Quasi employees? New law thrusts film industry workers into the limelight, 27 October 2022

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The Screen Industry Workers Act is a radical change in how screen workers are engaged in New Zealand as it permits contractors to bargain collectively without becoming employees. The operative provisions of the Act will take effect on 30 December 2022.

As an outline, the Act introduces the concept of screen production workers, to whom the Act applies. Whether an engager has a written agreement stating a screen production worker is an employee or not will be conclusive proof of that screen production worker's employment status.

Next, the Act creates new rules for individual contracts (not employment agreements) in the screen industry between screen production workers and engagers. The Act establishes mandatory, minimum terms required for individual contracts to be enforceable. Individual workers and engagers can still negotiate contract terms; however, they cannot go below any minimum terms set in any applicable collective contracts.

Additionally, the Act enables the screen production workers' right to bargain collectively, whilst allowing them to continue working as contractors.

There are 2 types of bargaining that can take place under this legislation. The first is occupational bargaining, resulting in occupational contracts setting new minimum terms and conditions of work across an occupation. These terms can be built on through the second type of collective bargaining, enterprise bargaining, with an enterprise contract setting minimum terms and conditions within a single production or engager.

The Act also seeks to establish processes for resolving disputes to prevent problems such as bullying, discrimination and harassment in the workplace. It does not affect those who were and remain employees.

Background

In the Supreme Court decision of *Bryson* v *Three Foot Six Ltd* [2005] NZSC 34 the Supreme Court found that Mr Bryson, who was working for Three Foot Six Ltd (a company hired to make models for The Lord of the Rings), was in fact an "employee" and not an "independent contractor".

This case was important as it raised the possibility that all screen workers, who were historically understood to be, and treated as, independent contractors, could now become employees. As employees, screen workers would be entitled to all the rights granted under the Employment Relations Act 2000.

In 2010 during the filming of the Hobbit film series in New Zealand, an Australian actors' union and their New Zealand affiliate advised its members not to work on the Hobbit films unless the producers of the films (Warner Bros Limited) agreed to provide minimum guarantees of wages and working conditions. In response, Warner Bros indicated it would move production of the films out of New Zealand if film crew had to be engaged subject to those minimum guarantees and employment conditions.

Following negotiations, the NZ Government subsequently introduced the Employment Relations (Film Production Work) Amendment Act 2010. The law (known as the "Hobbit law") clarified that unless it was explicitly stated in a written employment agreement, a film production worker was not an employee and was

instead an independent contractor. As such, a film production worker was unable to access employment rights or collectively bargain.

In 2018, the Minister of Workplace Relations convened the Film Industry Working Group (FIWG) which brought together film industry, business and worker representatives. The working group was tasked with designing a model allowing collective bargaining by contractors in the screen industry.

In October 2018, the FIWG unanimously agreed on a set of recommendations that were presented to the Minister and the Government.

Then in February 2020, the Screen Industry Workers Bill was introduced to Parliament.

Key terms under the Act

Good Faith

Part 2 of the Act imposes a duty of good faith for parties in a workplace relationship not to directly or indirectly mislead or deceive each other or do anything that is likely to mislead or deceive each other. This is similar to the good faith duties in an employment relationship.

The Act defines a workplace relationship as including the relationship between an engager and a screen production worker, a worker organisation and its members who are screen production workers, and a worker organisation and an engager.

The parties to collective bargaining must act in good faith during the bargaining process and use their best endeavours to agree a process for conducting the bargaining in an effective and efficient manner.

Meaning of Screen Industry Worker

Whether someone is covered by the Act will depend on whether they meet the definition of “screen production worker”.

Under s 11 of the Act, a screen production worker means an individual who is engaged by a person to contribute to the creation of one or more screen productions to which the Act applies and who undertakes the work in New Zealand. That definition expressly excludes any individual who either only provides support services, or is a volunteer, or is engaged by an engager that does not primarily engage in work relating to the creation of screen productions.

The occupation groups are listed in sch 2 to the Act. These groups are composers, directors, game developers, performers, technicians (production and post-production) and writers.

Under sch 2, the particular screen productions to which the Act applies are computer-generated games, films and programmes. However, the Act expressly does not apply to a number of specific types of screen productions, including; live event programmes, news and current affairs programmes, recreation and leisure programmes and sports programmes.

Collective Bargaining under the Act

The Act creates a collective bargaining framework, being the process to agree a collective contract between the seven occupational groups and engagers of screen production workers.

The Act enables representative organisations to collectively bargain contracts on behalf of each of the occupational groups. Organisations that represent screen production workers must be registered to be able to bargain collectively.

Collective Contracts

To manage the collective bargaining process, collective contracts are split into 2 layers to be negotiated:

- Occupational contracts are negotiated on behalf of a specified occupation group by representatives of the union or guild. These create a minimum standard for all production companies to comply with when they engage this occupation group in future. Occupational bargaining can only be initiated once approved by the Employment Relations Authority, following

an application by a worker organisation or engager organisation. Once agreed, the contract will be checked by the Employment Relations Authority and put to the affected workers for ratification. If it succeeds, it is to be published by the government.

• Enterprise contracts will relate to a specific production company's (engager) minimum terms and conditions for screen production workers within coverage of the enterprise contract when they work for that engager. This type of bargaining can take place within single productions or companies. The resulting enterprise-level collective contract will only apply to members of the union or guild that has signed the collective contract. Parties have the option of extending this coverage to non-member workers if everyone agrees (including the non-members). An enterprise-level collective contract does not need to be checked by the Employment Relations Authority before ratification.

Mandatory terms

Collective contracts must contain mandatory terms which the engager cannot opt out of or negotiate below. These relate to; pay rates, breaks, public holiday, hours of work, availability for work, bullying, discrimination, and harassment processes, termination periods and compensation.

Collective contracts must have an expiry date between 3–6 years.

Individual contracts also include the requirement to comply with the obligations under the Health and Safety at Work Act 2015 and the Human Rights Act 1993 and the need to include the process for resolving disputes.

Future outcomes

Given this legislation has been designed based on the unique features of the screen industry, the Act requires a review to be started before the fifth anniversary of its commencement. This will allow for consideration on whether this new structure for the screen industry is working well.

The Act lays open the possibility of other niche industries following suit and attempting to agree a solution to afford some protection to independent contractors. And in many ways, this Act foreshadows the approach the Government has adopted with respect to Fair Pay Agreements.