



BRIEFING

Fair Pay Agreements: Navigator functions

Date:	14 January 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1726

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Approve the proposed functions for navigators in the FPA system.	5 February 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	021 828 458	✓
Hannah Adams	Senior Policy Advisor	04 896 5262		

The following departments/agencies have been consulted

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

Fair Pay Agreements: Navigator functions

Date:	14 January 2021	Priority:	Medium
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Purpose

This briefing provides advice on the function of navigators within the Fair Pay Agreement (FPA) system.

Executive Summary

In the FPA system, bargaining parties will be encouraged to access support by a navigator. The functions provided by navigators are intended to help bargaining parties on both sides to understand and navigate the process and content requirements of the FPA system and to support constructive and efficient bargaining.

The proposed functions for navigators are consistent with the education and support functions that mediation services is set up to provide under the Employment Relations Act 2000 (although these are not currently commonly accessed). The main difference is that navigators' support is intended to be provided throughout the bargaining process. As such, we do not consider navigators should provide active dispute resolution services (eg they should not be able to make recommendations to parties) as this could negatively impact their on-going relationship with bargaining parties.

We recommend that functions of a navigator in the FPA Bill should be the same as those set out for mediation services in the Employment Relations Act 2000, as will allow flexibility for the navigator role to evolve, as needed, as the system develops. The only exception is that navigators will not be able to make recommendations to bargaining parties or binding decisions.

When parties consider they require more active support to resolve a dispute, they can seek assistance from a mediator, who should be independent from the bargaining process to date (ie not the navigator for that FPA).

It will be up to bargaining parties to decide whether they utilise the support provided by a navigator. If parties disagree on whether to have a navigator they can assess dispute resolution services to resolve the issue.

Recommended action

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

- a **Agree** the support provided by the navigator role to bargaining parties during bargaining include:
 - a. Helping bargaining parties understand how bargaining will work under the new system
 - b. Assisting with establishing a bargaining process agreement
 - c. Ensuring parties are aware of the procedural and content requirements of FPAs
 - d. Supporting bargaining discussions
 - e. De-escalating conflict where possible.

Agree / Disagree

- b **Note** under the Employment Relations Act 2000 mediation services may include:
- a. The provision of general information about employment rights and obligations
 - b. The provision of information about what services are available for persons (including unions and other bodies corporate) who have employment relationship problems
 - c. Other services that assist the smooth conduct of employment relationships
 - d. Other services (of a type that can address a variety of circumstances) that assist persons to resolve, promptly and effectively, their employment relationship problems
 - e. Services that assist persons to resolve any problem with the fixing of new terms and conditions of employment.

Noted

- c **Note** under the Employment Relations Act 2000 mediation services may make non-binding recommendations to parties, or binding decisions (although not for collective bargaining), at the request and agreement of both parties.

Noted

- d **Agree** the functions of a navigator in the FPA Bill should be the same as those set out for mediation services in the Employment Relations Act 2000, with the exception that navigators will not be able to make recommendations to bargaining parties or binding decisions (even at the request of parties).

Agree / Disagree

- e **Agree** that it will be up to bargaining parties as to whether they utilise the support provided by a government-funded navigator.

Agree / Disagree

- f **Note** parties can assess dispute resolution services if they disagree on whether to have support from a navigator.

Noted

- g **Agree** mediation services (when requested) must be provided by a mediator who is independent from the bargaining process to date (ie not the navigator).

Agree / Disagree

- h **Agree** that the requirements and protections for navigator services should be based on the requirements and protections for mediation services in the Employment Relations Act 2000

Agree / Disagree



Tracy Mears
Manager, Employment Relations Policy
Workplace Relations & Safety Policy, MBIE

13/01/21

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

1. There are a number of policy decisions still needed on some design features of the proposed FPA system, including some key design features, in order to obtain sufficient decisions for PCO to begin drafting a FPA Bill (refer 2021-0627).
2. You have requested advice on these remaining design features be provided to you by 19 February 2021, so that Cabinet agreement to the FPA system and approval to draft can be sought in April 2021.
3. The former Minister agreed that:
 - a. A government-funded 'navigator' will be provided by MBIE's Mediation Services.
 - b. Parties are able to agree to an alternative navigator (to the one available from MBIE) at their own cost.
4. In a meeting with officials on 17 November, you reconfirmed the Ministerial decision that a government-funded navigator should be available to facilitate the bargaining process.
5. This briefing provides advice on the functions of navigators within the FPA system.

The intended role of the navigator is to support bargaining parties throughout bargaining

6. The FPAWG recommended that a neutral expert facilitator should be available to support parties during the bargaining process. They provided the following examples of what the facilitator role could include:
 - a. Informing bargaining teams about the process
 - b. Advising about options for the process the parties should follow to reach agreement
 - c. Helping parties to discuss the range of possible provisions of the collective agreement.
7. We shifted from the use of the term 'facilitator' to 'navigator', as facilitation already has an existing meaning under the Employment Relations Act 2000 (ER Act).
8. In the discussion document, we built on the examples provided by the FPAWG and suggested that the navigator could:
 - a. Help bargaining parties understand how bargaining will work under the new system
 - b. Assist with establishing a bargaining process agreement
 - c. Support bargaining discussions
 - d. De-escalate conflict where possible.

A few submitters suggested additional functions for the navigator, but we do not consider these align with the type of support intended to be provided by this role

9. We asked whether stakeholders thought the navigator should have any functions in addition to those described. Of the few that commented, submitters generally supported the proposed functions.

Making non-binding recommendations

10. A few submitters suggested additional functions, including the ability to make non-binding recommendations or making recommendations / providing information to the determining body. This would be similar to the ability of mediators, under the ER Act, to make non-binding recommendations at the request and agreement of both parties (although this is rarely requested for collective bargaining).
11. We do not consider that providing active dispute resolution services fits with the intended function of a navigator. This role is intended to provide advice and support throughout the process, in contrast to a mediator whose assistance is generally sought in relation to a specific dispute. There is a risk that if the navigator makes a recommendation(s), even at the request of both parties, it could impact their on-going relationship with one party if they perceive the recommendation as 'taking sides'.
12. While we consider the navigator should de-escalate conflict, where possible, once an issue gets to the stage where more active dispute resolution support is required, parties can request assistance from a mediator. This assistance could include the mediator making a non-binding recommendation at the request of both parties. Once the dispute that mediation was sought for has been resolved, parties could return to bargaining (if further bargaining is required) with the continued support of the navigator.

Performing administrative functions

13. A couple of submitters suggested the navigator could perform administrative functions (such as keeping meeting records or presenting final terms of settlement for endorsement by parties). We do not consider that these should be part of the core functions intended for the navigator. The navigator could agree to perform some administrative functions (such as recording the key decisions from bargaining meetings) if they considered it was appropriate, would support constructive and efficient bargaining, and would not substantially increase their workload.

Communicating to stakeholders or media

14. A couple of submitters suggested the navigator should have a role to communicate with key stakeholders and fielding media enquiries about the FPA. We do not consider communication, whether to those affected by the FPA or others, is a function of the navigator.

Navigators should ensure bargaining parties are aware of the requirements of the system

15. We have further considered what assistance and support the navigator should provide to best support constructive and efficient bargaining. In addition to the functions listed in the discussion document, we consider the navigator should have a role in ensuring parties are aware of the procedural and content requirements of FPAs.
16. The FPA process includes procedural requirements and limitations on what an FPA is allowed to contain. For instance, parties can:
 - a. Negotiate a change in scope in the initial stages of bargaining. If this results in a significant expansion of the coverage, and the FPA was initiated by the 10% representativeness test, then they need to re-satisfy the representativeness test
 - b. Agree exemptions of up to 12 months for employers in serious financial difficulties.
17. If parties were to miss a procedural check or bargain exemptions that were not allowable, this would lead to inefficient bargaining. The navigator should therefore assist parties to be

aware of the procedural and content requirements for FPAs and let them know if they are stepping outside of the bounds of what is allowed within the system. This will avoid the risk of bargaining proceeding when it no longer meets the prescribed requirements.

Navigators should have the same functions as mediators under the ER Act, but not be able to make recommendations

18. We, therefore, recommend that the functions of the navigator include:
 - a. Helping bargaining parties understand how bargaining will work under the new system
 - b. Assisting with establishing a bargaining process agreement
 - c. Ensuring parties are aware of the procedural and content requirements of FPAs
 - d. Supporting bargaining discussions
 - e. De-escalating conflict where possible.
19. The proposed navigator functions fit within the functions mediators currently have under the ER Act. Under the ER Act mediation services may include:
 - a. the provision of general information about employment rights and obligations
 - b. the provision of information about what services are available for persons (including unions and other bodies corporate) who have employment relationship problems
 - c. other services that assist the smooth conduct of employment relationships
 - d. other services (of a type that can address a variety of circumstances) that assist persons to resolve, promptly and effectively, their employment relationship problems
 - e. services that assist persons to resolve any problem with the fixing of new terms and conditions of employment.
20. The ER Act also enables mediation services to make non-binding recommendations to parties, or binding decisions, at the request and agreement of both parties (although they cannot make binding decisions that would fix the terms of a collective agreement as collective agreements require the ratification by union members before the union can agree to it).
21. We recommend that functions of a navigator in the FPA Bill should be the same as those set out for mediator services in the ER Act, with the exception that navigators will not be able to make recommendations to bargaining parties or binding decisions (for the reasons listed above). Aligning the functions with those of mediators will allow flexibility for the navigator role to evolve, as needed, as the system develops.
22. The more detailed functions, outlined in paragraph 18, will inform the way the role is operationalised, including the provision of guidance and any additional training provided to MBIE Mediation Services staff performing the navigator role.
23. Given the overlap in functions, it is likely that some MBIE Mediation Services staff may provide both the mediation and navigator services. We do not consider it appropriate for the staff member performing the navigator role to also provide mediation services in relation to that FPA. This could have a negative impact on their on-going role as navigator. It would also blur the boundaries between the support provided by a navigator and the active dispute resolution support intended to be provided by a mediator before a dispute can be brought to the Employment Relations Authority.

24. When MBIE's Mediation Services are requested to resolve a bargaining dispute, the system will therefore require that it is provided by a mediator who is independent from the bargaining process to date. This is similar to the approach under the ER Act that specifies that when an Authority member is fixing the terms of a collective agreement it cannot be the same member that provided facilitation.

It will be up to bargaining parties as to whether they utilise the support provided by a government-funded navigator

25. We considered, but do not recommend, requiring parties to have a navigator for any FPAs being bargained. While there would be efficiency and potential benefits from parties being supported by a navigator, it would be difficult for the navigator to effectively perform their function if parties do not want their support. It would also be difficult to enforce such a requirement.
26. A navigator would be made available with no charge to the parties; it is therefore in the bargaining parties' best interest to voluntarily involve one (as prolonged bargaining would have cost and resource implications for parties). If one party wanted a navigator to support the bargaining process and the other did not, it would become a dispute which would go through the dispute resolution process to be resolved.

The same requirements and protections for mediators should apply for navigators

27. The ER Act enables mediation services to be provided in a flexible manner, but requires that mediators are independent and must keep information disclosed as part of the mediation confidential (with some exceptions in relation to collective bargaining).
28. The same approach of enabling services to be provided in a range of ways, while setting clear requirements in relation to confidentiality and independence is also relevant for the provision of navigator services in the FPA system.

Next steps

29. We are providing advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval to draft the Bill and to inform the drafting instructions. The schedule for the project is set out in the table below:

Milestone	Date
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
DEV Cabinet Committee	14 April 2021