



## BRIEFING

### Fair Pay Agreements: bargaining fees

<b>Date:</b>	20 January 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-1914

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	<b>Agree to not allow bargaining fee clauses in Fair Pay Agreements.</b>	27 January 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	✓
Beth Goodwin	Principal Advisor, Employment Relations Policy	04 901 1611	

The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments**



# BRIEFING

## Fair Pay Agreements: bargaining fees

<b>Date:</b>	20 January 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-1914

### Purpose

To advise that you should explicitly prohibit bargaining fees, given it is likely that silence in the Bill would mean that bargaining fee clauses are not allowed.

### Recommended action

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

- a **Note** unions are likely to want to recover some of their costs from non-members for representing them during FPA bargaining. *Noted*
- b **Note** we don't think it's appropriate to allow bargaining fees, due to the impacts it would have on freedom of association and as you intend to provide a Government contribution to bargaining costs. *Noted*
- c **Note** that if the FPA legislation was silent on bargaining fees (i.e. there was no explicit empowering provision) we believe a bargaining fee clause in an FPA would not be upheld by a court if it was challenged. *Noted*
- d **Agree** to not allow bargaining fee clauses in Fair Pay Agreements. *Agree / Disagree*

Tracy Mears  
**Manager, Employment Relations Policy**  
Labour, Science and Enterprise, MBIE

20 / 01 / 2021

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

..... / ..... / .....

## Background

---

1. In 2020 we recommended<sup>1</sup> to the former Minister of Workplace Relations and Safety that bargaining representation costs should lie where they fall, with parties to agree how shared costs of bargaining are paid. We did not recommend bargaining fees or levies as a feasible option, primarily for reasons of efficiency: the transaction costs of collecting contributions would be high compared to the (probably relatively low) amount collected from each industry participant. At the extreme, this could result in an overall net economic loss if collection costs are higher than amounts collected.
2. The former Minister agreed with that policy principle of 'costs lie where they fall', but also decided that the government would make a contribution towards bargaining costs. He agreed to pay \$50,000 to each bargaining side for each FPA initiated.<sup>2</sup> You indicated you wished to increase the monetary amounts – we will provide advice on higher amounts shortly.
3. You asked what the effect of silence in the legislation would be – whether bargaining fees would be allowed or prohibited. This briefing addresses that issue.

## Employment Relations Act allows for bargaining fees, with an opt-out

---

4. A 'bargaining fee' clause means a clause in a collective agreement that requires non-union member employees who perform work which comes within coverage of the collective agreement to pay a fee to the union, in return for receiving the benefit of the terms of the collective agreement.<sup>3</sup>
5. Part 6B of the Employment Relations Act 2000 (ER Act) explicitly allows for bargaining fees, but with significant limitations. A bargaining fee clause can only be included in a collective agreement if a majority of affected employees (ie both union and non-union members) who participate, vote in favour of the clause in a secret ballot.<sup>4</sup> Once a bargaining clause is operative, non-union members can opt out of paying the bargaining fee, and terms of the collective agreement will not apply to them.
6. Part 6B explicitly states that bargaining fee clauses created under Part 6B override the Wages Protection Act 1983 (which forbids deductions from wages without written consent, or stipulations of how wages are to be spent), and do not breach provisions in the ER Act related to voluntary membership of unions, prohibitions on preference and undue influence.<sup>5</sup>

## We believe a Court would rule that silence about bargaining fees in FPA legislation means they are not allowed

---

7. The question of whether bargaining fees can be negotiated in collective bargaining where the governing legislation is silent was considered by the courts in 2004. The ER Act was originally enacted without the above provisions about bargaining fees.<sup>6</sup> In the *NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd*<sup>7</sup> case the Court of Appeal considered the legality of a collective agreement which purported to create a bargaining fee. The parties gave existing employees the choice to opt in, but could not later opt out and the bargaining

---

<sup>1</sup> Briefing 2210 19-20

<sup>2</sup> Briefing 2512 19-20. The former Minister also agreed to contribute \$50,000 per year for three years to both peak bodies (BusinessNZ and New Zealand Council of Trade Unions) to build capability and capacity, and you have indicated you expect to increase this amount – however we do not expect this to directly offset bargaining costs.

<sup>3</sup> Defined in section 69P ER Act

<sup>4</sup> Section 69Q

<sup>5</sup> Section 69W

<sup>6</sup> Part 6B was inserted by the Employment Relations Amendment Act (No 2) 2004.

<sup>7</sup> [2004] 3 NZLR 652

fee was mandatory for any new employees. The Court ruled that the compulsory elements of the bargaining fee were unlawful, because they were contrary to the Wages Protection Act: the bargaining fee purported to dictate how employees must spend their wages.

8. FPAs will differ from collective agreements under the ER Act, as the resulting agreement will be made into a regulation [briefing 2021-1615], and thus take the form of secondary legislation, rather than simply a contractual agreement.
9. Unlike collective bargaining under the ER Act, employees will not be able to opt out of FPA coverage – once the FPA is made, all employees within coverage will be entitled to the benefit of its provisions. Therefore an opt-out clause similar to that in the ER Act is impractical, as there will be no incentive for any employee to stay opted in.
10. The alternative is a compulsory bargaining fee. Based on the *NZ Dairy Workers Union* decision, we believe a court would not allow such a clause if the FPA Act does not explicitly allow for it – the court would likely rule that the Wages Protection Act provisions would trump any purported bargaining fee clause in a regulation giving effect to an FPA.
11. The Legislation Design Advisory Committee (LDAC) Guidelines state that “Legislation must include an empowering provision that specifically authorises the Executive to prescribe a fee or levy.... it will usually be unlawful for a public body to charge a fee or levy without express authority from Parliament.”<sup>8</sup>

## **It would be best practice to specify the rules about bargaining fees in the Bill**

---

12. If there is ambiguity in relation to the legal position on bargaining fees, there is an incentive for unions to seek to include a bargaining fee in an FPA, and test through the courts whether it is permissible. It is also likely that parties may seek to test whether Part 6B in the ER Act (as the general employment legislation) applies to FPAs.
13. If the government decides a policy position on whether bargaining fees should be allowed, good legislative practice would be to clarify that position in legislation, including clarifying its interaction with the ER Act and Wages Protection Act.
14. Therefore, we have re-examined our previous advice on bargaining fees, in assessing whether to advise to explicitly allow or prohibit them.

## **We continue to recommend not allowing bargaining fees**

---

15. We have re-examined our earlier advice of whether to use the tool of bargaining fees to spread costs among participants, particularly considering the criteria of efficiency, supporting rights, and consistency with other bargaining systems. Overall, we consider that the costs of explicitly allowing for bargaining fees outweigh the benefits, so we recommend you specify in legislation that bargaining fees are prohibited.
16. As stated above, we believe allowing for bargaining fees with an opt-out (or opt-in) clause is not a viable option: no employee could reasonably be expected to stay in (or opt in) where they receive no additional benefit from doing so. Employees could instead join or donate to the union if they wished to contribute to bargaining costs.
17. A compulsory bargaining fee would be a significant limitation on the right to freedom of association, as it would require every non-union employee covered by the FPA to pay a contribution to the costs incurred in bargaining by the union – including employees who did

---

<sup>8</sup> <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-particularly-relevant-to-empowering-secondary-legislation/chapter-17/part-3/>

not support an FPA, do not personally benefit from it, or do not wish to associate with a union.

18. The LDAC Guidelines<sup>9</sup> state that fees may be inappropriate where:
  - a) the service or function is provided to the community as a whole;
  - b) the service or function is non-voluntary;
  - c) it is impractical to quantify the fee;
  - d) it is impractical to recover the fee;
  - e) the service or function is contractual in nature (and the level of charge can be negotiated contractually).
19. We consider that points b), c) and d) apply in the case of FPAs, and a) partly applies, as FPAs will cover a subset of the community, rather than the whole of New Zealand. This suggests LDAC would consider it inappropriate to charge a fee.
20. We continue to believe that the transaction costs of collecting a bargaining fee (which would likely fall to employers) would be high compared to the amount collected. This would be exacerbated if the fee was voluntary.
21. Most submitters (spanning both employee and employer perspectives) to the 2019 consultation opposed the option of a bargaining fee or levy. A full summary of submissions on this topic is set out at Annex 1. Common reasons for opposition to a fee or levy were that submitters:
  - held the alternative view that the government should fund the bargaining costs;
  - felt it would not work efficiently in practice; or
  - were concerned about cost increases for small employers.
22. In its submission the New Zealand Council of Trade Unions (NZCTU) proposed a funding model where most costs are funded by employers and the government.
23. The pay equity<sup>10</sup> and screen industry workers<sup>11</sup> bargaining systems both explicitly prevent unions from requiring bargaining fees from non-members.
24. The main argument in favour of allowing bargaining fees is that without this mechanism, all costs fall on unions and their members, with a 'free-riding' effect for non-union members. The FPA Working Group recognised this, and recommended that costs should not fall disproportionately on the groups directly involved in bargaining, and suggested the Government consider providing direct financial support, or allowing for a levy or bargaining fee. We consider this drawback is inherent in a FPA-style bargaining system where a subset of industry participants will bargain for terms that then apply to all participants. This applies both on the employee and the employer side.
25. This issue is mitigated somewhat by the government contributions to bargaining costs. To otherwise recoup their costs, unions may increase fees according to their rules (although that will involve weighing up the risk of losing members), ask for voluntary donations, or undertake membership drives, pointing to the FPA bargaining process as a demonstration of

---

<sup>9</sup> [http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-particularly-relevant-to-empowering-secondary-legislation/chapter-17/#part\\_1](http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-particularly-relevant-to-empowering-secondary-legislation/chapter-17/#part_1)

<sup>10</sup> Section 13X, Equal Pay Act 1972

<sup>11</sup> Clause 32A states occupational-level collective contracts (which are the equivalent of FPAs) must not include bargaining fees terms.

the value of unions. It is also possible that unions will seek larger contributions from government, either as a lump sum or recovery of actual costs, particularly if those costs far exceed any set government contribution. Employers are similarly likely to seek larger contributions.

26. Unions may also seek to bargain for differential terms for union members in an FPA – we are preparing separate advice on the question of differential terms, but our initial view is it would undermine the purpose of an FPA, which is to be a minimum floor across a workforce.

## **Next steps**

---

27. We will continue to provide you with advice on all remaining aspects of the FPA system, in order to prepare a Cabinet paper for you to seek Cabinet approval in April 2021 to draft a Bill.

## **Annexes**

---

Annex 1: Submissions about bargaining costs from the 2019 consultation

## Annex 1: Submissions about bargaining costs from the 2019 consultation

---

1. In the 2019 public consultation *Designing a Fair Pay Agreements system* we outlined three options for how costs could be shared. They were:
  - **Option 1: Bargaining fees.** If unions and employer associations are the only representatives, there could be a one-off charge on non-members to cover the costs of the bargaining parties. This bargaining levy would come at the end of the process once the costs were known. This approach would achieve an equitable sharing of costs between affected parties but it would require the creation of a complex administration system by the bargaining parties and/or the government. Everyone within coverage of the FPA would have to pay for its negotiation, regardless of whether they benefitted from it.
  - **Option 2: Costs as they fall, except government contributes to tangible costs (flights, catering, venue hire).** A government contribution to some of the costs of bargaining would ensure that the costs are not unreasonably skewed towards the bargaining parties. This approach would be a departure from the approach in the existing employment relations system, as well as pay equity and screen sector bargaining.
  - **Option 3: Costs as they fall.** This would be consistent with the approach in the current employment relations system. While this would be a feasible approach, we recognise it would place a significant burden on a small group of bargaining representatives, who would be bargaining on behalf of a much larger occupation or sector.
2. We asked submitters these questions about the options:
  48. *Which option for bargaining costs (see above) do you agree with, and why? Is there another option which you consider is best?*
  49. *If a bargaining fee or levy is introduced, how should non-members be identified?*
  50. *If a bargaining fee or levy is introduced, should the charge be made for all employees/employers as of a certain date? Would there need to be exceptions for certain circumstances? If so, which circumstances?*
  51. *Could there be good reasons for departing from the current situation where bargaining parties cover the costs of bargaining?*
3. Our summary of responses received is outlined below.

### **Submitters offered a number of reasons for departing from the current situation where bargaining parties cover the costs of bargaining (Q51)**

4. Submissions were varied on how the burden of bargaining costs should be distributed amongst the bargaining parties, the government, and the wider sectors involved.
5. A majority of submitters gave reasons for departing from the current situation where bargaining parties cover the costs of bargaining. Reasons included:
  - The government should be paying for bargaining costs, considering the FPA process is being imposed by the government. Unions similarly supported the idea of a fully funded model distributed by the government.
  - A stated reason for FPAs is that is in the public interest.
  - The breadth of worker and employer groups that will be involved in bargaining and the likelihood that the agreement will also bind and benefit parties that have not participated in or incurred any costs of the bargaining process. Non-members should have some

way to contribute to the funding of the costs of the respective representative organisations or else they enjoy a 'free ride'.

- FPA costs will be significantly higher than the usual bargaining costs of a collective agreement and not controlled by all parties.
- As an FPA will cover a large group of workers and require a prolonged negotiation, a small group of representatives should not bear the cost. Coverage will be sector wide by requirement and therefore sector wide contribution will be necessary.
- FPAs will require bargaining which is outside the normal functioning of both a union and employer body.

### **Many submitters argued for full government responsibility to cover bargaining-related costs (Q48)**

6. Several submitters (Baking Industry Association, NZ Air Line Pilots Association, NZ Air Line Pilots Association, Red Stag Timber, E tū, Gilberts Fine Food, Meat Industry Association [MIA], First Security and a worker) suggested the government pay for all bargaining related costs.
7. Restaurant Association NZ suggested that government has a responsibility to contribute to the cost of bargaining to avoid leaving employer organisations and members under financial strain if they are to enter into FPA negotiations based on legislative requirements, as opposed to voluntarily. It did not suggest the level of contribution government should make.
8. The Employers and Manufacturers Association (EMA) suggested that government should pay for the full cost of implementation and the cost of bargaining due to the compulsory nature of the FPA initiative, commenting:

*“Trying to apportion costs across all small employers will cost many thousands of dollars as will developing an equitable system of payment. The suggested low threshold of 10%, could also mean that 90% of employees and their employers, who don't want to be part of an FPA process, may be forced into paying an unknown cost of bargaining. EMA insists that “pass on” fees cannot be sanctioned under the terms or conditions of FPAs. As participation is mandatory, participating parties should not be entitled to gain financially from the process.”*

### **Submitters generally opposed the introduction of a levy or bargaining fee upon workers/employers ('Option 1')**

9. A majority of submitters who addressed the topic opposed Option 1 related to bargaining costs in the discussion paper: that, if unions and employer associations are the only representatives, there could be a one-off charge on non-members to cover the costs of the bargaining process. Common reasons for opposition were:
  - The government should be funding the bargaining costs.
  - It would not work efficiently in practice.
  - Concerns of cost increases for smaller employers involved in FPAs.
10. NZEI Te Riu Roa, NZCTU, NZ Meat Workers and Related Trades Union and First Security reiterated their position given in Q49 stating the government should provide a fully funded model. First Security did however offer compromise, commenting:

*“The costs of the FPA process should sit with the government. If such a bargaining fee was introduced it needs to be a statutory levy to all parties.”*

11. The Meat Industry Association showed concern at the practicality of such a process, commenting:



*“MIA is puzzled as to how this is practically possible. Employer associations or employers are unlikely to wish to become embroiled in payment of levies or seeking repayment of debt from recalcitrants.”*

12. Road Transport Forum NZ was concerned with how the costs would transfer to smaller employers, commenting:

*“FPAs will impose high administration and cost burdens on small firms to ensure their interests are represented in fair pay bargaining rounds. The need for employers to be represented, and then approve negotiated agreements, will have to be met by the growth of employer associations and independent bargaining agents, which the RTF opposes.”*

13. The Restaurant Association shared the sentiment that only a small number of costs should be passed on to the employers, yet commented:

*“...however should this proceed against our recommendations this fee should be based on individuals agreeing to be part of the process”*

14. NZ Air Line Pilots Association saw no reason for exceptions to be allowed if a levy was introduced.

15. In contrast, several submitters supported the bargaining levy in Option 1. Tatua Co-operative Dairy Company and the Centre for Labour, Employment and Work (CLEW) argued that those who are involved or wished to be involved in or covered by an FPA should pay. Tatua Co-operative also suggested there should be an ability to opt out and choose an individual employment agreement (IEA). CLEW commented:

*“Wages of worker bargaining team representatives should be paid by their employer and a one-off bargaining fee should be paid to the union by non-members. Employers who are not members of the employer organisation should also pay a one-off fee to the employer bargaining agent(s) following any determination or ratification.”*

16. Four submitters (D Anderson Contractors, JEM Contracting, Patoa Farms and a worker) supported a bargaining fee or levy being introduced on all workers/employers.

### **Some submitters provided suggestions for improving the workability of a bargaining fee/levy**

17. Some submitters offered suggestions of how to go about a bargaining fee, levy or similar process. Briscoe Group suggested that employees should be levied as they are the recipients of the outcome. NZ Law Society noted flexibility should be built into the bargaining costs process, commenting:

*“Consideration should be given to building some flexibility into the bargaining costs process, with parties able to agree as part of the Bargaining Process Agreement details of bargaining costs to be allocated as an agreed term of the FPA. These processes could consider whether exceptions are appropriate by reference to the specific occupation or sector; they could also consider whether the triggering of fees should be date based, or whether new employees (who commence employment after the commencement of the FPA) will also be required to make a contribution.”*

18. Motor Trade Association offered suggestions on how costs could be paid across time, commenting:

*“To mitigate against a large bill at the end of a lengthy process, interim invoices for shared costs could be issued at regular points during the FPA process (three monthly?). The bill would go to all identified parties as at the date of invoicing (based on the list developed during the early phase of initiating an FPA). As noted elsewhere in this submission, MTA would suggest small businesses that would be exempted from the FPA in the early stages might also be exempted from bargaining costs.”*

19. E tū and CLEW suggested this proposed levy should be charged at the date of ratification or determination of the FPA.

### **Some submitters supported costs lying where they fall except for a government contribution to tangible costs (‘Option 2)**

20. Some submitters (Hutt Union & Community Health Service, NZEI Te Riu Roa, NZ Private Surgical Hospitals Association, Forest Owners Association, Print NZ, OCS and a worker) supported Option 2 in relation to bargaining costs: that the government should contribute to tangible costs (flights, catering etc.), with the remaining costs lying where they fall.

21. OCS described their support for Option 2 by highlighting the downsides of Options 1 and 3:

*“Option 2, as Option 1 assumes that Unions will represent non-members, which is not a feasible approach. In addition, if there are effective unions in a sector, FPAs will not be required as collective bargaining will be taking place (unless inhibited in law). Option 3 is innately unfair on larger organisation with the likely ability to assert a bargaining team member and a greater likelihood of having employee representatives at the table.”*

### **There was some support for costs as they fall (‘Option 3’)**

22. A number of employer-perspective submitters (D Anderson Contractors, Taranaki Sawmills, Foodstuffs NZ, Briscoe Group, Federated Farmers, Patoa Farms) supported the option for costs to lie where they fall with no government contribution.

### **NZ Law Society and Motor Trade Association proposed a mix of Options 1 and 2**

23. NZ Law Society and Motor Trade Association suggested a combination of Options One and Two. They commented, respectively.

*“...Tangible costs could be funded centrally, with additional costs being funded by a bargaining fee would be factored into the wage rates agreed. This would be consistent with the objectives set out in section 3 ERA by reducing a reasonable level the direct impact of bargaining costs on affected workers and on those who have borne the costs of preparing for and attending bargaining.”*

*“We recommend a hybrid between Options 1 and 2. Government should contribute to tangible costs such as flights, catering and venue hire, with the remainder of the cost being attributed to employers and workers through bargaining fees.”*

### **NZCTU proposed an alternate funding model with most costs being covered by employers and the government**

24. The NZCTU labelled the options outlined as *“prescriptive and more limited than that advanced in the FPAWG report”*. It proposed the following funding model, which was endorsed by the NZ Meat Works and Related Trade Union.

- Paid meetings for workers (including contractors paid by engagers) to elect bargaining reps and at ratification, to be put into statute.
- Government funding for travel and accommodation to attend bargaining meetings.
- Employers/engagers to pay wages/costs for bargaining representatives.
- Government funding for provision of sitting fee to cover indirect costs such as venue, catering and the administrative burden.