

One Law to Rule Them All

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On 28 October 2010, the Employment Relations (Film Production Work) Amendment Bill received its first reading in the New Zealand House of Representatives. On that day, some regarded this Bill as controversial.

The events that ultimately led to the drafting of this legislation had played out very publicly. Claims and counter-claims filled the media for weeks, if not months; personal reputations were damaged, perhaps irretrievably so, and New Zealand's own reputation as a film production destination suffered.

The history of the Hobbit dispute has been written and re-written from many viewpoints, and the motives of the parties involved can be argued eternally. Regardless of the cause, the consequences for our film industry were potentially dire with other nations quickly lining up to make offers to host the two Hobbit films the moment conflict erupted.

The film industry is worth \$2.8 billion to the New Zealand economy. The two Hobbit films are expected to bring in \$670 million dollars alone, creating 3000 jobs over their duration.

Should *The Hobbit* have left our shores, the short-term economic impetus this investment will bring to New Zealand would have been lost, along with the publicity and profile such a production generates. Furthermore, new projects would almost certainly have looked elsewhere in the future, forcing a highly skilled and motivated workforce to look offshore for work opportunities.

In essence, the worst case scenario on the table was the complete decimation of an important industry that was not only bringing jobs and investment into New Zealand, but enhancing our reputation for innovation and ease of business.

The potential consequences of this dispute are, in themselves highly, relevant in that they inform the need for the law change being discussed in this Journal, and that they stemmed from the very problem this law seeks to resolve – lack of certainty.

The Government was aware that the threat of industrial action combined with the outcome of the Bryson v Three Foot Six Ltd case had led Warner Bros. to believe the employment relations environment in New Zealand was unstable. It considered production could be derailed and its investment put at risk. The decision was made to produce a legislative response to remove that uncertainty.

The 'Hobbit law', as it is known, was drafted in an effort to bring greater certainty to the regulatory environment the film industry operates under. The test of good law is in how its intent marries with practice and whether the resulting consequences are desired, or at least expected.

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The previous law allowed an agreement in relation to a person's employment status to be challenged and overturned by the courts. Despite what the contract or agreement said, the courts could 'look through' it and decide whether the relationship was a Contract for Service or Contract of Service.

For the film industry, this created a degree of uncertainty as productions are entirely events-based employment and, as such, those employed are deemed to be individual contractors brought in for a specific project. The law, as it stood, challenged that understanding, making it possible for a contractor to be deemed an employee in certain situations, as discovered in the Bryson case.

The Employment Relations (Film Production Work) Amendment Bill was carefully drafted to clarify this issue. It is not unprecedented. Sharemilkers and real estate agents already have industry exceptions.

It reflects what is common industry practice – actors, crew members and production staff are hired as independent contractors. Statistics from 2008 showed there were over 1600 contractors active in this industry earning nearly \$350 million. The number of big-budget productions filmed in New Zealand since then would suggest those figures are likely to have risen (Statistics NZ, 2008).

The law change makes it clear that the status of these workers as contractors or employees is based on the decision they make at the beginning of the employment relationship. If they sign on as an independent contractor, they are an independent contractor. If they sign on as an employee, they are an employee.

As employment lawyer, Peter Cullen, told TV3 news at the time:

If they sign a document saying they're contractors, then that should be the end of it... We don't want some disgruntled person, who was happily a contractor for 10 years reaping all the benefits of that, when we end the contract saying he's really an employee and suing us (as cited by O'Brien, 2010).

The Government had a view to being pragmatic in amending the law. The type of work affected by this law change was explicitly spelled out to ensure any confusion was removed. The law does not cover production work on programmes initially intended for television.

It does not alter how the parties will approach their employment arrangements. The law does not remove rights from anyone. It is not retrospective and does not affect any existing employment agreements. It is, in all respects, business as usual.

Criticism of the legislation has largely focussed on the events that led to its creation rather than the law itself. The Government did not create the situation, it responded to it.

It was essential that the film industry and the livelihoods of thousands of skilled New Zealanders were protected. The law has not changed how they are employed or how they view themselves, and employment agreements remain an option for those who are genuine employees.

In the eight months since this legislation passed through Parliament, the Government has not been inundated with complaints from film industry workers. Barely an eye has been batted, as it did not impact on how the industry already operated in practice.

Howevr, by providing greater certainty around the status of film workers, the regulatory environment governing the industry has been clarified, allaying fears that large-scale projects are likely to be caught up in protracted court battles.

New Zealand's film industry has battled hard to establish itself on the international scene and a highly skilled workforce has built up around it. This law was created out of the necessity to protect their interests and the Government stands by that decision.

References

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