



## BRIEFING

### Draft Cabinet paper 'Fair Pay Agreements: Approval to draft'

<b>Date:</b>	26 March 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2519

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations &amp; Safety</b>	Agree to provide feedback on draft Cabinet paper after Ministerial consultation	6 April 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Beth Goodwin	Principal Advisor, Employment Relations Policy	04 901 1611		✓
Vainui Moresi	Graduate Policy Advisor, Employment Relations Policy	04 830 7389		

The following departments/agencies have been consulted
The following agencies were consulted on the Cabinet paper: the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, the Te Kawa Mataaho Public Service Commission, Te Puni Kōkiri, the Ministries of Justice, Transport, Health, Education, and Social Development, Ministries for Women and Pacific Peoples, Department of Corrections and Inland Revenue Department.

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



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### Purpose

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This briefing provides you with a draft Cabinet paper to undertake Ministerial consultation.

### Executive summary

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We have circulated the current draft paper *Fair Pay Agreements: Approval to draft* to relevant government departments. Some departments have raised concerns or made suggestions in their feedback. We have highlighted these concerns and noted our response, including whether the proposals contain any mitigants to risks raised.

### Recommended action

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The Ministry of Business, Innovation and Employment recommends that you:

- a **Agree** to undertake Ministerial consultation on the draft Cabinet Paper *Fair Pay Agreements: Approval to draft*  
*Agree / Disagree*
- b **Provide** feedback on the attached draft Cabinet Paper following Ministerial consultation by 6 April  
*Agree / Disagree*
- c **Note** the concerns raised by other government departments  
*Noted*
- d **Confirm** that an initiating union for an occupational FPA does not need to specify which industries are within coverage, as the intention is that all employees working in that occupation are in coverage  
*Agree / Disagree*

Beth Goodwin  
**Principal Advisor, Employment Relations  
Policy**  
Labour, Science and Enterprise, MBIE

26 / 3 / 21

Hon Michael Woods  
**Minister for Workplace Relations and  
Safety**

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## Background

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1. We have prepared a Cabinet paper for you to seek full policy decisions and approval to draft a Bill to implement a Fair Pay Agreements (FPA) system. As usual, we circulated the paper for departmental consultation.

## Concerns have been raised by other government departments

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2. Some government departments have raised concerns in their feedback on the draft Cabinet paper, accompanied by a number of recommendations. We have addressed their comments in the paper where possible, but some comments conflict with design decisions you have already made. Departments may choose to brief their Ministers about those comments. This cover note summarises those key suggestions, and MBIE's responses.

### The FPA system should target key workforces

3. The Ministry of Education suggests the system would benefit more from having targeted workforces undertake FPA bargaining first. This would allow for observation of a working FPA to see what effects occur, before more FPAs are bargained.
4. The Treasury suggested targeted FPAs for the purpose of prioritising workforces that are widely considered to deserve better terms and conditions, and included this suggestion in its Treasury comment for the Cabinet paper (see paragraph 179 of the attached Cabinet paper). Treasury also suggested limiting the number of FPAs that can be progressed at any one time, saying it would ensure the new FPA system has the capacity to progress and complete FPAs in a timely manner.
5. Finally, Treasury noted implementing both suggestions together would be most effective and this limit on FPA initiations could be revised when the FPA system is next reviewed and more certain of its capacity.

#### *MBIE comment*

6. We note that you are aware of the risks associated with not targeting workforces for initial FPAs and you have decided to not target particular workforces through initiation thresholds, although Confidential advice to Government [REDACTED] We have made no change to the Cabinet paper in response to these comments.

### Representation by unions may not be effective for sub-groups (e.g. population groups, small employers)

7. The Ministry of Social Development (MSD) and Treasury both raised concerns that the perspectives of disadvantaged groups (disabled people, Māori, women) may not be adequately represented by unions. Treasury suggested that government should take a more active role in supporting workforces with low union density to ensure affected workers are represented well (rather than relying on unions with low density to act in the interest of workforces).
8. MSD commented that the absence of industrial action in the FPA system would further prevent the voices of disadvantaged groups from being adequately represented.
9. The Office of Disability Issues within MSD sought strengthened representation of disabled employees in FPA bargaining, particularly where a significant number of disabled people are employed, and believed that representation through sector unions is currently unlikely to meet this goal.

#### *MBIE comment*

10. Bargaining sides must use their best endeavours to represent affected parties within coverage (including non-members) on their side. This is a tailored obligation that differs from the duty of good faith in the Employment Relations Act, as requiring bargaining sides to establish and maintain a productive relationship with all the workers or employers in coverage would be a significant burden.
11. We have addressed these concerns by adding a further clarification to the bargaining obligations into the Cabinet paper (see the table in Annex A of the Cabinet paper). It now specifies that both bargaining sides must consider whether there are particular population groups or interests (including those who may be at risk of being overlooked) within the FPA coverage that should be recognised and reflected during bargaining (e.g. Pacific peoples, small businesses).
12. The Cabinet paper also includes a proposal to give more government support to bargaining sides representing workforces with low union density.

#### **FPA's will result in higher costs for the government**

13. Treasury has commented that the government will have reduced control over how much it is paying for its own employees and funded workforces.
14. The Ministry of Health raised the risk that District Health Board and public sector employers may be involved in FPA bargaining where the majority of employer parties are private sector companies. This will mean there is no certainty that settlements will observe the Government's fiscal or other expectations.

#### *MBIE comment*

15. You are aware of the possible impacts on the public sector so we have not suggested any changes to the paper. The paper already proposes to make the Public Service Commissioner responsible for FPA bargaining covering employees in the public sector.

#### **The FPA system is complex and will create a burden for employers/unions**

16. Ministry of Education (MoE) commented that the FPA system will burden unions/workers with extra costs, be a struggle for entities who lack capacity already and add confusion through the volume of obligations it creates (e.g. frequent communication obligations).
17. MoE has noted these burdens could lead to negative impacts on FPA progression and completion as well as the quality of bargaining participation from involved parties.

#### *MBIE comment*

18. You are aware that the system is complex and creates new obligations, so we have not suggested any changes to the proposals in the Cabinet paper. Government support via funding (to both bargaining sides and peak bodies) and provision of a bargaining support person will help mitigate the concerns of parties struggling with the FPA process.

#### **Interface between the FPA system and the Treaty of Waitangi**

19. Te Puni Kōkiri has requested a Treaty of Waitangi section describing the Crown's obligations be included prominently at the front of the Cabinet paper.
20. Treasury has identified a risk that the Crown is delegating responsibility to the bargaining parties who are third parties, and notes that the Crown cannot delegate its responsibility to uphold the Treaty of Waitangi.

### MBIE comment

21. We have incorporated a Treaty of Waitangi section on Te Puni Kōkiri's recommendation, but have located it just above the Population Implications section. MBIE's view was that giving this section prominence at the front of the Cabinet paper would have implied that Treaty obligations were a core driver and purpose of the FPA policy.
22. The section notes the overrepresentation of Māori and especially wāhine Māori in jobs with poor work outcomes (with more detail provided in the Population Implication section), and notes the Crown's obligation to design the FPA system in a way that ensures effective representation and participation of Māori in bargaining. The paper creates an obligation on bargaining parties to ensure Māori are effectively represented and Māori interests and views are sought and considered.
23. It is possible that the Crown could be challenged, under its Treaty obligations, in relation to outcomes of FPA bargaining. However, the delegation of decision making is an integral part of the bargained nature of the FPA system, so we have proposed no change to the paper in response to that aspect, other than noting it in the risks section.

### FPA's could give contractors a competitive advantage

24. Ministry of Transport is concerned that workforces such as Uber drivers may gain competitive advantage over taxi drivers due to contractors being initially excluded from the FPA system.

### MBIE comment

25. This is a known risk. You intend to bring contractors into the FPA system as soon as possible. In the meantime, penalties are being introduced where employers misclassify their employees to avoid FPA coverage.

### We also propose one clarification for workability reasons

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26. Our advice in relation to coverage recommended that for occupational FPAs, the initiating union needed to specify the occupation and industry(ies) within coverage (briefing 2021-1837 refers). However, as we understand the policy intention to be that *all* workers in an occupation would be included in an occupational FPA, in drafting the Cabinet paper we have omitted the requirement to specify industries. We now seek your approval to this change.
27. This is different to an industry FPA, where the initiating union *will* be required to specify which occupations are within coverage – the difference in approach is because all industries contains a wide variety of occupations, including those which are highly-paid, and it may make sense to only specify some occupations to be covered.

### Next steps

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<b>Action</b>	<b>Date</b>
Your office notifies MBIE of any changes from Ministerial consultation, MBIE provides a finalised Regulatory Impact Statement (RIS) to your office	6 April 2021
MBIE finalises Cabinet paper following Ministerial consultation	7 April 2021
Cabinet paper and RIS lodged	8 April 2021
Paper considered by Cabinet Economic Development Committee	14 April 2021

## Annexes

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Annex 1: Draft Cabinet paper *Fair Pay Agreements: Approval to draft*

Cabinet paper is available here: <https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-agreements-approval-to-draft-proactiverelease-pdf>