



AIDE MEMOIRE

Fair Pay Agreements: Implications of a change in initiation

Date:	9 December 2020	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1424

Information for Minister(s)

Hon Michael Wood
Minister for Workplace Relations and Safety

Contact for telephone discussion (if required)

Name	Position	Telephone	1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	✓
Hannah Adams	Senior Policy Advisor, Employment Relations Policy	04 896 5262	

The following departments/agencies have been consulted

--

Minister's office to complete:

Approved

Noted

Seen

See Minister's Notes

Declined

Needs change

Overtaken by Events

Withdrawn

Comments



AIDE MEMOIRE

Fair Pay Agreements: Implications of a change in initiation

Date:	9 December 2020	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1424

Purpose

To provide you with information on the implications of your decision to allow a Fair Pay Agreement (FPA) to be initiated by either a representativeness or public interest test (as per the FPA Working Group recommendation). While you have made your decision on this aspect of the system, you agreed for officials to provide advice on the implications associated with your chosen approach.

Executive Summary

The main implications of allowing either a representativeness or public interest test to initiate an FPA are that it will:

- 1. Make it more difficult to ensure priority for workers in sectors where there is a 'race to the bottom'** – Allowing initiation by either test is expected to lead to unionised, coordinated sectors initiating FPAs. This could make access more difficult for workers in other sectors where the public interest is higher. Collective bargaining capability in New Zealand is currently limited. If a number of FPAs are being bargained simultaneously, it could result in some sectors (which could include those most in need) not being able to access suitable expertise to support their bargaining. Similarly, it could result in government support (eg a navigator or dispute resolution services) being stretched, and/or directed towards sectors where there is no evidence of a 'race-to-the-bottom', delaying access in sectors where a 'race-to-the-bottom' is impacting wages. This risk could be partially mitigated by increasing the amount of government support provided, but this will be impacted by budget constraints. Another way to mitigate the risk could be to target the provision of government support. Please let officials know if you would like advice on options for prioritising government support.
- 2. Increase the costs associated with the system** - Without any constraints on the sectors that are able to initiate an FPA, the government costs associated with the system are likely to increase substantially. When establishing the system it will be difficult to accurately estimate how many FPAs will be initiated to ensure the support system is scaled appropriately. This could result in delays during the first few years while we get a better understanding of demand (and adjust resourcing accordingly).
- 3. Create uncertainty for more sectors** – Not identifying eligible sectors in advance (via a proactive public interest test) will increase the uncertainty associated with the implementation of the system. It will make it more difficult for employers to determine whether they should begin building the bargaining capability in their sector. If it results in a large number of FPAs being bargained, or coming into force, this may make it more difficult for businesses to keep up-to-date on which FPAs could/do apply to them.
- 4. Impact the justification for affecting human rights and international obligations** – The potential impacts on our human rights and international obligations of the proposed FPA system may be justified, to some degree, by the intention of the system to promote collective bargaining and improve outcomes for workers. If FPAs required a public interest to be initiated this would have provided further justification, as the FPA system would be clearly targeted (in

all instances) to sectors where there is a public interest in correcting the identified power imbalance in order to deliver better outcomes for workers in those sectors.

5. MBIE considers an FPA system that requires both a representativeness and public interest test, particularly a proactive public interest test, will be more workable, enduring, and likely to deliver the intended outcomes.



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

..... / /

Background

The FPA Working Group recommended initiation be triggered by either a representation test or a public interest test

1. When developing its recommendations for an FPA system, one of the constraints placed on the FPA Working Group (FPAWG) by the Government was that it would be up to the sectors and occupations involved to use the system, rather than the Government 'picking winners'.
2. The FPAWG recommended that there should be two circumstances where an FPA collective bargaining process may be initiated:
 - a. Representativeness trigger: in any sector or occupation, workers should be able to initiate a FPA bargaining process if they can meet a minimum threshold of 1,000 or 10 per cent of workers in the nominated sector or occupation, whichever is lower.
 - b. Public interest trigger: where the representativeness threshold is not met, an FPA may still be initiated where there are harmful labour market conditions in the nominated sector or occupation.
3. The FPAWG saw both initiation tests as being triggered by an application from a union (on behalf of workers).

We recommended requiring a proactive public interest test and a representation test

4. Following consultation on the FPAWG's proposed approach, we recommended in January 2020 that initiation should require both a public interest test and a representativeness test (refer 1893 19-20). The rationale for requiring both tests was to ensure all FPAs have both a sufficient mandate and are targeted to benefit workers whose wages or terms are suppressed by inherent imbalances of power in some workforces.
5. We recommended that the public interest test be proactively applied to identify eligible sectors to provide a higher degree of certainty for employers, allow the system to be targeted to where it would be most beneficial, and allow only a manageable number of workforces to be able to bargain at a sector level. We acknowledged that it could be seen as a change in direction for the Government as it is closer to "picking winners", but noted specified workforces would still retain control over whether to initiate bargaining.
6. We also recommended a higher representation test threshold of 20% of workers (and no absolute threshold of workers), as we do not consider a 10% or 1,000 worker threshold to provide a sufficient mandate.
7. The former Minister, Hon Ian Lees-Galloway, agreed that the initiation should require both a public interest test (applied proactively) and representativeness test, but decided to retain the representation test threshold of 10% of 1,000 workers.

You have indicated a preference to return to the FPAWG approach

8. At the meeting with officials on 17 November 2020 you indicated that you preferred the approach recommended by FPAWG, where an FPA can be initiated by either a representativeness test or a public interest test.
9. While you have made your decision on this aspect of the system, you agreed for officials to provide advice on the implications associated with your chosen approach.

Allowing either test to initiate an FPA will make it more difficult to ensure priority for workers in sectors where there is a ‘race to the bottom’

10. The Government has indicated the FPA system is intended to make it easier for workers to receive fair wages and conditions and avoid the ‘race to the bottom’ that occurs within competitive industries.
11. Requiring a public interest for all FPAs would ensure that the system is targeted to benefit workers whose terms or conditions are being suppressed by inherent imbalances of power. One of the consequences of allowing an FPA to be initiated by either test is that it will reduce the government’s ability to prioritise the sectors where FPAs are initiated and bargained.
12. If FPAs are able to be initiated in any sector that meets either test, we expect initiations from unionised, coordinated sectors first (many of which are in the public sector). This may make it difficult for the sectors most in need to obtain an FPA in a timely manner, as they may be crowded out (in terms of access to bargaining capability and government support) by more organised or better resourced sectors who want better conditions. This could potentially impact the social licence for the system.
13. Collective bargaining capability is a key input to the success of an FPA. Bargaining capability in New Zealand is currently limited. If a number of FPAs are being bargained simultaneously, it may result in some sectors (which could include those most in need) not being able to access suitable expertise to support their bargaining. This would be compounded if a number of multi-employer pay equity claims were also being bargained at a similar time. Issues regarding access to bargaining capability are likely to be greater on the employer side, as employers and employer organisations have expressed concern about current levels of expertise, and the infrastructure, for employers to coordinate and bargain in New Zealand. We expect this risk would decrease over time as bargaining capability in New Zealand increases to meet the demand.
14. Similarly, if a number of FPAs are being bargained simultaneously, it could result in government support being stretched (delaying access to a navigator or dispute resolution services) and/or directed towards sectors where this is no evidence of a ‘race-to-the-bottom’ impacting wages. One way to address this risk is to provide additional government support. This will, however, be constrained by the available funding.
15. Another way to address this risk would be to target the provision of government support. For example, by only providing navigators and/or funding to bargaining parties for FPAs that met the public interest test or both the public interest and representativeness test. Similarly, FPAs triggered by a public interest test could be prioritised in the dispute resolution system.

It will increase the costs associated with the system

16. Without any constraints on the sectors that are able to initiate an FPA, the costs associated with the system are likely to increase substantially. The main costs for the government relate to: assessing whether the initiation threshold has been met, support provided during bargaining (the navigator role), the dispute resolution process, funding provided to bargaining parties, and enforcement costs.
17. As mentioned above, there could be ways to limit and/or prioritise when government support is provided. The system would, however, still need to be able to respond in a timely manner to applications for initiation of an FPA and dispute resolution support. If the employment dispute resolution system is overwhelmed by FPA disputes, this would impact employees’ ability to access support to resolve non-FPA employment issues.

18. When establishing the system it will be difficult to accurately estimate how many FPAs will be initiated to ensure the support system is scaled appropriately. This could result in delays in access to support, or resources being underutilised, during the first few years, while we get a better understanding of demand (and adjust resourcing accordingly).

It will create uncertainty for more sectors

19. Businesses have expressed concerns about the potential unknowable impacts of an FPA system on their business models and costs.
20. The proposed approach of proactively identifying eligible sectors was intended to provide businesses with certainty regarding where FPAs could (and were likely to) occur. As bargaining capability is a crucial input to the system's success, it would have enabled the identified sectors to begin building their bargaining capability, which could include creating suitable organisations to represent businesses in the identified sectors.
21. Allowing an FPA to be initiated by either test is expected to substantially increase the use of the system. If a large number of FPAs are being bargained, or coming into force, this may make it more difficult for businesses to keep up-to-date on which FPAs could/do apply to them.
22. Participating in, and monitoring, a large number of FPA negotiations in government funded sectors could also create costs for the public sector.

Allowing FPAs in sectors where there is no public interest may impact the justification for affecting human rights and international obligations

23. The FPA system has potential implications for domestic human rights law, and compliance with international obligations stemming from international labour law and international human rights law. These implications are related to the following rights and obligations: promotion of collective bargaining, the voluntary nature of collective bargaining, freedom of assembly and expression, freedom of association, and the right to organise.
24. These rights and obligations are engaged by the following aspects of the proposed FPA system:
 - a. once bargaining has been initiated by a union, it will be compulsory for employers to engage in bargaining
 - b. industrial action will not be permitted as part of bargaining over an FPA
 - c. workers will be represented by unions in bargaining, which may compel people to associate with unions in order to have their interests represented during bargaining
 - d. disputes will be resolved through binding determination by the Employment Relations Authority, once mediation is exhausted
 - e. the resulting agreements will have universal coverage in the relevant sector.
25. Some business groups, such as BusinessNZ, have raised concerns that the proposed system will not comply with New Zealand's international obligations and are likely to raise this issue with the International Labour Organisation.
26. When designing the system, we have been mindful of the impact on human rights and international obligations and have recommended approaches intended to reduce the impact where possible. For example, through setting requirements that ensure determinations are

only used as a last resort and allowing parties to agree for the FPA to include regional variations or time-limited exemptions due to severe financial hardship.

27. The recommendation to include a public interest test and representative test was partly intended to further reduce the impact on these rights and obligations, by limiting the sectors where FPAs could occur to those where there was clear public interest.
28. The OECD recommends subjecting sector-wide extensions of collective agreements to reasonable representation criteria and a meaningful public interest test.¹ Given that FPAs are, in effect, collective agreements with a guarantee of a sector-wide extension provided up-front, we consider this to be an implicit endorsement of requiring both tests for FPAs.
29. The potential impact on New Zealand's human rights and international obligations of an FPA system could be justified by the intention of the system to promote collective bargaining and improve outcomes for workers. For example, the promotion of collective bargaining would assist New Zealand's compliance with the International Labour Organisation (ILO) Convention 98 on Collective Bargaining. We will be assessing the impact the FPA system would have on positive human rights obligations further as part of the human rights assessment as an input into the upcoming April 2021 Cabinet paper.
30. If FPAs were only able to be initiated in sectors where the public interest test was met, this would have provided further justification for the aspects of the system that affect human rights and international obligations based. For example, a potential justification for the universal coverage of the system is to ensure the resulting FPA addresses the negative impacts of a 'race-to-the-bottom' on wages, by mitigating the risk that employers opt-out in order to use lower labour costs as a means of competition. The public interest test would target the FPA system to sectors where they would contribute to a broad public interest by correcting the identified power imbalance in order to deliver better outcomes for workers in those sectors.

Next steps

31. We are preparing a number of other briefings on aspects of the FPA system for you, with the first set of briefings all due to you by 11 December 2020.
32. The schedule for the project is set out in the table below:

Milestone	Date
Advice on design features requested by Minister	All provided by 11 December 2020
Advice on consequential changes to other design aspects Advice on remaining advice on system issues	All provided by 19 February 2021
Cabinet paper drafted RIA prepared	12 March 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	26 March 2021

¹ OECD (2018) OECD Employment Outlook 2018, OECD Publishing, Paris.

Ministerial consultation completed (2 weeks)	29 March to 13 April 2021
Cabinet Committee	April 2021

33. Please let officials know if you would like any further advice regarding the initiation threshold and/or options for prioritising the provision of government support (eg access to a navigator and the dispute resolution services).