MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Iain Lees-Galloway	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	Government response to Film Industry Working Group recommendations	**Date of release**	16 July 2019

List of documents to be proactively released		
Date	**Title**	**Author**
29 May 2019	Cabinet paper: Government response to Film Industry Working Group recommendations	Office of Hon Iain Lees-Galloway
October 2018	FIWG's recommendations to government (Cabinet paper annex)	Film Industry Working Group
29 May 2019	Summary of government response to FIWG recommendations (Cabinet paper annex)	Office of Hon Iain Lees-Galloway
24 May 2019	Regulatory Impact Statement: A collective bargaining framework for screen production workers (Cabinet paper annex)	Ministry of Business, Innovation and Employment
29 May 2019	Cabinet Economic Development Committee: Minute of Decision (DEV-19-MIN-0140)	Cabinet Office

Information redacted **YES**

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Please note that some information has been withheld for the following reasons:

- Confidential advice to Government
- Commercial Information

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Economic Development Committee

Government response to the Film Industry Working Group's recommendations

Proposal

1. This paper seeks approval to implement the Film Industry Working Group's recommended collective bargaining model for contractors in the screen industry.

Executive summary

2. In 2010, the Employment Relations Act 2000 ("the ER Act") was amended under urgency to exclude film production workers from the definition of an "employee" unless they are party to a written employment agreement. Unlike other contractors, film production workers engaged as contractors cannot challenge their employment status based on the real nature of the relationship between parties, and therefore cannot access employment rights such as the right to bargain collectively.

3. These amendments were controversial and polarising. Production companies and others in the film industry saw the changes as important to protect New Zealand's ability to attract and retain international film production work. Many, including unions and academics, saw the change as a removal of fundamental employment rights (including the right to collectively bargain).

4. In 2018, the Film Industry Working Group (FIWG) was set up to make recommendations to the government on a way to restore collective bargaining rights to film production workers. They have since recommended a bespoke model that retains the carve-out from employee status, but allows collective bargaining both in occupational groups and at the enterprise level.

5. The FIWG's proposed model differs fundamentally from our existing collective bargaining system. The main point of difference is that collective agreements concluded under the FIWG's model would have universal coverage across a particular occupational group or enterprise. Collective agreements may allow for negotiated exemptions, but otherwise individual contracts would have to provide better terms than those in any applicable collective agreement.

6. I suggest the government implement the FIWG's model, with one change to their recommendations. The FIWG suggested their model apply to all screen production work, only excluding work on news and sports programmes. This would represent a great expansion of scope from the current legislation which only covers film production work, and excludes work initially intended for television broadcast. I instead suggest this new model covers work on films, drama serials, video games and commercials. This would still be wider than the scope of the current carve-out,

and captures closely-related work that has entertainment purposes regardless of distribution format.

7. I believe the FIWG's model strikes a reasonable balance between preventing worker exploitation, and giving production companies certainty about workers' employment status. It also lets parties participate in industry- or enterprise-wide processes to collectively determine minimum terms and conditions of work. While industrial action would not be allowed in bargaining, the FIWG's model allows for disputes to instead be meaningfully and efficiently resolved through mediation and arbitration.

8. Further work is required during detailed design to give effect to the FIWG's model. I intend to continue working with the FIWG and other parties in the screen industry during drafting to ensure any legislation is workable, enduring and fair.

Background

9. A significant majority of film production workers are contractors rather than employees (across both production and post-production roles).[1] This holds true both before and after the 2010 amendments came into force. For example, in 2009, there were 8,300 contractors and 2,420 employees in the industry whereas in 2017, there were 9,100 contractors and 1,580 employees in the industry.

10. In the case of *Bryson v Three Foot Six Ltd*, the Supreme Court found that James Bryson, a model-maker on the production of *The Lord of the Rings*, had been incorrectly classed as a contractor when according to the real nature of his relationship with Three Foot Six Ltd he was actually an employee.[2]

11. The ER Act was amended in 2010 to give film production companies certainty about the employment status of their workers.

12. The 2010 amendment to the ER Act created a carve-out from employee status for people doing film production work.[3] In the employment relations and employment standards system, employment status is generally determined by the real nature of the relationship between parties. This test no longer applies to people doing film production work. Instead, unless employed under a written employment agreement, film production workers are contractors, and cannot challenge their employment status in the courts.

13. As most film production workers are engaged as contractors, and cannot challenge their employment status, they are excluded from the rights and obligations of New Zealand's employment relations and employment standards system. One of these rights is the ability to bargain collectively. Collective bargaining is therefore virtually non-existent in the screen industry.

14. The inability to bargain collectively may contribute to poor outcomes for some workers in the industry. In the screen industry, workers tend to be engaged on a project basis. They experience peaks and troughs in their work and tend to work

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1 See table at page 7 of the attached Regulatory Impact Statement.
2 *Bryson v Three Foot Six Ltd* [2005] NZSC 34.
3 The term "film production work" includes work on video games, but specifically excludes work on anything intended initially for television broadcast.

multiple jobs a year. For contractors doing screen production work, median monthly earnings were $3,370 in 2017.[4]

15. In December 2017, the government committed to restoring film production workers' right to bargain collectively (CBC-17-MIN-0077 refers). The FIWG was established to recommend regulatory changes to achieve this outcome, while also giving production companies certainty about workers' employment status and maintaining competition between screen production companies.

Overview of the FIWG's recommendations

16. In October 2018, the FIWG submitted their recommendations on a regulatory framework for contractors doing screen production work (see Annex 1). The key features of their recommended model are summarised below.

Scope

17. The FIWG has recommended retaining the carve-out from employee status. In their view, the carve-out is essential to give production companies certainty about their workers' employment status. The FIWG has also recommended the scope of the carve-out be expanded from "film production work" to "screen production work", to reflect that productions increasingly transcend media formats.

18. This would not prevent people doing screen production work from being engaged as employees under written employment agreements. The model recommended by the FIWG would only apply to contractors. Screen production work done by employees would continue to be regulated by the employment relations and employment standards system.[5]

Principles

19. The FIWG has suggested four principles apply to all screen production work:

    19.1. Parties must act in good faith in their dealings with each other.

    19.2. Contractors doing screen production work must be protected from bullying, harassment of any kind, and discrimination.

    19.3. People who engage contractors must act fairly and reasonably when terminating contracts.

    19.4. Contractors doing screen production work must receive a fair rate of pay in relation to their skills and the scale of production.

20. The FIWG has recommended that parties not be able to contract out of the four principles above. They have said all individual contracts and collective agreements

[4] There is large year-on-year fluctuation in the median monthly earnings of contractors doing screen production work, largely reflecting the amount of work on offer in the industry. For example, median monthly earnings were $2,800 in 2016 and $2,710 in 2015. An employee earning the current minimum wage ($17.70 per hour) and working 40 hours a week would make $2,832 every four weeks.

[5] Employees are protected by minimum employment standards, such as the minimum wage and holiday entitlements. Employees can also bargain collectively with their employers through their unions.

should contain provisions giving effect to these principles. These principles are not intended to derogate from any existing protections (eg protections against bullying and harassment under the Health and Safety at Work Act 2015, or protections against discrimination under the Human Rights Act 1993).

Collective bargaining

21. The FIWG has recommended the creation of a multi-tiered collective bargaining system. In their proposed model, the main level at which collective bargaining would occur is the occupational group level. Parties could also bargain at the enterprise level (which is the predominant level of bargaining in New Zealand under the ER Act at present).

22. Such collective bargaining would set minimum terms and conditions for a particular occupation or enterprise. Parties would be free to individually negotiate above any collectively-set minima. Collective agreements set through the FIWG's bargaining system for contractors will not apply to or directly affect any employees doing screen production/post-production work.

23. Since submitting their written recommendations, the FIWG has suggested specifying screen industry occupational groups in a list subject to ministerial oversight, with one occupational-level collective agreement allowed at a time for each group. This would give all parties in the industry an indication of the potential coverage of occupational-level collective agreements, and would help parties identify in advance what collective agreements might apply to them. This list of occupations would cover the work of all contractors subject to this regulatory framework.

24. The initiation process for collective bargaining in the FIWG's proposed model differs from the existing process under the ER Act in two key ways:

    24.1. There would be a period of public notification before bargaining commences, to give the industry notice of intended bargaining and give contractors and those who engage contractors time to decide whether and how they want to participate in bargaining.

    24.2. During the public notification period, a public body would determine whether bargaining parties are the most representative parties for the workers and production companies whom they propose to represent. This process would also set the scope of work covered by collective bargaining.

25. The FIWG has recommended that once bargaining has commenced, parties be required to conclude a collective agreement. In addition to anything agreed by bargaining parties, all collective agreements should contain terms on the following:

    25.1. Minimum pay rates,

    25.2. Agreed breaks,

    25.3. The extent to which public holidays are recognised and how,

    25.4. Hours of work and availability,

    25.5. Dispute resolution processes, and

    25.6. Termination.

26. The FIWG has recommended industrial action not be allowed at any stage of collective bargaining. If disputes arise during collective bargaining, there should be mandatory consideration of mediation to resolve bargaining disputes in the first instance. If mediation is unsuccessful, bargaining disputes should be resolved through arbitration.

27. After collective agreements are negotiated, the FIWG has recommended they be ratified by contractors who would be covered by the collective agreement. There would be a public process by which workers can vote on a collective agreements, with a simple majority (of those who vote) required for ratification. Following ratification, collective agreements should be registered with a public body subject to compliance with all relevant procedural and substantive requirements.

28. Since submitting their written recommendations, the FIWG has suggested occupational-level collective agreements come into effect six months after ratification and registration have both been completed. This means sufficiently advanced productions would not have to renegotiate contracts that have already been agreed between parties. Enterprise-level collective agreements could take effect immediately after ratification and registration.

29. Collective agreements at the enterprise level are permitted on terms that are more favourable to contractors than in any applicable occupational-level collective agreement. Individual contracts are permitted on terms that are more favourable to contractors than in any applicable occupational-level and enterprise-level collective agreements.

30. All collective agreements should allow for agreed exemptions in exceptional circumstances. This means there may be some circumstances in which contracts are permitted to contain terms that are below those in any applicable collective agreement. The FIWG recommends that these exemptions must follow any agreed exemption process in the relevant occupational-level collective agreement and all parties must agree to the exemption. Exemptions to the four basic principles are not permitted.

31. The FIWG has recommended all collective agreements have a validity period of between three and six years. Collective agreements could continue to apply while replacement collective agreements are being negotiated, or during the six-month period after occupational-level collective agreements are ratified and registered but have yet to come into effect.

Dispute resolution

32. Similar to their recommended dispute resolution process for bargaining disputes, the FIWG has said there should be mandatory consideration of mediation in the first instance to resolve disputes. If mediation is unsuccessful, disputes should be resolved through arbitration. Litigation is possible to enforce mediated settlements or arbitrated decisions.

Government response to FIWG recommendations

33. Noting our commitment to restoring collective bargaining rights to film production workers, I consider the FIWG's model strikes the best balance between:

    33.1. Redressing the imbalance of power between film production workers and those who engage them,

33.2. Providing certainty about workers' employment status to encourage continued investment in New Zealand by screen production companies, and

33.3. Maintaining competition between businesses offering screen production services.

34. Overall, I highly value the FIWG's model because it represents consensus from different parts of the screen industry. Through the working group process, the screen industry has designed a model they believe best suits their needs and circumstances. All parties in the industry have an interest in seeing our screen industry thrive, and I believe they are well-placed to articulate a vision for a regulatory framework for screen production work. The aim of legislative change in this area will be to give effect to this vision in a way that is workable, enduring and fair.

35. While the FIWG's model looks different to the general employment relations and employment standards system, it reflects some common principles which will guide development of legislation and any further policy decisions that may be required:

35.1. Preventing worker exploitation while minimising disruption and uncertainty for businesses,

35.2. Allowing workers and companies to take part in representative collective processes, which lead to bargained minimum terms and conditions of work,

35.3. Giving individual workers and companies the ability to negotiate freely above bargained minimum terms and conditions, and

35.4. Meaningful dispute resolution options to solve problems that may arise in working relationships or during collective bargaining.

Modifications to the scope of the FIWG's model

36. A summary of the proposed government response to each of the FIWG's recommendations is at Annex 2.

37. I recommend one change to the model recommended by the FIWG, relating to the model's scope. The FIWG has suggested their model apply to screen production work. Since submitting their written recommendations, they have clarified they mean *all* screen production work except work on news and sports programmes.

38. Given the degree of regulatory change involved in implementing their model, I prefer a more conservative scope for the following reasons:

38.1. Including all screen production work (except news and sports programmes) could capture work that is not generally thought to be related to entertainment, such as the production of training videos and applications.

38.2. Including all screen production work (except news and sports programmes) would also depart from the reason the carve-out from employee status was introduced in 2010: to attract very mobile capital in a highly competitive industry, where production companies have choices about where to locate productions.

39. I instead suggest any new regulatory framework for screen production work only apply to work on films, drama serials, video games and commercials, regardless of how they are distributed or broadcast.[6]

40. All of these are currently covered by the carve-out unless they are initially made for television broadcast. Bringing all of these types of work within the carve-out recognises that the distribution format for a particular work can change during production/post-production, and it is increasingly common for works to be distributed through multiple media formats.

Further work required to implement the FIWG's model

41. As we connect the various elements of the FIWG's model during detailed design, we might identify incompatibilities and inefficiencies. I therefore request authorisation to make any changes during drafting in line with the overall policy framework outlined in this paper.

42. At this stage, I do not envisage needing to depart substantially from the FIWG's recommendations other than in relation to the model's scope. However, more work is required during detailed design, some of which is summarised below.

Scope of model

43. I agree with the intention of the FIWG's recommendations relating to scope (recommendations 1 – 3), but further work is required to better understand the interplay between these recommendations. During detailed design, the aim will be to clearly differentiate between work that falls within this new regulatory system, and work that remains within the employment relations and employment standards system.

Principles

44. Although the FIWG's four mandatory principles have been expressed as a single list, they differ in nature. For example, the first two principles (about good faith and protection from bullying, discrimination and harassment) are less subjective than the latter two principles (about fairness in termination and pay rates). This means the principles could take different forms when implemented in legislation. Some may exist as duties, and others could take the form of procedural requirements or even minimum standards.

Initiating collective bargaining

45. Because this new system would allow parties to conclude collective agreements which have universal coverage across a particular occupational group or enterprise (regardless of affiliation with bargaining parties), some new collective bargaining processes will need to be created. For example, the FIWG's model involves representativeness testing and public notification ahead of bargaining.

46. To give all parties a sense of the coverage and number of potential collective agreements, occupational groups subject to this framework will be specified in an

[6] Defining "films, drama serials, video games and commercials" will largely be a technical exercise during drafting. These terms refer to production formats, rather than genres. For example, "drama serial" refers to the role of dramatic performances (normally scripted) in the production, rather than the drama genre.

instrument subject to ministerial oversight. These occupations need to be carefully defined so everyone within coverage can identify with the occupational group that best reflects their work.

47. There may also need to be specific rules for organisations representing contractors and production companies to ensure that anybody affected by collective bargaining can have some say through these organisations. This means that anyone affected by bargaining should have the option to join their relevant representative organisation, but does not mean that membership or affiliation will be forced.

Bargaining process rules

48. The FIWG has suggested a more expansive list of compulsory matters to be included in collective agreements than current laws require. As detailed design work is completed, we may realise other matters should also be required in collective agreements (eg criteria for exemptions from collective agreement coverage).

49. During detailed design, the concept of "industrial action" will need to be translated for contractual relationships. Refusing to provide or purchase services according to pre-agreed terms would likely constitute breach of contract. Banning industrial action would mean preventing this on a coordinated basis, but still allowing parties to terminate and cancel contracts on an individual basis.

Concluding collective bargaining

50. When collective agreements have been negotiated, the FIWG has recommended ratification and registration processes would differ from existing comparable processes under the ER Act. There is also a question about what contracts are affected by concluded collective agreements. The FIWG has recommended a six-month notice period, so that contracts for work in the next six months will not be affected. Because contracts can be agreed in advance, there will need to be clear boundaries specifying which minimum terms apply to which contracts, both existing and contemplated.

51. The system proposed by the FIWG allows for collective bargaining at various levels (ie at the occupation and enterprise levels). There will therefore need to be further work on the relationship between collective agreements at different bargaining levels, including the permissible scope of any agreed exemptions.

Dispute resolution

52. The FIWG has recommended disputes be resolved by mediation, and arbitration where mediation is unsuccessful. This applies both to bargaining disputes as well as any other disputes that may arise. I intend for dispute resolution in any new system for screen production work to be provided by existing employment institutions because of their expertise with such matters. However, further work will be required to create new processes to resolve screen industry disputes where the nature of these disputes is fundamentally different to those currently resolved through employment dispute resolution.

Remedies and penalties for breaches

53. The exact nature of penalties under this proposed new regulatory framework will depend on the specific duties and obligations created during detailed design. The ER

Act also provides a starting point for matters which might be associated with a penalty. For example, it allows penalties for breaches of the duty of good faith, breaches of employment agreements, and breaches of bargaining process obligations. I envisage the levels of penalties will be analogous to those that can be imposed under the ER Act.

54. I also envisage any new regulatory framework will allow for damages as a remedy for breach of a collective agreement or contract.

Implications of implementing the FIWG's model

55. Creating this specific arrangement for the screen industry could be seen to pre-empt other work, particularly on dependent contractors and Fair Pay Agreements. This could also create a precedent in terms of building a bespoke regulatory regime for one industry. However, I consider film production workers to be in a unique position because of their ongoing exclusion from employee status in the ER Act, which justifies proceeding with this work now. It is also too early to tell whether future work on dependent contractors or Fair Pay Agreements will address the issues faced by film production workers.

56. FIWG members have said they think the screen industry needs resource support to bargain collectively. In response, I have indicated it is outside current government policy to provide resource support to parties in collective bargaining. Employment institutions will provide the usual support they give to bargaining parties: resources about collective bargaining, and mediation support when disputes arise.

57. Under the proposed framework there will be no compulsion for parties to initiate collective bargaining. This will be an industry-driven process, requiring interest and investment from all parties involved in the bargaining process. Collective bargaining may therefore initially proceed at a relatively slow pace. It will take time for groups to form representative bodies and find resources to support bargaining.

58. The introduction of a new regulatory framework and negotiation of collective agreements will result in some uncertainty during the initial phases. This is particularly so for foreign production companies which have long investment lead cycles. The FIWG's proposed transition arrangements (a six-month gap between occupational-level collective agreements being concluded and taking effect) are intended to smooth this process.

Consultation

59. This paper was prepared by the Ministry of Business, Innovation and Employment. The following agencies were consulted on this paper: the Department of the Prime Minister and Cabinet, Inland Revenue, the Ministry for Culture and Heritage, the Ministry of Foreign Affairs and Trade, the Ministry of Justice and the Treasury. Feedback received from these agencies has been reflected in the paper.

Financial implications

Bargaining and dispute resolution functions

60. The FIWG's model involves several unique bargaining and dispute resolution functions. These differ from those in the employment relations and employment standards system at present. Performing these new functions is likely to result in costs to regulatory bodies.

61. It is too early to calculate the exact amount of extra resource needed, but I expect this to be in the range of an additional 2 – 3 FTE for mediators, and some accompanying case management resource. There could also be training and resource-building costs associated with new functions for employment institutions.

Legislative implications

62. Legislation is required to implement the proposals in this paper. The proposed Act will bind the Crown. Confidential advice to Government

63. There will need to be consequential amendments to the ER Act. At present, provisions on the determination of film production workers' employment status are in the ER Act. There may also need to be changes to provisions about the functions of employment institutions, so that they can properly perform their proposed roles for the screen industry in this model.

64. Amendments to, or in relation to, the Commerce Act 1986 will be necessary. Collective bargaining by contractors doing screen production work could be seen to substantially lessen competition in the markets for such services. At present, only bargaining for employees' terms and conditions of work is exempt from the Commerce Act's competition regulatory framework. As part of the drafting process, further work will be done on the design of any Commerce Act exemption for collective bargaining in the screen industry to ensure that it is no broader than necessary to achieve the policy objectives.

Impact analysis

65. The requirements for regulatory impact analysis apply to the proposals in this paper. MBIE has therefore prepared the Regulatory Impact Statement (RIS) at Annex 3.

66. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached RIS. The panel considers that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Human rights

67. There are two elements of the FIWG's proposed model (detailed below) that engage domestic human rights law and international legal obligations. Confidential advice to Government

Universal coverage of collective agreements

68. Under the FIWG's proposed model, collective agreements would apply to all contractors within coverage, and all companies engaging such contractors. Coverage

is universal regardless of individual contractors' or businesses' affiliation with bargaining parties. This could raise freedom of association issues.[7]

69. I consider universal collective agreement coverage necessary to prevent worker exploitation through undercutting of collectively negotiated terms and conditions. Collective agreements will only set minimum terms, and parties will be free to negotiate above these minima.

Ban on industrial action with compulsory arbitration

70. The FIWG's recommended collective bargaining system does not allow for industrial action and requires disputes to be resolved through compulsory arbitration. In addition to freedom of association issues, this also raises questions of freedom of assembly and expression.[8]

71. Confidential advice to Government [redacted] the FIWG's model is an improvement on the status quo. Today, contractors doing film production work are prevented from taking industrial action and cannot bargain collectively. I consider the unanimity of screen industry parties on this matter to be of great relevance. The concept of industrial action by contractors, rather than employees, is also unclear.

Publicity

72. I intend to announce the government's response to the FIWG's recommendations. I expect there will be high levels of interest in this work from the screen industry domestically and overseas.

Proactive release

73. This paper will be proactively released (subject to redactions in line with the Official Information Act 1982) at the same time the Government's response to the FIWG's recommendations is announced.

Recommendations

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

Create a new regulatory framework for contractors doing screen production work

1. **Note** in December 2017, the government committed to restoring film production workers' right to bargain collectively, and established the Film Industry Working Group (FIWG) to recommend regulatory changes to allow this (CBC-17-MIN-0077).

2. **Note** in October 2018, the FIWG submitted its recommendations to the government on a collective bargaining model for contractors doing screen production work.

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[7] Bill of Rights Act 1990, s 17; International Covenant on Civil and Political Rights 1966, art 22. The International Labour Organization's (ILO's) Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87) is also relevant: New Zealand has not ratified this convention but as an ILO member we are expected to abide by its principles.

[8] Bill of Rights Act 1990, ss 14 and 16; Right to Organise and Collective Bargaining Convention 1949 (ILO Convention No. 98, which New Zealand has ratified); International Covenant on Economic, Social and Cultural Rights 1966; art 8.

3. **Agree** to endorse the FIWG's recommendations subject to limiting the scope of workers covered by their proposed model, as set out in Annex 2.

Agree the scope of this regulatory framework

4. **Agree** to retain the carve-out for film production workers from the definition of an employee under the Employment Relations Act 2000, unless they are party to a written employment agreement.

5. **Agree** to extend the carve-out from employee status to people doing screen production work (covering work on films, drama serials, commercials and video games) unless they are party to a written employment agreement.

6. **Agree** that the regulatory framework proposed in this paper will only apply to contractors doing screen production work, and those who engage the services of these contractors.

7. **Agree** to amend the Commerce Act 1986 to provide for an exemption for collective bargaining by contractors doing screen production work that is no broader than necessary to achieve the policy objectives in this paper.

8. **Note** that employees doing screen production work will remain within the employment relations and employment standards regulatory system.

Approve drafting of legislation

9. **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office giving effect to the policy decisions in this paper.

10. **Authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy framework in this paper, on any issues that arise during the drafting process.

11. **Authorise** the Minister for Workplace Relations and Safety to consult with parties in the screen industry on draft legislation giving effect to the policy decisions in this paper.

12. **Agree** that legislation drafted to give effect to the policy decisions in this paper will bind the Crown.

Publicity

13. **Note** the Minister for Workplace Relations and Safety intends to announce the government response to the FIWG's recommendations, and the matters in recommendations 3 – 8 in particular.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

New Zealand's screen industry: Great work, great workers

Recommendations of the Film Industry Working Group to the Government

OCTOBER 2018

Background

The Government convened the Film Industry Working Group (FIWG) in January 2018. We were tasked with coming up with recommendations on how to enable workers in the film industry to bargain collectively, while also:

- Allowing screen production workers to continue to be engaged as contractors,
- Providing certainty to encourage continued investment in New Zealand by screen production companies, and
- Maintaining competition between businesses offering screen production services to promote a vibrant, strong and world-leading screen industry.

The FIWG was convened to address the Government's concerns about power imbalances in the industry in relation to bargaining, and in particular the fact that contractors doing film production work cannot bargain collectively under existing labour laws.

The FIWG has held a series of meetings in Auckland and Wellington. The result of those meetings is that we have reached consensus on a way forward for the screen industry. We believe the resulting recommendations are a milestone for the industry and, if adopted, could be a long-lasting and durable foundation for future certainty and growth.

New Zealand's screen industry

As a first step, the FIWG agreed that what has traditionally been referred to as the film industry is better described as the 'screen industry'. Changes to technology and viewing habits have made all screens equal. This includes television, web-based productions and gaming.

The screen industry is a key part of New Zealand's cultural landscape. It provides career pathways for thousands of people in New Zealand. It is an incubator and developer of New Zealand creativity and innovation. It allows New Zealand's identity to be explored, expressed and shared. We are well-known internationally for being a great place to produce content.

Every year, we produce culturally significant, original and high-quality works. In 2017, total gross revenue from New Zealand's screen industry businesses was $3.5 billion. This represented an 8% increase from the previous year. Production and post-production businesses had total revenue of $1.9 billion in 2017, with $792 million (42%) coming from overseas sources.

Due to the highly mobile nature of the screen industry, the attractiveness of New Zealand as a production location is directly related to the certainty that producers have about our labour laws and their obligations. Our business is also one that is built on relationships between people working in the industry.

Our recommendations are based on these well-functioning relationships and a shared desire to provide the certainty necessary for New Zealand's screen industry to thrive. The recommendations also recognise that there are features unique to the screen industry which both support the industry having its own employment regime, and require flexibility and pragmatism.

The key elements of the package of recommendations are as follows:

- A recognition that screen industry workers can agree to work either as employees or contractors.
- All screen industry workers engaged as contractors are to be covered by a stand-alone statute that provides the protection of a set of principles and the option of collectively agreed minima.
- Recognition that the screen industry is not like any other industry, and therefore distinct labour laws are both required and recommended.
- A set of principles underpinning the labour relations system for all contractors working in the screen industry.
- Each sub-industry group within the wider screen industry can negotiate collectively in the form of sub-industry collective contracts.
- Any opt-out from the standards set in sub-industry collective contracts can only be by agreement of all parties, in exceptional circumstances, and in keeping with the underpinning principles.
- Contractors who could be covered by a sub-industry collective contract agree not to strike during bargaining of any sub-industry collective contract.

Any person working in the screen industry who, by agreement, opts to be an employee rather than a contractor, will continue to be subject to the employment relations and employment standards system.

All parties participating in the FIWG support this package of recommendations and urge the Government to adopt it in its totality.

Part A: Application of the employment relations and standards systems

1. Retain the carve-out from the Employment Relations Act for film production workers

We recommend retaining the general principle currently reflected in sections 6(1)(d) and 6(1A) of the Employment Relations Act 2000. This is that the status of a film production worker as an employee or contractor is solely determined by the type of contract/agreement they are engaged under. We understand this means the majority of workers in the screen industry will continue to be contractors.

In our view the carve-out from the common law tests for employment status is necessary to provide certainty in our screen industry, which is highly internationally mobile and depends on certainty about labour laws. However, we recommend the carve-out be modified in accordance with our recommendations in this part.

This will not change the ability of people doing film production work to be employees if they are party to or covered by a written employment agreement that provides they are an employee. This also will not prevent people doing film production work from requesting to be engaged as employees.

2. Extend the carve-out to cover screen production work

We recommend the carve-out from the Employment Relations Act be modified to more accurately reflect screen production work as opposed to the more narrow concept of 'film production work' currently in the Act. This would include work performed, or services provided, in respect of the production of feature films, gaming, television, internet-delivered video recordings, and virtual and augmented reality imaging. This should also cover formats not yet known to our industry.

The existing carve-out only applies to people engaged in 'film production work' as defined in the Employment Relations Act, with television production specifically excluded. There is no longer any justification for such a distinction between the two forms of screen production. Many workers frequently move between the two, and productions increasingly do not fall neatly into either the 'film' or 'television' genre. For example, a production could initially be conceptualised as a film but end up being broadcast on television, or available online only.

Equally, the development of web-based productions and gaming use many of the same skills and production models as film and television production. Increasingly, the distinction between productions is less about where the product is shown, and more about scale and budget. We therefore recommend that our proposed model for labour relations applies to all screen production work in New Zealand.

3. Limit the carve-out to workers engaged by an entity that primarily engages in screen production work

We recommend all work performed and services provided to an entity that primarily supplies the screen industry be considered 'screen production work'. However, the carve-out should not apply to workers who perform work or provide services to a company that *does not* primarily supply to a screen production.

This restriction is appropriate for the following reasons:

- It is desirable that people who are only tangentially associated with screen production work and who might not have chosen to work in the screen industry retain the protection of the Employment Relations Act.
- A worker who would usually be covered by the Employment Relations Act (e.g. a builder) should not lose the protections of the employment relations and standards system, or have the nature of their employment relationship changed because their employer decides to take on a contract supplying a screen production.

Accordingly the carve-out should only apply in respect of workers engaged by:

- An entity *primarily* involved in screen productions, or
- An entity which *primarily* supplies services to another entity primarily involved in screen productions.

This allows the carve-out to exclude work which is well-established outside the screen industry, and that is not generally thought of as being screen production work. For example, a builder whose services are contracted to build a film set through a building company should not be covered by the carve-out if the building company's main business is not doing building in the screen industry.

In the rest of this document, we use the term 'screen production worker' to refer to contractors working in the screen industry and doing screen production work in line with our recommendations above. For the avoidance of doubt, this includes contractors doing screen production work irrespective of their business structure (eg sole trader, company, partnership).

Any worker who does not meet the definition of a 'screen production worker' (eg employees working in the screen industry) will not be subject to the recommended screen industry statute.

Part B: The nature of the screen industry

4. Recognise the unique nature of the screen industry in any new labour relations system pertaining to it

We recommend that the starting point of any new labour law relating to contracting provisions for screen production workers is the recognition that the screen industry is not like any other industry. Its unique factors include, but are not limited to:

- The market for screen production is global. If New Zealand wants to have a screen industry, it needs to be competitive.
- The scale of productions made in New Zealand ranges from the very small 'home-style' product to the massive foreign-produced product employing hundreds in multiple locations. There is no one size that can fit all.
- Producers choosing to film in New Zealand require certainty of cost and flexibility of conditions in order to complete a production on time and on budget.
- The nature of filming (the location, the availability of light, the availability of outdoor sets or street access) requires flexibility and the ability to make late changes to schedules.

All members of FIWG accept the need for flexibility in contracts that is different from other industries or workers.

Part C: Principles for engagement in the screen industry

All of our recommendations from this part onwards only apply to contractors doing screen production work. They do not apply to employees doing screen production work.

5. Require all screen production workers to be engaged consistent with four basic principles

Underpinning our recommended model are a series of principles that apply to the engagement of any screen production worker. We recommend these principles be reflected in our proposed stand-alone legislation for the screen industry. These principles should be treated as minimum contract terms and should not be able to be contracted out of. All collective contracts (or individual contracts if there is no collective contract) should include specific provisions concerning the principles.

As our proposed model for engaging screen production workers is separate to the standard employment relations and standards system, these principles do not apply to employees in the screen industry. Employees working in screen production enjoy the protections provided under the Employment Relations Act and other laws comprising the employment relations and standards system. However, our recommended model does not prevent employers and employees from agreeing to apply any aspects of these principles or the collective contracts in employment agreements. The principles do not affect any rights or obligations for employees stemming from the employment relations and standards system.

These principles are intended to be interpreted with reference to the screen industry's unique nature and circumstances, rather than employment/contractual relationships in other industries.

Principle 1: Good faith

Parties to a screen production work contract should be required to act in good faith in their dealings with each other. Specifically, parties must not, whether directly or indirectly, do anything:

- To mislead or deceive each other, or
- That is likely to mislead or deceive each other.

This principle should also apply when parties are in negotiation to enter into a contract.

We further recommend that parties to any authorised collective bargaining in the screen industry should be under an express obligation to bargain in good faith.

Principle 2: Protection from bullying, discrimination and harassment

People doing screen production work must be protected from bullying, harassment of any kind, and discrimination. We recognise that existing legislation such as the Human Rights Act 1993 and the Health and Safety at Work Act 2015 provide some of these protections, but believe this issue is of sufficient importance that it should be an express principle applicable to all screen production work given the vulnerability of some workers in the industry. It is also worth specifying that screen production workers who are contractors are still entitled to these protections.

This principle does not affect or modify any protections as provided by the Human Rights Act and the Health and Safety at Work Act.

Principle 3: Fair and reasonable termination of contracts

Engagers must act fairly and reasonably when terminating contracts. This does not affect any situations of force majeure resulting in the termination of a contract without notice or payment of notice.

We think this principle should however take into account, and continue to allow for, current practice in the screen industry with respect to early termination of a screen production worker's contract for cause and without cause. This practice may vary across different occupational groups in the screen industry.

For example, current practice in relation to termination of crew contracts allows for the following:

Cause	*Notice*	*Payment*
Without cause	One week's notice by either party (or less if contract period is shorter)	For services rendered and notice period
With cause (eg theft, wilful misconduct, working under the influence of alcohol/other drugs)	None	For services rendered only

Termination is to be distinguished from cancellation: cancellation of contracts happens *before* work on a contract has begun (but after confirmation of the contract, if confirmation provisions apply). Termination is when a party decides (or both parties agree) to end the contractual relationship *after* the contract has begun.

The ending of employment for employees doing screen production work would continue to be governed by the Employment Relations Act.

Principle 4: Fair rate of pay

Screen production workers must receive a fair rate of pay in relation to their skills and the scale of production.

This principle is intended to be given effect by requiring collective contracts to cover pay in the form of minimum rates which may include bands depending on production scale (see recommendation 6.5 below).

Part D: Collective bargaining in the screen industry

6. Enable collective bargaining in relation to the remuneration and conditions of work for screen production worker sub-industries

We recommend that screen production workers should be able to bargain collectively at a sub-industry level in relation to remuneration and other minimum terms and conditions of work. The existing law should be amended to remove any barriers and restrictions on collective bargaining by contractors doing screen production work (eg the Commerce Act 1986).

We anticipate that this bargaining will most likely result in the negotiation of collective contracts at a sub-industry level, and allow different contracts for each major occupational group in the screen industry (eg technicians, writers, directors, actors, stunt people). This bargaining could set minimum terms and conditions for each sub-industry, below which contractors cannot be engaged.

In the rest of this document, we refer to these collective contracts as 'sub-industry collective contracts'. We have also used the term 'collective contracts' to distinguish from 'collective agreements' which exist in the employment relations system (whereas these would be a contractual agreement).

Where a sub-industry collective contract has been agreed, it will bind all contractors in that sub-industry and all people who engage those contractors. This is regardless of membership of/affiliation with a signatory party of a sub-industry collective contract.

This collective bargaining regime is intended to result in minimum terms for contractors in the screen industry. Given contractors in the screen industry can also provide services through a company structure, we recommend specifying that only individuals doing screen production work (even through a company structure) be on the 'worker' side of collective bargaining. We expect this will ensure competition between genuine businesses is maintained. In general, we believe a screen production worker is an individual who:

- Has a contract or other arrangement to do work or services personally, and/or
- Is generally expected to perform the services personally in most cases but may subcontract from time to time, and/or
- Is required to perform work when requested.

The remainder of this part contains more specific recommendations about our proposed system of collective bargaining for contractors in the screen industry.

Obligations and duties for parties to collective bargaining

6.1 Require bargaining to be conducted in good faith

To ensure effective bargaining, we recommend requiring bargaining parties to act in good faith in all aspects of the bargaining process, including:

- Parties must not act in a misleading or deceptive way.
- Parties must be responsive and communicative.
- Parties must raise issues in a fair and timely way.
- Parties must work constructively and positively together.
- Parties must not undermine or do anything that is likely to undermine the bargaining.

6.2 Impose a duty on parties bargaining for a sub-industry collective contract to enter into an agreement

Once collective bargaining has commenced, we recommend that parties are expected to enter into an agreement. This will prevent surface bargaining, where a party may bargain without any real intention of entering into an agreement.

Recognition of bargaining parties

6.3 Formally recognise bargaining parties and require them to demonstrate that they are the most representative organisations for those they purport to represent

To support a clear and orderly collective bargaining system, we recommend there be a formal process to recognise and register groups seeking to collectively bargain on behalf of screen production workers and those who engage them.

As sub-industry collective contracts will apply to all screen production work within the coverage of the contract, we propose registration of bargaining parties to ensure it is clear who represents the relevant workers and engagers.

Registration will be a precondition to being able to engage in collective bargaining and before groups can become registered they must demonstrate they are the most representative groups for those that they purport to represent. This does not preclude a single group of workers or engagers being represented by more than one organisation.

Companies and organisations that engage screen production workers (ie producers) should be able to form contractee groups to collectively bargain.

Because not all industry groups within the screen industry currently have guilds or other representative organisations, and because some groups are small and/or emerging, the FIWG supports the recognition of some multi-disciplinary contracts. These could cover screen production workers who do not comfortably fit within a well-defined industry group.

Where any individual working on a single production is fulfilling multiple roles (eg writer and director) their contract will accommodate the different sub-industry collective contracts as appropriate. Depending on the work being performed, the relevant sub-industry collective contract will apply.

6.4 Require public notification prior to bargaining to ensure representativeness

We recommend a public notification process before bargaining begins to ensure that bargaining parties are representative of the people to be covered by any sub-industry collective contract. This would allow people to be involved in the collective bargaining process even if they are not currently a guild member.

Requirements for sub-industry collective contracts

6.5 Require that sub-industry collective contracts include the following:

- Pay, in the form of minimum rates, which are to be scaled according to the scale of the production,
- Agreed breaks,
- Agreed recognition of public holidays,
- Hours of work and availability,
- Dispute resolution processes (including to respond to any issues of harassment, discrimination, bullying and cultural safety), and
- Termination.

Sub-industry collective contracts can also contain anything else agreed by the parties.

It is for parties to determine during bargaining what cultural safety means in the context of their occupation, enterprise or project; and how to ensure this for all screen production workers.

6.6 Require concluded sub-industry collective contracts to be ratified

Sub-industry collective contracts are intended to apply to all workers in a particular sub-industry, rather than just those who are members of a guild involved in bargaining. To ensure any agreement reached is representative of the workers it purports to cover, we recommend a ratification process that gives any workers who could be covered by a particular sub-industry collective contract an opportunity to express their views on it.

We also recommend this ratification process require screen production workers to vote to approve any sub-industry collective contract before it can be registered. All screen production workers who could be covered by the proposed sub-industry collective contract are eligible to vote, with a simple majority required of those voting to ratify any sub-industry collective contract.

6.7 Require concluded sub-industry collective contracts to be registered

It is important that sub-industry collective contracts are used genuinely and for the benefit of engagers and workers in the screen industry. We therefore recommend that sub-industry collective contracts be registered with the Employment Relations Authority. Registration can be contingent on the Authority being satisfied that:

- Bargaining parties are representative of the workers and engagers who will be covered by the sub-industry collective contract, and

- Parties adequately understand the provisions or implications of the sub-industry collective contract, and have not been induced to enter into the agreement by oppressive means, undue influence or duress, and
- The sub-industry collective contracts contain provisions on each of the required criteria (as set out in recommendation 6.5 above), and
- The sub-industry collective contract has been ratified by affected screen production workers.

Resolving disputes and facilitating bargaining

6.8 Government-provided mediation services should be made available for disputes that arise in bargaining

To ensure any disputes are resolved in a timely manner, while preserving the relationship between bargaining parties, we recommend making government-provided mediation services available to resolve bargaining disputes. Parties may also choose to use private mediation.

6.9 If mediation is unsuccessful, provide for arbitration to resolve bargaining disputes

If mediation is insufficient to resolve bargaining disputes, we believe these would be best addressed through arbitration. This would ensure that bargaining disputes are resolved in a manner that contributes to the conclusion of sub-industry collective contracts.

6.10 Industrial action is not permitted

Industrial action (strikes, lockouts, boycotts) is not permitted in relation to collective bargaining, given the volatility and international mobility of the screen industry. This does not affect screen production workers' right to cease or refuse to carry out unsafe work under the Health and Safety at Work Act 2015.

Application of sub-industry collective contracts

6.11 Sub-industry collective contracts apply to all screen production workers within the coverage of the contract, with no ability to contract below unless through an agreed exemption

Any sub-industry collective contract should apply to all screen production workers within the coverage of the contract. Parties should only be able to contract below sub-industry collective contracts if:

- All parties agree to the exemption,
- Circumstances are exceptional (eg unusual locations or the use of animals requiring flexibility of working hours), and
- Agreed exemption processes in the sub-industry collective contract are followed.

In the case of an exemption, the underpinning principles in recommendation 5 continue to apply.

If an exemption is sought after production has commenced, parties affected (ie producers and workers involved in a particular production) should be able to agree exemptions as if they were signatory parties of any prevailing sub-industry collective contract. The following conditions apply in addition to those specified above:

- The proposed exemption is to apply to at least two workers (ie if an exemption is in relation to a single worker, the standard exemption process applies),
- Affected parties are able to seek advice (eg legal advice, or advice from their representative signatory party) before deciding on an exemption, and
- Signatory parties to the sub-industry collective contract are notified of the exemption after agreed.

6.12 Enable the courts to apply appropriate remedies for sub-industry collective contracts' non-compliance with the principles and bargaining requirements

We believe remedies should be available if sub-industry collective contracts do not comply with the principles or bargaining requirements. This will support an orderly, fair and lawful bargaining process.

Renewals and variations

6.13 Sub-industry collective contracts must include an expiry date of between three and six years

As previously noted, certainty is important in the screen industry. We intend sub-industry collective contracts to support certainty by having a reasonably long lifespan; however this will be a matter for the parties to the agreement. We recommend a minimum lifespan of three years and a maximum lifespan of six years to ensure the collective contracts remain relevant.

6.14 Sub-industry collective contracts should continue to apply after expiry until a new sub-industry collective contract has been negotiated

Where a sub-industry collective contract lapses, existing contracts based on it should continue to have effect. The sub-industry collective contract will continue to apply (including for new contracts) until a new sub-industry collective contract is in place.

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7. Enable enterprise- or project-level collective contracts on top of sub-industry collective contracts

We recommend that collective bargaining also be allowed at an enterprise or project level. A precondition for initiating such bargaining is agreement from all parties to do so. Where relevant sub-industry collective contracts are in place, enterprise- or project-level collective contracts cannot go below minima set in the applicable sub-industry collective contracts: workers need to be at least as well off in relation to each term in their relevant sub-industry collective contract.

This recognises there might be unique circumstances in which parties may see benefit in having a production-specific collective contract, or in creative collectives where contractors are solely engaged by a single company, which in turn supplies production companies/producers.

Enterprise- or project-level collective contracts should also be allowed where there is no relevant sub-industry collective contract. This means that where there may be gaps in the coverage of sub-industry collective contracts, these gaps can be filled using enterprise- or project-level collective contracts. Such enterprise- or project-level collective contracts will have to meet all the requirements set out in recommendation 6 above. For such enterprise- or project-level collective contracts, guilds could be bargaining agents for the relevant screen production workers. Alternatively, workers could create and register their own guild or other representative group for the purposes of the enterprise- or project-level collective contract.

8. Allow contracting on an individual basis

We recommend that where a sub-industry collective contract is in place, individual contracts not be allowed to contain terms and conditions that are less favourable than those in sub-industry collective contracts. Independent contractors will still be able to bargain on any terms and conditions above these floors.

Part E: Resolving disputes

9. Establish a framework for resolving disputes in the screen industry (outside collective bargaining)

We recommend a three-tier process for resolving disputes arising from contracts. These tiers are:

1. *Mediation* by trained and certified mediators,
2. If mediation is unsuccessful, then *arbitration*, and
3. *Litigation* if needed to enforce any agreements reached through mediation or arbitration.

There should be mandatory consideration of mediation as a first tier for resolving disputes. Parties should not be able to proceed to a higher tier without first attempting dispute resolution at a lower level: litigation should not be commenced without either mediation or arbitration having been attempted, and arbitration should not be used unless mediation has failed.

This is intended to give parties several opportunities to resolve disputes relating to breaches of these principles in a conciliatory and expedient manner, while recognising there may be instances in which recourse to the courts is necessary in the interests of justice.

We believe mediation between parties is preferable to litigation or ongoing disputes. This is because court action and any media reporting of any disruption tends to have a chilling effect on screen production. As such, we suggest making government-provided mediation available to screen production workers and engagers, though parties may choose to use private mediation if they wish.

Creating an environment for this system to flourish

We believe the nine recommendations above represent key components of a collective bargaining system for contractors doing screen production work. However, the recommendations alone will not be enough to create an environment in which this proposed model will thrive. In our view, the considerations below are a key accompaniment to our recommendations.

Capacity building and resourcing

At present, the screen industry does not have capacity to carry out collective bargaining. The two main examples of collective contracts that exist, the Blue Book (for crew) and the SPADA/Equity New Zealand Individual Performance Agreement (for actors) are the result of several years' negotiation and work, typically on a voluntary basis.[1] In some guilds, worker representatives provide their labour on a volunteer basis. Specialist assistance will be needed, given the large time commitment collective bargaining will involve. In some sub-industries, there may not yet be representative guilds or unions.

There therefore needs to be consideration of how organisations in the screen industry can be supported to grow their collective bargaining capacity, infrastructure and skills.

This is particularly important for ensuring the longevity of this system: parties need to be able to bargain collectively among themselves and renew collective contracts at least every six years. If not, the screen industry will probably revert to contracting on an individual basis with only the principles to shape parties' behaviour in contract negotiations.

Recognising that current resource levels in the screen industry are insufficient to allow for collective bargaining on the scale envisaged by the recommended model, members of the working group recommend that resource support be made available to the sector for a transitional period.

Any resource support would only be required for such time until the first sub-industry collective contracts are being negotiated and the model is essentially established. Such support would ensure parties are in a position to actually carry out collective bargaining, rather than refraining from initiating bargaining due to resource constraints.

Education

Alongside capacity building, the screen industry would also benefit from information to positively understand and adopt a collective bargaining system as we have proposed. This could cover:

- The rights of screen production workers and the companies who engage them,
- How collective bargaining works,
- Who is able to negotiate on behalf of screen production workers and companies,
- How any changes may affect future contracts for screen production work, and

[1] The Blue Book and the SPADA/Equity New Zealand Individual Performance Agreement can be considered examples of current industry practice (eg when interpreting these recommendations) in relation to the engagement of crew and actors.

- Sources of assistance for screen production workers and companies during the transition to a new system of collective bargaining.

The industry employs a generation of contractors with little or no experience of collective bargaining. Education will support greater understanding that collective bargaining is not about raising fees — it is instead about creating business stability through minimum standards, and also projects maturity in our industry to offshore productions.

Certainty

Any regulatory changes need to be signalled early: a high amount of certainty will be required to ensure continuity of production and our ability to attract offshore productions to New Zealand. This could take the form of early indications to the industry about when any proposed changes are intended to take effect, with sufficient lead-in time to allow the industry to prepare for changes.

We need to be able to communicate clearly during the transition from the current regime to what comes next. Those producers already committed to New Zealand productions need the certainty of knowing if and when the new laws will be in effect and they need time to plan and prepare.

Communication

Any media reporting of changes to labour laws affecting the screen industry creates uncertainty and international concern. It is important to all members of FIWG that, in the event you accept our recommendations (or alternately that you decide to impose some others), any change is communicated in concert with the industry. The FIWG has worked hard to reach consensus and we are committed to offering any assistance we can to ensure this is done effectively and in the best interests of the industry.

Review

The regime we recommend is a big change for some in the industry and it imposes a burden on some groups in particular to manage the bargaining process. We recommend any collective bargaining system introduced for contractors in the screen industry needs to be reviewed in the first 18 months after its introduction. This will allow for early assessment of whether the collective bargaining system is working well, and identify areas for fine-tuning.

Crew and cast representatives

We support productions instituting a system of crew and cast representatives, who are workers elected by their peers. Crew and cast representatives can facilitate smooth communication between producers and workers both on and off-set. They can also serve as a first port of call for either party when issues arise in the working relationship. If crew and cast representatives are not available, we recommend that workers approach their representative organisation (eg guild or union) for assistance.

Concluding remarks

We believe the system created by the recommendations above meets the four objectives set in our terms of reference:

- It restores collective bargaining rights to screen production workers.
- It allows workers to continue as contractors if they wish to do so.
- It provides certainty to encourage continued investment in our screen industry.
- It allows competition between businesses providing screen production services.

It gives the Government comfort that workers in the screen industry have protections and the right to bargain collectively. But it also provides the industry with the certainty and stability it needs to continue to grow and attract international productions here.

We look forward to the Government's response to our recommendations and thank you for the opportunity to contribute to this proposal. We are also amenable to reconvening to assist with implementing any changes arising from this proposal.

Annex 1: Members

The Film Industry Working Group comprised 13 members:

Organisation	*Representative*
	Barrie Osborne *Film Producer*
BusinessNZ	Paul Mackay *Manager Employment Relations Policy*
Directors and Editors Guild of New Zealand	Tui Ruwhiu *Executive Director*
Equity New Zealand	Melissa Ansell-Bridges *Director*
Film Auckland	Alex Lee *Chair*
New Zealand Council of Trade Unions	Richard Wagstaff *President*
New Zealand Writers Guild	Alice Shearman *Executive Director*
Ngā Aho Whakaari	Erina Tamepo *Executive Director*
Regional Film Offices New Zealand	Michael Brook *Chair*
Screen Industry Guild	Sioux Macdonald *Vice President*
Screen Production and Development Association	Richard Fletcher *Co-President*
Stunt Guild of New Zealand	Augie Davis *President*
Weta Digital	Brendan Keys *Manager Human Resources*

Linda Clark, special counsel at Kensington Swan, facilitated the Film Industry Working Group's meetings. Secretariat support was provided by the Ministry of Business, Innovation and Employment.

The Film Industry Working Group met on seven occasions between January and July 2018. South Pacific Pictures and the New Zealand Game Developers Association were also consulted during the course of the Film Industry Working Group's discussions.

Annex 2: Overview of recommendations

KEY ELEMENTS OF PROPOSED MODEL

The carve-out of film production work from the employment relations and standards system is retained

The scope of the carve-out will be slightly modified to cover television production (currently excluded) to encompass "screen production", rather than "film production"

Any person doing screen production work who has an employment agreement will still be an employee (ie covered by employment relations and standards system, rather than this proposed model)

All contracts for screen production work must give effect to four principles

Principle 1
Parties must act in good faith

+

Principle 2
Workers must be protected from bullying, discrimination and harassment

+

Principle 3
Engagers must act fairly and reasonably when terminating contracts

+

Principle 4
Workers must receive a fair rate of pay

Screen production workers can bargain collectively at a sub-industry level (ie occupational level)

- Exemptions (opt-outs) from sub-industry collective contracts may be permitted
- Enterprise- or project-level collective contracts are possible, <u>above</u> sub-industry terms
- Screen production workers can continue to contract on an individual basis, <u>above</u> sub-industry terms

Resulting agreements are referred to as "sub-industry collective contracts"

Sub-industry collective contracts will cover the work of all people within a particular sub-industry

Before bargaining:

- Bargaining parties need to be registered (as most representative groups)
- There must be public notification before bargaining to ensure representativeness

Concluded sub-industry collective contracts need to be ratified and registered before becoming enforceable

Duties on parties:

- Bargain in good faith
- Enter into an agreement

Sub-industry collective contracts must include terms on:

- Pay in the form of minimum rates
- Agreed breaks
- Agreed recognition of public holidays
- Hours of work and availability
- Dispute resolution processes
- Termination

A tiered system will be available to resolve contractual disputes relating to screen production work

Tier 1
There must be mandatory consideration of mediation as a first tier for resolving disputes

If mediation is unsuccessful

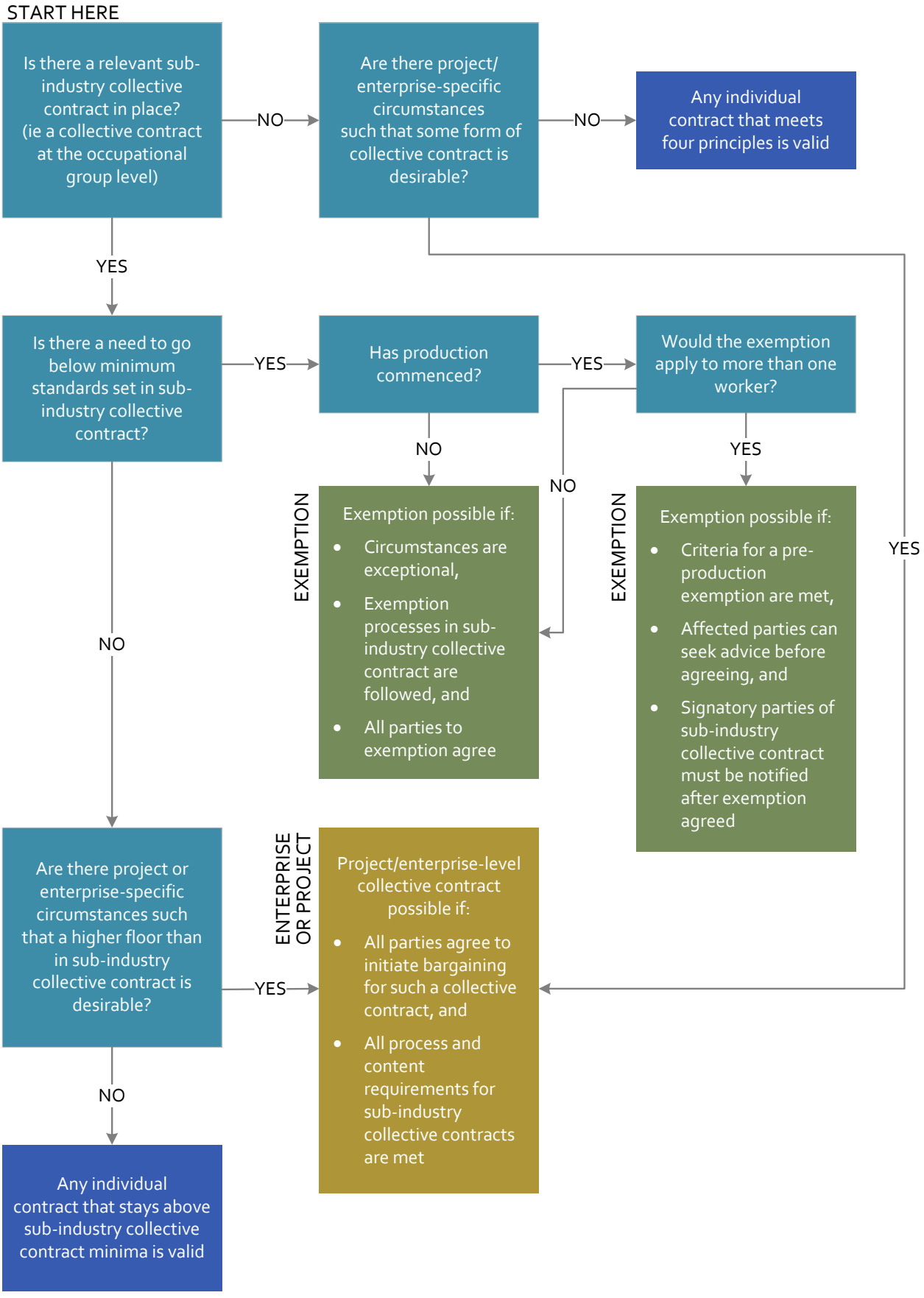
Tier 2
Arbitration should then be used to resolve disputes

If enforcement is required

Tier 3
Litigation can be used to enforce agreements reached through mediation or arbitration

If enforcement of a mediated settlement is required

Annex 3: Relationship between bargaining levels



Annex 2: Summary of government response to FIWG recommendations

A note on terminology: for consistency with the Film Industry Working Group's (FIWG's) recommendations, this table uses the terms "sub-industry collective contract" and "enterprise- or project level collective contract" to refer to collective agreements at the occupational group and firm levels respectively.

	FIWG recommendation	Government response
Application of the employment relations and standards system		
1	Retain the carve-out from the Employment Relations Act for film production workers.	Accept recommendation.
2	Extend the carve-out to cover screen production work. *Since submitting their written recommendations, the FIWG has said the carve-out should cover all screen production work except work on news and sports programmes.*	Extend the carve-out to cover a more limited definition of "screen production work" that covers work on films, drama serials, video games and commercials. This is regardless of how these products are distributed (eg cinematic release, television broadcast, internet streaming).
3	Limit the carve-out to workers engaged by an entity that primarily engages in screen production work.	Accept recommendation.
The nature of the screen industry		
4	Recognise the unique nature of the screen industry in any new labour relations system pertaining to it.	Accept recommendation.
Principles for engagement in the screen industry		
5	Require all screen production workers to be engaged consistent with four basic principles.	Accept recommendation.
Collective bargaining in the screen industry		
6	Enable collective bargaining in relation to the remuneration and conditions of work for screen production worker sub-industries. *Since submitting their written recommendations, the FIWG has suggested occupations doing screen production work be specified in an instrument subject to ministerial oversight. Only one sub-industry collective contract would be allowed for each specified occupational group.*	Accept recommendation, noting a preference to use existing employment institutions. Accept further recommendation about specifying occupational groups.
6.1	Require bargaining to be conducted in good faith.	Accept recommendation.
6.2	Impose a duty on parties bargaining for a sub-industry collective contract to enter into an agreement. *Since submitting their written recommendations, the FIWG has suggested bargaining be initiated using a process similar to that under the Employment Relations Act.*	Accept recommendation. Accept further recommendation about initiation of bargaining.

	FIWG recommendation	Government response
6.3	Formally recognise bargaining parties and require them to demonstrate that they are the most representative organisations for those they purport to represent.	Accept recommendation.
6.4	Require public notification prior to bargaining to ensure representativeness.	Accept recommendation.
6.5	Require that sub-industry collective contracts include the following: • Pay (in the form of minimum rates), • Agreed breaks, • Agreed recognition of public holidays, • Hours of work and availability, • Dispute resolution processes, • Termination processes.	Accept recommendation.
6.6	Require concluded sub-industry collective contracts to be ratified.	Accept recommendation.
6.7	Require concluded sub-industry collective contracts to be registered. *Since submitting their written recommendations, the FIWG has suggested sub-industry collective contracts take effect six months after being concluded.*	Accept recommendation, noting registration could be with an employment institution other than the Employment Relations Authority. Accept further recommendation about a six-month notice period before sub-industry collective contracts come into effect.
6.8	Government-provided mediation services should be made available for disputes that arise in bargaining.	Accept recommendation.
6.9	If mediation is unsuccessful, provide for arbitration to resolve bargaining disputes.	Accept recommendation.
6.10	Industrial action is not permitted.	Accept recommendation.
6.11	Sub-industry collective contracts apply to all screen production workers within the coverage of the contract, with no ability to contract below unless through an agreed exemption.	Accept recommendation.
6.12	Enable the courts to apply appropriate remedies for sub-industry collective contracts' non-compliance with the principles and bargaining requirements.	Accept recommendation, noting there may also be other remedies and penalties in the entire system.
6.13	Sub-industry collective contracts must include an expiry date of between three and six years.	Accept recommendation.
6.14	Sub-industry collective contracts should continue to apply after expiry until a new sub-industry collective contract has been negotiated. *Since submitting their written recommendations, the FIWG has modified their recommendation: they*	Accept modified recommendation.

	FIWG recommendation	Government response
	suggest expired sub-industry collective contracts can continue to apply while a replacement is being negotiated or during the six-month notice period after a replacement has been negotiated.	
7	Enable enterprise- or project-level collective contracts on top of sub-industry collective contracts.	Accept recommendation, noting that where applicable the same processes and requirements will apply to enterprise-level collective contracts as sub-industry collective contracts.
8	Allow contracting on an individual basis.	Accept recommendation.
Resolving disputes		
9	Establish a framework for resolving disputes in the screen industry.	Accept recommendation, noting a preference to use existing employment institutions.

Cover sheet: A collective bargaining framework for screen production workers

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. Confidential advice to Government [redacted]

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.

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.

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

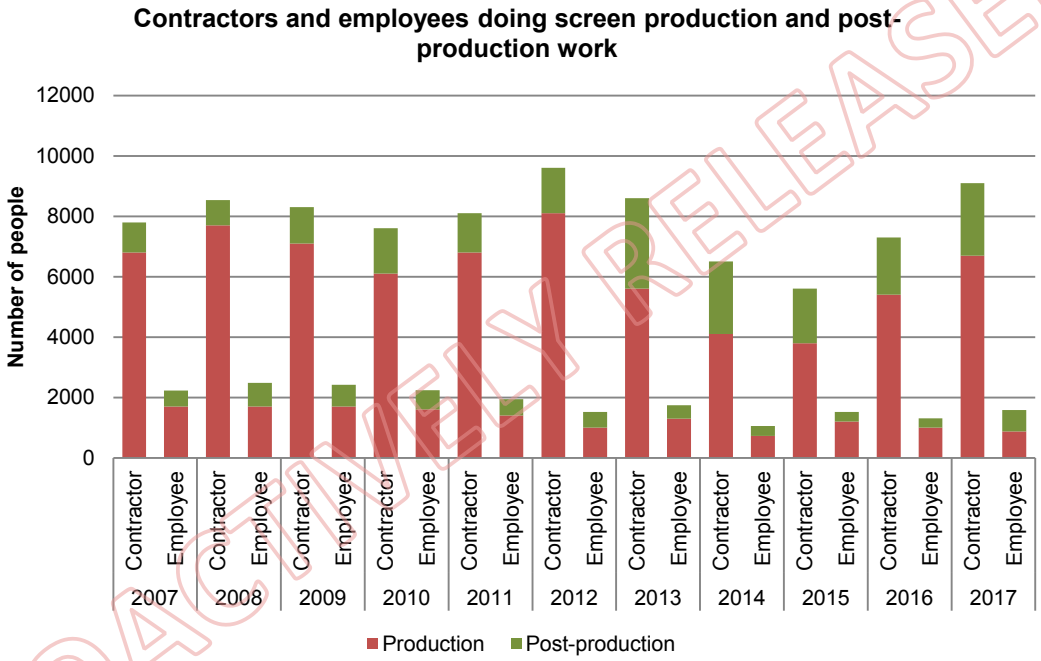
10 The Commerce Act 1986 excludes employment arrangements through its definition of services (s 2) and a specific exception relating to arrangements for remuneration and work conditions of employees (s 44(1)(f)).

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.

Confidential advice to Government

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]

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

Confidential advice to Government

[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.

Confidential advice to Government

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 *Repeal carve-out (ie employees can use existing bargaining system)*	Option 2 *Retain carve-out + create new bargaining system for contractors*	Option 3 *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. 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. 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	**– –** 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. 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. On balance, given the industry has operated for more than eight years under the carve-out, we think its removal could cause uncertainty.	**0** 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. 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** 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** **0 for existing employees and contractors** **– – for displaced workers** 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. There is no change from the status quo for existing employees and all other contractors. 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** **0 for employees** 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. There is no change from the status quo for employees because they would not be covered by the recommended model. 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** **0 for employees and non-unionised contractors** 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. 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	**–** 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. 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. 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. 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.	**+** 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. 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. 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. 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.	**–** As with option 1, we think bargaining won't be regularly initiated under this option, therefore there will be limited improvement in worker wellbeing. 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. 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. 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 *Est $1 – 3m*	Low
Regulated companies	Collective bargaining costs	Low-medium *Est $1 – 3m*	Low
	Increased labour costs	Medium *Est $15m*	Low
Regulators	Additional costs to provide bargaining and dispute resolution infrastructure	Low *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 *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 [redacted] 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.

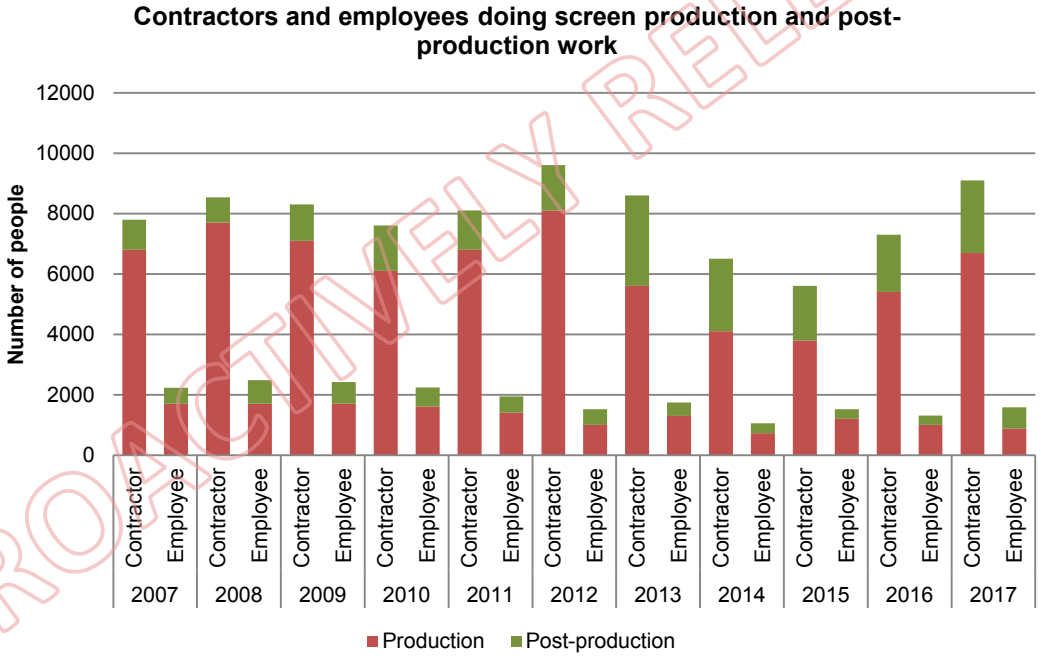
the *use* of collective bargaining. This recognises there is benefit to parties both through having the option to bargain collectively, and the outcomes flowing from participation in bargaining. For employees this can include improved terms and conditions of work. For firms this can include productivity 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).

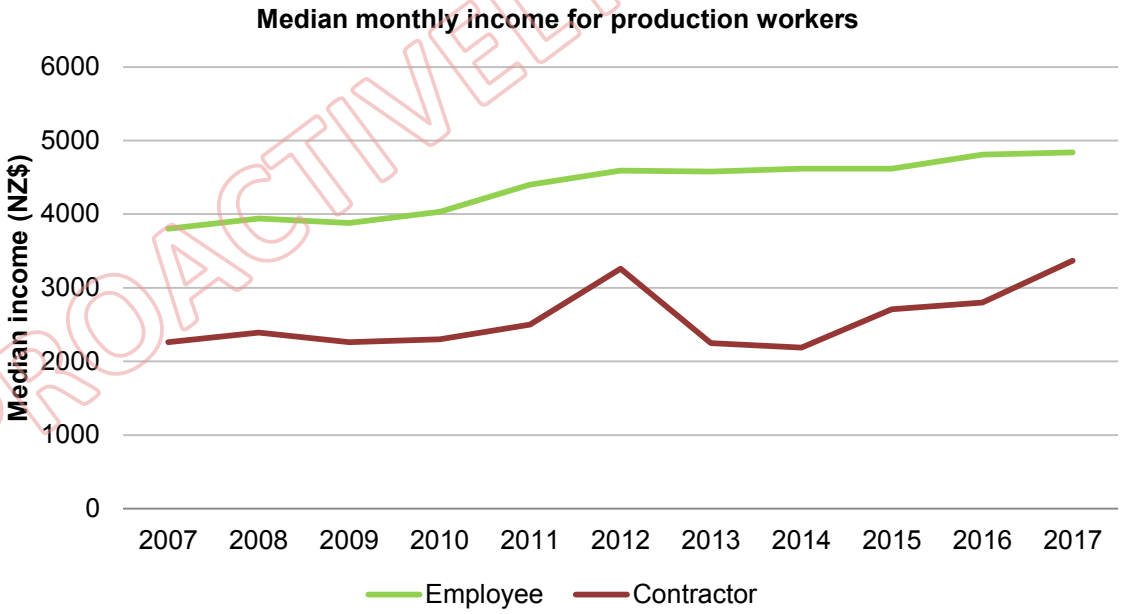
34 Statistics New Zealand, "Characteristics of independent contractors in the screen industry", 15 March 2019. Available at: https://www.stats.govt.nz/reports/characteristics-of-independent-contractors-in-the-screen-industry.

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.

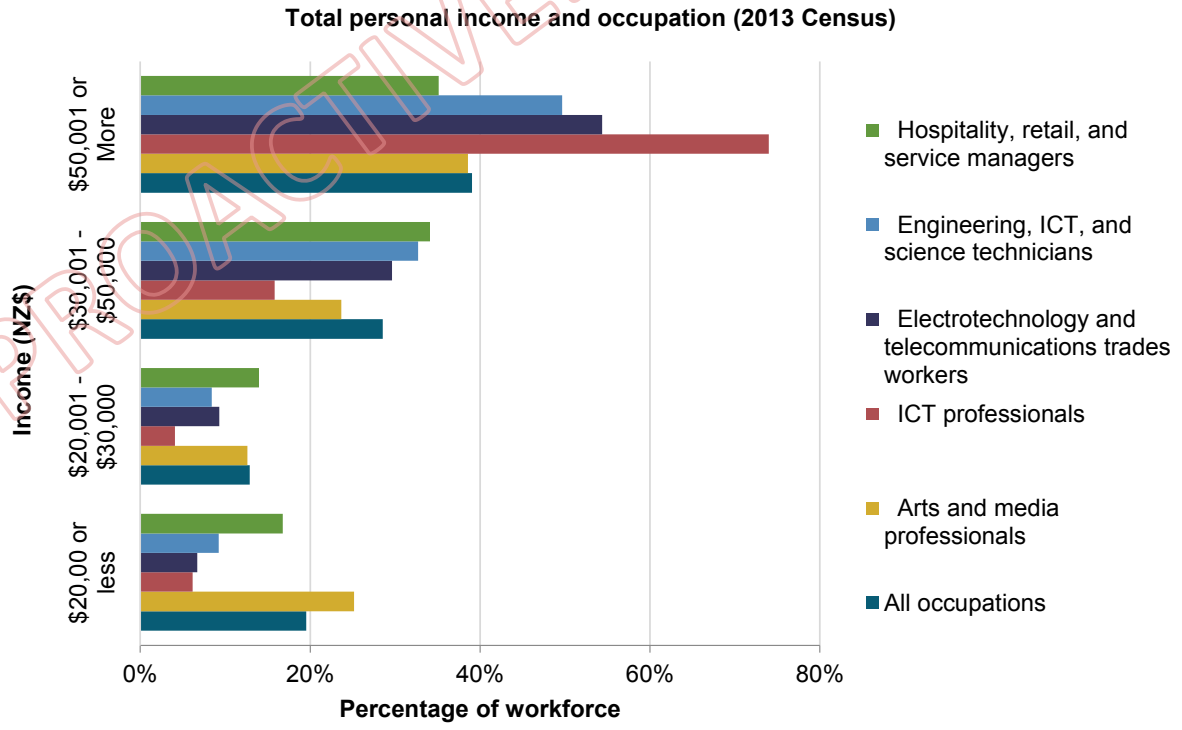
Publication note: footnote 37 should refer to page 38 of the Sapere report.

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". 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.