

1 May 2000

## **Submission**

**TO: Employment and Accident Insurance Legislation Committee**

**ON THE: Employment Relations Bill**

### **Introduction**

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).
2. We wish to appear before the committee to speak to our submission. We can be contacted at (04) 802 4577. Those who wish to appear are Karen Soich, President of SPADA, Jane Wrightson, Chief Executive of SPADA and one independent producer who is a member of SPADA.
3. SPADA is the foremost industry organisation representing film and television producers and directors in New Zealand. We have 250 members who employed or contracted over 5000 people last year. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand*. An operating arm of SPADA is Film New Zealand, which markets New Zealand offshore as a filming location for foreign producers.
4. This submission has been approved by SPADA's Executive, a board annually elected by its members.

### **General Summary**

5. SPADA is primarily concerned that clause 6 of the Bill, the definition of an employee, and Clause 81, dealing with fixed term contracts, do not fit with the procedures and practices of the screen production industry as they relate to the provision of goods and services by independent contractors. These procedures and practices are standard in the international screen production industry.

## Background

6. The film, television and commercial production industry is unusual in the extent to which it comprises independent contractors. In 1998/99, the estimate of personnel employed was 6,412 independent contractors or freelancers, 552 part time employees and 766 full time employees.<sup>1</sup>
7. Production companies are typically very small, with a tiny core staff (sometimes just the owner plus an assistant) augmented with contractors as productions are commissioned. There is only a handful of production companies (perhaps a dozen across New Zealand) with more than ten full time permanent staff.
8. The reason for this is the project-based, intermittent nature of screen production and the transferable skills of industry practitioners. People are usually hired specifically for the production of a particular film, programme or commercial. Almost all in the industry work on several projects for several different producers during the course of a year depending on their skill base and the availability of work. A production engagement can be as short as one day or as long as many months (but almost never longer than a year). This is the same as all screen production internationally. For example:
  - The producer of a one-hour documentary (of which over 60 are made each year) will employ, on average, a researcher for four weeks, a director for eight weeks, an editor for four weeks etc. Even if that producer made two or three documentaries back-to-back, different personnel will usually be required on each production for creative reasons, given the unique nature of each production.
  - The producer of a feature film will be in a similar situation to the above, with a longer production period (eg. an editor would normally be employed for around 16-18 weeks)
  - The producer of a television commercial will also be in a similar situation to the above, with a much shorter production period (eg. an editor would normally be employed for one - two weeks)
  - The producer of a 40-part special interest magazine series (of which around half a dozen are made per year) may well employ a core staff for the period but will have no guarantee from year to year that the series will be renewed by the network.
  - The producer of a long-running drama series (of which perhaps four or five are made per year, assuming that foreign-originated companies remain here to augment the low levels of New Zealand-originated production in this genre) is the most likely to have significant numbers of permanent employees. However these do not necessarily include actors, given the creative need to write their characters in and out of scripts in such series.
  - Most producers are unlikely to have projects which dovetail neatly into a 48 week working year and which provide continuity of employment.

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<sup>1</sup> Source: *Survey of Screen Production in New Zealand 1999*. Colmar Brunton. p27

## Why Does This Matter?

9. The screen production industry has been identified as an emerging key source of foreign exchange by central and local government and a key creative industry employer. In 1998/99, the industry earned \$155 million in foreign exchange and spent \$307 million on production. We expect both these earnings to more than double this year<sup>2</sup> and employment in the screen production industry to continue to surpass many of the traditional labour-intensive industries.
10. In addition, one of Film New Zealand's key marketing planks in the very competitive world of international locations marketing is the comparative lack of employment barriers. Other countries offer significant tax breaks and employment deductions which can compensate in part for a high level of red tape. In the absence of this type of incentive New Zealand has to be able to offer, in addition to great scenery and a low dollar, a stable regulatory environment and simple employment and payroll procedures.

## Impact of the Bill

11. Our prime concerns are **Clause 6**, the definition of an employee and **Clause 81**, dealing with fixed term contracts.
12. The definition of employee is somewhat foreign to an industry which operates in a collaborative and cooperative manner. Few members of a production are directly supervised (unless in training). Is an actor an employee? A camera operator? A writer? A production accountant? Few of these are, currently, except in the small handful of larger production houses.
13. These personnel are also atypical compared to a traditional employee in that many make considerable investment in their own plant and equipment which is offset as a business expense. For example:
  - Technical crew such as boom operators and sound recordists all own expensive equipment, the provision of which is included in the contract fee.
  - A lighting gaffer may well own a lighting truck, the provision of which is included in the contract fee.
  - An Art Director invests in several thousand dollars of tools, drills repair materials and the like, which also form part of the goods and services provided.

None of this material is, or realistically can be, provided by a small production company. These technical personnel operate as sole traders or small businesses, but are almost certainly employees under the Bill as it stands by virtue of the "control and direction" test in clause 6.

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<sup>2</sup> Op cit.

14. The main problem for the film and television industry with this generic approach is that the project-based stop/start nature of our work does not fit with this approach. This is because:
- 14.1 The many thousands of contracts annually entered into within the screen production industry are for periods as short as one day and on average would be for one - three months.
  - 14.2 The requirement of personal grievance procedures is not tenable for the majority of short-term projects which comprise most of the work in the screen production industry. To provide oral and written warnings, and sufficient time to improve with, say, a four week shoot, is not realistic. The project would usually be completed by the time the procedure was followed.
  - 14.3 There is no certainty of status between the company and the contractor who, at the time of entering their agreement, both believe that they are contracting for a certain state of affairs (eg. tax, ACC, holiday, insurance etc) only to find a retrospective 'employee' status imposed unilaterally.
  - 14.4 If an independently-produced series is cancelled or not renewed by a television network (generally because of ratings or changed network priorities), a substantially increased number of newly-defined "employees" would be entitled to redundancy payments. The personnel budget of a series is based on the cost of staff during the production period, and does not include potential redundancies. The small size of production companies means that this requirement would see many, if not most, bankrupted. Alternatively, providing for potential redundancy costs would inflate production budgets and we are certain that the market (eg. funders like NZ On Air and the NZ Film Commission, broadcasters like TVNZ and TV3, advertising agencies and their clients and offshore financiers) will not bear this cost.
  - 14.5 If a series is renewed, the Bill effectively imposes an obligation on the producer to rehire a fixed-term contractor who has worked on the first series, irrespective of the creative or directional needs of the production have changed or not. The freedom to contract the best available for the job will have been removed.
15. *We submit that the definition of employee be amended (or that a new test be developed) to take into account industries typified by small employers with a high reliance on skilled independent contractors, who may effectively be under the control and direction of the employer for the period of the contract, but who are in reality operating in all other respects as sole traders or small businesses.*
16. We are also concerned that the Bill does not address the tax status of the proposed dependent contractors. Currently most operate as sole traders or small companies, paying GST, withholding and/or company tax and claiming business-related expenses for the provision of their equipment and services to a production. We submit that:

- 16.1 *The tax status of a contractor must be clear in the legislation and not left to the interpretation of the IRD. The IRD has had difficulty over many years in treating members of the film and television industry consistently.*
- 16.2 *Even if the concept of dependent contractors is deemed to apply to the screen production industry (with the requirement to follow personal grievance procedures) contractors should still be classed as sole traders or small businesses for taxation purposes, and not entitled to be covered by Holidays Act provisions, ACC nor receive similar benefits such as paid statutory holidays and sick leave. These elements are already built into the contract price and the Bill's requirements would lead to an inflationary effect on budgets or a drop in the net amount received by the contractor.*

### **Other points**

17. We note that there are no transitional provisions when the Bill is enacted. This will be onerous on small businesses with little infrastructure and high levels of contractors, such as those typical of the film and television industry. It seems quite unfair that the cessation of a short-term fixed contract entered into in good faith by both parties could then be subjected to personal grievance provisions. We submit:
- 17.1 *That a transitional provision be included in the Bill specifying that existing contracts covering less than a six month period after the legislation is enacted be allowed to run their course without being impacted upon by the new legislation.*
18. The impact of the Bill, as it stands, on the screen production industry would seem to be at variance with the initiatives of both the Government and our industry which are designed to encourage the growth, employment and export potential of this creative industry. In short, we believe that our industry has largely been captured by default with this Bill, and that due consideration has not been given to this type of new and emerging industries which operate differently to traditional work structures and which operate in a collaborative and cooperative way.

**Jane Wrightson**  
**Chief Executive**  
**Screen Producers and Directors Association**

**1 May 2000**