

Fair Pay Agreements Regulatory Impact Assessment update to account for the expansion of LI powers

Section 1: Executive Summary

- 1. This document provides updated analysis to the previous Regulatory Impact Analysis (RIA) that was done by the Ministry of Business, Innovation and Employment (MBIE) on Fair Pay Agreements (FPAs) in April 2021.
- 2. During subsequent development of the system, the Minister decided in line with the delegated authority he received from Cabinet that the Labour Inspectorate (LI) should be able to decide if an employee is within coverage.
- 3. To be able to perform this role effectively in an FPA context and to minimise the number of coverage decisions that need to go to the Employment Relations Authority, an extension of the LI's powers was considered necessary. The Minister is seeking Cabinet approval for these changes and this analysis supports that consideration.
- 4. MBIE considered several options for expansion of the LI's powers to enable the LI to make coverage decisions in a broader range of cases. MBIE agrees that two of the proposed options along with a number of other changes related to collection of information generally will enable the LI to make a greater number of coverage decisions with minor impacts on parties from whom the LI could seek information.

Responsible Manager (signature and date):



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3 March 2022

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
The Ministry of Business, Innovation and Employment

Quality Assurance Assessment:
Meets the criteria

Reviewer Comments and Recommendations:
N/A

Section 2: Background

5. On 19 April 2021, Cabinet agreed to the key policy features of a new Fair Pay Agreements (FPA) system and to begin drafting legislation to implement the system [CAB-21-MIN-0126 refers].

Role of the LI

6. In the FPA model agreed by Cabinet, it was agreed that the FPA legislation would be added to the list of legislation that the Labour Inspectorate (LI) has jurisdiction over. So the existing powers of the LI would be available to enforce the minimum entitlement provisions in FPAs if the prescribed form is used (e.g. minimum base rates, overtime and penal rates).
7. At the time of the Cabinet meeting in April, the Minister had not decided on the role the LI would play in deciding whether an employee was covered by an FPA. However, Cabinet agreed to delegate authority to the Minister to decide, whether and how, the LI would decide if an employee is in coverage of an FPA. The Minister subsequently decided that the LI should be able to decide whether an employee is covered by an FPA. With its existing powers, the LI would only be able to make decisions on FPA coverage in simple cases. Complex cases such as those involving triangular employment relationships, it was unlikely that the LI's existing powers would allow it to obtain sufficient information to be able to make a definitive decision on FPA coverage so these cases would still need to go to the Employment Relations Authority for a decision. To increase the range of situations that the LI can make FPA coverage decisions on, it needs to expand the scope of its existing powers to ensure it can get the information it needs to make these decisions in a broader range of situations.

Updated Regulatory Impact Analysis to implement an FPA coverage determination function for the LI

8. The Regulatory Impact Analysis that accompanied the April 2021 Cabinet decisions, compared system-level interventions for addressing the labour market issues identified. This update to the Regulatory Impact Analysis covers the subsequent decisions that specifically relate to the extension to the LI's powers when making decisions on coverage of FPAs.

Section 3: Problem definition and Objectives

Rationale and objectives of extending the LI's powers

9. The Minister decided to enable the LI to decide if an employee is covered by an FPA. The rationale is to provide a low cost, quicker mechanism for seeking decisions on coverage than the alternative process via the ER Authority.
10. This will be a new role for the LI, so an assessment was undertaken to determine if their existing powers for information gathering were sufficient to enable decisions in the range of situations expected.

Problem definition

11. Two main challenges for the LI in undertaking this new role were identified:
 - First, there was some uncertainty about how the LI currently collects information, such as whether the LI can interview employees at a location that is not the worksite and whether electronic documentation is covered by LI requests for information.
 - Secondly, the existing constraints on the LI's powers or the application of the existing powers to some likely FPA scenarios means the LI would only be able to make coverage decisions in the simplest of cases. For example, some priority

occupations identified by the New Zealand Council of Trade Unions, involve roles where controlling third-parties are relatively common (e.g. cleaning and security services). These services tend to be provided by specialist firms at a client's premises. The LI's view was that in this circumstance their existing power to require information from the direct employer may not provide them with sufficient information about the nature of the work actually performed given the work is likely to be performed at a client's premises. The client in this case may be better placed to provide that information given that the work is performed at their premises. Without an extension of their powers, decisions about coverage in these situations would need to be made by the ER Authority.

12. Extending the LI's powers and clarifying some uncertainties about how the LI can collect information would enable the LI to make coverage decisions in more situations.

Objective of extending the LI's powers for decisions on coverage of an FPA where there is a dispute

13. The objective is to ensure that the LI can obtain sufficient information to enable a robust, defensible decision as to whether an employee is covered by an FPA or not in the majority of cases with only the most complex cases needing to be referred to the Employment Relations Authority for investigation. This will enable more timely and cost-effective decisions on coverage for both employees and employers.

Section 4: Options Identification

14. To address uncertainty about how the LI currently collects information, two legislative options are proposed to provide clarity for the purposes of decisions on FPA coverage:
 - Enabling the LI to conduct any interviews with employees within its powers at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview.
 - Clarifying that when the LI requires documents to be provided, this includes information stored electronically.
15. In addition, there is a proposal to allow appeals from LI decisions to the Employment Relations Authority within 28 days.
16. These clarifications will have only minor impacts and will not significantly change the impact analysis.
17. In addition to these clarifications, a range of options for extending the LI's powers have been considered to address the identified problem:
 - A. Expand the LI's powers to require documents, to include documents from all companies with a contractual relationship with the employer, where the LI has a reasonable belief that the contracting business would have information that is important to determining coverage.
 - B. Extend the concept of 'employer' to include a 'controlling third party' when the LI reasonably believes this third party has information relevant to FPA coverage decisions, which would allow the LI to question a party or require them to provide documents.
 - C. Enable the LI to interview, with their consent, employees of a business which holds a contract with the employer that is subject to the coverage determination, if the LI reasonably believes the information would be important to determining coverage.

Who is impacted by this change?

18. The three options considered will impact a small number of employers or employees depending on the option. These options will only be available for determining coverage and will not be available when enforcing FPAs. These powers will also only be used if

the LI cannot get the information they need from the employer and the employees of that employer – as they can use their existing powers to gather this information. So, the range of situations in which these powers will apply is limited.

- Option A – will potentially require any companies with a contractual relationship with the employer to provide information, but only in circumstances where the information would be important to the coverage decision.
 - Option B – will require “controlling third parties” to provide information as though they were the employer.
 - Option C — an employee that works for a firm contracted to the employer can be asked to answer the LI’s questions on a voluntary basis.
19. For each of these options, to safeguard privacy, the LI will also need to ask the employee’s permission before asking questions of third parties about the role performed.

What stakeholders think

The LI believe all of the options are necessary for them to be able to have the information they need to determine coverage of an FPA in the majority of employment situations.

The Office of the Privacy Commissioner supports the approach for the employee to retain autonomy in the process of determining if an employee is covered by a FPA and provide the necessary authorisations to the Labour Inspectorate to collect the relevant information about the employee in question from the relevant third parties for the purposes of making a determination.

Section 5: Impact analysis

Assessment of options for addressing the lack of a default bargaining party

20. The below criteria have been developed to assess the three possible options for expansion of LI powers:
- **Determinations settled at LI level:** more cases are likely to be resolved by a quick determination by the LI, rather than be escalated to the ER Authority due to a lack of information.
 - **Expectation of privacy:** expectation of privacy is in line with the obligation to provide information (i.e. parties are not required to provide information for which they have a reasonable expectation of privacy).
 - **Rights-consistent:** the option that is most consistent with BORA (i.e. is least intrusive, is proportionate to the need and has adequate safeguards).
 - **Compliance cost:** the extension of the LI powers will require more parties to provide information when requested. This will involve some additional cost for those employers.

Impact Analysis table

We have conducted a qualitative impact assessment as we have limited cost data to compare options in comparable units.

Marginal impact: How does each of the options identified above compare with the status quo against the criteria?

| | Status Quo | A. The power to require documents from companies with a contractual relationship with the employer | B. Extend the concept of 'employer' to include a 'controlling third party' | C. Enable the LI to interview, with their consent, employees of a business which holds a contract with the employer |
|-------------------------------|--|--|---|---|
| Decisions settled at LI level | 0 overall rating Would only allow decisions on coverage in the simplest of cases. Would result in many coverage decisions being referred to the Employment Relations Authority | + overall rating This would further increase the range of cases in which the LI could decide on coverage to include those where contracting third parties hold relevant information. | + overall rating This would increase the range of cases in which the LI could decide on coverage. | + overall rating This would increase the range of cases in which the LI could decide on coverage. |
| Expectation of privacy | 0 overall rating Similar to the current situation | 0 overall rating An employee who is seeking a decision on the coverage of an FPA would need to give permission for information to be collected about the work they perform. | 0 overall rating An employee who is seeking a decision on the coverage of an FPA would need to give permission for information to be collected about the work they perform. | 0 overall rating An employee who is seeking a decision on the coverage of an FPA would need to give permission for information to be collected about the work they perform. |
| Rights-consistent | 0 overall rating Consistent with existing rights | - overall rating Contracting third parties are unlikely to expect to have to provide information about the work performed by another organisation's employees. | + overall rating A controlling third party should reasonably expect that information about work performed on their behalf could be requested. | 0 overall rating The employee will only be interviewed if they agree. |
| Compliance cost | 0 overall rating Consistent with existing powers | - overall rating Is expanding the requirement to answer LI questions to any party that has a contract with the employer. Will involve compliance costs. | 0/- overall rating Will involve additional compliance costs for controlling third parties required to provide information | 0 overall rating There will be a small opportunity cost for employees to answer LI questions given responding is voluntary. |
| Overall assessment | This is not the preferred option. | This is not the preferred option. | This is a preferred option in combination with C | This is a preferred option in combination with B |

Key: ++ much better than doing nothing/the status quo, + better than doing nothing/the status quo, 0 about the same as doing nothing/the status quo, - worse than doing nothing/the status quo, -- much worse than doing nothing/the status quo

21. Options B and C are the preferred options. They balance the need for the LI to gather information about non-standard employment situations and the degree of intrusiveness. We do not believe the status quo would meet the Minister’s objective of ensuring the LI is able to deliver FPA coverage decisions in a wide range of situations. Option A would result in the LI being able to gather information from a broader range of employers and would increase their compliance costs.

Section 6: Costs and benefits

22. The focus of the cost/benefit analysis is the small number of cases where a decision on FPA coverage is needed in a situation where the LI new powers would be needed. Other situations are not included below as they are not affected by the decision to give the LI new powers e.g. the many cases the LI can decide with existing powers, and the proportion of cases that are so complex they will always go direct to the ER Authority. The table below provides a summary of the marginal monetised benefits of the use of the extension of the LI powers.

Benefits

23. The below table provides a summary of the marginal monetised benefits of the use of the extension of the LI powers. With the new powers, the LI will be able to make the coverage decision at a lower cost than the ER Authority.

| Expected benefits of expanding LI powers | | | |
|--|-----------|---|--------------------------|
| Affected parties | | Comment | Impact |
| Regulated parties | Employees | Quicker decisions on whether they are covered by an FPA in situations covered by the expanded powers. More likely to seek a decision because of the reduced cost and speed of the process, therefore expected benefits to employees from having a decision made. Reduced cost of having to go to the ER Authority for a decision on coverage. | Med-Low |
| | Employers | Quicker decisions on whether they are covered by an FPA in situations covered by the expanded powers. More likely to seek a decision because of the reduced cost and speed of the process. Reduced cost of having to go to the ER Authority for a decision on coverage. | Med-Low |
| Regulators and Government | | Reduced need for decisions by the ER Authority in situations covered by the expanded powers | \$400,000 - \$500,000 pa |
| Total Monetised Benefit | | Monetised benefits are the reduced costs to employers, employees and the Government from not having to go to the ER Authority | \$400,000 - \$500,000 pa |
| Non-monetised benefits | | Time saved for employees/employers | Med-Low |

24. The primary monetised benefit is the savings by having FPA coverage decisions made by the LI rather than the ER Authority. The LI will be able to make the coverage decision at a lower cost than the ER Authority (estimated at around one third of the

cost) and with the new powers will be able to make decisions in a broader range of situations than they could without the powers.

25. There will also be non-monetised benefits for employees and employers as it is expected that the LI will be able to provide faster decisions on FPA coverage questions at a lower cost than the ER Authority.

Costs

26. The below table provides a summary of the marginal monetised costs of the use of the extension of the LI powers.

| Expected costs of LI powers | | | |
|-----------------------------|-----------|--|-----------------------------------|
| Affected parties | | Comment | Impact |
| Regulated parties | Employees | In extremely limited circumstances may be asked to be interviewed by LI | Low |
| | Employers | If they are a controlling third party, may be required to provide information about an employee. | Low |
| Regulators and Government | | Cost of resourcing the LI to perform the functions associated with this increase in their powers | Confidential advice to Government |
| Total Monetised cost | | Monetised cost is the cost of decisions on coverage that use the new LI powers | |
| Non-monetised cost | | The compliance costs for employers and employees in providing the information required/requested by the LI | Low |

27. The primary monetised cost is the additional cost of the LI using their powers as part of a coverage decision. We have assumed that the LI will be the first port of call for coverage decisions. The additional powers will only be used in cases where it is not possible for the LI to get the information they need from the employer and employee.
28. So there is an overall monetised net benefit from the cost savings of having decisions made by the LI rather than the ER Authority (estimated to be up to [redacted] per annum). There are also further benefits for employees and employers from having a quick and more cost-effective avenue to get an FPA coverage decision.

Section 7: Implementation and evaluation

Implementation

29. These new powers will be given effect through the Fair Pay Agreements Bill and will only apply when decisions are made on FPA coverage by the LI.
30. Additional funding for the LI to increase capacity to make FPA coverage decisions is being sought in Budget 2022. The proportion relevant to the additional powers of the LI identified here is unknown but likely to be small relative to the amount of funding sought for all coverage determinations. Some assumptions have been used to estimate the relevant costs and benefits above.
31. The power to ask third parties about the work of an employee raised some privacy issues. These will be managed by the LI asking the employee's permission before

asking third parties and using their usual processes with respect to collecting and storing private information.

Monitoring and Evaluation

32. A full set of performance and success measures, and a monitoring plan, will be developed as part of the detailed monitoring and evaluation design for FPAs, based on a detailed programme logic. The intervention logic and evaluation plan, together with identification of key performance indicators, will be developed over the course of 2022. MBIE is currently developing a framework for evaluating the overall effectiveness of the Employment Relations/Employment Standards Regulatory Framework. It is intended that the evaluation of the impact of FPAs will be nested within this wider programme of work.