

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Business Committee

Establishment of the Film Industry Working Group

Proposal

- 1 To seek agreement to establish the Film Industry Working Group to make recommendations to restore the right for film production workers to bargain collectively.

Executive Summary

- 2 The Government has committed to restoring the right for workers in the film industry to bargain collectively. By working together through collective bargaining and effective engagement, workers and employers can set standards that are relevant to their sector.
- 3 A 2010 amendment to the *Employment Relations Act 2000*, commonly referred to as the 'Hobbit law', means film production workers are independent contractors, unless they are party to a written employment agreement that states they are employees. Independent contractors do not have the right to collective bargaining under the *Employment Relations Act*, and risk engaging in anti-competitive behaviour in breach of the *Commerce Act 1986*.
- 4 I propose the establishment of a Film Industry Working Group (FIWG) of business and worker representatives in the sector to make recommendations on a durable framework to restore collective bargaining rights for film production workers in a way that is fit for purpose for the industry. The proposed Terms of Reference, including membership, of the FIWG are attached as Annex One.
- 5 I will report to Cabinet on the FIWG's recommendations by August 2018.

Background

- 6 In 2010 the *Employment Relations Act 2000* (the Act) was amended so that film production workers are independent contractors, unless they are party to a written employment agreement that states they are employees. Independent contractors are not covered by statutory employment protections such as the minimum wage, holidays and the right to collectively bargain with their employer.
- 7 The amendment was in response to disputes around workers' employment status (including the Supreme Court decision in *Bryson v Three Foot Six*) at the time *The Hobbit* films were being produced. The film industry was concerned that contractors could challenge their employment status in the Employment Court, giving rise to lengthy and costly legal disputes. If a contractor was found to be an employee, the film production company could be liable for failing to provide employment rights and could be required to participate in collective bargaining.

- 8 The amendment, formally the *Employment Relations (Film Production Work) Amendment Act 2010*, is commonly referred to as the 'Hobbit law'. The changes attracted significant negative publicity at the time.

The issue relates to the employee vs contractor boundary

- 9 A distinction between employees and contractors is necessary to set the boundaries of the employment relations and standards system. This ensures only employees are provided employment protections, and persons engaging commercial businesses (eg sole traders) do not have obligations as an employer.
- 10 Most workers can challenge the nature of their working relationship under the common law tests for employment. The film industry is the only sector in which workers cannot do so (ie challenge whether they are an employee rather than a contractor).
- 11 Under the common law tests for employment, the intent of the parties is relevant, but intent alone does not determine the true nature of the relationship. The Employment Court also considers:
- 11.1 the control of the employer or the independence of the worker over the worker's work content, hours and method
 - 11.2 the integration of the work to the employer's business (usually the work performed by a contractor is only a supplementary part of the business), and
 - 11.3 the fundamental economic reality of the working relationship (eg whether the worker pays their own income tax and GST, takes on financial risk and works for multiple entities).
- 12 The ability of workers to challenge the nature of a working relationship ensures that employment protections are not undermined by misclassification of employees as independent contractors. In particular, it protects employees with low bargaining power who may not have genuine choice about being engaged as independent contractors, thereby circumventing employment protections, when the nature of their relationship is in fact that of an employee.
- 13 The application of the common law tests on a case-by-case basis recognises the complex and varied nature of working relationships and facilitates flexibility in the labour market. However, it does not always provide a straightforward guide for how the "real nature" question will be decided in any particular instance.
- 14 Appropriately setting this boundary to protect employees, while also allowing freedom for genuine contracting relationships, is a challenge facing many countries. The changing nature of work, such as the growing gig economy, is placing increasing pressure on this part of the employment relations and standards system.

Employment status of workers in the film industry

- 15 The film industry is a frontrunner for this issue and I believe an enduring solution is required to best suit the needs of workers and businesses in the industry.

- 16 While repealing the *Employment Relations (Film Production Work) Amendment Act 2010* would restore the right of film production workers to collectively bargain, it would not address the underlying concerns about the uncertainty of the status of contractors in the film industry.
- 17 The draft findings of an NZIER report indicate that screen sector workers' median annual earnings have grown, particularly for lower income workers, but are still below the New Zealand average. There also appears to be increasing consolidation of worker contracts, suggesting a shift towards more employment-like arrangements. However, as that report notes, there would need to be further investigation of the distribution of hours worked to confirm this.

Establishment of the Film Industry Working Group

- 18 I propose the establishment of the FIWG to make recommendations on changes to the regulatory framework for film industry workers that will restore the rights of film production workers to collectively bargain. The recommended changes should also:
- 18.1 allow film production workers who wish to continue working as individual contractors to do so
 - 18.2 provide certainty to encourage continued investment in New Zealand by film production companies, and
 - 18.3 maintain competition between businesses offering film production services to promote a vibrant, strong and world-leading film industry.
- 19 I wrote to key stakeholders in the film industry in November 2017 to propose that the industry work collaboratively to find a durable solution to restore collective bargaining rights for film production workers, without necessarily changing the status of those who wish to continue working as independent contractors. All stakeholders I contacted have confirmed their support for this approach.
- 20 I am confident the FIWG will find a way to restore collective bargaining for workers in the industry in a way that best suits the nature of the industry.
- 21 The proposed Terms of Reference for the FIWG are attached.
- 22 I expect the FIWG will meet monthly over a period of approximately six months and make final recommendations to me by June 2018. The Ministry of Business, Innovation and Employment (MBIE) will attend the FIWG as an observer and provide secretariat support.
- 23 The FIWG's recommendations will help inform the Government's broader proposals to ensure employment law protects workers and is fit-for-purpose, such as Fair Pay Agreements and employment protections for dependent contractors.
- 24 I will report to Cabinet on the Government response to the FIWG's recommendations by August 2018.

Membership of the Film Industry Working Group

- 25 I recommend inviting the following key film industry participants to be members of the FIWG. They will provide a broad range of perspectives and film industry experience.

| Proposed Membership of FIWG | | |
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| Organisation | Representative | Groups represented |
| 1. Equity New Zealand | Melissa Ansell (Executive Director) | Actors, generally operating as individual contractors or employees |
| 2. Screen Production and Development Association (SPADA) | Richard Fletcher (Co-President) or Sandy Gildea (Executive Director) | Film and television production companies, finance companies and distributors |
| 3. Screen Industry Guild (SIG) | Richard Bluck (President) | Independent contractors and businesses engaged as screen production crew, such as technicians and directors |
| 4. Weta Digital | David Wright (Chief Operating Officer) | Digital visual effects company which engages a large number of individual contractors |
| 5. Stunt Guild of New Zealand (SGNZ) | Craig Dunn (President) | Individual contractors working as stunt coordinators and performers |
| 6. New Zealand Writer's Guild | Alice Shearman (Executive Director) | Writers in film, television, theatre and radio, both contractors and employees |
| 7. Directors and Editors Guild of New Zealand (DEGNZ) | Tui Ruhia (Executive Director) | Directors and editors of films, television, commercials and web content |
| 8. Regional Film Offices New Zealand (RFONZ) | Michael Brook (Chair) | Agencies that promote and attract film production in regions |
| 9. - | Barrie Osbourne | Film producer with links to US production companies |
| 10. Film Auckland | Alex Lee (Chair) | Businesses and individual contractors with interests in film production in Auckland |
| 11. Nga Aho Whakaari | Erin Tamepo (Executive Director) | Māori working in screen production, including actors, directors, technicians and independent production companies |
| 12. New Zealand Council of Trade Unions | A nominated representative | Employees of affiliated unions |
| 13. BusinessNZ | A nominated representative | Businesses' views |

Facilitator for the Film Industry Working Group

- 26 The facilitator is important for the overall success of the FIWG. An effective facilitator will require an understanding of the industry and employment law, and have strong collaboration and consensus building skills.
- 27 I propose to appoint Linda Clark as facilitator for the FIWG. Ms Clark is a special counsel at law firm Kensington Swan.
- 28 The facilitator will be paid in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

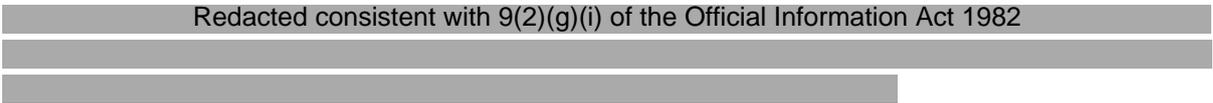
Key risks

Anti-competitive behaviour under the Commerce Act 1986

- 29 As some participants in the FIWG may be, or represent, competitors, care must be taken to ensure participants do not engage in anti-competitive behaviour that may breach the *Commerce Act*. The Terms of Reference focus the FIWG on the regulatory framework for film production workers and require the FIWG not to enter into arrangements on the terms and conditions for engaging film production workers.

Evaluation of the New Zealand Screen Production Grant

- 30 MBIE and the Ministry for Culture and Heritage are currently carrying out an evaluation of the New Zealand Screen Production Grant (NZSPG), which is the government's main financial incentive for the New Zealand screen sector. There are two components of the NZSPG:
- 30.1 International: The Minister for Economic Development has responsibility for the NZSPG International, which incentivises international productions to locate in New Zealand.
- 30.2 New Zealand: The Minister for Arts, Culture and Heritage is responsible for the NZSPG New Zealand, which supports the creation of New Zealand content and stories.
- 31 The evaluation is due to be completed in December 2017, with a report to Cabinet in early 2018. The results of the evaluation may be used to inform future policy decisions relating to the NZSPG.

- 32  Redacted consistent with 9(2)(g)(i) of the Official Information Act 1982

Uncertainty about changes to employment law

- 33 International film productions considering investing in New Zealand may raise concerns about the uncertain nature of future employment law in New Zealand. In particular, there may be concerns about employment law changing after the production of a film has already commenced, leading to possible disruptions. The scale of this risk is unclear at this stage. If this risk eventuates, I will report to Cabinet with options.

Reaching consensus on recommendations

- 34 The FIWG has a difficult task to balance the needs of the industry and workers to ensure that any imbalance of bargaining power in the industry is addressed sufficiently, while competitive tensions between genuine businesses are maintained. There is a risk that the FIWG may be unable to agree to a workable solution that satisfies all parties. I will monitor this risk and report to Cabinet if required.

Setting a precedent for related employment policies

- 35 The FIWG's recommendations could set a precedent for the Government's broader employment law proposals, including Fair Pay Agreements and employment protections for dependent contractors and vulnerable workers. I intend to consider the FIWG's recommendations within the Government's overall objectives for the employment relations and standards system.

Consultation

- 36 The Treasury, the Ministry for Culture and Heritage and the Department of Prime Minister and Cabinet were consulted on this paper.

Financial Implications

- 37 MBIE will fund the fees for the facilitator, and any research or legal advice MBIE agrees to undertake or commission, from within existing baselines. MBIE will also consider requests to contribute to reasonable travel and accommodation costs for out of town members.

Human Rights

- 38 The proposal is consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*.

Legislative Implications

- 39 The proposal does not have immediate legislative implications. The FIWG may recommend legislative changes.

Regulatory Impact Analysis

- 40 A regulatory impact analysis is not required at this stage.

Gender Implications

- 41 There are no gender implications.

Publicity

- 42 If approved by Cabinet, I intend to announce the establishment of the Film Industry Working Group and its membership in January 2018. I will publish this paper, the FIWG Terms of Reference and related Cabinet decisions on the MBIE website, subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 Note that the Government has committed to restoring the right for film production workers to collectively bargain.
- 2 Agree to establish a Film Industry Working Group to make recommendations on changes to the regulatory framework for film industry workers that will restore the rights of film production workers to collectively bargain.
- 3 Agree that the Film Industry Working Group's recommendations should also:
 - 3.1 allow film production workers who wish to continue working as individual contractors to do so, and
 - 3.2 provide certainty to encourage continued investment in New Zealand by film production companies, and
 - 3.3 maintain competition between businesses offering film production services to promote a vibrant, strong and world-leading film industry.
- 4 Agree to the Terms of Reference for the Film Industry Working Group attached as Annex One.
- 5 Agree to invite the parties listed in paragraph 25 to be members of the Film Industry Working Group.
- 6 Authorise the Minister for Workplace Relations and Safety to appoint Linda Clark as the facilitator for the Film Industry Working Group.
- 7 Authorise the Minister for Workplace Relations and Safety to make minor amendments to the Terms of Reference and membership of the Film Industry Working Group in consultation with the Minister for Arts, Culture and Heritage and the Minister for Economic Development.
- 8 Invite the Minister for Workplace Relations and Safety to report to Cabinet on the Government response to the recommendations of the Film Industry Working Group by August 2018.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety