to their work;
- To promote policy, legislation and legal and economic rights for the benefit of writers, including but not limited to the issues of copyright, moral rights and status of the artist.

BACKGROUND

FILM INDUSTRY WORKING GROUP

Alice Shearman, Executive Director of the NZWG was a member of the Film Industry Working Group (FIWG) actively participating in both the wider group that delivered recommendations to Minister Iain Lees-Galloway in October 2018 and through the smaller sub-FIWG that met directly with the Ministry of Business, Innovation and Employment (MBIE) in 2019 post delivery of recommendations.

NZWG supports the four principles, created through cross sector consultation and consensus, and that underpin the legislation and guide our support and recommendations for the betterment of screen worker's rights through the Bill.

1. Principle 1 – Good Faith
2. Principle 2 – Protection from bullying, discrimination, and harassment

3. Principle 3 – Fair and reasonable termination of contracts
4. Principle 4 – Fair rate of pay

In certain places the legislation drafting missed the intentions of the FIWG recommendations and principles. As a result, this drafting of the unanimous recommendations, now contains unintentional loopholes, and lacks the mechanisms of enforcement that would make this legislation effective. These misinterpretations are outlined in the recommendations section.

COVID-19

This pandemic has significantly and seriously depleted the resources of NZWG and many other screen sector guilds and organisations. It has also economically exhausted the sector to a point that an Action Group has been created to support and stimulate the sector back to good health.

The timing of submissions to the Select Committee has been very unfortunate in coming at such a demanding time, and we hope this will be taken into consideration when the Select Committee receive and review the submissions delivered.

NZWG SUBMISSION ON THE SCREEN INDUSTRY WORKERS BILL

COMMENTS

Currently, screenwriters are predominantly independent contractors who must negotiate individual contracts, including pay rates and conditions, for every job they undertake. There are no legally enforceable pay minimums or standard contracts, and 'going rates' have remained static for many years.

Individual contractors have little bargaining power to overcome this, and constantly face the possibility of losing jobs if they attempt to negotiate for better pay or conditions. This leads to financial vulnerability, and to writers being paid significantly less than their skill and experience warrants.

Collectively negotiated agreements setting out legally binding minimum pay rates and a standard contract covering terms and conditions including remuneration would provide screenwriters and other screen industry workers with the same rights and protections that other unionised workers enjoy.

America, Great Britain, and Australia all have union negotiated minimums. This is not strange, or remarkable. There are baseline industry standards, which are agreed between industry organisations. This makes the industry more professional.

Workers in the creative industries want what all other workers want – to be able to support their families, buy their own homes and maintain viable careers with a clear and fair financial structure.

As screenwriters are primarily individual contractors, it is difficult to achieve this. The Screen Industry Workers Bill will have the power to change that by restoring collective bargaining as a fundamental worker's right.

If New Zealand wishes to have a world leading screen industry, we need to have world class standards and practice. This legislation will help professionalise the NZ screen industry and put it on a footing with the rest of the world.

The submission is separated into two sections – Support of the Bill, and Recommendations to the Bill – clearly stating NZWG's support and need for strengthening of the Bill to better protect and reinstate the rights of screen industry workers, specifically screenwriters.

SUPPORT AND RECOMMENDATIONS

SUPPORT OF THE BILL

NZWG support the Screen Industry Workers Bill, the reintroduction of collective bargaining for screenwriters and other screen industry workers to ensure basic pay minimums that will provide a living wage and a degree of financial stability that is vital to making a career in the creative industries.

GOOD FAITH (PART 2 OF THE BILL, CLAUSES 13 TO 15)

- NZWG supports parties to a workplace relationship being required to act in good faith.

INDIVIDUAL CONTRACTS (PART 2 OF THE BILL, CLAUSES 16 TO 20)

- NZWG supports individual contracts having mandatory terms – including how to deal with complaints of bullying, discrimination, or harassment in the workplace.
- NZWG supports it being mandatory for individual contracts to specify the notice periods and amount of compensation that must be provided if the contract is terminated by the engager – please see a further recommendation point strengthening mandatory terms in collective agreements.
- NZWG support there being a prohibition on retaliatory termination of individual contracts.

COLLECTIVE BARGAINING FOR COLLECTIVE CONTRACTS (PART 3 OF THE BILL, CLAUSES 21 – 35)

- NZWG supports collective bargaining for collective contracts for screen production workers.
- NZWG supports collective bargaining needing to be conducted in good faith by all the parties involved.
- NZWG supports collective bargaining to set minimum standards for entire occupations across the sector, including base rates for pay and minimum rights in relation to termination.

- NZWG supports collective contracts having terms that outline a process for raising and responding to bullying, discrimination or harassment in the workplace and services available for resolution of workplace relationship problems.

COLLECTIVE BARGAINING FOR OCCUPATION-LEVEL COLLECTIVE CONTRACTS (PART 3 OF THE BILL, CLAUSES 36 – 49)

- NZWG supports collective bargaining for occupation-level collective contracts.
- NZWG supports collective bargaining at this level to set minimum standards for entire occupations across the sector, including base rates for pay and minimum rights in relation to termination.

COLLECTIVE BARGAINING FOR ENTERPRISE-LEVEL CONTRACTS (CLAUSES 50 – 55)

- NZWG supports collective bargaining for specific projects, enterprises and productions for conditions that are better than the baselines set by the occupation-level collective contracts.

RECOMMENDATIONS TO THE BILL

NZWG recommends strengthening the Bill. Industrial action is not an available right for screen workers under this proposed legislation, and there is a clear and present need for strengthening – aka 'growing some teeth' – within the legislation to protect the remaining available rights of screen workers in the absence of the right to strike.

Specifically, there is no requirement for engagers to collectively bargain under the Bill, which means engaging enterprises and projects may try to avoid negotiating with worker organisations entirely. The Bill needs to ensure that this cannot occur, and that negotiation and resolution are mandatory in both Occupational and Enterprise Level Collective Contracts.

DUTY OF GOOD FAITH

- There is no clause that requires parties to a workplace relationship to deal with each other in good faith. It is only mentioned in the overview section at cl 4(5) and in the heading to cl 13. Compare with cl 26(1) which states that the parties to collective bargaining must act in good faith during the bargaining process.

UNDUE INFLUENCE

- Clause 14 says a person must not exert undue influence on any screen production worker to (c) be covered or not covered by a collective contract – all workers will automatically be covered by occupation-level collective contract if they fall within the occupational coverage – this needs further clarity.
- An example of when it could become relevant is in the process of collective bargaining for an enterprise-level collective contract, there was disagreement over which types of work it should cover, and the engager tries to influence this by

lobbying workers not to be covered, so that the workers in turn do not lobby the worker organisation.

- Lacks broader protections available to employees, particularly the prohibition on preference.

INDIVIDUAL CONTRACTS

- Requirement for an individual contract to be in writing in cl 16. But it is not clear what the written contract must comprise where the parties have not been able to agree on all terms and conditions or how to document them. Clarity on remedies and mandatory terms – as with collective contracts.
- No compulsory provisions providing for notice or compensation for termination. Clauses 17(3)(a) and (b) refer to notice and compensation "if any". Engagers could state that the contract may be terminated with no notice and no compensation.
- Clause 18 Prohibition on retaliatory treatment of screen workers only prohibits termination of contract. It does not protect screen workers against other types of adverse treatment. Compare with the definition of adverse conduct in s 110A of the Employment Relations Act 2000. Also, this clause should protect screen workers who provide information in relation to another worker's rights (e.g. where they are a witness in an investigation of harassment or discrimination). See s 66 of the Human Rights Act 1993.
- No requirement for a plain language explanation of the services available for the resolution of disputes or workplace relationship problems (compare with cl 32(2)(h) of the Bill).

COLLECTIVE CONTRACTS

- No compulsory provisions providing for notice or compensation for termination. Clauses 32(g) and 32(8) only require "a termination clause" that refers to notice and compensation "if any". It also requires a "process" to be specified, but it is unclear what that means. This provides no protection for screen workers if a "process" could include, at a minimum, termination with immediate effect.
- Clause 32 should be amended to make clear that the parties have an obligation to consider during bargaining appropriate terms to include in the occupational-level collective contract, and if the parties agree that a mandatory matter will not be provided for in the occupational-level collective contract, that an explanation for that decision be outlined in the collective contract – as there are no mandatory minimum standards, meaning this is below minimum code in general employment law and the requirement for "mandatory terms" rendering it toothless unless amended.
- Must contain a plain language explanation of services available for the resolution of any "workplace relationship problems", but there is no definition of "workplace relationship problems" in the Bill.

- Must contain a coverage clause, but it is not clear that collective contracts only cover screen production workers who are independent contractors (not employees).
- Also, not clear which collective contract(s) apply where a screen worker is covered by more than one occupation-level collective contract, or more than one enterprise-level collective contract. Compare with s 57 of the Employment Relations Act 2000.

EXEMPTION PROVISIONS

- It is mandatory for an occupation-level collective contract to contain an exemption provision which must specify the terms that are permitted to be less favourable in an individual contract (cl 33) (excluding rates of pay).
- If production has already commenced, and an engager wants to enter into an individual contract with less favourable terms with only 1 screen worker, then there is no requirement that they be given a reasonable opportunity to seek advice – this needs to be addressed. Screenwriters are often a single worker on any production and at a minimum they should be entitled to a reasonable opportunity to seek advice before agreeing to less favourable terms.
- This clause is not about involvement in collective bargaining. It applies once a collective contract is already in place that covers screen writers, but the engager wants less favourable terms to apply to the screen writer.

OCCUPATION-LEVEL COLLECTIVE BARGAINING

- Clause 41(2) occupation-level collective bargaining does not bring engagers to the table, only the engager's organisations. If engagers choose not to register an engager organisation, then collective bargaining for an occupation-level collective contract cannot occur (cl 36(1)). Only collective bargaining for an enterprise-level collective contract could occur directly with engagers (without engager organisations), but engagers can refuse to participate in enterprise-level collective bargaining (which is dealt with below). Therefore, the requirement to register being a pre-requisite to engaging in collective bargaining must be removed.
- An occupation-level collective contract cannot be ratified until the Authority has approved it as suitable for ratification. That requires, amongst other things, that the Authority is satisfied that the draft contract (a) contains the mandatory terms in cl 32, (b) is not contrary to law and (c) is not inconsistent with the Act. If the Authority approves the draft, but a dispute later arises over whether a term in the collective contract does not comply with (a), (b) or (c), it is unclear what the process is for dealing with that dispute, or whether the Authority's approval was final and binding and not appealable under this Bill.

ENTERPRISE-LEVEL COLLECTIVE BARGAINING

- Enterprise-level collective bargaining is only initiated if the relevant engager(s) consents (i.e. opts in to bargaining) (cl 51(2)). Engagers can choose not to consent to

collective bargaining for any reason. We are concerned that engagers will choose not to consent because they can, and because of the consequences if they do consent (e.g. that they will be required to conclude a collective contract (cl 27), or face having the terms and conditions fixed by the Employment Relations Authority (cl 59)).

- Key concern is the engager choosing not to opt-in to collective bargaining. NZWG recommends amending the Bill to provide that the initiation of bargaining by a worker organisation requires the engager or engagers initiated against to engage in the bargaining and to adopt s32(1) of the ER Act.
- Enterprise-level collective bargaining can and should be strengthened by applying the same or similar requirements to the bargaining parties that are required for occupation-level collective bargaining. Specifically, the engager(s) should be required to participate in collective bargaining.

INDUSTRIAL ACTION

- Clause 28 prohibits industrial action "during bargaining". However, it is not clear that industrial action is also prohibited at other times (e.g. when collective bargaining is not taking place).
- Given that industrial action is prohibited, this may expose screen workers to allegations that they are engaging in unlawful "industrial action" and threats of penalty action. The right in s 83 of the Health and Safety at Work Act 2015 to refuse to carry out unsafe work needs to be recognised and preserved.

DISPUTE RESOLUTION

- Ensuring that screen industry workers can access justice in the same way that employees can by outlining the processes that screen industry workers on individual contracts can use to raise an issue of bullying, harassment or discrimination complaints or disputes about potential retaliatory termination of an individual contract.
- There is no definition of "dispute" in the Bill (unlike in the Employment Relations Act 2000), or "contract disputes" which is referred to at page 4 and in cl 19 of the Bill. Clause 59 provides that certain sections in that Act apply with necessary modifications, but it is unclear whether that is intended to also include the definition of "dispute".
- The Authority's jurisdiction is not clearly defined, and is circular as the Bill refers to ss 159 to 178 of the Employment Relations Act 2000, and then s 161(3) of that Act (once amended by this Bill) says "The Authority has jurisdiction to exercise the functions and powers conferred on it by the Screen Industry Workers Act 2020".
- Disputes provisions lack detail on what remedies are available, other than penalties and fixing terms and conditions of collective contracts. For example, there is no reference to compliance orders where engagers or engager organisations are

refusing to comply with their statutory or contractual obligations, or to compensation or reinstatement for screen workers who have been subjected to retaliatory treatment or unlawful termination.

- Final offer arbitration on occupation-level collective contracts – it is unclear whether this procedure can be used for fixing identified disputed matters in collective bargaining (Schedule 4, cl 3 refers to the "issues in dispute") or only for fixing the terms of the whole collective agreement (Schedule 4, cl 5 and cl 8 refer to "fix[ing] the terms of the collective contract").
- This Bill should not proceed unless and until a compulsory arbitration system is configured correctly in both occupational and enterprise level collective contracts.
- Clause 59(3)(b) - fixing terms can only occur where cl 58(3) complied with, which includes that parties have complied with duty of good faith in cl 26. If one party (e.g. the engager) has not complied with the duty of good faith, then it appears that would prevent the other party (e.g. the worker organisation) from applying for fixing terms. There also does not appear to be any requirement that the breach of good faith be rectified as part of the collective bargaining process, only an ability to apply for a penalty for breach. This could become a serious impediment to worker organisations seeking assistance from the Employment Relations Authority in concluding collective bargaining.

PENALTIES AND OFFENCES

- This Bill references matters such as the vulnerability of screen production workers as a concern, but the strengthening of protections and ability to take action to rectify a breach is exceptionally low for workers under this Bill.

OTHER PROVISIONS NOT APPEARING IN BILL

- Engager obligation to keep records relating to minimum entitlement provisions
- Engager obligation to provide information to screen workers about worker organisations
- Provision for code of good faith
- Good faith in bargaining for an individual contract
- Protection against unfair bargaining of individual contracts
- Jurisdiction of Labour inspectorate
- The Bill does not replicate or extend protections that apply to employees under other legislation, including:
    1. Minimum Wage Act 1983
    2. Wages Protection Act 1983
    3. Holidays Act 2003
    4. Accident Compensation Act 2001, including entitlements to rehabilitation and return to work

DRAFTING ISSUES

- Clause 38(1) should say 'or an applicable *occupation-level collective* contract expired…'

CONSIDERATION FOR MATTERS OUTSIDE OF THE SCOPE OF THE BILL

The Film Industry Working Group's recommendations included a section on creating an environment for the system to flourish. Recognising that the sector is varied and has not collectively negotiated as a sector at large in the last 20 years.

NZWG support the Film Industry Working Group recommendations on:

CAPACITY BUILDING AND RESOURCING

NZWG support the recommendation to equip the screen sector to achieve the possibilities presented by this legislation, and the screen sector at large is very keen to see this Bill introduced, the sector has not been equipped to provide a response to the introduction of the Bill. This has been the case throughout the process for the following reasons:

1. The sector has not collectively negotiated for almost 20 years and was therefore unable to seek the additional funding and build the capacity needed to resource the FIWG consultation process in the timeframe provided, as the sector was not resourced by the Government through the FIWG consultation process.
2. The sector does not have the ability to adequately fund the collective negotiation process due to lack of local funds available and the tight time frame within which to seek the additional funds.

NZWG also have concerns that the Screen Production and Development Association (SPADA) will not be resourced to a level that will allow it to negotiate with all other screen sector guilds and organisations, which would potentially leave the legislation redundant without an employer type organisation for the sector to negotiate collective agreements with.

Financial support of all the screen sector guilds and organisations is vital to ensure that the legislation is supported and successful in its intention of restoring rights to screen workers.

EDUCATION

Education is vital in the adoption and embedding of the Bill. The screen sector is made up of predominantly contractors who have not experienced the benefits of collectively negotiated agreements, which includes creating a stable and mature sector enabling further offshore investment.

REVIEW OF THE BILL

NZWG agree an 18-month term to review the Bill. This will allow for early assessment of whether the collective bargaining system is fit for purpose or requires areas of fine tuning.

This also enables the ability to allow for additional changes to the legislation concerning contractors, meaning that changes affecting collective bargaining for contractors will be adopted into the Bill.

COPYRIGHT LEGISLATION REVIEW

The main component of screenwriter's agreements consists of the assignment of rights, from screenwriter (author under copyright legislation) to a producer or production company. This enables the creation and further exploitation of the finished product. With the Copyright Review still in a holding pattern, it leaves screenwriters potentially exposed in the collective negotiation process. NZWG would like to see an update and further consultation around the copyright review, ensuring that screenwriters rights under copyright are strengthened and leveraged for career and sector advancement.

SUPPORT FOR CAREER PROGRESSION OF SCREENWRITERS

To enable opportunities to support and progress their careers, NZWG recommends that screenwriters can benefit by being offered positions on offshore long-term series productions filming in New Zealand. Similar to the Australian quota system which sets out requirements for the use of local screenwriters, dependent on the size of the production and the amount of support the production receives from the Australian government through subsidies, grants, or tax concessions.

CONCLUSION

NZWG supports this proposed legislation, with the recommendations offered for consideration and amendment, and looks forward to fairer workplace relationships and working conditions for contractors in the screen sector. Specifically, the rights and remuneration of screenwriters, the original IP creators telling New Zealand stories for the screen.

We look forward to addressing the select committee in person for our oral submission.

Yours sincerely,

Alice Shearman
Executive Director | New Zealand Writers Guild – Puni Taatuhi o Aotearoa