# Cover sheet: A collective bargaining framework for screen production workers

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| **Advising agencies** | Ministry of Business, Innovation and Employment |
| **Decision sought** | Whether to implement the Film Industry Working Group's recommended collective bargaining framework for screen production workers |
| **Proposing Minister** | Minister for Workplace Relations and Safety (Hon Iain Lees-Galloway) |

## Section A: Summary of problem and proposed approach

**Problem definition: What problem or opportunity does this proposal seek to address? Why is government intervention required?**

Most film production workers are contractors who cannot challenge their employment status under the Employment Relations Act 2000, and therefore cannot bargain collectively. This has led to some workers experiencing poor work outcomes, such as low wages compared to other industries. Arrangements may also be non-compliant with international labour standards on freedom of association and the right to bargain collectively.

**Proposed approach: How will government intervention work to bring about the desired change? How is this the best option?**

The key aims are to address the bargaining power imbalance between contractors doing film production work and those who engage them, while giving production companies the certainty they need to continue investing in New Zealand.

We propose to do this by implementing a model recommended by the Film Industry Working Group (FIWG). This would retain the carve-out from employee status for film production workers and create a new collective bargaining system for these contractors. Collective agreements concluded through this new system would cover entire occupational groups in the industry.

We consider this the best option because it provides certainty about employment status to production companies, while making collective bargaining available to all contractors in the film and wider screen industry (which is an effective tool to redress bargaining power imbalances).

## Section B: Summary impacts: Benefits and costs

**Who are the main expected beneficiaries and what is the nature of the expected benefit?**

The main beneficiaries are regulated workers, who will benefit from being able to bargain collectively and having improved terms and conditions of work.

**Where do the costs fall?**

The main costs relate to bargaining (falling on regulated parties) and providing supporting infrastructure for bargaining (falling on regulators). There could be increased costs associated with the outcomes of bargaining, but these are offset as a benefit to workers (in terms and conditions of work).

### What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

The preferred option involves new roles for regulatory bodies (eg recognising parties' bargaining mandate and arbitrating disputes). Existing employment institutions have signalled they can perform these functions, but further operational policy work is required. The small size of the industry means the proportion of new work for these bodies is likely to be low.

Bargaining capacity and capability in the screen industry ranges from low to non-existent among existing representative bodies. This means initiation of bargaining could be staggered, with agreements concluded at a relatively slow rate (which could create short-term uncertainty).

Increased uncertainty about the labour environment could reduce New Zealand's attractiveness internationally as a place to do screen production work. Changes will need to be signalled in advance both when amending laws and negotiating collective agreements.

Given labour costs make up a large proportion of production budgets, any increase to worker earnings as a result of bargaining could mean New Zealand becomes a less cost-competitive destination for production companies compared to other countries.

### Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

One area of incompatibility has been identified: the FIWG recommended that industrial action not be allowed under the preferred option, with any disputes resolved by compulsory arbitration if required.

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## Section C: Evidence certainty and quality assurance

### Agency rating of evidence certainty

The evidence base is largely qualitative. It is hard to glean reliable information from administrative statistics about the working terms and conditions of contractors. We have therefore supplemented quantitative and qualitative research with feedback from industry stakeholders to form our understanding of the problem definition and current situation in the screen industry.

It is not possible to gain more reliable evidence without in-depth research into the industry with a large fieldwork component.

### Quality assurance reviewing agency

Ministry of Business, Innovation and Employment

### Quality assurance assessment

The Regulatory Impact Statement meets requirements.

### Reviewer comments and recommendations

The information and analysis summarised in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

# Impact statement: A collective bargaining framework for screen production workers

## Section 1: General information

### Purpose

The Ministry of Business, Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

### Key limitations or constraints on analysis

Cabinet set up an industry working group to come up with solutions involving collective bargaining that specifically apply to the screen industry. We have therefore not considered options that do not involve collective bargaining, or that have economy-wide application.

While we have access to some industry-specific information through the Screen Industry Survey and Statistics New Zealand's Linked Employer-Employee Data, the nature of the survey and the industry mean labour market outcomes are hard to measure. Other sources of administrative statistics generally do not tell us much about working conditions for workers in this industry, given most are engaged as contractors.

It is also hard to establish a causal relationship between the problem (lack of access to collective bargaining) and observed conditions in the industry. In the absence of such information, we are relying on industry experience and feedback.

We have very limited quantitative information on the costs and benefits of change, particularly for the preferred option (which involves the greatest degree of regulatory change). These aspects of our options and cost-benefit analyses are therefore less reliable.

### Responsible manager (signature and date)

Tracy Mears

Manager, Employment Relations Policy

Labour and Immigration Policy Branch

Ministry of Business, Innovation and Employment

24/05/2019

# Section 2: Problem definition and objectives

## 2.1 What is the context within which action is proposed?

This work restores collective bargaining rights to contractors doing film production work. Background information (ie about the employee/contractor boundary and events that led to 2010 changes to the Employment Relations Act) is in Annex 1.

### Employment Relations (Film Production Work) Amendment Act 2010

In 2010, the Employment Relations Act was amended 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: an individual's employment status is for the courts to determine using tests about the real nature of the relationship between parties, which can be a protracted process.[1]

Certainty about employment status was provided by a "carve-out" which excluded people doing film production work from the definition of an "employee" under the Employment Relations Act.[2] This means film production workers are contractors, unless they are party to or covered by a written employment agreement that specifies they are employees.[3] The real nature of the relationship test no longer applies to people doing film production work.[4] Instead, the contract/agreement under which they are engaged is the sole determinant of their employment status.

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 standards system. One such right is the ability to bargain collectively. Others include rights under the Minimum Wage Act and the Holidays Act.

### The 2010 law change has achieved its stated objective

International investment in New Zealand's screen industry has also grown since 2010, suggesting the labour environment here has been conducive to investment.

The graph below shows gross revenue received by screen production and post-production businesses in the 2006 – 2018 financial years. Gross revenue tends to be lumpy from one year to the next, reflecting fluctuations in production and post-production activity. Overall, however, gross revenue from international productions has grown since the 2010 law change:[5]

1 For international production companies, the process of deciding where to locate a production generally first involves a consideration of where a project could be made depending on its script. Beyond that, cost is a major and often determining factor. Labour costs account for a large proportion of production costs, and certainty of labour cost is therefore a key consideration for international production companies when making location decisions.

2 Employment Relations Act 2000, s 6(1)(d).

3 Employment Relations Act 2000, s 6(1A).

4 Employment Relations Act 2000, s 6(2).

5 Statistics New Zealand, Screen Industry Survey, releases up to 2017/18.


**The Film Industry Working Group has recommended a new model**

The Labour Party's 2017 election manifesto said it would "remove the discrimination that prevents film and television workers bargaining collectively."[6] After the 2017 election, both producers and workers in the screen industry indicated they did not necessarily want to see the 2010 carve-out removed.

The Government convened the Film Industry Working Group (FIWG) in January 2018.[7] Cabinet tasked the FIWG with designing a model to allow film production workers to bargain collectively, without necessarily reversing the changes made in 2010. This was based on industry feedback that many workers feel being engaged as contractors better suits their work.

The FIWG reported back in October 2018.[8] They unanimously proposed a model for workplace relations in the screen industry that would retain the carve-out from employee status but allow contractors to bargain collectively using a new bargaining system. Their proposed model is considered in this analysis as option 2.

At present, the carve-out from employee status applies to people doing "film production work", which includes film production and post-production work, but excludes such work on programmes intended for television broadcast. The FIWG's recommended model instead applies to "screen production work" (and the wider "screen industry") because they consider there is no substantial difference between working on television production, for example, and film production.

The screen industry comprises a broad range of work spanning production, post-production, television broadcasting, film and video distribution, and film exhibition. There is no clear, universal definition of the "screen industry" as new technologies are being developed (eg augmented reality and virtual reality) that could be considered screen work if the end product can be accessed from screen devices. The end products of this work include films, video games, television programmes, and commercials. For the purposes of this proposal for regulatory change, we are therefore talking about *screen* production and post-production work when referring to work in the industry.

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6 The relevant Labour Party manifesto chapter is here: https://www.labour.org.nz/workplace_relations_policy.

7 Members of the FIWG represented workers (ie guilds and unions), producers (ie the NZ film production organisation and overseas production companies) and other industry bodies (eg screen promotion bodies). There were also two members from outside the screen industry representing the New Zealand Council of Trade Unions and BusinessNZ.

8 The FIWG's full recommendations are available here: https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/film-industry-working-group/.

## 2.2 What regulatory system, or systems, is already in place?

There are three regulatory systems related to this work. The regulation of employment relationships sits within the employment relations and employment standards (ERES) system. The regulation of contracting relationships through which services are provided involves two other regulatory systems: the competition system and the consumer and commerce system.

**The ERES system**

The ERES system regulates employment relationships (ie between employers and employees) but not work by contractors. It aims to promote employment relationships that are productive, flexible, and which benefit employees and employers. The ERES system includes:

- A regime for employment agreements that emphasises a duty of good faith,
- Interventions (in particular, collective bargaining and minimum standards) to address information and power asymmetries between employees and employers,
- A range of minimum standards that apply to all employment relationships (eg the minimum wage, leave entitlements),
- Services to support employment relationships and resolve disputes, and
- Institutions that enforce regulatory requirements.

The ERES system contributes to social and economic outcomes. Employment is a primary source of income for many households. The effective use of knowledge, skills and capital in firms is a key driver of innovation and growth.

The fitness-for-purpose of the ERES system was evaluated in 2017. The system is, overall, achieving its objectives. A need for ongoing monitoring and evaluation was identified to ensure the system's objectives are achieved, and regulation is fit for purpose.[9] This work would be a significant shift for the ERES system because it represents a move to regulating work by contractors, rather than just work by employees.

**The competition system and consumer and commercial system**

Work that is not done through an employment relationship falls under the competition system and the consumer and commercial system.[10]

The objective of the competition regulatory system is to promote competition (or outcomes consistent with competition) in New Zealand markets for the long-term benefit of consumers. The Commerce Act 1986 provides a set of generic competition laws prohibiting:

- Contracts, arrangements or undertakings substantially lessening competition,
- The use of substantial market power to restrict entry or eliminate competitions, and
- Mergers and acquisitions likely to substantially lessen competition.

The Commerce Commission may also authorise mergers or arrangements that substantially lessen competition if they are in the public interest.

These generic provisions are supplemented by economic regulation and other industry-specific regimes where necessary, such as in the telecommunications, gas and electricity markets.

The consumer and commercial regulatory system enables consumers and businesses to interact with confidence when goods and services are transacted across the economy. It helps consumers to:

- Access and understand relevant information,
- Be protected from high levels of detriment from actions outside of their control, and
- Have access to appropriate redress avenues if things go wrong.

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9 Ministry of Business, Innovation and Employment, MBIE's Regulatory Stewardship Strategy 2017/18, August 2017, page 55.

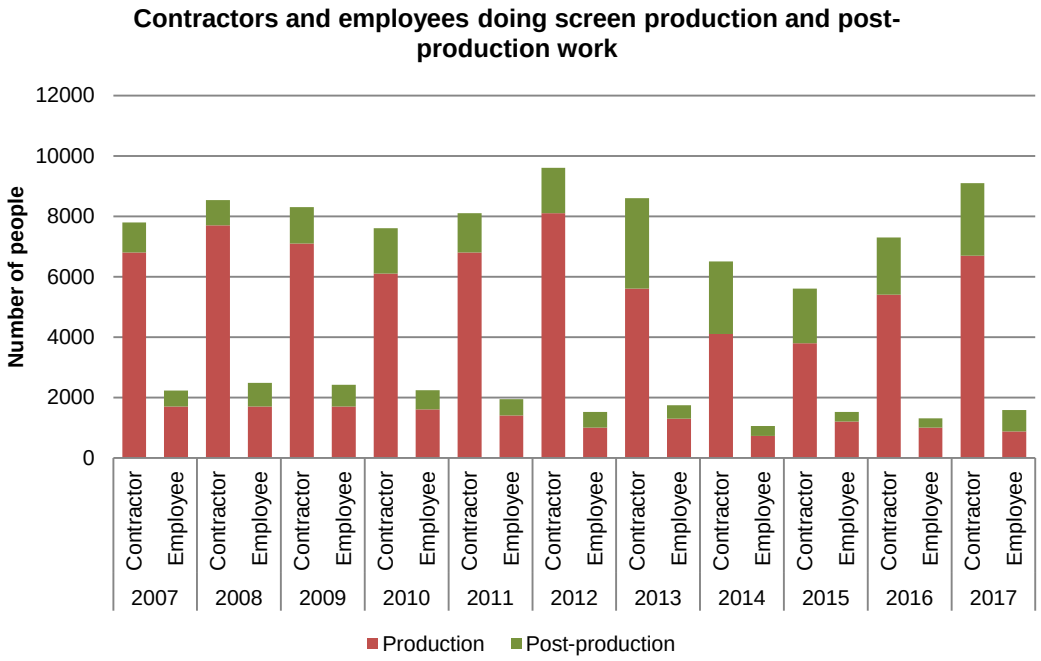
10 The Commerce Act 1986 excludes employment arrangements through its definition of services (s 2) and a specific exception relating to arrangements for remuneration and work conditions of employees (s 44(1)(f)).

## 2.3 What is the policy problem or opportunity?

### Problem definition

*Workers in the film industry cannot bargain collectively*

In New Zealand, only employees can bargain collectively. There is virtually no collective bargaining in the film industry because the majority of film production workers in New Zealand are contractors:[11]




To be able to bargain collectively at present, workers need to be employed under a written employment agreement. Feedback from the FIWG is that most workers in the industry are rarely able to negotiate being hired as employees when offered roles as contractors. This is because production companies can simply offer the role to another worker willing to be a contractor and the companies may only have a limited window of project work.

Even for employees, the impracticalities of having to bargain collectively with a different company for each production means in practice, collective bargaining does not happen in the industry. Under our existing laws, collective agreements only bind signatory parties and employees who are affiliated with both a union and employer signatory. Many production companies are specific purpose vehicles set up solely to create a particular production, and only exist for the lifespan of that project. This means under the existing system, unions would have to separately bargain with each company for each production for collective agreements. Some guilds in the industry are also not registered trade unions, which prevents them from being able to bargain collectively on behalf of their members (who are employees).

*The lack of collective bargaining may contribute to sub-optimal outcomes for some workers*

Workers in the creative and arts industries—including the screen industry—tend to make less than those in the economy generally. They are engaged on a project basis, and experience peaks and

[11] Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry. There is only one collective agreement in the film industry, between Park Road Post Production and the Public Service Association. This covers the work of three employees.

troughs in their work as a result. Between 2007 and 2017, contractors in the screen industry had on average around 1.6 jobs per year.[12] In 2017, 52% of the annual income of contractors who undertook some or all of their work in the screen industry came from that industry. Other sources of income for these contractors included wage and salary jobs, government income and contracts in other industries.[13]

For those productions supported by the New Zealand Screen Production Grant (NZSPG), average earnings are as follows:[14]

| | Domestic | | International | |
|---|---|---|---|---|
| | **Film** | **Television** | **Film** | **Television** |
| **Average earnings per job**[15] | $13,552 | $17,665 | $67,738 | $34,836 |
| **% of jobs done by NZ residents** | 92.5% | 97.6% | 81.7% | 90.9% |

Feedback from FIWG members representing film production workers is that while workers enjoy a degree of flexibility from being contractors, they also want industry-specific minimum terms and pay rates. Workers are said to experience an acute lack of bargaining power and are often stuck accepting terms as given rather than being able to negotiate improved offers.

There are two broad groups of workers in the screen industry:

- On the production side, there could be an oversupply of workers.[16] This includes performers (eg actors, stunt people) and other "below the line" crew.[17] These workers have less (or virtually no) bargaining power and do not earn much from their screen industry work. Median monthly earnings for contractors doing production work were $3,370 in 2017, which comes to about $40,000 annually.[18] They supplement their income with work in other industries during gaps between screen production projects.
- On the post-production side, highly-skilled workers are in high demand globally, but less so in New Zealand. They earn on average $150,000 annually, which is much more than workers on the production side of the business.[19]

Through the FIWG process, both of these groups of workers have expressed a desire to have some collective voice about their terms of engagement. More information about working in the screen industry is at Annex 2.

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12 Statistics New Zealand, "Screen contractors move centre stage", 10 April 2019. Available at https://www.stats.govt.nz/news/screen-contractors-move-centre-stage.

13 Statistics New Zealand, "Screen contractors move centre stage", 10 April 2019. Available at https://www.stats.govt.nz/news/screen-contractors-move-centre-stage.

14 Sapere, "Evaluating the New Zealand Screen Production Grant", March 2018, pages 36 and 38. This is for grants during the period from 1 April 2014 to 1 July 2017. Available at http://www.srgexpert.com/publications/evaluating-the-new-zealand-screen-production-grant/.

15 These figures are for each job on a production supported by the NZSPG during the period from 1 April 2014 to 1 July 2017.

16 It should be noted that not all people who do a film-related qualification will end up working in the industry, and there are international opportunities for crew.

17 "Above the line" refers to the people primarily responsible for the creative elements of a production (ie writers, producers, directors, principal cast/stunt persons). "Below the line" refers to all other support staff, crew and talent involved in a production.

18 Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry. The median monthly income for production workers has risen steadily from 2014 to 2017, and 2017 has seen the highest median income for production workers over the last ten years. See Annex 2 for more information.

19 Sapere, "Evaluating the New Zealand Screen Production Grant", March 2018, page 38. Available at http://www.srgexpert.com/publications/evaluating-the-new-zealand-screen-production-grant/.

*Publication note: footnote 19 should refer to page 38 of the Sapere report.*

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The International Labour Organization (ILO) has said determination of whether an employment relationship exists should be "guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties".[20]

This means whether an employment relationship exists—and therefore workers' protection through international labour standards—should be based on the actual nature of the relationship between parties. The real nature of the relationship between film production workers and those who engage them is irrelevant in determining employment status. Confidential advice to Government

**Objectives of regulatory change**

We consider there to be three objectives of regulatory change in this area:

- Redressing the imbalance of power between film production workers and those who engage them,
- Providing certainty to encourage continued investment in New Zealand by screen production companies (primarily in the form of certainty about employment status), and
- Maintaining competition between businesses offering screen production services.

There are tensions inherent in these objectives. For example, a worker is either an employee and exempt from competition regulation (and therefore able to bargain collectively), or they are a contractor and subject to competition regulation.[22]

It is not possible to entirely satisfy all three of the above objectives. We consider the first two objectives are the primary objectives, and the third is a secondary consideration to these. The challenge for regulatory change in this area will therefore be striking an optimal balance between the objectives that does not compromise the integrity of the regulatory systems involved.

## 2.4 Are there any constraints on the scope for decision making?

**We have only considered options involving collective bargaining**

Cabinet asked the FIWG for a solution involving collective bargaining. We have therefore not considered options that do not rely on collective bargaining to address the power imbalance between film production workers and those who engage them. See section 3.3 for examples of some of these options.

**We have not considered options with economy-wide application**

We have not considered solutions that could be applied across the entire New Zealand economy. This is because Cabinet set up the FIWG to provide a solution solely for the screen industry, based on its characteristics.[23]

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20 ILO, Recommendation No. 198 Concerning the Employment Relationship, 2006.

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22 The screen industry could apply to the Commerce Commission for a collective bargaining authorisation. Only one such authorisation has been granted to the Waikato-Bay of Plenty Chicken Growers Association: https://comcom.govt.nz/case-register/case-register-entries/waikato-bay-of-plenty-chicken-growers-association-incorporated-on-behalf-of-its-members. The Australian Competition and Commerce Commission has granted multiple authorisations for collective bargaining, including in relation to screen production work.

**Links with other work across government**

This project has links to the following work underway within this portfolio and across government.

- Fair Pay Agreements: the model recommended by the Fair Pay Agreement Working Group would allow collective bargaining across entire industries or occupations, including contractors. If implemented as recommended, it could negate the need for a separate collective bargaining system for contractors doing screen production work. The Government is yet to respond to the Fair Pay Agreement Working Group's recommendations. Confidential advice to Government
- Strengthening protections for vulnerable workers in non-standard forms of employment: people in non-standard forms of employment who could be vulnerable to exploitation include contractors and temporary workers. Strengthening these protections could improve worker outcomes but its scope and focus are yet to be confirmed. The Minister for Workplace Relations and Safety is responsible for this work.
- Protection from unfair commercial practices: this work has the potential to provide economy-wide protection from unconscionable or substantially unfair conduct, which could reduce the need for industry-specific collective bargaining to achieve these protections in some instances. This work is being led by the Minister for Small Business and the Minister of Commerce and Consumer Affairs.
- Screen sector strategy: work will shortly commence on the development of an industry-led ten-year strategy for the screen sector, which will consider issues such as growing resilience and sustainability.
- Funding and incentives: support is provided to the screen sector through several funding pathways and financial incentive schemes. Some such pathways are available through NZ on Air, Te Māngai Pāho and the NZ Film Commission. The New Zealand Screen Production Grant, which supports domestic and international production work in New Zealand, is also an example of a financial incentive scheme in the screen industry.

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## 2.5 What do stakeholders think?

**FIWG process**

The key stakeholders are workers and production companies (both domestic and international) in the screen industry. The chosen model for industry consultation was the establishment of the FIWG, whose membership represents the following screen industry organisations:

- Directors and Editors Guild of New Zealand,
- Equity New Zealand,

[23] The conditions experienced by screen industry workers may not be solely due to factors unique to this industry. However, film production workers are distinguishable from other workers due to not being able to access *any* form of ERES system protection. While there may be contractors in other industries (eg with low union density and collective agreement coverage), and whose work-related outcomes could be improved through collective bargaining, they are entitled to protections under the ERES system if found to be employees. The catalyst for this work is the carve-out covering film production workers, not whether the existing collective bargaining system is generally fit-for-purpose.

- Film Auckland,
- New Zealand Writers Guild,
- Ngā Aho Whakaari,
- Regional Film Offices New Zealand,
- Screen Industry Guild,
- Screen Production and Development Association,
- Stunt Guild of New Zealand, and
- Weta Digital.

BusinessNZ and the New Zealand Council of Trade Unions were also members of the FIWG, representing employer and union interests generally. The perspective of international production companies was represented on the FIWG through Barrie Osborne, a film producer.

The FIWG reported back to the Minister in October 2018. Since then, MBIE has continued to consult FIWG members to better understand the model they have recommended and what works for their industry.

**Other consultation**

Targeted consultation was also done with screen industry bodies not represented on the FIWG but who have an interest in any regulatory change in this area (eg the New Zealand Film Commission, the New Zealand Game Developers Association, South Pacific Pictures and the New Zealand Advertising Producers Group).

**Industry feedback**

Feedback from the FIWG members representing workers is that while workers enjoy a degree of flexibility from being contractors, they also want industry-specific minimum terms and pay rates. Film production workers are said to experience an acute lack of bargaining power and are often stuck accepting terms as given rather than being able to negotiate improved offers.

Production companies believe the current system works for them. They prioritise having certainty about workers' employment status. Their satisfaction with the status quo was also shared by one of the worker groups on the FIWG. In their view any system that makes New Zealand an attractive production venue is good for workers because this increases the amount and quality of work on offer.

Overall, all parties on the FIWG support their proposed model. They understand the status quo is unlikely to continue, and see the recommended model as being best suited to the industry's needs and characteristics.

We intend to continue working with stakeholders from the screen industry as this work continues, both through the FIWG and more broadly.

# Section 3: Options identification

## 3.1 What options are available to address the problem?

There are three options available. These reflect two key questions relating to our primary objectives:

| | | **Should the carve-out from employee status be retained to give certainty about employment status?** | |
|---|---|---|---|
| | | *No* | *Yes* |
| **Should the existing collective bargaining model be used?** | *Yes* | Option 1 | Option 3 |
| | *No* | Not considered (see section 3.3) | Option 2 |

**Option 1: repeal Employment Relations (Film Production Work) Amendment Act 2010**

This option would return the law relating to film production work to its pre-2010 position: film production workers would no longer be excluded from the definition of an "employee" under the Employment Relations Act. Contractors would be able to challenge their employment status if they believed the relationship to be one of employment. If found to be employees (or hired from the outset as employees), they would gain the protection of minimum employment standards and be able to bargain collectively. There could be industrial action under this option.

**Option 2: retain carve-out but allow contractors to bargain collectively using new model**

This option involves a new collective bargaining system for contractors doing screen production work as recommended by the FIWG (specific features of the recommended model could still change based on ministerial decisions). This is the option preferred by the screen industry.

Unlike in our existing collective bargaining system, this option would allow contractors in the screen industry to bargain collectively as part of specified occupational groups.[24] Collective agreements reached through this model would have universal coverage across a particular occupation. These would effectively set occupation-specific minimum terms of work without requiring negotiation with each individual production company.

As unanimously recommended by the FIWG, this option does not allow for industrial action, with bargaining disputes instead resolved by mediation and then arbitration (if mediation is unsuccessful).

**Option 3: retain carve-out but allow contractors to bargain collectively using existing model**

This option would extend access to our existing collective bargaining system to contractors doing screen production work. Collective agreements would only bind signatory parties (ie production companies and unions) and workers affiliated to signatory parties (ie union members who work for signatory production companies); though they can be voluntary for other workers and parties. Guilds would only be able to represent their members in collective bargaining if they were registered trade unions. There could be industrial action under this option.

[24] There is international precedent for this sort of model: in other countries, there are examples of contractors working in the film or creative industries being allowed to bargain collectively without having to be employees. Québec's model bears the most similarity to the FIWG's recommended model, and has been in place since 1987. See Annex 3 for more information about unique arrangements for screen production/creative industry workers overseas.

**How each option contributes to objectives**

| | **Option 1**<br>*Repeal carve-out (ie employees can use existing bargaining system)* | **Option 2**<br>*Retain carve-out + create new bargaining system for contractors* | **Option 3**<br>*Retain carve-out + allow contractors to use existing bargaining system* |
|---|---|---|---|
| *Redressing power imbalance* | Given the nature of the film industry (which renders collective bargaining impractical even for employees) and the low levels of collective bargaining in the industry before 2010, we expect similarly low levels of collective bargaining under this option. | All contractors doing screen production work would be able to bargain collectively. Once collective agreements are in place, they would mandatorily cover all work relating to a particular occupational group in the screen industry. | Contractors will continue to be unable to access minimum employment standards, but would be able to bargain collectively.<br>Only some guilds in the screen industry are registered trade unions; those who aren't will not be able to bargain collectively on behalf of their members.<br>Given this constraint, and the inability to bargain at a sector- or occupation-wide level, we expect low levels of collective bargaining under this option. |
| *Certainty of employment status* | Less certainty about employment status: film production workers would be able to challenge their employment status. | More certainty for production companies about their workers' employment status. | More certainty for production companies about their workers' employment status. |
| *Competition between contractors* | No impact on competition among contractors. | Competition among contractors on specific terms and conditions would lessen. However, given international production companies have a choice over where to locate their productions, and contractors can still negotiate above any minima, the increased level of anti-competitive behaviour may not be large. | Competition among contractors would lessen by a small amount, if and when collective bargaining occurs. |

## 3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

The options have been assessed using the following criteria:

- Investment certainty,
- Worker wellbeing, and
- Cost effectiveness.

The first two criteria are directly related to the two primary objectives for this work: redressing the imbalance of power between film production workers and those who engage them, and providing certainty to encourage continued investment in New Zealand by screen production companies.

The third criteria relates to the costs and benefits of each option.

## 3.3 What other options have been ruled out of scope, or not considered, and why?

**Applying for collective bargaining authorisation**

We have not considered the screen industry applying for collective bargaining authorisation from the Commerce Commission for the following reasons:

- There is no guarantee of an authorisation being granted. There is also a high bar to meet in terms of public interest.
- The Commerce Commission is a competition regulator, and does not have specific knowledge or experience of work-related conditions and considerations.
- The parties who apply for authorisation (and if successful, parties to collective bargaining) would be self-selecting and may not be adequately representative of all interests across an occupational group or those who engage such workers.
- There may need to be separate authorisations for each existing guild or union, and there are some workers who are not represented by any existing guild or union.
- Any resulting collective agreement may not be binding on parties, and would definitely not be binding on production companies who directly engage workers. This is because production companies tend to be specific purpose vehicles created for every production, and are highly unlikely to directly participate in collective bargaining. Like workers, their interests would be represented by a separate organisation in bargaining.
- Any resulting collective agreement would also not be accompanied by specific dispute resolution provided in statute.

**Providing certainty about employment status some other way and repealing 2010 changes**

At a high-level, there are two ways to increase certainty about the employment status of a group of workers:

- Excluding or including a class of workers from the definition of an “employee”, and
- Amending the real nature of the relationship test for employee status.

Any option that involves a discretionary application of the real nature test, even if modified to increase the weight given to industry practice (either generally or specifically for the screen industry), is still going to leave ultimate authority for determining employment status up to a third party (the courts).

Production companies have made it clear—through the 2010 law change—that certainty in their eyes requires knowing workers who are engaged as contractors remain contractors, without any flexibility for parties outside the contractual relationship (eg the courts) to determine individual employment status. Any alternatives to the carve-out are likely to be viewed by production companies as a disincentive to invest in New Zealand.

**Introducing a new bargaining model after repealing 2010 changes**

We have not considered repealing the Employment Relations (Film Production Work) Amendment Act

2010 and introducing a new bargaining system to allow occupation-wide collective agreements (potentially covering all workers, ie employees and contractors). This is the excluded option signalled in section 3.1 above. This policy is instead being considered through the Fair Pay Agreements work, also within the Workplace Relations and Safety portfolio.

**Legislating minimum standards for the screen industry**

We have not considered the government setting minimum standards/terms and conditions for screen production work, or extending existing minimum standards to screen production workers. This would be a significant change for the ERES system: we do not set minimum standards on an occupation or industry basis. Instead, the system provides a mechanism for parties to do so themselves through collective bargaining. Setting minimum standards for the screen industry would also lack the collective bargaining element sought by Cabinet, and (based on engagement thus far) the industry input needed to get it right.

## Section 4: Impact analysis

**Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?**

| | Option 1: repeal carve-out (employees can use existing bargaining system) | Option 2: retain carve-out and create new bargaining system | Option 3: retain carve-out and allow contractors to use existing bargaining system |
|---|---|---|---|
| *Investment certainty* | **– –**<br>Impact on investment certainty will depend on the industry's sensitivity to removal of the carve-out. Feedback from the industry is that having certainty about employment status outweighs any uncertainty that may be generated through widespread collective bargaining.<br>Empirical evidence is limited. On one hand, for the five years between the *Bryson* decision (that found a film production worker to be an employee) and the 2010 law change, there were no reported instances of productions choosing to forego production in New Zealand because of uncertainty about employment status. On the other hand, uncertainty in 2010 (re *The Hobbit* films) was sufficient to prompt lobbying for a law change.<br>On balance, given the industry has operated for more than eight years under the carve-out, we think its removal could cause uncertainty. | **0**<br>Retention of the carve-out from employee status means the industry will continue to have the certainty about workers' employment status that it says is essential.<br>Feedback from the industry is that having certainty about employment status outweighs any uncertainty that may be generated through widespread collective bargaining, including any associated mediation/arbitration processes. | **0**<br>Retention of the carve-out from employee status means the industry will continue to have the certainty about workers' employment status that it says is essential. |
| *Worker wellbeing* | **+ for new employees**<br>**0 for existing employees and contractors**<br>**– – for displaced workers**<br>This option is better than the status quo for current contractors if they can establish that the real nature of their relationship is one of employment through the courts. If found to be employees, they would then be entitled to minimum employment standards (eg the minimum wage). If union members, they could also benefit from collective bargaining, which their unions would need to initiate with production companies. Terms and conditions of employment may improve through collective bargaining.<br>There is no change from the status quo for existing employees and all other contractors.<br>If there is less work on offer as a result of reduced investment certainty, that means a much worse outcome than the status quo for any workers (both employees and contractors) displaced from the industry. | **+ + for contractors**<br>**0 for employees**<br>This option is much better than the status quo for contractors in the industry. They would be able to bargain collectively, and collective agreements would have occupation-wide coverage (rather than only binding workers through the principle of double affiliation). Their terms and conditions of work could improve as a result.<br>There is no change from the status quo for employees because they would not be covered by the recommended model.<br>If labour costs increase significantly as a result of collective bargaining, and this in turn reduces the cost-competitiveness of New Zealand's screen sector, there could be less work on offer. However, because international productions already tend to pay better than domestic work, we think any potential displacement of workers is likely to be low. | **+ for unionised contractors**<br>**0 for employees and non-unionised contractors**<br>This option is better than the status quo for contractors who are union members, and whose unions initiate bargaining with production companies. For contractors covered by collective agreements, their terms and conditions of work could improve.<br>There is no change from the status quo for employees as they retain access collective bargaining under the Employment Relations Act. Non-unionised contractors would not be able to bargain collectively (noting there is a strong reluctance among some guilds in the industry to be registered trade unions). |
| *Cost-effectiveness* | **–**<br>Bargaining is not likely to be regularly initiated under this option given low levels of collective bargaining pre-2010. This means limited improvement of worker wellbeing.<br>There could be costs to both parties relating to court proceedings if employment status is challenged, with potential benefits only accruing to individual workers who can establish they are employees.<br>An additional potential cost to workers is if production companies do not have enough certainty to invest in New Zealand, leading to less work in the industry.<br>Compared with option 2, there will be no additional costs to regulators under this option and there will be limited bargaining costs to regulated parties. | **+**<br>Regulated parties will have to bear the costs of bargaining. There will also be costs to regulators to provide supporting infrastructure for a new bargaining model.<br>However, a much larger group of workers would be able to access collective bargaining under this option than options 1 and 3. This represents a wider distribution of benefit than under either of those options.<br>Production companies benefit from the continued certainty of employment status, and workers benefit if that leads to more investment in New Zealand and more work in the industry.<br>Overall, though the costs of this option are likely to be higher than options 1 and 3, the scale of benefits to workers under this option is the highest. | **–**<br>As with option 1, we think bargaining won't be regularly initiated under this option, therefore there will be limited improvement in worker wellbeing.<br>Where collective bargaining is initiated, there will be bargaining costs to regulated parties. These costs are likely to be the same as under than option 1, but lower than option 2.<br>Production companies benefit from the continued certainty of employment status, and workers benefit if that leads to more investment in New Zealand and more work in the industry.<br>The scale of worker wellbeing benefits under this option is likely to be low given they will only be experienced by unionised contractors, and union density in the industry is low. |
| *Overall assessment* | **This is not the preferred option.** | **This is the preferred option.** | **This is not the preferred option.** |

**Key**

| | |
|---|---|
| **++** | *much better than doing nothing or the status quo* |
| **+** | *better than doing nothing or the status quo* |
| **0** | *about the same as doing nothing or the status quo* |
| **–** | *worse than doing nothing or the status quo* |
| **– –** | *much worse than doing nothing or the status quo* |

# Section 5: Conclusions

## 5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Option 2 is our preferred option. It is the only option that could improve worker wellbeing in the industry without reducing certainty for production companies.

However, pursuing this option involves a risk of inconsistency with future developments in the Workplace Relations and Safety portfolio. For example, future work on Fair Pay Agreements and strengthening protections for those in non-standard forms of employment (eg contractors and temporary workers) may offer alternative pathways to addressing the objectives of this work.

The FIWG process has signalled to the screen industry that there *will* be a change in the regulatory settings applying to film/screen production work. Although the government has yet to commit to a particular course of action, doing nothing, or returning to the pre-2010 situation (ie option 1), could be seen to contradict these indications.

## 5.2 Summary table of costs and benefits of the preferred approach

| Affected parties | Comment | Impact | Evidence certainty |
|---|---|---|---|
| **Additional costs of proposed approach, compared to taking no action** | | | |
| *Regulated workers* | Collective bargaining costs | Low-medium<br>*Est $1 – 3m* | Low |
| *Regulated companies* | Collective bargaining costs | Low-medium<br>*Est $1 – 3m* | Low |
| | Increased labour costs | Medium<br>*Est $15m* | Low |
| *Regulators* | Additional costs to provide bargaining and dispute resolution infrastructure | Low<br>*Est $1m* | Low |
| ***Overall costs*** | Increased labour costs are effectively a transfer to workers (see benefits table below). The costs that remain relate to carrying out bargaining (falling on regulated parties) and providing the necessary infrastructure for this (falling on regulators). | **Low-medium** | **Low** |
| **Expected benefits of proposed approach, compared to taking no action** | | | |
| *Regulated workers* | Improved worker wellbeing through being able to bargain collectively | Medium | Low |
| | Improved terms and conditions of work including pay | Medium<br>*Est $15m* | Low |
| ***Overall benefits*** | Benefits in terms of improved terms and conditions of work are offset by increased labour costs to production companies (see costs table above). The benefits that remain are to workers in terms of wellbeing improvements as a result of being able to bargain collectively. | **Medium** | **Low** |

**Overall statement on costs and benefits**

The largest cost component (in real terms) of the preferred option is increased labour costs to production companies. This is effectively a transfer to workers in the form of improved terms and conditions of work, and is therefore offset when looking at net benefit/cost.

The remaining cost components relate to collective bargaining process costs. In real terms, we expect these will be lower than increased labour costs/returns to labour. These costs will need to be met by industry.

These are then weighed against improved worker wellbeing from being able to participate in collective bargaining. We cannot quantify this benefit, but worker groups on the FIWG have indicated the value associated with being able to bargain collectively (eg the participation benefits from expressing collective voice) outweighs what it will actually cost them to do so.

This view is shared by FIWG members representing production companies and producer organisations.

**Quantifying labour costs/terms and conditions of work**

It is hard to predict the outcomes of collective bargaining, particularly in terms of labour costs and the elasticity of labour demand.

The New Zealand Institute of Economic Research (NZIER) modelled two scenarios associated with introducing minimum pay rates in the screen industry.[25] Noting a lack of available data, they assumed a 10% increase in wages for the bottom quartile of earners. The two scenarios below show the effects of such an increase in earnings:

| | ***Scenario 1*** | ***Scenario 2*** |
|---|---|---|
| **Assumptions** | | |
| Change in demand for labour | **- 1.0%** | **- 3.5%** |
| Increase in earnings for bottom quartile of workers | 10% | |
| **Effects** | | |
| Increased income per worker per annum | $837.30 | |
| Loss of jobs | 35 | 122 |
| Increased labour cost (millions) | $31.69 | $30.89 |
| Gross revenue needed to offset increased labour cost | 0.89% | 0.87% |

The actual elasticity of labour demand will depend on the project, the type of work (skills involved), whether the increase is well-signalled, and production budget.

NZIER used a broader definition of “screen industry” than the scope of this work.[26] If half of the workers in the bottom quartile of earners in the screen industry do production and post-production work, then (using NZIER’s model above) a 10% increase in earnings for these workers would mean a roughly $15 million increase in labour costs. This is less than 0.5% of companies’ gross revenue.

**Quantifying bargaining costs**

The total costs and benefits of the proposed approach are difficult to quantify. They will depend on the

25 NZIER, “The Film Industry Working Group’s Recommendations: An initial assessment of the benefits and detriments, and some things to consider”, January 2018, page 19. NZIER recognise that there is limited data available to provide insights, and caveat the work as indicative of the potential “direction of travel” for the reported outcomes.

26 The scope of this work is concerned with the production and post-production, while NZIER’s modelling includes broadcasting, distribution and exhibition work in the screen industry. To put into perspective how this shapes the reported effects, according to the Screen Industry Survey, about 7,600 people work in production and post-production, and about 6,300 people work in broadcasting, distribution and exhibition.

outcomes of collective agreements as well as the transaction/process costs of participating in collective bargaining.

The estimated value of $1 – 3 million in the tables above is only a rough indication of the scale of potential costs. Actual collective bargaining costs are likely to vary depending on the following factors:

- Level of organisation across occupations/parties represented,
- Services parties choose to engage (eg a facilitator, negotiator, legal advice, communications),
- Capacity among bargaining parties,
- Frequency/duration of bargaining,
- Size of the workforce, and
- Approach to bargaining.

The cost-effectiveness of bargaining will also vary, depending on how many people the collective agreement covers (in terms of reducing the amount of individual negotiation required).

## 5.3 What other impacts is this approach likely to have?

**Risk of creating an unattractive investment landscape**

Production companies look for certainty and stability in production markets. While cost is a major factor determining where a screen production will locate, anything that leads to uncertainty (eg bargaining processes with unpredictable outcomes) could reduce New Zealand's attractiveness internationally.

New Zealand could experience a decline in international production activity, and associated economic activity, if studios opt to avoid New Zealand until the impact and consequences of new labour regulations and collective bargaining is known. Given it may take some time for the first wave of collective bargaining to be completed, this could have a detrimental impact on the pipeline of international projects opting to be based in New Zealand. There could be particular consequences for multi-season (eg television) productions or large budget productions with long lead-in times.

Also, if improved worker outcomes end up increasing overall costs for screen production work, this could also reduce New Zealand's ability to attract international screen productions. However, there are many factors that affect this calculation, including appropriateness of locations, exchange rates, workforce skill levels, studio capacity, and available financial incentives.

Decisions about transitional arrangements for any new regulatory system could assist in mitigating uncertainty, but are unlikely to fully eliminate this. However, it should be noted that other jurisdictions have undertaken similar reform and feature collective bargaining in their screen industries.

## 5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

One area of incompatibility has been identified: the FIWG have recommended that industrial action not be allowed under option 2, with any disputes resolved by compulsory arbitration if required. Confidential advice to Government the preferred option can be implemented in a way that is consistent with the government's expectations for the design of regulatory systems, with the following additional comments:

- Regulatory design and drafting should strike a good balance between the objectives sought to ensure the least adverse competition impact.
- While uncertainty related to bargaining cannot be completely eliminated, there are features that can mitigate its effects. These features include public notification before bargaining begins, and a stand-down period after a collective agreement is concluded before it can take effect.

- There could be added complexity created through the blending of elements of contract law and employment law, which could have implications for the overall cohesiveness of both those systems. This could be mitigated by applying a strict delineation between contractors to whom this model applies, and other contractors in the economy.

# Section 6: Implementation and operation

## 6.1 How will the new arrangements work in practice?

All options, including the preferred option, require legislative change. The preferred option will require amending the Employment Relations Act and the Commerce Act.

MBIE and employment institutions (ie Employment Mediation Services, the Employment Relations Authority and the Employment Court) will be responsible for ongoing operation and enforcement of the new arrangements. We have not identified any concerns with these parties' ability to implement the preferred option consistently with the government's expectations for regulatory stewardship by agencies.

It is expected that any new arrangements will come into effect on a specified date after Royal Assent to allow sufficient preparation time for regulated parties. This lead-in time is necessary because screen production work is often planned well in advance, and is sensitive to changes in expected risks and costs.

We will continue to work with stakeholders in the screen industry, including those represented on the FIWG, through the implementation of any regulatory change.

## 6.2 What are the implementation risks?

Confidential advice to Government

**New roles and functions for regulatory bodies**

A key implementation challenge is that the preferred option involves new roles and functions related to collective bargaining. Existing employment institutions have signalled they can perform these functions, and further work during detailed design will need to ensure any new processes put in place align with existing functions in the ERES system The challenge for employment institutions will be identifying and recognising bargaining parties, and ensuring parties are adequately prepared for bargaining (in terms of process steps etc).

Another implementation challenge will be creating dispute resolution pathways—both for bargaining disputes and contractual disputes—that interface well with existing dispute resolution in the ERES system. The nature of these disputes is likely to be similar to those experienced within the ERES system but some of the dispute resolution roles might differ (eg the use of arbitration).

Given the small size of the industry, the actual proportion of new and different work for employment bodies is likely to be low. The challenge will be ensuring all regulatory bodies have the necessary information, support and expertise to perform these new functions.

**Bargaining capacity and capability**

Industry participants do not have recent collective bargaining experience which means they will need to build bargaining capacity and capability from a low base. We consider bargaining could still be initiated under option 2 without additional resources from government. Bargaining might be slow to begin with (eg with one agreement negotiated at a time), and will probably only involve major occupational groups in the industry at the start.

# Section 7: Monitoring, evaluation and review

## 7.1 How will the impact of the new arrangements be monitored?

Statistics New Zealand collects and publishes information about the screen industry annually as part of its Screen Industry Survey includes information about employment in the screen industry, earnings from jobs and wage distribution. This also provides information about screen industry businesses, completed screen production work, their financing, and revenue in the industry.

In annual releases of Screen Industry Survey findings, we may expect to see changes in the distribution of wages in the screen industry. However, because this measure includes earnings of those who work in broadcasting, distribution and exhibition, any changes to the earnings of those doing screen production and post-production work may be obscured. However, the Screen Industry Survey can tell us about revenue from international sources, which will inform us about whether we continue to attract work from overseas.

Screen Industry Survey findings can be accompanied by periodic analysis about employee and contractor counts, and sub-industry wage and earnings information.

There is no qualitative evaluation planned for this work.

Through the registration of concluded collective agreements, MBIE will be able to gain a better view of collectively negotiated terms and conditions in the screen industry.

## 7.2 When and how will the new arrangements be reviewed?

Any new arrangements put in place as part of this work will be considered during policy work on strengthening protections for those in non-standard forms of employment (eg contractors and temporary workers) and Fair Pay Agreements. Developments across all these projects will be rationalised at a later date, if needed.

Other than this, review of new arrangements will happen on a regular basis as part of our usual ERES system oversight.

*Publication note:*
*The Screen Industry Survey has been discontinued. MBIE is exploring other ways to track the impact of regulatory changes on labour market outcomes in the screen industry.*

# Annex 1: Background information

**Determining whether a worker is an employee or a contractor**

In New Zealand, employment law only applies to employment relationships (ie when a worker is an employee, but not when they are a contractor). Determining whether a worker is an employee or a contractor depends on the "real nature of the relationship" when a person is employed by another person under a contract of service. The real nature of the relationship is determined using several tests established in common law:

- The intention test: what the parties intended the relationship to be is relevant, but it alone does not determine the true nature of the relationship.
- The control vs independence test: this refers to the control of the employer or the independence of the worker over the worker's work content, hours and method.
- The integration test: this refers to whether the work performed by the worker is fundamental to the employer's business, and whether they are a 'part and parcel' of the organisation.
- The fundamental/economic reality test: this involves looking at the total circumstances of the work relationship to determine its economy reality (eg whether the worker pays their own income tax and GST, takes on financial risk and works for multiple entities).

Workers can challenge the nature of their working relationship (ie whether they are an employee rather than a contractor). This is then determined by either the Employment Relations Authority or the Employment Court on a case-by-case basis.

This ensures employment protections are not undermined by misclassifying employees as contractors. In particular, it protects employees with low bargaining power who may feel compelled to be engaged as contractors (thereby circumventing employment protections) when the real nature of their relationship is in fact one of employment.

**2003 – 2005: *Bryson v Three Foot Six***

In *Bryson v Three Foot Six*, the applicant (Mr Bryson) had been working as a model-making technician on the Lord of the Rings films. He was made redundant and pursued a personal grievance in relation to his dismissal. Because this remedy is only available to employees (not contractors), a preliminary question was whether he was an employee.

Determining the real nature of the relationship with regard to any relevant factors and the common law tests is a fact-based exercise for the courts. The appeal history of the *Bryson* case—which remains New Zealand's leading case on this matter—shows that judicial conclusions on employment status can be finely balanced. Mr Bryson was found to be an employee by the Employment Court, an independent contractor by the Court of Appeal, and finally, an employee by the Supreme Court.

This led to significant concern in the film industry that contractors would begin challenging their employment status. This was seen to represent large amounts of uncertainty to film production, and there was a fear that this would lead to lengthy and costly legal disputes for the film industry.

**2010: Employment Relations (Film Production Work) Amendment Act**

Film production is a highly competitive market globally, and the industry is very sensitive to changes in the industrial landscape. The uncertainty stemming from the *Bryson* decision became an issue during the production of *The Hobbit* films in 2010, amidst potential industrial action.

To give the film industry certainty about film production workers' employment status, the Employment Relations Act was amended in 2010. A "carve-out" was created for people doing film production work from being considered employees,[27] unless they are party to or covered by a written employment agreement that specifies they are employees.[28] This means the real nature of the relationship test that

27 Employment Relations Act 2000, s 6(1)(d).

28 Employment Relations Act 2000, s 6(1A).

generally applies when determining employee/contractor status does not apply to people doing film production work.[29] Instead, the contract/agreement under which they are engaged is the sole determinant of their employment status.

Most film production workers are now engaged as contractors, and cannot challenge their employment status. They are therefore excluded from the rights and obligations of New Zealand's employment relations and standards system, one of which is the right to bargain collectively.

### The right to bargain collectively

Broadly speaking, there are two mechanisms for achieving employee protection in our ERES system:[30]

- Collective bargaining: this allows employees to come together as a group and negotiate with employers as a joint unit to achieve specific terms and conditions that relate to their work. MBIE's role as regulators is to create an enabling framework that parties to an employment relationship can use to achieve mutually beneficial outcomes.
- Employment standards: these are statutory minima that apply across the entire economy, and relate to matters such as holidays, minimum wage, paid parental leave etc. MBIE's role as regulators is to determine minimum terms for all work done through employment relationships in New Zealand.

Collective bargaining is an important tool for redressing information and power asymmetries between workers and employers. This is because while, in principle, terms and conditions of employment can be agreed between each individual employee and their employer, the actual scope for every single employee to genuinely negotiate terms of their particular employment relationship is more limited. Allowing workers to act collectively can offset this imbalance.

The ILO considers collective bargaining a fundamental right. New Zealand has accepted this by ratifying the ILO's Right to Organise and Collective Bargaining Convention 1949 (No 98), and incorporating it in our domestic law. Article 4 states:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

In New Zealand, all employees can bargain collectively about the terms and conditions of their employment. The Employment Relations Act specifically mentions the promotion of collective bargaining in its purposes,[31] and provides infrastructure for collective bargaining. Some employees (eg those in the essential services such as police officers) have a curtailed version of collective bargaining, recognising it is not in the public interest for there to be industrial action as a corollary of bargaining in the essential services.

Contractors, who provide their services through business structures, cannot bargain collectively. To do so may amount to a contract, arrangement or undertaking that aims to or has the effect of substantially lessening competition in a market. This is prohibited under the Commerce Act, unless authorised by the Commerce Commission.[32]

### Collective bargaining is a means to an end

The *availability* of collective bargaining is one component of the right to bargain collectively. There is also an obligation, stemming from having ratified ILO Convention No 98, to encourage and promote

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29 Employment Relations Act 2000, s 6(2).

30 In addition to these regulatory mechanisms, employees are free to negotiate their terms and conditions of employment on an individual basis, but cannot contract out of minimum employment standards set in law.

31 Employment Relations Act 2000, s 3(a)(iii). The inherent inequality of power in employment relationships is also acknowledged at s 3(a)(ii).

32 Commerce Act 1986, ss 27 and 30. The option of applying to the Commerce Commission for authorisation of a collective bargaining arrangement is discussed in section 3.3.

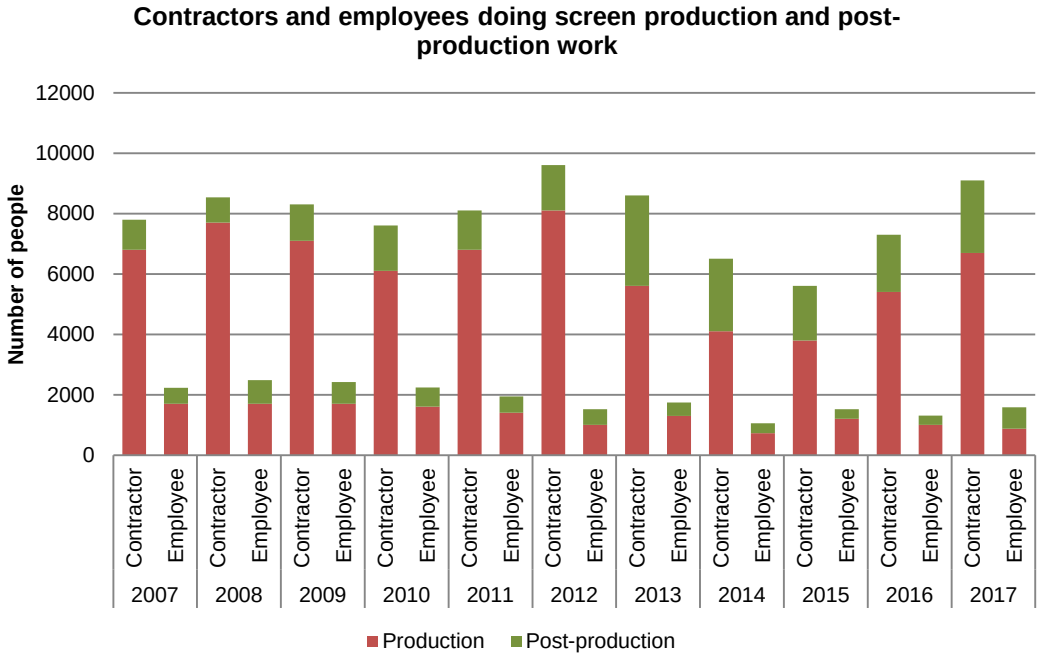
the *use* of collective bargaining. This recognises there is benefit to parties both through having the option to bargain collectively, and the outcomes flowing from participation in bargaining. For employees this can include improved terms and conditions of work. For firms this can include productivity benefits and reduced transaction costs from not having to individually negotiate employment agreements. As regulators, we are therefore concerned not only with whether parties to an employment relationship can bargain collectively (in a literal sense) but also whether the framework for collective bargaining allows parties to use the framework for mutual benefit.

# Annex 2: Working in the screen industry

Work in the screen industry is project-based: workers are generally engaged on a contract basis for part-time work linked to project durations. They tend to move from one production to the next. It is common for workers to be engaged on several projects in a single year, and for there to be gaps between these engagements (during which they may work outside the industry).[33] Hiring tends to happen through personal and professional connections: heads of department are recruited first, who then draw from their networks to staff the tier below them (who in turn identify workers for the next tier and so on).

The nature of work in the screen industry makes accurately counting workers and examining their terms and conditions of engagement hard. Most workers are not employees, and are not consistently engaged in screen production and post-production work. The figures in this annex should therefore only be considered a rough approximation.

The graph below shows the number of people who work in the industry, according to their employment status:[34]




In terms of earnings, it is generally considered that:

- Work on international productions tend to pay a higher hourly wage, but
- Domestic television work tends to be higher paying overall because of the longer duration of employment.

33 A key exception to this are creative collectives, such as the Weta group of companies, which operate more like clearinghouses in that they are the intermediary between customers (production companies) and labour (their workers).

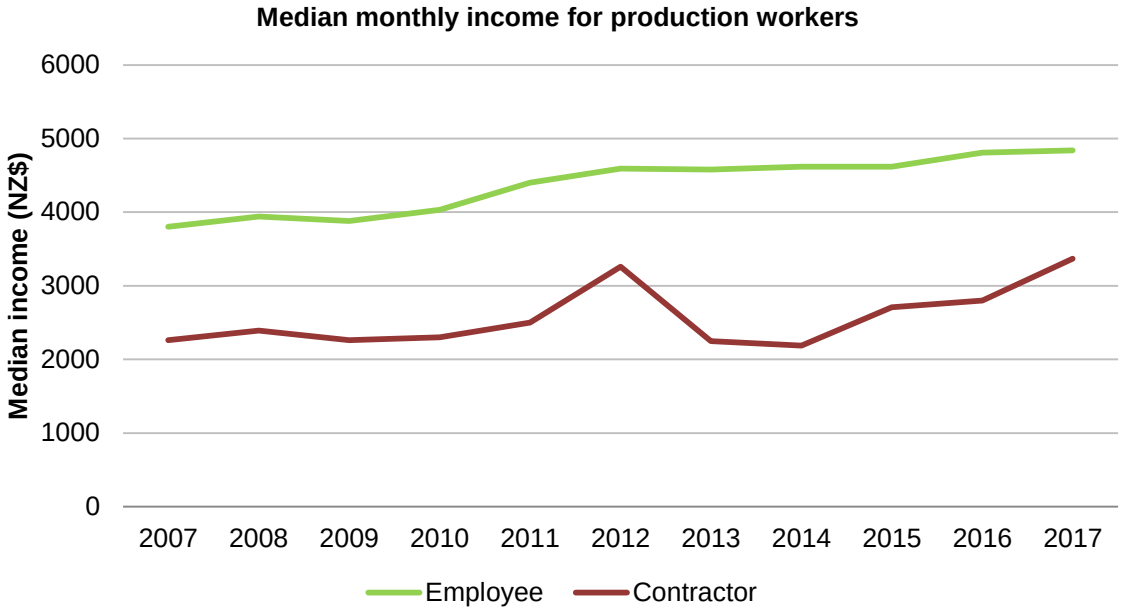
34 Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry.

It is harder to tell from administrative statistics what contractors doing production and post-production work in the screen industry make from this work. The table below shows earnings by format for individual projects supported by the New Zealand Screen Production Grant (NZSPG):[35]

| | Domestic | | International | |
|---|---|---|---|---|
| | **Film** | **Television** | **Film** | **Television** |
| **Labour cost** | $18.7m | $11.0m | $168.8m | $56.4m |
| **Jobs** | 1,379 | 625 | 2,167 | 1,620 |
| **Average earnings**[36] | $13,552 | $17,665 | $67,738 | $34,836 |
| **% of jobs done by New Zealand residents** | 92.5% | 97.6% | 81.7% | 90.9% |

The above figures have been extracted from grant applications, and do not include post-production, digital and visual effects work (PDV). Commercial sensitivity —average annual earnings for PDV is thought to be around $150,000.[37]

The graph below shows median monthly earnings for contractors and employees doing production work:[38]




In 2017, the median monthly earnings for contractors doing screen production work were $3,370. This comes to around $40,440 annually.

35 Sapere, "Evaluating the New Zealand Screen Production Grant", March 2018, pages 36 and 38. This is for grants during the period from 1 April 2014 to 1 July 2017. Available at http://www.srgexpert.com/publications/evaluating-the-new-zealand-screen-production-grant/.

36 These figures are for each job on a production supported by the NZSPG during the period from 1 April 2014 to 1 July 2017. Statistics New Zealand reports that in 2017/18, workers doing screen production and post-production work did on average 1.6 jobs per year.

37 Sapere, "Evaluating the New Zealand Screen Production Grant", March 2018, page 38. Available at http://www.srgexpert.com/publications/evaluating-the-new-zealand-screen-production-grant/.

38 Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry.

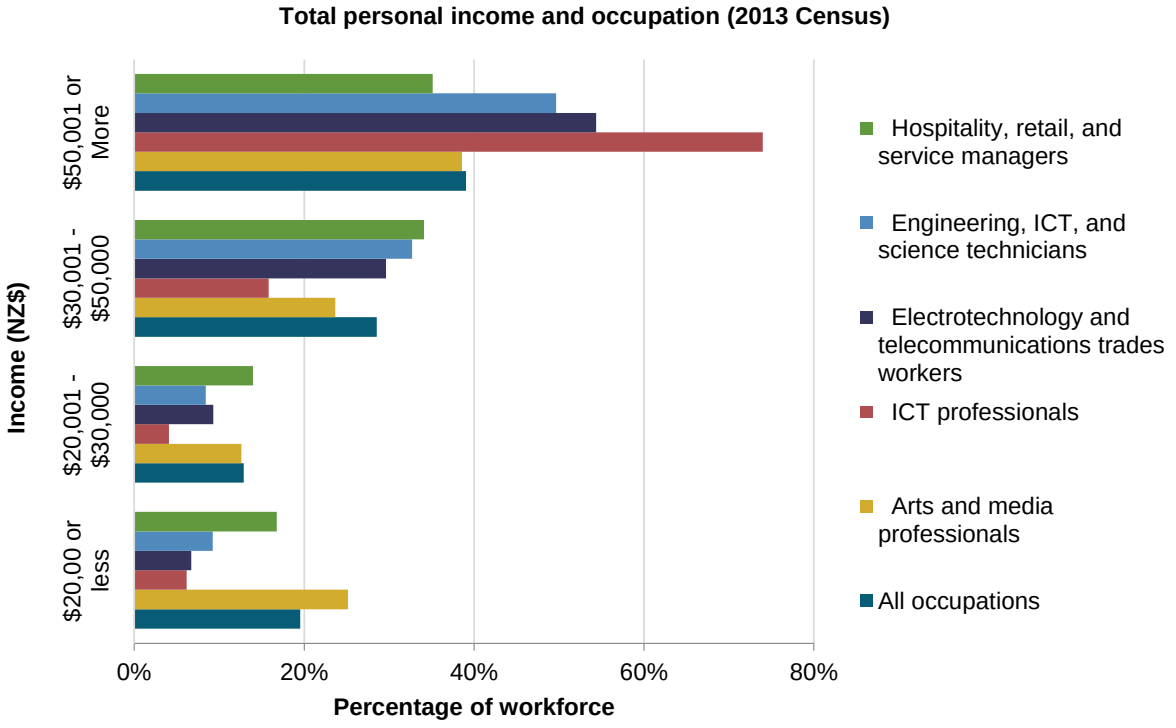
*Publication note: footnote 37 should refer to page 38 of the Sapere report.*

We also know that longer jobs tend to pay better, but are outnumbered by shorter jobs:

*Independent contractor counts of job spells and median earnings by job tenure (2017)* [39]

| Sector | Job length | Counts of job spells | Median monthly earnings |
|---|---|---|---|
| **Production** | 1 – 2 months | 11,910 | $1,270 |
| | 3 – 5 months | 2,530 | $4,410 |
| | 6 – 12 months | 1,200 | $5,480 |
| | More than 1 year | 440 | $4,860 |
| **Post-production excluding Weta Digital** | 1 – 2 months | 1,390 | $600 |
| | 3 – 5 months | 210 | $2,490 |
| | 6 – 12 months | 140 | $3,150 |
| | More than 1 year | 120 | $4,400 |

The graph below compares personal incomes (including what contractors make) by industry. It uses a broader occupational classification of arts and media professionals, of which a subset is people working in the screen industry.




The graph shows that a large proportion of arts and media professionals are more likely to earn a higher income. However, compared to other skilled occupations like ICT professionals, the proportion of arts and media professionals earning above $50,000 per annum is low. A high proportion of arts

[39] Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry.

and media professionals also appear to earn a very low income (less than $20,000 per annum in 2006) and more often than other occupations.

The table below shows incomes and industry distribution for some occupations in the screen industry. This information is from the 2013 Census and the occupational groups are at the six-digit (most granular) level of the Australian and New Zealand Standard Classification of Occupations. The data includes information for both employees and contractors. It shows that there is likely to be variation in incomes across the screen industry. However, given the relatively low prevalence of each occupation in the screen production and post-production sectors, we do not consider this information conclusive about incomes for various occupational groups in the screen industry.

| | | | | *% of occupation working in industry* | |
|---|---|---|---|---|---|
| | **Number of workers** | **Mean personal income ($)** | **Median personal income ($)** | **Motion picture and video production (J551100)** | **Post-production services and other motion picture and video activities (J551400)** |
| Actor | 492 | 31,500 | 22,900 | 24% Most common industry for occupation | Not in top 10 industries for occupation |
| Actors, Dancers and Other Entertainers (not elsewhere classified) | 261 | 35,800 | 24,500 | 9% | Not in top 10 industries for occupation |
| Media Producer (excluding video) | 975 | 71,300 | 63,700 | 38% Most common industry for occupation | 3% |
| Author | 1,605 | 44,200 | 36,000 | 5% | Not in top 10 industries for occupation |
| Book or Script Editor* | 75 | 44,300 | 40,400 | 16% | Not in top 10 industries for occupation |
| Art Director (Film, Television or Stage) | 174 | 60,300 | 54,400 | 12% Most common industry for occupation | Not in top 10 industries for occupation |
| Director of Photography* | 63 | 77,600 | 60,800 | 52% Most common industry for occupation | Not in top industries for occupation |
| Film and Video Editor | 384 | 54,700 | 49,400 | 41% Most common industry for occupation | 12% |
| Technical Director | 354 | 114,500 | 104,200 | 3% | 23% Most common industry for occupation |
| Video Producer* | 126 | 50,300 | 44,000 | 48% Most common industry for occupation | Not in top industries for occupation |

| | | | | % of occupation working in industry | |
|---|---|---|---|---|---|
| | Number of workers | Mean personal income ($) | Median personal income ($) | Motion picture and video production (J551100) | Post-production services and other motion picture and video activities (J551400) |
| Film, Television, Radio and Stage Directors | 156 | 71,200 | 50,300 | 33% Most common industry for occupation | 15% Second most common industry for occupation |
| Fashion Designer | 855 | 38,400 | 31,100 | 3% | Not in top 10 industries for occupation |
| Illustrator | 549 | 54,600 | 42,000 | 11% | 30% Most common industry for occupation |
| Multimedia Designer* | 297 | 70,400 | 64,200 | Not in top 10 industries for occupation | 14% Second most common industry for occupation |
| Dressmaker or Tailor | 552 | 26,900 | 26,100 | 5% | Not in top 10 industries for occupation |
| Camera Operator (Film, Television or Video) | 666 | 49,200 | 45,500 | 36% Most common industry for occupation | 2% |
| Light Technician | 273 | 45,000 | 40,100 | 12% Second most common industry for occupation | Not in top 10 industries for occupation |
| Make Up Artist | 381 | 30,900 | 28,300 | 11% | Not in top 10 industries for occupation |
| Sound Technician | 510 | 53,100 | 48,300 | 15% Most common industry for occupation | 7% |
| Performing Arts Technicians | 291 | 69,000 | 57,100 | 41% Most common industry for occupation | 27% Second most common industry for occupation |
| Production Clerk | 2,985 | 54,000 | 51,700 | Not in top 10 industries for occupation | Not in top 10 industries for occupation |
| Production Assistant (Film, Television, Radio or Stage) | 363 | 43,100 | 36,300 | 46% Most common industry for occupation | 4% |

** Less reliable data because of low numbers*

# Annex 3: International examples of contractor bargaining

Self-employed workers generally cannot bargain collectively. This is because they are considered to operate commercially as "undertakings" subject to competition regulation, which generally forbids collaborative price-setting (in this case, of contractors' services/labour).

There are generally several pathways to contractors being able to bargain collectively, combinations of which may be simultaneously available:

- Exemption from competition law (ie a legislative, administrative or judicial exemption),
- Wilful non-compliance with competition law where there is low risk of enforcement action, and
- Avoidance of competition regulation through limitations on bargaining.

The examples below relate to bargaining by contractors in the film/creative industries.

| | **Australia** | **Québec (Canada)** | **Ireland** | **United Kingdom** |
|---|---|---|---|---|
| *Pathway to collective bargaining* | Exemption to bargain collectively from Australian Competition and Consumer Commission (ACCC) under Competition and Consumer Act 2010. | Legislative exemption through Status of the Artist Act 1992 (federal) and Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists 1987. | Legislative exemption through Competition Amendment Act 2017. | Non-binding, voluntary collective agreement that does not set wage rates and therefore isn't prohibited by competition regulation. |
| *Workers covered* | Subject to ACCC decision on application from parties. Currently, authorisations exist in relation to writers, directors and actors. | Artists are those who provide "services, for remuneration, as a creator or performer in a field of artistic endeavour".<br>The Administrative Labour Tribunal gives organisations (ie guilds/unions) exclusive mandates to represent particular groups of workers/producers. | Voice-over actors, session musicians and freelance journalists. There is also broader provision for fully dependent self-employed workers and false self-employed workers to apply to the relevant Minister for permission to bargain collectively. | All crew members engaged on major motion pictures (feature films intended for initial cinematic exhibition with a production budget at least or greater than £30 million. |
| *Are agreements binding?* | No. Agreements only establish model terms which can be departed from. | Yes. Agreements are binding not just on parties but all work within coverage of a particular agreement. | Not specified. We are unaware of any collective agreements having been concluded since the exemption was passed in law. | No. The agreement does not contain a clause stating it is binding on parties and is therefore considered a "handshake agreement". |
| *Is industrial action* | Not specified. | Yes. Artists and their associations are | Not specified. | Not specified. |

| | | | | |
|---|---|---|---|---|
| *allowed?* | | barred from using pressure tactics that could be seen to prevent a producer from creating or presenting an artistic work. | | |

*Publication note:*
*In relation to whether industrial action is allowed in Québec, no recognised association or artist may boycott or use pressure tactics during the term of a collective agreement.*