



SPADA's Submission in Response to the Screen Industry Workers Bill

24 May 2020

1.0 INTRODUCTION

- 1.1 The Committee Staff of the Education and Workforce Committee (**Committee**) have sought feedback on the Screen Industry Workers Bill (**Bill**), and the Screen Production and Development Association of New Zealand (**SPADA**) welcomes the opportunity to make a submission regarding the Bill.
- 1.2 This submission addresses some of the key issues raised from an engager perspective regarding the Bill.

2.0 ABOUT SPADA

- 2.1 Established in 1982, SPADA is a non-profit membership-based organisation representing key producers and production companies in the New Zealand screen industry.
- 2.2 SPADA plays a pivotal role in informing government and key stakeholders on key policy that impacts the screen industry. It ensures government is properly informed on industry issues, and responds to requests for advice as needed, for example on proposed or existing incentives, co-production treaties, trans-pacific negotiations, government agency arrangements relating to the industry, policy and regulatory settings (including media regulation) and public service broadcasting.

3.0 THE UPHEAVAL AND IMPACT OF COVID-19

- 3.1. SPADA and its members have found it extremely difficult to turn their attention to the Bill in the unprecedented times brought about by the Covid 19 pandemic. While the extensions of time for submissions are appreciated, SPADA has had insufficient time to consider the implications of the Bill for a sector that will look vastly different after the lockdown than it did when the Film Industry Working Group (**FIWG**) first met over 18 months ago to discuss the agreed recommendations, upon which this Bill has been drafted.
- 3.2. The effects of COVID-19 and the shut-down of the New Zealand economy has hit the screen sector extremely hard. The consequences are so severe that SPADA considers the Bill should be halted until the shape, size and needs of the screen industry post-Covid 19 are known.
- 3.3. During the lockdown, 98% of screen practitioners were out of work. Producers are carrying a lot of additional costs relating to shutting down and recommencing productions, and considerable stress. Short, medium and long-term priorities are being worked on, and producers are working together to decide how best to deal with a multitude of urgent needs:
 - (a) health and safety advice and development of standard and protocols;
 - (b) funding support and stimulus / recovery packages being developed;

- (c) ongoing insurance issues;
- (d) immigration issues– borders affecting key cast and crew returning to New Zealand; and
- (e) exploring how the industry can return to work safely and what the post-COVID landscape might look like.

3.4. In SPADA’s view, it could take at least two years for the screen industry to recover, many production companies will struggle to survive, and we simply do not know what the “new normal” will be for the industry. What we do know is that it will be a challenge, and there will be additional costs involved because of COVID-19 and health and safety requirements.

3.5. SPADA considers that it is not in the interests of the industry’s survival to introduce the prospect of complex and potentially contentious industrial negotiations while the industry is struggling. It is an unwelcome distraction and unity is needed. Accordingly, SPADA requests the suspension of the Bill’s progress

3.6. If, notwithstanding SPADA’s submission, the Bill is to progress, then it is absolutely vital that the Government ensures the sector is properly resourced. Our specific submissions on resourcing are set out in Section 5 below.

4. POSITIVE ASPECTS – AND AREAS OF CONCERN

4.1. Overall, SPADA is strongly supportive of the aims of the Bill, and we are pleased with the following aspects:

- (a) the Bill (in clause 5) provides the industry with certainty on the status of screen industry workers, confirming that a screen industry worker that is a party to an independent contract agreement cannot then look to argue that he or she is an employee. This will mean the parties can contract with certainty;
- (b) the Bill (in clause 28) limits the right to strike, so that screen industry workers cannot strike if the intention is to undermine or affect the outcome of bargaining. This is critical, as strike action could be expensive, delay productions and reduce New Zealand’s attractiveness to overseas studios and producers. SPADA submits, though, that the Bill should make it clear that there is no wider right to strike – provisions equivalent to section 86 of the Employment Relations Act 2000 should be included;
- (c) we agree with the inclusion of exemption provisions in occupation-level contracts (in clauses 32 and 33), but in Section 7 below, we raise some concerns around the process for agreeing an exemption; and

- (d) the importance of the provision in clause 67 relating to when consent to enter the workplace can be revoked cannot be understated. SPADA agrees entirely with its inclusion.
- 4.2. However, other aspects of the Bill generally (rather than specific clauses, which are addressed in later Sections of this submission) give rise to concerns.
- 4.3. SPADA's first general concern is how the Bill will work in practice. SPADA expects that concluding occupation level collective contracts will be challenging, in part because of resourcing (Section 5 below) but also because of the large number of entities that could be a party to these contracts, and the requirement that all parties must agree to all aspects of the collective contract, regardless of the size of the party or the base it represents. SPADA is concerned, also, that its members will be required to fund the costs of collective bargaining, while engagers who choose not to become SPADA members will not bear any cost – and that it could be faced with having to engage in bargaining with multiple different occupation groups at the same time. SPADA suggests that, at least during an initial period (4 or 5 years), there should be some flexibility in the bargaining process, including around timeframes.
- 4.4. That leads into SPADA's second concern, which relates to flexibility – and in particular, to imposing "fixed" terms on an industry in which flexibility is vital. The Bill provides that screen industry workers are independent contractors and not employees, but then, in the detail, imposes obligations on engagers that are more akin to an employment relationship. Engagers in the film industry need to be able to make changes very quickly, to be able to agree – quickly – to terms appropriate to a particular production rather than standard terms, and even to be able to replace a cast member expeditiously and without an obligation to consult, so as not to disrupt filming. There should not be an obligation to set out the process for termination and what compensation, if any, is payable in the event the engager terminates the contract – these are employment law concepts. The parties to a contract for services (as opposed to an employment agreement) should be able to decide themselves, on a case by case basis, how the agreement can be terminated – and if they choose to agree that termination without cause and with minimal or no notice, the Bill ought to permit that.
- 4.5. SPADA's third concern also relates to the influence employment law concepts – specifically, concepts around fair pay – appear to have had on the Bill. It seems to us that the Bill prematurely adopts fair pay concepts, when those concepts are still only the subject of discussion and consultation in the employment sector. We are concerned that the Bill mandates bargaining for minimum terms and conditions of engagement across occupations before there has been adequate consideration of how fair pay concepts would work in the screen industry. As noted, there will potentially be numerous parties taking part in bargaining for occupation level collective contracts, none of whom have engaged in such a process before, and finding themselves seeking to agree to minimum terms that will bind a diverse range of engagers and workers. Again, SPADA submits

that the Bill should recognise these challenges by ensuring the regime to facilitate occupation level collective contracts is flexible rather than prescriptive.

- 4.6. Fourthly, SPADA is concerned that the Bill does not adequately protect the freedom of the parties to agree their own contractual terms. While SPADA agrees with the concept of collective bargaining, we consider that is all the Bill should address – it ought not to impose arbitration or a dispute resolution process where a collective contract cannot be agreed, nor should it impose conditions or restrictions on what the parties might agree to in an individual contract (as it currently does in clause 17(3), for example).

5. RESOURCING IS CRITICAL

- 5.1. The “Authority” that is responsible for approving parties before collective bargaining can take place at the occupation level is the Employment Relations Authority. While SPADA considers the ERA to be the appropriate body to undertake that role, it is crucial that the ERA be appropriately staffed and funded for these additional activities.
- 5.2. The entity that should most appropriately seek registration as an engager entity – representing producers - is SPADA. SPADA is willing to take on that role, but it is not likely to be able to do so effectively with its current staffing and funding, particularly given the impact of Covid-19 on its members. Additional staff resourcing, external legal advice and specialist consultants will be required.
- 5.3. In addition, none of the other organisations in the screen sector have any experience in collectively bargaining either. SPADA considers there will be a need across the industry for additional resources, and funding for those resources.
- 5.4. SPADA therefore repeats its request of MBIE and the government to provide additional funding to the screen production sector so that the aims of the Bill can be achieved.

6. WHO IS A SCREEN SECTOR WORKER?

- 6.1. The FIWG wanted to ensure that only workers engaged by an entity that primarily engages in screen production work would be covered – “the carve-out should not apply to workers who ... provide services to a company that does not primarily supply to a screen production”.
- 6.2. The Bill reflects this by providing, in clause 11, that a screen production worker does not include a person engaged to do the work by an entity that does not primarily engage in work relating to the creation of screen productions”.

- 6.3. In SPADA's view, this exclusion is far too wide and open to abuse. It focusses on what the engager's business does, and not what the individual worker does. SPADA submits that a screen producer who wanted to get around the collective bargaining provisions could simply:
- (a) procure a third party (who has a plumbing/building/any other business) to hire the workers that will work on the production; and
 - (b) enter into a contract for services with that other business.
- 6.4. Because that other business does not primarily engage in screen production work, the workers it engages – no matter how involved in screen production work they are – cease to be screen production workers.
- 6.5. SPADA agrees that the exclusion of "support services" makes good sense – but the exclusion of genuine screen production workers just because of what their engager does is wrong.
- 6.6. Accordingly, SPADA considers that clause 11(1)(b)(iii) of the Bill should be amended to include as screen workers those who are engaged by entities not primarily involved in screen production if what they have been engaged to work on is a screen production i.e. if it is a screen production, and the worker comes within the Occupational Groups set out in Schedule 3, then the worker is a screen worker and covered by the Act.

7. EXEMPTIONS FROM THE COLLECTIVE CONTRACT

- 7.1. A collective contract must contain a term setting out when and how an engager and a worker can enter into an individual contract with terms less favourable to the worker than the collective.
- 7.2. Clause 33 of the Bill sets out the process for agreeing an exemption, and in SPADA's submission, it is perplexing. We set out in the table below, the different processes for agreeing an exemption, and illustrating why those processes are difficult to understand.

<i>When is the exemption sought</i>	Before production commences	After production commences	After production commences
Exemption can be agreed if			
<i>How many workers</i>	2 or more (so before a production commences, engager cannot agree an exemption with just 1 worker – why not ?)	1 worker only	2 or more workers

<i>Who must agree</i>	The workers	The worker	The workers
<i>Who must be notified</i>	The signatories to the collective	The signatories to the collective	The signatories to the collective
<i>Other conditions</i>		It is the only individual contract being entered into	Before agreeing, each worker is given a reasonable opportunity to seek advice

7.3. SPADA does not understand why, before a production commences, an engager cannot enter into an individual contract with just one worker – why does it have to be two or more? SPADA submits that an engager ought to be able to enter into an individual contract, before a production commences, with any number of workers.

7.4. We also do not understand why in only one situation, workers have to be given a reasonable opportunity to seek advice. SPADA submits that in every case where an exemption is ought, that should be a requirement.

8. DURATION OF OCCUPATION LEVEL COLLECTIVE CONTRACTS

8.1. By clause 34 of the Bill, occupation level collective contracts must have a minimum duration of three years.

8.2. As already noted, collective bargaining will be new for SPADA – and for the industry. There is a need for significant resourcing and upskilling. SPADA therefore submits that clause 34 be amended to provide that the first occupational level collective contract for each occupation must have a minimum duration of four years, reducing to three years thereafter. That would ensure that the industry has some breathing room before being required to undertake further collective bargaining.

Thank you again for the opportunity to provide feedback on this Bill, SPADA is happy to discuss the issues it has outlined above, and any others that the Committee considers relevant to progressing the discussion regarding the Bill.

Yours sincerely

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