



BRIEFING

Fair Pay Agreements – the nature of ‘support’ for the representation test

Date:	3 May 2021	Priority:	High
Security classification:	In Confidence	Tracking number:	2021-3420

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to require a positive, or active, indication of support from at least 1000 employees who fall within coverage for the representation test to be met.	7 May 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	Privacy of Natural Persons	✓
Beth Goodwin	Principal Advisor, Employment Relations Policy	04 901 1611		

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 Withdrawn |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 – the nature of ‘support’ for the representation test

Date:	3 May 2021	Priority:	High
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Purpose

To advise on what is required for a demonstration of ‘support’ for the purposes of the representation test.

Recommended action

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

- a **Note** four options for demonstrating ‘support’ for the purposes of the representation test have been assessed:

Option A: At least 1000 members participate, and a majority of them vote yes
Option B: Support from a majority of those who vote (with no minimum number of participants)
Option C: A positive, or active, indication of support from at least 1000 employees
Option D: Union membership is deemed to be support

Noted

- b **Agree** to require a positive, or active, indication of support from at least 1000 employees who fall within coverage for the representation test to be met (Option C).

Agree / Disagree

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

3 / 5 / 2021

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

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Background

1. Cabinet has agreed that one of the ways Fair Pay Agreement bargaining can be initiated is “a representation test that would require either 10% or 1,000 employees (whichever is lower) of the employees within proposed coverage to support initiation of a FPA” (CAB-21-MIN-0126).
2. We have to date operated on the assumption that the word ‘support’ in that paragraph means active or positive support i.e. there is evidence that each individual in the 1000 or 10% of employees within coverage agrees that an FPA should be initiated.
3. The New Zealand Council of Trade Unions (NZCTU) has suggested that because a union can initiate an FPA on behalf of its members within coverage, membership of the union should be sufficient evidence of support for an FPA, or alternatively, that a majority vote where at least 1000 employees participate should be sufficient. A common way that a union decides on a course of action is (similar to many other organisations) to hold a vote in accordance with its rules. A union will then then adopt the position or take the action indicated by the outcome of the vote.
4. Following the NZCTU’s suggestion, we sought confirmation from you that you shared our interpretation of what was meant by ‘support’. Your office has indicated that you may be open to something less than evidence of active support, and asked for advice on this topic. In particular, your office asked for comments on three options:
 - a. *Initiation based on union membership if there is a successful vote (if a union has more than 1,000 members and a majority of them vote in favour of initiation)*
 - b. *Initiation based on the proportion of a successful vote (if a union has 2,000 members, 500 of them vote and 51% are in favour of initiation can trigger i.e. the union can apply the percentage across all members rather than requiring every member to participate)*
 - c. *Active participation required of every member (e.g. a vote or petition).*
 - i. We are interpreting this option as meaning ‘active participation by at least 1000 members’ – as if the union had more than 1000 members in coverage, it would not require every member’s support to meet the threshold.
5. The Fair Pay Agreement Working Group (FPAWG) used the following words to describe the representativeness test: “ten per cent or 1,000 (whichever is lower) of workers in the sector or occupation... must have indicated their wish to trigger FPA bargaining” (emphasis added). The FPAWG explained the representativeness threshold “is intended to ensure there is sufficient demand for bargaining within the sector or occupation.”
6. The Government’s 2019 public consultation *Designing a Fair Pay Agreements System* asked for input on “How should an applicant group need to prove that they have reached a representation threshold? (such as through signatures, membership etc)”. Of those who responded to this question, one third thought union membership was enough, and two thirds thought something more active should be required:
 - a. Eight clearly indicated that representation should be able to be indicated by either signature or union membership (these responders were mostly unions),
 - b. Twelve clearly indicated that a signature or more should be required (these were mostly employers),
 - c. Four thought a vote should be held.

We have considered constraints and criteria in assessing the options

7. In considering the options, this briefing recognises some relevant constraints.
8. First, it is clear from the Cabinet decision that the 10% or 1000 workers need to all be within coverage of the proposed FPA in order to be counted. This means that under any option, an initiating union will need to ascertain that those it is counting as ‘supporting’ the initiation are within coverage – that is, are currently employed, in the industry or occupation as defined in the coverage. Any option for ascertaining ‘support’ needs to ensure that unions can be sure of this fact.
9. Second, the representation test could be met by support from a combination of union and non-union members. The FPAWG stated that “the representativeness threshold should cover both union and non-union members.” We understand this did not mean that unions must canvas or seek the views of non-members – rather, that a union may also point to non-members who support initiation, as part of achieving 1000 supporters. Therefore, the FPA system will need to be broad enough to enable non-union members’ support to be demonstrated if needed.
10. We have applied the following criteria when considering the options.
 - a. Legitimacy: does the option ensure there is a mandate or social licence for an FPA? This criterion is particularly important for two reasons.
 - i. First, the purpose of the representation test is to ensure there is a degree of demand for an FPA. We consider that the 10% or 1000 workers test is already a fairly low bar as a demonstration of mandate – for example, in a large occupation with 100,000 workers, 1000 workers only comprises 1% of the total. The public interest test is designed as the safety valve for when a union can’t gather the necessary mandate but the workforce faces poor labour market outcomes.
 - ii. Second, the representation test is a mitigant where the FPA system places limitations on human rights, such as freedom of association. Part of the justification for these limitations is that there is some desire for an FPA from those who will be covered by it. An interpretation of the representation test which weakens its legitimacy would in turn weaken that justification.
 - b. Equity: is there equity of access to the FPA system across types of employees? We have assumed that giving equivalent weight to both union members’ and non-members’ views is desirable.
 - c. Consistency: is the option consistent with the rest of the FPA system and with parallel interventions in the employment relations and employment standards (ERES) regulatory system, unless there is a good reason for divergence?
11. We also considered whether to include ‘effectiveness’ as a criterion, that is, whether the options support improved outcomes for workers. We don’t consider that any option is likely to be more effective than others – while some options make it easier to access the FPA system, there may be downsides to increased access, such as increasing the risk of queuing in the system and making it more difficult to ensure priority for workers in sectors with poor labour market outcomes.¹ In addition, a very low degree of active support from workers in the sector could make it difficult for the union/s to develop, and get support for, a bargaining strategy.

¹ These implications are set out in more detail in our aide memoire 2021-1424 *Fair Pay Agreements: Implications of a change in initiation*, dated 9 December 2020.

We recommend requiring positive support

12. We have considered the three options that you asked for advice on, to give effect to Cabinet's decision that the representation test requires support from 1000 or 10% of the employees within coverage. We have also assessed, for completeness, a fourth option based on the NZCTU's initial suggestion that union membership could be sufficient to show support. While we have re-described the options, they are listed in the same order as in your office's request (reproduced above in paragraph 4a – c), with the additional option as D. While these options are framed in relation to the 1000 employee representation test, the concepts would apply equally to the threshold for meeting the 10% representation test.
13. Our assessment of the options is summarised in the table below. We recommend option C, as it would best ensure the legitimacy of the FPA, equity of treatment of employee views, and is consistent with the rest of the FPA system.

Option	Criteria	Legitimacy	Equity	Consistency
A: At least 1000 members participate, and a majority of them vote yes		X	X	-
B: Support from a majority of those who vote (with no minimum number of participants)		XX	XX	✓
C: A positive, or active, indication of support from at least 1000 employees		✓✓	✓✓	✓
D: Union membership is deemed to be support		XX	XX	XX

Option A: At least 1000 members participate, and a majority of them vote yes

14. In this option, if at least 1000 union members within coverage participate in a ballot, a majority 'yes' vote (comprising minimum 501 individuals) would be deemed to be 'support' from all 1000. This could be within one union, or the 1000 participants could be summed across multiple unions (if all were within coverage).
15. We believe option A has low legitimacy (lower than option C, but higher than options B or D). It effectively halves the number of active supporters required for the representativeness test, to 501 individuals. This option also contains a potential negative consequence for some union members: a union member who fell within coverage but did not support the initiation of the FPA would be deemed to support it if a majority of their peers did. The only way to avoid being counted as 'support' would be to leave the union, and thus lose the other benefits of union membership. We consider this consequence further negatively affects the legitimacy of option A.
16. It is also less equitable than option C (but again, higher than options B or D), as while the representation threshold can be met by 501 union members, the same threshold would require 1000 non-members. A union member's support could have up to twice the weight of a non-member.
17. In relation to the consistency criterion, we couldn't find a situation elsewhere in the ERES system where a numerical threshold is required and it can be met by that number participating, but with only a majority of that number supporting the proposal.

Option B: Support from a majority of those who vote (with no minimum number of participants)

18. This option is similar to option A, but removes the requirement that at least 1000 members participate in the ballot. For example, a union may have 2000 members within coverage, but only 500 of them might participate in the ballot. If 51% of them (251 individuals) vote yes, that would be deemed to be support from over 1000 employees, if you extrapolate the

51% support across all 2000 members. We suggest this option should require the union/s to have at least 2000 members in coverage, in order for a majority of voters to be extrapolated out to equal at least 1000 supporters. In the extreme, if very few members vote (e.g. fewer than 100, or fewer than 10), there could be a very small number of employees that demonstrate support.

19. This option scores low on legitimacy: the example in the previous paragraph would quarter the number of active supporters required for the representativeness test (251 instead of 1000). Further, it would allow for fewer people to participate in the ballot than are ostensibly required to 'support' representation (i.e. 500 people participate, but 1000 are deemed to support). We believe this is stretching the meaning of 'support' beyond what can be encompassed in its natural meaning.
20. It also scores low on the equitable criterion, for the same reason as option A but even more so: any given union member's support can have up to four times the weight of a non-member.
21. In relation to consistency: this option mirrors the approach applied in section 45 of the ER Act. Where a union proposes to initiate bargaining for a multi-employer collective agreement (MECA), the union must hold secret ballots, in accordance with its rules, for its members who are employed by the relevant employers. If a majority of the members eligible to vote and who do vote, vote in favour, then the union can initiate MECA bargaining. However, that vote results in a collective agreement which only binds union members, and everyone who would be affected has a chance to vote. In contrast, a ballot about whether to initiate FPA bargaining results in an FPA which binds all employees within coverage, many of whom will not have had an opportunity to participate in the ballot. These key differences indicate that a different (higher) demonstration of support is warranted in the FPA system than for collective bargaining.

Option C: A positive, or active, indication of support from at least 1000 employees

22. This option requires a positive, or active, indication of support from at least 1000 employees who fall within coverage. This could comprise (for example) signatures on a petition, or 1000 'yes' votes in a ballot.
23. This is the option that would most clearly give effect to Cabinet's decision, and most clearly reflects the ordinary meaning of the work 'support'. We believe it also reflects the FPAWG's intention, demonstrated by the words 'indicated their wish' in the Group's recommendations to describe the support required, and its indication that the purpose of the test is to ensure sufficient demand.
24. This option is the strongest in relation to the legitimacy criterion, as it involves the strongest mandate from affected employees (1000 employees actively support it, rather than the possible 501 or 251 employee thresholds in options A and B).
25. It is also the most equitable – support from a union member would carry the same weight as support from a non-member under this option, and a union could run a single process (such as a petition) for both union members and non-members.
26. This option is internally consistent with the other aspect of the FPA system where support is demonstrated (the ratification vote), in that it is run by a union agnostically for union members and non-members, whose votes carry the same weight.

Option D: Union membership is deemed to be support

27. For completeness we have assessed a fourth option, initially suggested by NZCTU, that a union/s could initiate FPA bargaining if it has at least 1000 members in coverage, without requiring a ballot, petition or other way to ask members their views on the initiation.

28. We do not consider this option shows legitimacy. It requires no indication of support from any members. It is not equitable, as union members would be simply deemed to be supportive, while non-members would need to actively indicate support to be counted.
29. It is inconsistent with the rest of the ERES system, as it would be a lower threshold than required to initiate MECA bargaining. As described above in paragraph 21, section 45 requires a ballot of affected members and majority support for MECA bargaining to be initiated, but under this option FPA bargaining (with wider coverage) would have a lesser requirement.

Next steps

30. You have indicated you would like to make a decision on this matter before your public announcement of the FPA system, currently scheduled for Friday 7 May. We will incorporate your decision into the drafting of the FPA Bill.