



## BRIEFING

### Fair Pay Agreements – Further advice on the public interest test

|                                 |               |                         |           |
|---------------------------------|---------------|-------------------------|-----------|
| <b>Date:</b>                    | 17 March 2021 | <b>Priority:</b>        | Urgent    |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 2021-2869 |

| Action sought  |  |               |
|--|--|---------------|
|  | Action sought  | Deadline      |
| Hon Michael Wood<br><b>Minister for Workplace Relations and Safety</b> | Agree to the proposed approach for the public interest test in the Fair Pay Agreement system | 22 March 2021 |

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Withdrawn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



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### Purpose

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This briefing provides further advice on the criteria for the public interest test in the Fair Pay Agreement (FPA) system, suggesting a shorter list of four alternative criteria.

### Recommended action

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

- a **Note** that in response to our briefing 2021-1978 *Fair Pay Agreements - Operationalising the representation and public interest initiation tests*, you suggested the public interest test should have a single set of factors the ER Authority may consider.

*Noted*
- b **Note** that combining all the proposed criteria gives a list of 13 factors.

*Noted*
- c **Note** that in other employment laws, the usual approach is a small number of criteria linked to the labour market characteristic that the policy tool is used to address which can be supported by a list of other factors as indicators.

*Noted*
- d **Note** that a long list of factors may represent a low threshold for the public interest test which may create some risks.

*Noted*
- e **Agree** to either:
  - i. Option 1 – the Employment Relations Authority has discretion to identify whether an initiation is in the public interest, using the 13 factors listed in paragraph 4 as optional considerations.

*Agree / Disagree*
  - ii. Option 2 – the Employment Relations Authority must agree that one of four criteria linked to the ‘mandatory to agree’ terms within an FPA (low pay; low bargaining power; lack of pay progression; long or unsocial hours, or contractual uncertainty, that is not adequately compensated) is present before determining that an initiation is in the public interest. The other factors listed in paragraph 17 would be listed as indicators that the decision-maker would take into account in forming their view.

*Agree / Disagree*

f **Note** the wording of any factors would need to be discussed with PCO to ensure there is sufficient clarity.

*Noted*



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

17 / 3 / 2021

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

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## Background

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1. In response to briefing 2021-1978 *Fair Pay Agreements - Operationalising the representation and public interest initiation tests*, you indicated you wanted a single suite of criteria for the public interest test rather than two hurdles including low bargaining power and other factors.
2. You also asked for “low pay” instead of the wage related criteria we had proposed.
3. You also proposed “reliance on off-shore labour”. We have interpreted this to mean “a high proportion of migrant workers”.
4. The planned process for the public interest test is that the initiating union will provide evidence of how the public interest test criteria are met, and the Employment Relations Authority will consider that evidence and decide whether the criteria are met. We advised that for reasons of natural justice, the assessment process should allow for submissions from interested parties within a set timeframe, but we have not yet received your decision on this point [briefing 2021-1978 refers]. The Authority’s decision would be able to be judicially reviewed, but there would be no right of appeal.

## Public interest test criteria

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### Combining all the proposed criteria gives a list of 13 factors

5. When the two criteria you suggested are combined with the criteria suggested by the Fair Pay Agreements Working Group this creates a list of 13 factors that the Employment Relations Authority (ER Authority) could use to assess whether the initiation of an FPA was in the public interest. The 13 criteria are:
  - i. low pay
  - ii. low bargaining power
  - iii. long or unsocial hours, which are not adequately compensated
  - iv. a high proportion of migrant workers
  - v. historical lack of access to collective bargaining
  - vi. high proportion of temporary and precarious work
  - vii. poor compliance with minimum standards
  - viii. high fragmentation and contracting out rates
  - ix. poor health and safety records
  - x. migrant exploitation
  - xi. lack of career progression
  - xii. occupations where a high proportion of workers suffer ‘unjust’ conditions and have poor information about their rights or low ability to bargaining for better conditions, and
  - xiii. occupations with a high potential for disruption by automation.
6. The key questions are what judgement the decision-maker is being asked to make in deciding on the public interest and what guidance does the Government want to provide to the decision-maker in making that choice.

7. There are two options:
  - i. Option 1 – the ER Authority has discretion to identify whether an initiation is in the public interest, with the factors as possible considerations only.
  - ii. Option 2 – the ER Authority must be satisfied that specific factors are present before determining that an initiation is in the public interest, with judgement needed to determine whether the factors are present.
8. The difference between the two options is the degree of discretion the ER Authority has. A wide discretion increases the risk that the ER Authority makes a decision that is inconsistent with the Government's policy intent. Too many constraints and the ER Authority may not be able to make a public interest decision when it considers it is warranted.

**The usual approach in employment law is to include a small number of criteria linked to the labour market characteristic that the policy tool is designed to address**

9. In other situations in employment legislation option 2 has been used – the legislation specifies criteria that the decision-maker needs to use to guide their decision. There is usually a relatively small number of criteria used which are sometimes supported by other indicators. For example in assessing applications to add occupations to Schedule 1A of the Employment Relations Act (ER Act), three criteria need to be met:
  - i. Restructuring in the sector occurs frequently
  - ii. Terms and conditions of employment tend to be undermined by restructuring
  - iii. Employees have little bargaining power.
10. In s13F of the Equal Pay Act, there are two legs to the arguability test:
  - i. The claim relates to work predominantly performed by female employees – which is then defined to be a workforce of which approximately 60% or more members are female
  - ii. The work is currently undervalued or has historically been undervalued – there is then a list of factors (in s13F(3)) that the decision-maker can take into account in making that judgement
11. In both these cases, the criteria specifies the undesirable labour market characteristics that the policy tool is designed to address.
12. However, it is important to understand the differences in these processes as well. The ER Act Schedule 1A assessment is undertaken by the Minister on the basis of extensive analysis undertaken by MBIE. In the pay equity regime, the arguable test is a deliberately light-touch test and is not an acknowledgement that there is a pay equity issue – this judgement comes later after extensive analysis of the issues undertaken by the parties through bargaining. In the FPA context, the public interest test will be considered by the ER Authority and will require judgements based on analysis that the Authority does not routinely undertake. The impact of the decision is also high as once the public interest test is met, an FPA for the proposed occupation or sector will result in every case.

**Including a long list of factors in the public interest test for an FPA may represent a low threshold for the public interest test which may create risks**

13. The criteria specified or the factors that the decision-maker may or must take into account in assessing the public interest should indicate the types of issues the Government is expecting an FPA to be used to address for occupations that are unable to meet the representation

test. There will be a perceived link to the objective of an FPA and this will create an expectation that the FPA will address those elements.

14. The list of factors proposed above is a mix of labour market outcomes (low pay, long hours not adequately compensated), contributing factors (low bargaining power), a description of the characteristics of the sector (high proportion of migrant labour, high fragmentation and contracting out rates, lack of career progression) and a description of the behaviour of some employers (migrant exploitation, poor health and safety record, poor compliance with minimum standards).
15. The current wording of many of the factors also lacks the clarity needed for a decision-maker to know whether an occupation meets the criteria or not. For example, low pay is a relative term and without an anchor, the decision-maker is left to make their own judgement about what "low" is. Similarly, a factor such as migrant exploitation or poor compliance with minimum standards would need to be defined so a decision-maker was clear about the threshold. For example, is the prosecution of a single employer for migrant exploitation sufficient to say the criteria had been met? There are also similarities between some of the factors so rationalisation may be possible.
16. The inclusion of such a long and diverse list of factors is likely to be interpreted by a decision-maker to suggest that there are many and varied circumstances in which an FPA is in the public interest. This is likely to mean the public interest test would be a very low hurdle. There are a number of risks that may occur if the public interest test threshold is low it may:
  - i. Allow FPAs to be initiated in occupations/industries where an FPA may not actually address the issues faced in those occupations/industries. For example, if there is poor compliance with minimum standards, it is not clear how an FPA which increases the level of the minimum standards is going to enhance compliance.
  - ii. Allow occupations/industries to initiate FPAs when they do not have the effective co-ordination or representation necessary to progress through the FPA system effectively
  - iii. Be seen as a lower cost hurdle for entry to the FPA system which could dilute the expectation that occupations/sectors get through the public interest "gate" based on need.

**We propose the public interest test include a core set of four criteria related to the 'mandatory to agree' topics, with the other factors included as indicators**

17. We would expect to see a connection between the public interest factors and the core topics on which an FPA will set new minimum terms. This suggests that the public interest test should focus on the factors that are mandatory to agree (base wage rates, wage rate adjustment, superannuation, ordinary hours, overtime, penalty rates, coverage, FPA duration, governance arrangements).
18. We therefore propose the public interest test should be triggered if the ER Authority is satisfied that one of the criteria related to the mandatory to agree topics is met, i.e.
  - i. Base wage rate (perhaps below a specified level)
  - ii. Low bargaining power
  - iii. Lack of pay progression (perhaps below a specified level)
  - iv. Long or unsocial hours, or contractual uncertainty, that is not adequately compensated
19. It would then be possible to use some of the factors in the broader list as indicators of those criteria, which the decision-maker could take into account in forming their view. For example:

- i. A high proportion of migrant workers
  - ii. Evidence of systematic migrant exploitation
  - iii. High proportion of temporary work
  - iv. Evidence of systematic non-compliance with minimum standards
  - v. High proportion of small firms
  - vi. Evidence of systematic health and safety issues
20. The exact wording would need to be considered by PCO during drafting.

## **Next steps**

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21. We will incorporate your decisions on this briefing into the Cabinet paper we are developing for you to seek approval to draft a Bill, scheduled to be considered by Cabinet Committee on 14 April 2021. We will provide a final version of the Cabinet paper and a draft of the associated Regulatory Impact Statement on 26 March 2021.