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HOBBIT LAWS
Human Rights and the Making of a Bad Sequel

Abstract

In 2010 the National Party-led government did a deal to keep the filming of *The Hobbit* in New Zealand. The deal involved amending the Employment Relations Act 2000 to exclude film workers from the definition of 'employee', and thus also from the protections of employment law. The amendment was rushed through under urgency, and protests and international criticism ensued. Ten years later, the Labour government is considering the Screen Industry Workers Bill. Rather than restoring employment rights to the workers in the film industry, it introduces a dangerous new precedent and continues to trade off human rights against commercial convenience.

Keywords independent contractors, freedom of association, film industry, strikes

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Much like the *Lord of the Rings* movies, the legal status of workers in the New Zealand film industry is something of a long and drawn-out saga. This article re-examines the making of the 'Hobbit law' in the light of its problematic sequel, the Screen Industry Workers Bill currently before Parliament. The 'Hobbit dispute', as it came to be known, provides a case study of political deal making, in which workers were excluded from the minimum standards of employment and human rights traded away for the sake of the commercial profitability of favoured industries. The Hobbit dispute helps to explain the peculiar Screen Industry Workers Bill currently being considered and provides timely warnings for future law reform efforts.

The legal background

The origins of the Hobbit dispute begin in 2001, when a Mr Bryson, engaged as a model technician working on the *Lord*

of the Rings movies, sought to challenge his termination, requiring him first to be declared an employee by the courts. His case was appealed all the way to the Supreme Court, which eventually decided that Mr Bryson was an employee (*Bryson v Three Foot Six*).[1] The *Bryson* case was significant for New Zealand law, becoming the leading authority on employment status determinations. It also had a particular impact on the film industry, which had taken advantage of the previous Employment Contracts Act 1991, engaging a large proportion of its workforce as independent contractors. The difference between an employee and an independent contractor is an important one, as employee status opens the door to the rights and protections of employment law. For example, an employee must be provided with the minimum employment standards, such as being paid at least the minimum wage and provided with paid annual or sick leave. Employees can access the personal grievances regime and can bring a legal case to challenge unfair treatment or dismissal, using the Employment Relations Mediation Service, the Employment Relations Authority or the Employment Court to resolve their disputes. Importantly also, an employee can join a union, and exercise legally protected rights to collective bargaining and industrial action (see Anderson, Hughes and Duncan, 2017, ch.5).

An independent contractor, 'being in business for themselves', is not covered by employment protections and is left largely to determine their own legal affairs. Employers sometimes engage in a practice called 'sham contracting', which involves misclassifying their workers as independent contractors in order to avoid having to comply with these minimum employment rights. The employment relationship is treated as a special legal relationship, with additional rules and protections due to the inequality of bargaining power that exists between the parties and the risk of exploitation. An explicit aim of the Employment Relations Act is to acknowledge and address 'the inherent inequality of power in employment relationships' (s3). The legal test for determining the status of a worker reflects this aim, requiring the courts to determine 'the real nature of the relationship' (s6(2)). The courts look at all the circumstances and decide whether the worker being described as an independent contractor is genuinely in business for themselves, or is in reality an employee and entitled to the rights and protections of employment law.

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The Hobbit dispute

The 2010 Hobbit dispute received a lot of attention at the time, and more detailed accounts are provided elsewhere (Tyson, 2011; Kelly, 2011a, 2011b; Nuttall, 2011; Wilson, 2011; Haworth, 2011; Handel and Bulbeck, 2013). To summarise briefly, the movie director Peter Jackson sought to film *The Hobbit* in New Zealand, as he had the *Lord of the Rings trilogy*. The actors' union, New Zealand Actors Equity (now Equity New Zealand), supported by international unions, sought to enter into bargaining for a collective agreement. This was refused, with the production company claiming, among other things, that to do so would breach part 2 the Commerce Act 1986, as their workers were genuinely independent contractors (despite the decision in *Bryson* discussed above). This is because the legal line between employee and independent contractor also operates as the line between legally protected collective bargaining and running a cartel. Genuine independent contractors seeking to act collectively to improve their working conditions run the risk of being accused of price fixing or entering into other cartel arrangements. While the New Zealand Commerce Commission has not typically pursued legal actions against such workers in this grey area, the Commerce Act does allow for other parties to bring cases. A disgruntled film production company seeking to prevent union action could commence such proceedings, with the attendant delays and legal costs of defending the case. This has been a tactic used overseas to prevent workers such as Uber drivers from trying to act collectively to improve their working conditions (Brown, 2020; Paul, 2017).

At the time of the Hobbit dispute, the film and television industry had seen a rise in large-scale strike action internationally (Handel, 2011; Littleton, 2013). The dispute between the New Zealand actors' union and the film production company escalated and Jackson threatened to take production to another country, with the associated loss of jobs and reputation for New Zealand as a filming destination. New Zealand politicians and industry representatives had spent considerable time and effort developing a local film industry and the loss of *The Hobbit* would have been a significant setback (Shelton, 2005). Jackson also criticised New Zealand's employment laws as being too uncertain and inflexible for the film industry, specifically citing the decision in *Bryson* (Tyson, 2011; Kelly, 2011a). The National-led government of the time intervened in the escalating dispute, negotiating directly with the Warner Brothers production company to keep the film in New Zealand. A deal was reached by which the law would be changed for the film industry and subsidies to the company to make the film would be increased in return for tourism promotion benefits, such as advertising New Zealand tourism on distributed DVDs and launching a tourism campaign in association with the New Zealand film premiere. There was considerable backlash

from unions and workers over the doing of this deal, with protests and widespread international condemnation. The deal resulted in the Employment Relations (Film Production Work) Amendment Act 2010, commonly referred to as the 'Hobbit law', being passed under urgency, meaning it was not subject to normal public consultation and submission processes (Wilson, 2011).

The Hobbit law and its effects

The Hobbit law changed the definition of employee in section 6 of the Employment Relations Act to specifically exclude workers 'engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer' and workers 'engaged in film production work in any other capacity' (s6(1)(d)). A long list of possible film industry jobs were covered by the amendments, meaning that unless a contract specified that a worker was an employee, they were deemed to be an independent contractor, regardless of what the courts considered to be the 'real nature of the relationship'. The film industry is the only industry that has been given such a special exemption, with the definition of 'employee' and the resulting employment obligations otherwise near universally applicable. As few film workers have sufficient individual bargaining power to demand that they be engaged as an employee, the effect of the amendment is to allow film production companies to dictate how their workers are engaged, depriving them of both their individual and collective employment rights. Declaring the film workers to be independent contractors, and thus outside the Commerce Act exemptions for employees, meant that film industry workers and their organisations could not engage in collective bargaining activities. The interaction of the law in this area has been set out in more depth elsewhere (McCrystal, 2014).

Reclassifying the film workers as independent contractors had obvious effects on individual bargaining power, as there were no applicable minimum legal standards and no associated inspection and enforcement machinery to support workers, as well as no protection from dismissal. The reclassification also damaged the collective bargaining power of workers in the industry, with workers unable to negotiate collectively for improvements to their working conditions or take industrial action. One of the explicit goals of the Employment Relations Act is 'to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively' (s3(b)). Freedom of association is a fundamental human right contained in article 20 of the Universal Declaration of Human Rights (1948), which New Zealand was – and still is – a signatory to, and is also protected under section 17 of the New Zealand Bill of Rights Act as well as the Employment Relations Act. While film industry workers still had the 'freedom' to join an organisation, those organisations lacked the legal rights of unions and were prevented from taking action to improve the terms and conditions of those workers. It is difficult for union power to survive under such conditions. Quite simply, there is little value in belonging to a union that cannot engage in collective bargaining or take industrial action to improve wages.

> There was no evidence presented that the film industry could not operate under the normal laws of employment, as it had done before the Hobbit law and as every other industry in New Zealand does.

Further, the absence of employment status effectively also prevents a union from enforcing minimum conditions or representing workers with individual claims. In such circumstances freedom of association rights are rendered effectively useless. As seen in the 1990s, unions are profoundly affected by the statutory conditions they operate within; Anderson concludes:

> it is almost axiomatic in industrial relations and labour law that effective collective representation requires substantial legislative support … History and practice make it clear that, in the absence of support and in the face of employer hostility to collective representation, union membership and the coverage of collective bargaining are likely to plummet. (Anderson, 2011, p.77)

The Film Industry Working Group

It is against this background that one can perhaps begin to make sense of the peculiar 2018 report of the Film Industry Working Group. When the Hobbit law was passed in 2010 the Labour Party stood in firm opposition to it, promising repeal. When the Labour-led coalition government was elected in 2017, rather than simply repeal the Hobbit law amendments it set up the Film Industry Working Group and charged it to make recommendations 'on a way to restore the rights of workers in the industry to collectively bargain, without necessarily changing the status of those who wish to continue working as individual contractors' (Film Industry Working Group, 2018a). It is unclear why the Labour-led coalition government chose to do this, and whether it was the result of industry lobbying, internal coalition dynamics or simply a desire to avoid a repeat of the publicity and political controversy that occurred in 2010.

The Film Industry Working Group involved representatives of a number of film industry bodies and guilds, and also the New Zealand Council of Trade Unions (Film Industry Working Group, 2018b, p.20). While it is difficult to know exactly what happened in its meetings, or to get a sense of the negotiation dynamics at play, when the group provided its report to the government it recommended not a repeal

of the Hobbit law amendments but an extension. The report proposed to include workers in the wider 'screen industry' within the exceptions, including those involved in television, web-based productions, online games and 'formats not yet known to the film industry' (ibid., p.4). The Film Industry Working Group considered the screen industry to be so unique as to warrant its own legal regime, with watered-down minimum standards that could be opted out of 'by agreement', in which workers are 'free to request' that they be engaged as employees and continue to have no meaningful protection from termination and no right to engage in industrial action to support collective claims.

To justify such special treatment, the reasons advanced were that the market was global and competitive; there are different types of film productions ranging in size; producers require certainty of cost and flexibility of conditions; and the nature of filming (e.g. location, light, outdoor sets, etc.) requires late changes to schedules (ibid., p.6). There are few industries in New Zealand that are not subject to global competition, do not have market participants of varying sizes, would not prefer certainty in cost and flexibility of conditions, and do not have to change working patterns and schedules due to factors such as weather or access to locations and resources. There was no evidence presented that the film industry could not operate under the normal laws of employment, as it had done before the Hobbit law and as every other industry in New Zealand does. None of the factors listed were especially unique, and none were so compelling as to justify continuing to deprive workers of their fundamental human rights.

The Screen Industry Workers Bill

Based on the recommendations in the Film Industry Working Group report, the Screen Industry Workers Bill was introduced into Parliament in February 2020. Although the recommendations of the working group are peculiar, and the Screen Industry Workers Bill is a highly problematic piece of legislation as a result, it was likely thought politically easier to simply give the industry what it had apparently agreed to than to propose something different that was more consistent with New Zealand's employment laws or international obligations. Continuing the Hobbit law legacy, the Screen Industry Workers Bill, if it is passed, will create an even larger group of workers who are declared independent contractors, with no regard to the reality of their working situation and leaving them without the full protections of employment law. While workers may 'choose' to request to be employees, the production companies may also 'choose' to refuse to engage them as such (the same position as presently the case). The bill does restore some collective bargaining rights, granting an exemption from the Commerce Act. It creates a watered-down good faith regime, with no right to strike, that falls far short of what is anticipated in ILO conventions 87 and 98. This point is articulated well by Gordon Anderson in his submissions to the parliamentary select committee on the bill:

> The Bill, as with the 'Hobbit' legislation, provides a signal that New Zealand law is amenable to reform on the demand of overseas investors and that New Zealand is willing to tailor its laws to conform to the employment prejudices of such investors … The right to strike, other than in very limited circumstances, is an internationally recognised fundamental right of all workers. The convenience of one, non-essential, industry [does] not justify such an exception. Apart from depriving workers in the screen industry of a fundamental right, the removal of the right to strike sets an unwelcome precedent. (Anderson, 2020)

While the right to strike is often unpopular with employers and governments … it is a fundamentally important human right, core to the ILO decent work agenda and the 2030 United Nations Sustainable Development Goals …

The decisions of the ILO Committee on Freedom of Association clearly set out that 'the right to strike is a fundamental right of workers and their organisations', 'an intrinsic corollary to the right to organise protected by Convention No. 87' and an 'essential means through which workers may promote and defend their economic and social interests' (ILO Committee on Freedom of Association, 2018). Further, it is clear that 'all workers must be able to enjoy the right to freedom of association regardless of the type of contract', that 'the status under which workers are engaged by the employer should not have any effect on their right to join workers organisations and participate in their activities', and, further, that 'the criterion for determining the person covered by the right to organise is not based on the existence of an employment relationship' (ibid.). A right to bargain without a right to strike is referred to as 'collective begging' and has far less practical value (Novitz, 2020). While the right to strike is often unpopular with employers and governments (the government itself being a very large employer), it is a fundamentally important human right, core to the ILO decent work agenda and the 2030 United Nations Sustainable Development Goals, operating as a civil and political right at the heart of a democratic society and a social and economic right to counter the abusive

exercises of economic power (ILO, 2021; Novitz, 2019). The Screen Industry Workers Bill has been reported back from select committee, and there have been some changes made, but the core issues, especially in relation to the right to freedom of association, remain. At May 2021, the bill appears to have stalled, with the government announcing it has done a deal with Amazon to film the Lord of the Rings television series in New Zealand. The deal involves substantial increases in the subsidies payable to Amazon. It has not been confirmed that the stalling of the bill forms part of this deal, but the timing suggests this may be the case.

Regardless of the deal done with Amazon, the creation of the Screen Industry Workers Bill sets a dangerous precedent. It indicates a political willingness to slice out segments of the workforce to exclude from the protections of employment law on the basis that it may be more convenient for certain industries. The risk of setting a precedent is a very real one at the moment. The government has signalled its intention to change the law relating to independent contractors, but not what it is proposing to do (Ministry of Business, Innovation and Employment, 2019). It is also Labour Party policy to introduce fair pay agreements, which, although still light on detail, seem likely to entail bargaining for industry minimum conditions applicable to all workers, but that involves either a partial or total loss of the right to strike (New Zealand Labour Party, 2021).

There are other industries that may be looking to the special treatment of the film industry as a template for their own lobbying, and could just as easily argue that they were 'unique' in being subject to global competition and the risk of international capital flight and would prefer certainty of cost and increased flexibility. For example, in 2020 there were three legal cases on the employment status of drivers (*Leota v Parcel Express, Southern Taxis v A Labour Inspector* and *Archchige v Raiser*).[2] The courier and taxi drivers in *Leota* and *Southern Taxis* were held to be employees, but the Uber drivers in *Archchige* were held to be independent contractors. The previous legal status of drivers had been an area of ongoing ambiguity (due to the peculiarities of how the Supreme Court in the *Bryson* decision dealt with the previous leading case). Transport sector companies unhappy with the 'uncertainty' of these recent decisions may well be looking for the government to do a similar deal to that done for the film industry. The clarification of the status of Uber drivers as independent contractors also opens the door to actions for breaching the Commerce Act should Uber drivers seek to act collectively to improve their working conditions.

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A lesson for future reforms

The Hobbit dispute and the Screen Industry Workers Bill are symptomatic of wider problems and provide important warnings for policymakers trying to solve them. In late 2019 the government started consulting on reforms to the law relating to independent contractors, with a number of options open for consideration (Ministry of Business, Innovation and Employment, 2019). It is widely recognised that the centuries-old distinctions between employee and independent contractor are out of step with the hiring practices of the contemporary labour market and that some type of reform is needed. There is no consensus, however, about what that reform should look like. The Screen Industry Workers Bill is one model of response. While this response may be a dream come true for industries that would like to be free of their employment obligations and given a chance to write their own special laws, it also creates segments of the workforce with fewer legal rights than others, with less access to justice and particularly vulnerable to exploitation. For example, while some workers in the newly expanded category of 'screen production workers' will have greater rights than they had under the Hobbit law, they will not have equal rights to other workers in the labour market, and they will not have the full rights they are entitled to in the human rights instruments that New Zealand has adopted.

Additionally, if the Screen Industry Workers Bill passes, many workers not previously covered by the Hobbit law will then be able to be deprived of their employment status and the legal protections afforded by it. While these workers can notionally ask to be engaged as employees, the reality is that very few will have the bargaining power to do so. This lack of individual bargaining power is the underlying reason for having universally applicable minimum employment protections in the first place, and is also the reason that the right to freedom of association is a fundamental human right.

The Hobbit dispute and the Screen Industry Workers Bill provide a number of warnings to policymakers and legislators. The first warning relates to the role of working groups in law making, and the need to carefully consider whether a working group is appropriate, its terms of reference, its membership and negotiation dynamics and the risk of capture. While potentially offering a government the ability to avoid responsibility and controversy over the law that results, establishing a working group does not guarantee that better law will be made. The second warning relates to attempts to tinker with bad law, rather than repealing and properly fixing the underlying

problems. A key thing to remember is that, if not for the Hobbit law, many of these workers would be employees. The Hobbit law removed these workers' legal rights without consultation or due democratic process. Were it not for the Hobbit law there would have been no reason to establish a Film Industry Working Group, and had a Film Industry Working Group not been established, the Screen Industry Workers Bill would likely never have been drafted in such a form, opening up a raft of new problems. If, for example, the government considers there is a problem with the law relating to independent contractors, it should repeal the Hobbit law and properly reform that area of law in a way that gives certainty to all businesses and workers.

The third warning is about the role of the law in protecting workers from exploitation and intervening in unequal bargaining relationships. There are very good reasons why universal minimum employment standards and international conventions on fundamental workers' rights exist, and trading off those minimum standards and human rights for the convenience of powerful international corporations should not be an acceptable compromise in New Zealand employment law.

1 *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC); *Bryson v Three Foot Six* [2005] NZSC 34.

2 *Leota v Parcel Express* [2020] NZEmpC 61; *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63; *Arachchige v Raiser New Zealand Ltd* [2020] NZEmpC 230.

References

Anderson, G. (2011) *Reconstructing New Zealand's Labour Law: consensus or divergence?*, Wellington: Victoria University Press

Anderson, G. (2020) Submissions to the parliamentary select committee on the Screen Industry Workers Bill, 4 June

Anderson, G., J. Hughes and D. Duncan (2017) *Employment Law in New Zealand* (2nd edn), Wellington: LexisNexis

Brown, R.C. (2020) 'Ride-hailing drivers as autonomous independent contractors: let them bargain!', *Washington International Law Journal*, 29 (3), pp.533–74

Handel, J. (2011) *Hollywood on Strike! An industry at war in the internet age*, Los Angeles: Hollywood Analytics

Handel, J. and P. Bulbeck (2013) *The New Zealand Hobbit Crisis*, Los Angeles: Hollywood Analytics

Haworth, N. (2011) 'A political economy of "the Hobbit" dispute', *New Zealand Journal of Employment Relations*, 36 (3), pp.100–9

Film Industry Working Group (2018a) Terms of Reference, January

Film Industry Working Group (2018b) New Zealand's Screen Industry: great work, great workers: recommendations of the Film Industry Working Group to the government, October, Film Industry Working Group

ILO (2021) 'Freedom of association and collective bargaining', https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm

ILO Committee on Freedom of Association (2018) *Freedom of Association: compilation of decisions of the Committee on Freedom of Association*, Geneva: International Labour Office

Kelly, H. (2011a) 'Helen Kelly: the Hobbit dispute', *Scoop*, 12 April, https://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>

Kelly, H. (2011b) 'The Hobbit dispute', *New Zealand Journal of Employment Relations*, 36 (3), pp.30–3

Littleton, C. (2013) *TV on Strike: why Hollywood went to war over the internet*, New York: Syracuse University Press

McCrystal, S. (2014) 'Organising Middle-Earth? Collective bargaining and film production workers in New Zealand', *New Zealand Universities Law Review*, 26 (1), pp.104–31

Ministry of Business, Innovation and Employment (2019) *Better Protections for Contractors: discussion document for public feedback*, November, Wellington: Ministry of Business, Innovation and Employment

New Zealand Labour Party (2020) 'Workplace relations and safety', https://www.labour.org.nz/workplacerelations

Novitz, T. (2019) 'Freedom of association: its emergence and the case for prevention of its decline', in J. Bellace and B. te Haar (eds), *Research Handbook on Labour, Business and Human Rights*, Elgar online

Novitz, T. (2020) 'The perils of collective begging: the case for reforming collective labour law globally and locally too', *New Zealand Journal of Employment Relations*, 44 (2), pp.3–19

Nuttal, P. (2011) '"Where shadows lie": confusion, misunderstanding and misinformation about workplace status', *New Zealand Journal of Employment Relations*, 36 (3), pp.73–90

Paul, S. (2017) 'Uber as a for-profit hiring hall: a price-fixing paradox and its implications', *Berkeley Journal of Employment and Labor Law*, 38 (1)

Shelton, L. (2005) *The Selling of New Zealand Movies*, Wellington: Awa Press

Tyson, A.F. (2011) 'A synopsis of the Hobbit dispute', *New Zealand Journal of Employment Relations*, 36 (3), pp.5–13

Wilson, M. (2011) 'Constitutional implications of "the Hobbit" legislation', *New Zealand Journal of Employment Relations*, 36 (3), pp.91–9