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FILM WORKERS IN NEW ZEALAND: THE CONTRACTOR QUESTION

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Abstract

This paper deconstructs the issues surrounding the distinction between employees and contractors in the New Zealand film industry. This paper analyses the relevant legislation and case law. It attempts to break down the film industry at a statistical level to determine the extent of workers affected by changes to employment legislation. This paper takes a detailed look at some competing interpretations of key employment legislation as it affects film workers in New Zealand. Finally, this paper seeks to propose an appropriate approach to future regulation based on a mixture of theory and practice.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,600 words.

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I Introduction

In October 2010, the National Government passed the Employment Relations (Film Production Workers) Amendment Act 2010 ("Amendment"), under urgency. The Amendment altered the rights of film production workers in New Zealand. As a regulatory tool, the Amendment was contentious. It was categorized as both a rational economic decision and a deliberate attack on workers' rights. The necessity and the effect of the Amendment have been hotly debated. Recently, the Labour Government has charged a Working Group with the responsibility of proposing an alternative to the Amendment. This paper will analyse the Amendment in the context of the production and post-production sector ("**PPP Sector**") of the New Zealand film industry.

Part One of this paper provides a general overview of the paper's structure and argument, as well as some brief context around the Amendment.

Part Two of this paper will provide an overview of the PPP Sector and the film industry in New Zealand. Different categories of 'workers' within the PPP Sector will be identified, including an 'at-risk' category. This 'at-risk' category represents the PPP Sector workers who have been, and will likely be, most affected by regulatory change.

Part Three will provide a summary of the relevant regulatory and judicial history. The summary will involve a synopsis of the Amendment and a breakdown of the Supreme Court decision in *Byrson v Three Foot Six*. Part Three will then analyse three competing interpretations of the Amendment. Part Three will conclude with an introduction to the recent Working Group established under the Labour government.

Part Four attempts to distill the tension at the heart of the Amendment, as it relates to at-risk workers in the PPP Sector. This paper argues that the core issue involves on the one hand, the rights of at-risk workers to minimum protections, and on the other hand, a desire to meet wider industry needs. To-date, the regulatory approach has not addressed this tension in a satisfactory manner.

Part Five will consider possible approaches to the regulation of at-risk workers in the PPP Sector.

Ultimately, this paper seeks to argue that the appropriate approach to regulation of the film industry must place the needs of at-risk workers at the forefront. However, the government should then tailor the regulatory approach to incorporate a response to wider industry issues, where there is scope to do so without compromising minimum protections for workers. It is not necessarily a 'balancing act' (which presupposes that workers' rights can be diminished, if considered necessary) but rather an acknowledgment that a creative, purposive approach to regulation can yield a positive-sum outcome for individuals and entities.

A The Hobbit Law: Context

It is useful, at the outset of this paper, to provide some brief context. The Amendment (colloquially known as the Hobbit Law) was the result of a bill passed under urgency by the National Government in October 2010 to amend the Employment Relations Act 2000 ("the Act").

The bill arose because of some uncertainty regarding the production of The Hobbit film. The film was produced by Warner Bros and directed by Peter Jackson. Jackson wanted to produce the film in New Zealand. Warner Bros indicated reluctance, on the basis that it was unclear (under existing New Zealand law) whether workers were entitled to the right to collective bargaining. The degree of Warner Bros' reluctance, and the scope of the threat posed by such reluctance to New Zealand's film industry, is a contested matter.

To mitigate the uncertainty and secure production of The Hobbit in New Zealand, the Government passed the Amendment. The effect of the Amendment and the motive for its passing will be discussed in further detail below.

II The Film Industry in New Zealand: An Overview

A Industry Breakdown

The New Zealand screen industry comprises four major sectors. These are production and post-production, television broadcasting, film and video distribution and film exhibition.[1] Workers in the New Zealand film industry largely operate within the PPP sector. PPP Sector roles include artists, designers, actors, extras, technicians, engineers, and administration and professional staff, amongst others. The PPP Sector comprises close to 95 per cent of all businesses in the screen industry.[2]

This paper will focus on the PPP Sector, as the Amendment specifically targets workers in the production sector of the film industry.[3] Additionally, most employees and contractors work for businesses in the PPP Sector.[4] This Part Two will provide some context for the discussion of film workers later in the paper. It will first define the scope of the PPP Sector in terms of revenue generation, worker numbers and total earnings. It will then discuss average earnings for workers in the PPP Sector. This paper will focus most of its discussion and analysis on workers who are most at-risk from a regulatory perspective; as such, it is first necessary to define the scope of 'at-risk workers'.

1. Statistical measures and limitations

It is important to note at the outset of this paper that accurate, detailed employment statistics are difficult to obtain. Employment in the PPP Sector is, by its nature, fluid. There are a mix of employees and contractors, many working in freelance capacities and on multiple projects for multiple businesses.[5] The traditional statistical measure of employment numbers within an industry is calculated using Rolling Mean Employment.[6] This measure is derived from statistics produced using PAYE. Contractors do not receive wages or salaries, and such do not record PAYE. As noted by Statistics NZ in their "Wider Lens" report, RME figures understate the true level of those working in the industry.[7] This paper will provide estimates of employment numbers which have been calculated using an alternative statistical measure called Linked Employer-Employee Data ("**LEED**"). These statistics can, at a high level, inform the discussion and analysis of labour regulation in the

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[1] Statistics NZ "A wider lens: Taking a closer look at employment in the screen industry" (13 May 2014) Statistics NZ http://archive.stats.govt.nz/browse_for_stats/industry_sectors/film_and_television/wider-lens-another-look.aspx at [x].

[2] Statistics NZ, above n 1.

[3] Employment Relations (Film Production Work) Amendment Act 2010.

[4] Statistics NZ, above n 1.

[5]

[6] At 19.

[7] Statistics NZ, above n 1.

PPP Sector; however, they have limited analytical utility at a micro level due to a lack of specificity in the data.

2. Size of the PPP sector

LEED is a statistical measure that accounts for data missing from the traditional RME measure.[8] A 2012 study, using the LEED method, took a close look at experimental data obtained over a seven year-period, from 2005 to 2012.[9] In 2012, the total number of workers in the screen industry was 15,700. Just over 9000 worked in the PPP Sector. The PPP Sector generated approximately 60 per cent of screen industry revenue for that year ($1,654 million).[10] A proportionate relationship exists between the number of workers in the PPP Sector and revenue generated by the PPP Sector (roughly 60 per cent), a relationship that does not exist in other screen industry sectors. In the same vein, PPP Sector workers received about 60 per cent of all screen industry earnings in 2012 (which totaled $787 million, roughly 25 per cent of overall revenue).

B Workers in the PPP Sector: Jobs and Earnings

Workers in the PPP Sector do not typically fit the standard employment model.[11] Businesses require an influx of workers to service major projects or productions and a comparably low number of workers in between those projects; a feast-or-famine model. Some types of workers are required on a year-round, full time basis, and others are brought in when their skill-set is in demand. As of 2017, workers in the screen industry had (on average) 1.76 part time jobs or contracts in a calendar year.[12] This is a decrease from an average of 2 in 2006; it is unclear whether this decrease is due to a consolidation of previously part-time roles, or a decrease in the amount of available work.

The latest Screen Industry Survey was published in 2016 and covered the 2014/2015 year.[13] The number of contracts and jobs in the PPP sector showed a marked reduction from the levels seen earlier in the decade. There were 35 per cent less jobs in the PPP sector in 2015

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[8] Statistics NZ, above n 1. LEED draws data from multiple sources (including Statistic's NZ business surveys) and incorporates PAYE, withholding tax, sole trade and self-employed income data.

[9] Statistics NZ, above n 1.

[10] Statistics NZ, above n 1.

[11] New Zealand Institute of Economic Research "The Economic Contribution of the Screen Industry" (April 2017) NZIER <https://nzier.org.nz> at 35.

[12] At 35.

[13] At 35.

than in 2009.[14] This downward trend has occurred since the passing of the Amendment, although it is impossible to determine whether there is any causative relationship between those two factors. Whilst the overall number of jobs has trended down, average earnings have risen.[15] Prima facie, this suggests consolidation; workers are less likely to be switching contracts and roles and are subsequently earning more per job. The measure of jobs and contracts within the industry is not controlled or manipulated to represent the number of individuals working in the industry. The decrease could be the result of workers who previously held 2 or 3 contracts in a year, now holding one.

However, this assumption could easily be misleading. The average earnings could reflect a smaller tier of skilled or in-demand workers now receiving higher wages, and a larger group of low-paid workers (who would otherwise work multiple contracts) exiting the industry due to instability, insufficient earnings or a lack of minimum protections.

Despite this statistical uncertainty, there are some definite trends in the screen industry as a whole:

a) From 2005 to 2015, there was a marked growth in average earnings across the screen industry. The average earning for the top 75th percentile of screen industry workers increased from $47,845 to $70,000.[16] The overall median increased from $19,232 to $35,565.

b) The bottom 25th percentile of the screen industry experienced the most dramatic growth in earnings between 2005 and 2015, with an increase of 163 per cent.[17] This rate of growth could be misconstrued, however, as average earnings remained well below minimum wage in 2015 at $8,666. However, this figure reflects per contract/job earnings; workers who are undertaking multiple contracts or part-time jobs throughout the year are not accurately represented by the data.

c) Overall, median annual earnings have increased across the screen industry. However, the NZIER report from which the statistics are drawn does not break this data down by sub-sector, so it is difficult to determine whether the trends in the PPP Sector match those in the industry as a whole. Given the overrepresentation of screen industry

[14] At 35.
[15] At 36.
[16] At 36.
[17] At 37.

workers in the PPP Sector, it is reasonable to assume some level of correlation. However, this could be skewed by outlier data in other screen industry sectors.

The Screen Industry, and the PPP Sector in particular, suffers from a lack of detailed data. Traditional employment data is ill-suited to an industry with many non-standard workers.[18] It is clear that median annual earnings in the screen industry have been trending upwards. This trend applies to the bottom 25 percentile of earners (a measure relevant to the at-risk subsector of workers discussed further on this paper) and has continued since the targeted government regulation in the Amendment.[19]

What is not known, however, is whether the direction of this trend is due to the Amendment, despite the Amendment, or independent of the Amendment. It is not known whether the bottom 25th percentile of workers seek most of their income from the screen industry, or to what extent these workers may have been marginalized due to their assumed role as contractors. It is not known whether these individuals are working under arrangements that could be considered genuine employment, or whether these individuals are contractors under both the common law tests and subsequent regulatory categorization.

For this paper some assumptions need to be made beyond the limited hard data in order to have a meaningful discussion about the role of regulation in the PPP sector:

a) the PPP Sector contains the largest number of workers and the largest number of contracts and jobs;

b) basic statistics would indicate that at least some proportion of these workers are earning the minimum wage, or less (given the earnings information for the bottom 25 per cent of the screen industry, of which PPP Sector is a significant subsector);

c) If we assume (as the accurate statistics are not available) that a directly proportionate number of PPP Sector workers form the bottom 25 percentile, approximately 2,000 workers are earning minimum wage or less (based on a combination of the earnings information for the screen industry in the 2017 NZIER study and the PPP Sector worker numbers from the 2012 Wider Lens study), and

[18] Ministry of Economic Development, above n 5, at 19.

[19] NZIER, above n 11, at 37.

approximately 6,000 workers are earning less than $70,000 annually (based on the same comparison as above);

d) Even accounting for inaccuracies in the above information, it is highly likely that there are a significant number of workers in the PPP Sector who might fall at the lower end of the earnings spectrum; and

e) With the number of jobs decreasing in the PPP Sector, it is also possible that a number of these low-earning workers are not switching from contract to contract, but instead are working on either an on-going part-time or full-time basis.

C 'At Risk' Contractors

As stated, this paper will focus its analysis on at-risk workers in the PPP Sector. For the purpose of characterizing an at-risk worker, this paper will borrow a set of categorizations from Bernard Walker in his paper discussing non-standard employment in New Zealand.[20] Walker sets out three categories of contractors (as initially proposed by McKeown and Hanley) along a spectrum of dependence/independence.[21] The categories are: a) dependent contractors; b) contractors who work for temporary employment agencies, and; c) self-employed contractors who service a range of clients.[22] Employees in the PPP sector will not be considered in this paper, as they fall within the ambit of the minimum standards prescribed by the Act and its associated rules and regulations.

The 'dependent contractor' in the above model is a contractor by label alone; someone who is "effectively dependent on the hiring company in a manner similar to employee".[23] This definition is particularly relevant to the PPP Sector in New Zealand, as the Amendment had the intended consequence of overruling the existing common law tests for employment status. As will be described further below, the courts in New Zealand had expressly disavowed the notion that a contractor could be made such by name only.[24] The common law approach integrated a number of tests, but in essence, the Court looked beyond the

[20] Bernard Walker "How does non-standard employment affect workers? A consideration of the evidence" (2011) 36 NZJER 3 at 14-29.
[21] At 14-29.
[22] At 14-29.
[23] At 14-29.
[24] Peter Kiely "Independent Contractor vs Employee" (2011) 36 NZJER 3 at 59-72.

label.[25] If an individual was dependent on their employer in the same manner as an employee, they were entitled to the same status and protections as an employee. The Amendment removed that protection for film workers; now, if a contract states that an individual in the PPP Sector is a contractor, then they are a contractor.

This exposes an entire tier of workers in the film industry to regulatory classification as 'independent contractors', even if those workers are otherwise dependent on their employer for the benefits and protections afforded to employees. Workers who earn low wages, sometimes at or below minimum wage, are those who are most in need of regulatory protection. Unlike genuine contractors, low-wage dependent contractors may not have traded their minimum protections for the flexibility and potential profit available to the self-employed. These minimum protections include the right to paid statutory holidays, the right to parental leave, access to personal grievance and dispute procedures, the right to sick leave, the right to minimum wage protection and the right to collective bargaining.[26] Such workers do not necessarily have leverage in respect of their employer and may have little-to-no ability to negotiate better pay, better working conditions or even (in the context of the film industry) actual employment contracts. The statistics and trends identified above indicate that somewhere between 2,000 to 6,000 PPP Sector workers could fall in to this category. This is a significant number of workers.

Self-employed independent contractors (as per the spectrum borrowed from Walker) are genuine contractors, in substance as well as form. Those individuals make a deliberate decision to forego the employment model of working, as the perceived benefits of self-employment outweigh the minimum protections provided by the Act.

In the context of the film industry in New Zealand, the most contentious right that is denied to contractors is the right to collective bargaining. For the at-risk workers, collective bargaining may represent their only means of obtaining better working conditions. Workers who are unable to negotiate employment contracts due to a lack of demand for their skill-set are unlikely to have recourse against their employer for poor working conditions. The right to collective bargaining will be discussed in further detail below, but it must be noted that, rightly or wrongly, it sits close to the heart of the regulatory debate in the film sector. However, employees are entitled to a number of other protections under the Act (as listed above). It is crucial that these protections are not overlooked when considering the effect

[25] At 59-72.
[26] At 59-72.

of the Amendment on at-risk workers. The right to collective bargaining was strongly associated with the Amendment in a political sense, but for workers affected by the Amendment, rights to minimum wage protection and access to personal grievance procedures (for example) may be much more important on a day-to-day basis.

III Judicial and Regulatory History

A The Employment Relations Act and Common Law

The Act defines an employee as "any person of any age employed by an employer to do any work for hire or reward under a contract of service".[27] This statutory definition embeds the common law distinction between an employer and a contractor; the former engaged under a contract of service, the latter under a contract for services. The common law had developed various tests to determine how to define a given working relationship. These tests included assessments of the degree of control exerted by the employer, the degree to which the employee was integrated into the hiring company and the degree to which the employee was economically dependent on the hiring company.[28] This paper will not exhaustively describe these tests. It is enough to state that the Act incorporated established common law principles; it did not set a new standard or describe new tests for assessing the nature of employment relationships.

The tests, in essence, were ones of substance, not of labelling. This is firmly established precedent under New Zealand's common law and was not challenged by the Act.[29] At no point under recent New Zealand law has it been enough to simply label someone a contractor in order to make them a contractor.

Whether the Act changed the common law tests relating to employment status was an issue determined by the Supreme Court in *Bryson v Three Foot Six*.[30]

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[27] Employment Relations Act 2000, s 6(1).
[28] Kiely, above n 24, at 59-72.
[29] *Cunningham v TNT Worldwide Express (NZ) Limited* [1993] 3 ERNZ 695 (CA). The oft-cited Cunningham case reinforces this principle.
[30] *Bryson v Three Foot Six Ltd* [2005] NZSC 34.

B The Bryson Decision

As stated above, this paper argues the Amendment failed to adequately resolve the tension between individual workers' rights and wider industry needs. In respect of the film industry in New Zealand, one Supreme Court decision acutely encompasses this tension: *Bryson v Three Foot Six*. The ultimate issue for the Supreme Court to determine in that case was the proper interpretation of Section 6(1) of the Act, which defined 'employee'.

Bryson was a model-maker working on miniatures for Lord of the Rings, under a contractual relationship with the company 'Three Foot Six'. His relationship was explicitly one of an 'independent contractor'.[31] A number of factors indicated to the Employment Court (which initially heard Bryson's case) that this label was in substance incorrect. Bryson worked regular, fixed hours. His services were contractually exclusive to Three Foot Six. He was compensated for hours worked on statutory holidays and he did not provide his own equipment. Bryson, according to the Employment Court, was in substance an employee.[32] The factors considered by the Employment Court when interpreting Section 6(1) of the Act were substantially the same as those that had been developed under the common law.[33]

The Court of Appeal explicitly rejected the Employment Court's decision. One of their reasons for doing so was the potential effect that the decision might have on the New Zealand film industry, in terms of cost and uncertainty.[34] Essentially, the court engaged in a balancing exercise. On the one hand was Bryson's true status and entitlement to the protections afforded employees, and on the other was the financial impact to the New Zealand film industry. This paper will go on to argue that such 'balancing exercises' are fundamentally inappropriate to the consideration of individual entitlement to minimum employment protections.

The Supreme Court had the opportunity to endorse the Court of Appeal's approach to individual worker rights. They did not. Above and beyond their core decision (that the Court of Appeal did not have the grounds to hear an appeal from the Employment Court), the Supreme Court reinforced the notion that prevailing industry standards should not be

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[31] *Three Foot Six Ltd v Bryson* (2004) 2 NZELR 29 (CA).

[32] Kiely, above n 22, at 59-72.

[33] At 59-72. Kiely describes factors under 'mixed/multiple' test under the common law, which align closely with those considered by the Supreme Court in Bryson.

[34] *Three Foot Six Ltd v Bryson* (2004) 2 NZELR 29 (CA).

used as the predominant mechanism for determining the true nature of a working relationship.[35]

C The Employment Relations (Film Production Workers) Amendment

The Amendment was passed under urgency by the National Government on the 28th and 29th of October 2010. The bill bypassed Select Committee Hearings and Reports, and the Explanatory Note accompanying the Amendment is brief. The Amendment stipulates that workers in the film industry are to be considered independent contractors unless employed specifically under an employment agreement.

More specifically, the Amendment added sections 6(1)(d), 6(1A) and 6(7) to the Act. Collectively, these sections specifically exclude persons engaged in film production work from the definition of 'employee' under the ERA, unless their written employment agreement provides that they are employees.[36]

Subsequently, the Amendment was subjected to intense academic, political, commercial and public scrutiny. There are a multitude of conflicting interpretations as to the Act's necessity and justification. This paper will consider three interpretations, selected to represent a broad spectrum of viewpoints.

1. Government interpretation: simple clarification

In a paper published in 2012, Kate Wilkinson (the Minister for Labor at the time the Amendment was passed) provided some clarification on the government's intention in passing the Amendment under urgency.[37]

Wilkinson writes that "the worst-case scenario on the table was the complete decimation of an important industry".[38] This is an oversimplification, at best. Loss of The Hobbit to off-shore production would have represented a significant set-back for the New Zealand film industry, but by no means would it have necessarily decimated the industry itself.

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[35] *Bryson v Three Foot Six Ltd* [2005] NZSC 34.
[36] Pam Nuttal "...Where the Shadows lie": Confusions, misunderstanding, and misinformation about workplace status" (2011) 36 NZJER 3 at 73-90.
[37] Kate Wilkinson "One Law to Rule Them All" (2011) 36 NZJER 3 at 34-36.
[38] At 34-36.

There are many overseas films and television productions which utilise production and post-production services in New Zealand, and the decision of Warner Bros to move filming offshore for The Hobbit may not have impacted the decision-making process of other studios.

Neither does Wilkinson offer any evidence to explain the degree of the threat. A worst-case scenario with a low-probability of occurrence is not justification for passing a bill in a manner which avoids the usual legislative process. Wilkinson's assertion that the 'Hobbit Law' was drafted to bring greater certainty to the film industry's regulatory environment is not necessarily incorrect, in and of itself (although this view has been well-contested).[39]

The fact that the Amendment has not been challenged in Court indicates that the industry at least perceives certainty in the law. The issue, from a regulatory perspective, is whether this certainty was necessary, or even desirable. Legal certainty at the cost of individual rights is a tenuous proposition. The lack of certainty in the law prior to the Amendment reflected the fact that working arrangements in the film industry (and all industries) contained discrepancies in substance and form. If relationships labelled as 'contracting' were substantively contracting relationships, then the legal 'uncertainty' would have been resolved without any recourse to regulatory or judicial action.

2. Employer perspective: mutual benefit

Barbara Burton described an alternative point of view in her paper 'Non-Standard Work: An Employer Perspective'. The thrust of Burton's argument is that non-standard work, including contracting arrangements which deny workers the rights otherwise granted to employees, is mutually beneficial.[40] Burton states that "without the ability to work in a non-standard way many individuals would have no opportunity at all to work in paid employment. Non-standard work has its advantages – for employers and workers alike".[41] Burton cites flexibility and access to paid employment opportunities as key advantages for workers. For employers, Burton argues that dependent contractor arrangements (such as those in the PPP Sector) are often an "economic necessity" for businesses, due to the costly nature of compliance with legislative requirements.[42] Some businesses in some industries

[39] Nuttal, above n 32, at 73-90.
[40] Barbara Burton "Non-standard Work: An Employer Perspective (2011) 36 NZJER 3 at 37-43.
[41] At 37-43.
[42] At 37-43.

are not able to meet those requirements and continue to provide employment opportunities. In this sense, Burton is describing dependent contractors as informed individuals making a conscious decision to accept non-standard work in lieu of unemployment, or undesirable employment. This decision is made on the mutual understanding between employer and contractor that the protections afforded by legislation are not applicable to the relationship. According to Burton, this model does not always involve exploitation. In Burton's words:

> Nor are most employers out to take advantage of their employees. That is not the way to get the best from an employee… Treating anyone in a contractual relationship badly, whatever form the contracting takes, will not achieve those outcomes.

Burton appears to view the employer/employee relationship as one of pragmatic trust and mutual interest. In this light, the Amendment makes economic sense. Workers are willing to sacrifice their minimum rights, believing that their employers will mitigate that regulatory loss of rights with an inherently good-faith approach to employment. This view presents contradictions between traditional schools of thought; that employers are both economically rational and morally benevolent. One way of categorising Burton's analysis is to view the Amendment as a supply side response to possible market failure; regulatory action was driven by workers as much as employers.

This is not necessarily a rebuttal of the Amendment, or an endorsement. Burton's argument is predicated on the concept of pragmatic, rational choice. The Amendment does not 'create' that choice. The Amendment can be repealed at no loss to workers or businesses, at least in respect to Burton's model of mutual cooperation.

3. Union view: attack on workers

Helen Kelly, noted worker's rights activist and former President of the New Zealand Council of Trade Unions, published a scathing article in 2010 addressing the Amendment in the light of the right to collective bargaining.[43] Kelly asserted that the Amendment was part of an on-going attack on workers' rights and that it represented little more than an opportunistic attempt to secure foreign investment from Warner Bros whilst removing the ability of film workers to negotiate better working conditions.[44]

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[43] Helen Kelly "The Hobbit Law" (2010) 17 International Union Rights 4 at 4.

[44] At 5.

Kelly goes as far as stating that in passing the Amendment, the New Zealand Government "effectively ceded sovereignty to a foreign corporation".[45] The dramatic nature of Kelly's rhetoric somewhat masks a valid concern; the regulatory and legislative process was, to at least some degree, hijacked by Warner Bros. Wilkinson essentially acknowledged this fact when she wrote that the bill was designed to avoid the decimation of an entire industry. Given that the only threat posed to the industry at the time was that of losing The Hobbit production, the only conclusion available is that Warner Bros did indeed influence the regulatory process.

However, Kelly's point is that the Amendment was not a one-off response to a crisis, but rather a symptom of the Government's deliberate erosion of minimum protections. This interpretation significantly colours Kelly's analysis. An acknowledgement that the decision-making process of a foreign corporation forced the Government to regulate does not preclude the possibility that said decision was also in the best interests of the industry (and by proxy, the workers who rely on that industry for employment).

Whether the decision was the best way to protect that industry, and whether the Amendment had the effect of removing rights which should not have been balanced against wider industry needs, is a related but separate issue. Whether the Government that passed the bill had a wider agenda against unions is also relevant, but still separate. There were more parties involved in the regulatory process than just the unions, the Government and Warner Bros. The film industry as a whole, and the New Zealand public, had a considerable stake in the issue.

4. Analysis

The justification for the Amendment as described by Wilkinson is a flawed one. The former Minister of Labour stated that the purpose of the Amendment was to clarify that film workers in New Zealand *could* be independent contractors.[46] This point required no legislative clarification. The existing common law test for employment status had already confirmed that film workers could be contractors, if the nature of their employment was that of a contractor.[47]

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[45] At 5.
[46] Wilkinson, above n 34, at 34-36.
[47] Bryson v Three Foot Six Ltd [2005] NZSC 34.

In passing the Amendment, the government adopted the stance that workers had the ability to decide themselves whether to sign on as contractors or employees. In the abstract, this might make sense. This logic pervades Burton's analysis. But it ignores two crucial points: 1) low-paid workers with little to no leverage do not always have the ability to make unilateral decisions about their employment contracts; and 2) employers in the industry had a vested potential interest in hiring contractors instead of employees, as this categorization removed their obligation to provide 'costly' minimum protections.

The first point raised above (that low-paid workers have little leverage) is simple enough to understand, but difficult to quantify. Point two, however, is not abstract. There are quantifiable benefits to employers in the film industry if they can categorise a worker as a 'contractor', regardless of the true nature of their employment.[48] These benefits are not dissimilar to those that any employer would derive in the same position. If the business was to lose a major project, a contractor could be dismissed without the usual protections available to employees. The business does not need to factor in holiday pay or provide annual leave. The requirement to deal with the worker in good faith is absent. And crucially, contractors do not have the legal right to collective bargaining. All of these factors can present considerable costs to an employer; costs which can be avoided if the worker is considered a contractor. Kelly asserts that the Amendment was the direct result of a concerted effort on behalf of government and the film industry to deny workers their right to collective bargaining.

However, the counterpoint is that just because a business has the ability to treat workers poorly does not dictate that they will treat workers poorly. There are valid arguments to the contrary, at least in a hypothetical sense. As stated by Burton, businesses in a competitive industry may derive significant benefit from treating their workers in a way that engenders a positive on-going relationship. The strength of this assertion relies to some extent on the cynicism of the interpreter (as it is difficult to test in any meaningful quantitative manner), and a willingness to ignore hundreds of years of evidence of worker exploitation.

Regardless, this paper asserts that appropriate regulatory frameworks should aim to mandate minimum standards, instead of relying on their provision by private companies. If, in an ideal world, private companies will provide the same minimum protections as

[48] Burton, above n 37, at 37-43.

those mandated by law, then there is no loss to those companies if the law prescribes protections itself.

The only companies which would suffer in that scenario are those that either cannot, or will not, comply with the law. Companies in the former category may not be deliberately exploiting workers, but neither should their economic struggles be sufficient justification for a failure to provide minimum protections to workers. A flexible regulatory framework could potentially capture alternatives to legislated minimum protections, if both individuals and companies demand and consent to those alternatives, but it should not mandate the removal of those protections. Companies in the latter category have no excuse and are precisely why employment regulation is required in the first instance.

D The Labour Government Working Group

In 2018, the Office for the Minister of Workplace Safety and Regulation announced the creation of a Working Group to make recommendations for the restoration of collective bargaining rights to workers in the film industry. This Working Group was a response to the backlash that the Amendment had received from both workers in the industry, and the general public.

The specific intention here is crucial; the Cabinet paper establishing the Working Group does not target the restoration of minimum legislative protections to workers in the film industry, but instead focusses on restoration of the right to collective bargaining.[49] This is but one right that is guaranteed to employees under the Act. The right to collective bargaining certainly had an important role to play in the Amendment. The regulatory removal of the right for dependent contractors to challenge their employment status and bargain for better conditions captured attention. However, the approach to the regulation of the film industry should not be contained to the debate surrounding one issue. Intended or not, the Amendment affects other minimum standards.[50] This paper argues that the appropriate regulatory approach should be to consider the Amendment in light of all minimum standards and protections afforded to employees under the Act, not just the right to collective bargaining.

[49] MBIE "Terms of Reference – Film Industry Working Group" < https://www.mbie.govt.nz>
[50] David McLaughlin, A legal view: The Hobbit Law in context, OnFilm, Auckland, December 2010, 7

The Working Group is comprised of representatives drawn from different parts of the film industry, including workers and businesses, some of whom have competing interests. In addition to making recommendations on the best way to restore the rights of film industry workers to collective bargaining, the Working Group has also been charged with determining the best way to:[51]

a) allow film production workers who wish to continue working as individual contractors to do so;

b) provide certainty to encourage continued investment in New Zealand by film production companies; and

c) maintain competition between businesses offering film production services to promote a vibrant, strong and world-leading film industry.

The Government has appointed an independent, neutral party to facilitate the Working Group (Linda Clarke). The Working Group has submitted their final recommendations to the Minister as at the date of this paper; however, those recommendations have not been made available to the public.

IV Individual versus Industry: Appropriate Approach

This paper argues that the true issue with the Amendment is one of priorities, not law. The legal and regulatory environment prior to the Amendment was not unclear, nor inconsistent. It was simply incompatible with the desires of important players in the film industry. This is not to say that addressing those desires is an inappropriate goal of regulation. An adaptable regulatory framework should be capable of responding to new issues. But it is important to acknowledge the true motive for regulatory action, in order to ensure that the regulatory steps taken do not have unintended or inappropriate consequences.

The Amendment needed to address a threat to the film industry. In categorising the Amendment as a response to an ‘uncertain’ law, the government gave itself permission to rewrite the law. By stating that the possible ‘decimation’ of an entire industry was the

[51] MBIE “Terms of Reference – Film Industry Working Group” < https://www.mbie.govt.nz>

underlying motive, the government gave itself permission to place industry needs ahead of individual rights. The Amendment was a clumsy, blunt regulatory move which created a zero-sum equation for at-risk workers in the PPP Sector. For genuine contractors, the Amendment was not an issue. These workers would have had no entitlement to collective bargaining or any other minimum standards, under the common law or the Act. However, for at-risk workers (which could number approximately 2,000, and likely more during productions such as the Hobbit), losing the right to challenge their employment status is hard to reconcile with the government's 'save-the-industry' rhetoric. Another interpretation is that at-risk workers were sacrificial lambs in a regulatory context. With little to no leverage, either politically or in an employment context, their potential entitlement to minimum standards was removed in order to prop up the industry for the true contractors and employees, who were not affected at all by the Amendment.

One author has categorized the Amendment as an example of "race to the bottom" regulation.[52] This is a very real risk. The degree of marginalisation suffered by workers as a result of the specific regulation discussed in this paper is arguably less relevant than the principle such regulation endorses; that minimum standards and workers' rights are simply flexible components in a balancing equation (as opposed to fixed values). If the government can decide that the needs of an industry outweigh the rights of the workers in that industry, then there is a mandate for the government to strip away those workers' rights at any time. It will always be possible to argue that such a decision is in favour of those disenfranchised workers, on the basis that the industry from which they derive their employment would cease to exist without regulatory intervention. But this argument essentially states that no employment rights are absolute. The ongoing entitlement of workers to minimum protections is determined solely in reference to the demands made by influential private entities. This cannot be the appropriate approach; individual rights must trump industry demands.

V Regulatory Reform

This paper does not seek to propose specific regulatory approaches to reform of the Amendment. Such approaches to reform will be proposed by the Working Group in the near future, and an attempt to predict those recommendations would be fruitless. However, it is helpful to at least frame some potential approaches that the Working Group may adopt.

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[52] Michael Wynn "Feudal societies and Hobbit law: The story of '*The Hobbit* amendment' (2015) 22 Small Enterprise Research 2 at 136.

Before doing so, it is important to note that the perceived role of the government as the sole source of regulatory authority is no longer generally accepted. In a 2017 paper, Howe states that a number of theoretical approaches to regulation:

> recognise that the state is not the only actor with the power to deploy resources and influence others. Instead, regulation can involve a range of different regulatory strategies combining governmental and nongovernmental actors, and state efforts can be indirect in the sense that they are focused on steering, influencing and coordinating interactions between actors and systems (Black, 2002: 7; Hardy, 2011: 120). Further, a key focus of regulation and governance theory is on the effectiveness of regulation and regulatory compliance.[53]

This is relevant when considering the extent to which the requirements of foreign non-state entities might affect the regulatory decisions of the New Zealand government. The government is clearly not the only influential actor in the context of the New Zealand film industry. It is not necessarily a breach of the government's theoretical regulatory role to consider and coordinate the influence of non-state actors. However, given that the government's actions in regard to the Amendment affected fundamental employment rights, this paper argues the threshold for regulatory change based on such non-state influence should be set high. The rights of at-risk workers should be protected before any other regulatory action is taken.

A Repeal and Return

The first category of reform would be to simply wipe the slate clean; repeal the Amendment and restore the usual application of the Act to workers in the film production industry. This action would restore the right of at-risk workers to challenge their employment status in court (as per Bryson). If workers were genuine employees, regardless of their written contract, then they would be entitled to the full range of protections afforded by the Act. This would achieve the first goal of regulation, as argued by this paper: a removal of fundamental rights from the regulatory balancing equation. However, it wouldn't then achieve the purposive approach to regulation described by Howe above, which recognises that an appropriate role of the state is to coordinate the various actors involved in a regulatory framework. A simple repeal could return perceived uncertainty to the law. As

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[53] John Howe "Labour Regulation now and in the future: Current trends and emerging themes" (2017) 59 Journal of Industrial Relations 2 at [209-224]

much as at-risk workers rely on regulatory protection for minimum rights, Burton's economic necessity arguments still hold some truth. If New Zealand is not an attractive location for large-scale productions, then at-risk workers will be the first to suffer in terms of quantity and quality of employment. Hence the Working Group's mandate to ensure that any regulatory change ensures that New Zealand remains an attractive location for foreign investment.

B Amend the Amendment

The second category of reform is to amend the Amendment; to simply state that all workers in the film production industry have the right to collective bargaining, regardless of their employment status. This action would achieve one of the goals of the Working Group, but in a very rough manner. The right of dependent contractors to challenge their employment status in court would not be restored (ignoring the range of practical and financial barriers to such action, which this paper has not addressed). Workers could (theoretically) use their right to collective bargaining to try and obtain the other minimum protections prescribed by the Act, but through private contractual negotiation with their hiring company. However, the right to collective bargaining was the right that created issues with Warner Bros in the first instance. A blanket restoration of this right could place the film industry in the same tenuous position of losing major film productions, but without providing at-risk workers with either automatic entitlement to minimum protections, or the ability to obtain those minimum protections through the judicial process. In a way, it represents the worst of both worlds, for both individuals and the industry. Uncertainty as to status would not return (Section 6(1)(d) of the Amendment would still determine the status of a worker) but the perceived threat to film productions would be restored without any change in worker entitlement to minimum protections.

Additionally, there could be an interesting consequence for employment regulation in general if the Working Group "restored" the right to collective bargaining for film workers. The current Act does not provide collective bargaining rights to genuine contractors. If the Amendment was changed to provide a blanket right to collective bargaining for all workers in the film industry, it would extend the scope of that right to an entire group of workers who would not otherwise be entitled to it under the Act.

It could be argued that this consequence is a positive one, on the basis that dependent contractors are just as morally entitled to collective bargaining rights as employees, regardless of their true employment status under either the common law or the Act.

However, a change of this nature would be contentious, and for the reasons described above, could be damaging to the industry as a whole.

C Repeal and Replace

The final category of reform is a combination of the previous two categories; repeal and further amendment. The Working Group could decide that the existing Amendment is poorly drafted and inimical to an adequate employment regime in New Zealand. A new regulatory framework could be set in place that first and foremost provides minimum protections and standards to at-risk workers in the film industry, regardless of employment status. The regulation could then account for non-standard work in the film industry by still allowing employment status to be determined by written agreement, but with the explicit and informed consent of the worker, at the time the contract was signed. This would enable individuals and companies in New Zealand to decide that workers are 'contractors', regardless of the true nature of their employment. This may be a sufficient balm for foreign entities in the industry, to whom the word 'contractor' carries weight (regardless of its actual meaning). The scope and definition of the minimum standards and protections provided to workers in the film industry could be tailored to suit industry needs, with the consent and input of the at-risk workers most affected. This tailoring could provide the industry protection required, without balancing that industry protection against individual entitlement to fundamental rights.

VI Regulatory Divergence and the PPP Sector

Ultimately, there is a divergence between the way that PPP sector workers are regulated, and the regulatory approach to employment protection in general. There have been amendments proposed and passed in recent years which reinforce minimum employment standards for employees, to mitigate trends of increased exploitation[54]. As it stands under the Amendment, at-risk PPP sector workers are not afforded the benefits that these regulatory steps were intended to achieve for workers.

The PPP sector, with its strict focus on contractors versus employees and the allocation of rights based on that division, represents an anomaly in employment regulation trends. The Employment Relations Amendment Act 2016 contains a range of components which

[54] Gordon Anderson "Reinforcing Minimum Employment Standards in New Zealand" unpublished paper for ALLA 9th Biennial Conference 2018.

address the enforcement of minimum employment standards.[55] These include declarations of breach, pecuniary penalties, compensation orders and banning orders, amongst others.[56] Collectively, these components provide the Court with greater power to ensure that breaches of minimum employment standards are dealt with effectively.[57] For PPP Sector workers who cannot obtain an employment agreement, these components are meaningless. The government has clearly indicated a strong desire to ensure that minimum standards are both available and enforced. While the Amendment remains in force, the PPP Sector will continue to be left in the regulatory wake.

VII Conclusion

There is a fundamental issue with the approach to employment regulation in the context of the New Zealand film industry; the focus to-date has been on the distinction between employees and contractors. This focus has narrowed and distilled the issue to the extent that any ability to address the essential problems for workers has been masked. Entitlement to basic, minimum employment standards must be the core focus of any regulatory approach which concerns at-risk workers. The government and regulators need to step back from a technical analysis of the contractor/employee distinction in the PPP Sector. The spectrum of workers is too broad now for that distinction to hold much relevance. A new approach is required; one which secures basic entitlements to at-risk workers, regardless of their status as an employee or contractor.

[55] Anderson, above n 54.
[56] Anderson, above n 54.
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