



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Fair Pay Agreements – Backstop where one side is not represented	Date to be published	2 May 2022

List of documents that have been proactively released		
Date	Title	Author
March 2022	<i>Fair Payments Agreement: Backstop where one side is not represented</i>	<i>Office of the Minister of Workplace Relations and Safety</i>
21 March 2022	<i>Fair Payments Agreement: Backstop where one side is not represented</i> <i>CAB-22-MIN-0080.02</i>	<i>Cabinet Office</i>
March 2022	<i>Fair Payments Agreement: Regulatory Impact Assessment: update for the backstop</i>	<i>MBIE</i>

Information redacted

YES

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Some information has been withheld for the reason of confidential advice to Government.



Cabinet

Minute of Decision

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Fair Pay Agreements: Backstop Where One Side is Not Represented

Portfolio **Workplace Relations and Safety**

On 21 March 2022, following reference from the Cabinet Economic Development Committee, Cabinet:

Background

- 1 **noted** that on 19 April 2021, Cabinet agreed to the key features of the Fair Pay Agreement (FPA) system [CAB-21-MIN-0126];
- 2 **noted** as part of the April 2021 decisions, Cabinet agreed that BusinessNZ will be the default representative for employers (where there is no willing and suitable representative), and that it will be required to:
 - 2.1 use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated;
 - 2.2 be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months [CAB-21-MIN-0126, paragraph 19];
- 3 **noted** that:
 - 3.1 Cabinet has delegated decision-making authority to the Minister for Workplace Relations and Safety [CAB-21-MIN-0126, paragraph 87];
 - 3.2 under this authority, the Minister has decided that the New Zealand Council of Trade Unions will be the default representative for unions (where there is no willing and suitable representative);
- 4 **noted** that there is a residual risk that the intent of the FPA system will be frustrated if either BusinessNZ or the New Zealand Council of Trade Unions are unwilling or unable to fulfil their role as default employer and employee bargaining party respectively;
- 5 **rescinded** the decision referred to in paragraph 2.2 above; and instead
- 6 **agreed** to incorporate a backstop into the FPA system to cover situations where there is no bargaining party on one side of FPA bargaining, the details of which are set out in paragraphs 7 to 24 below;

Trigger for the backstop

- 7 **noted** that state sector employers will generally be able to be represented by the Public Service Commissioner (or in a few specific cases, able to represent themselves), and that they will not have obligations to represent private sector employers or vice versa;
- 8 **noted** that this means there is an exception to the ‘no bargaining party’ concept – if private and state sector employers are covered by the same FPA, both must have representation on the employer bargaining side – so if there a bargaining party from the state sector but none from the private sector, the backstop process applies;
- 9 **agreed** that if bargaining has been initiated but there are no bargaining parties on the non-initiating side, BusinessNZ and the New Zealand Council of Trade Unions will be offered the option of representing employers or employees respectively in FPA bargaining, if the following timeframes have passed:
- 9.1 for a proposed FPA: three months from initiation;
- 9.2 for renewal of an FPA: two months from initiation; or
- 9.3 for withdrawal of non-initiating side during bargaining: immediately;
- 10 **agreed** that for the purposes of paragraph 9 above, BusinessNZ and the New Zealand Council of Trade Unions will have one month to decide whether they wish to step in as a bargaining party;
- 11 **agreed** that if the non-initiating side remains without a bargaining party after the one month period referred to in paragraph 10 above, the other bargaining side may trigger the backstop;
- 12 **agreed** that the period in which the represented bargaining side may trigger the backstop is three months, and that if the backstop is not triggered during this period, the development of the FPA will cease;
- 13 **agreed** that if all the bargaining parties on the initiating side withdraw or cease to be an eligible bargaining party during bargaining, BusinessNZ or the New Zealand Council of Trade Unions (as is relevant) will have one month to decide whether to represent employers or employees respectively in FPA bargaining, and that if they do not, then the development of the FPA will cease;

Institution to perform backstop function

- 14 **agreed** that the Employment Relations Authority will determine the terms of the FPA if a party applies for a determination through the backstop;

Process requirements

- 15 **agreed** that the following will be parties to the backstop proceedings:
- 15.1 approved bargaining party(ies);
- 15.2 approved ‘state sector employer bargaining party(ies)’ (if the FPA covers any state sector employers);
- 16 **noted** that employees and other employers covered by the FPA would not be party to the backstop proceedings;

- 17 **agreed** that the Employment Relations Authority has flexibility in how it obtains input from, or information about the implications of potential FPA terms on, the side that is not represented in backstop proceedings, which could include:
- 17.1 information about the sector or industry concerned provided by the Ministry of Business Innovation and Employment; and/or
 - 17.2 appointing an independent advisor;
- 18 **agreed** that when fixing terms in the backstop process, the Employment Relations Authority will have the same requirements as in the main FPA system when it fixes terms following a bargaining dispute or two failed ratifications, in particular:
- 18.1 the determination should be made by a panel of members (who would not be able to determine any future disputes about that FPA);
 - 18.2 the Employment Relations Authority must apply the same statutory criteria as when fixing terms in situations where there are bargaining parties on both sides (set out in Annex 1 to the paper under DEV-22-SUB-0040);
 - 18.3 the Employment Relations Authority will be required, or able, to include terms on the same topics in the FPA (with the exception of the terms that require both sides' agreement to include);

Appeals and judicial review rights

- 19 **agreed** that where the Employment Relations Authority sets an FPA after the backstop has been triggered:
- 19.1 only those who were a party to the backstop proceedings may appeal the determination; and
 - 19.2 appeal rights are limited to questions of law (consistent with appeal rights in the rest of the FPA system);
- 20 **agreed** that appeals as described in paragraph 19 above will be heard by the Employment Court;
- 21 **agreed** that for appeals described in paragraph 19 above, the Employment Court must appoint an amicus curiae to represent the side that was not party to backstop proceedings in the Employment Relations Authority;
- 22 **agreed** that appeal rights as described in paragraph 19 above must be exhausted before a party can seek judicial review of an FPA set through the backstop process;

Detailed design


- 23 **agreed** to amend certain features of the FPA system, as outlined in Annex 1 to the paper under DEV-22-SUB-0040 to account for the backstop;

Risks associated with the backstop

- 24 **noted** that the possible risks associated with the backstop process include:
- 24.1 potential limitation on the right to free and voluntary negotiation;
 - 24.2 potential limitation on natural justice rights, specifically the right to be heard;


Financial implications

25 Confidential advice to Government

**Legislative implications**

- 28 **noted** that the Minister for Workplace Relations and Safety intends to table the proposed change to the Fair Pay Agreement Bill as a Parliamentary Paper to inform the select committee and the public of the policy intentions;
- 29 **noted** that a category 2 priority on the 2022 Legislation Programme is being sought for the FPA Bill (to be passed in 2022);
- 30 **noted** that the FPA Bill has been drafted based on Cabinet's April 2021 decisions, and will shortly be ready for introduction to the House;
- 31 **agreed** to the proposed process to incorporate the decisions outlined above into the FPA Bill, that is:
- 31.1 the Minister for Workplace Relations and Safety will advise the select committee of Cabinet's decisions, attaching the Parliamentary Paper;
 - 31.2 the Minister will ask the select committee to consult on the proposals in that paper;
 - 31.3 the above proposals will be drafted in the form of a Supplementary Order Paper (SOP), which the Minister will provide to the select committee in July 2022;
 - 31.4 the Minister will ask the select committee to incorporate the SOP into the version of the Bill the committee reports back to the House;

32 Confidential advice to Government



- 33 **invited** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to draft an SOP to give effect to the above paragraphs;

- 34 **authorised** the Minister for Workplace Relations and Safety to make decisions, consistent with the objective and overall design of the FPA system, on any issues that arise during drafting of the backstop SOP;
- 35 **agreed** that the legislation will bind the Crown.

Michael Webster
Secretary of the Cabinet

Secretary's Note: This minute replaces DEV-22-MIN-0040. Cabinet agreed to the rescinding decision in paragraph 5.
