MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

FPAs: Process for fixing FPA terms

Date:	25 May 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-3005

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	Make decisions on the process the Employment Relations Authority should follow in making recommendations or determinations to fix FPA terms.	31 May 2021

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
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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- ☐ Withdrawn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

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FPAs: Process for fixing FPA terms

Date:	25 May 2021	**Priority:**	Medium
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Purpose

This briefing seeks your decisions on the process the Employment Relations Authority (ER Authority) should follow in making recommendations and determinations to fix Fair Pay Agreement (FPA) terms.

Executive summary

Cabinet has authorised you to decide any process the ER Authority must follow when making a determination to fix FPA terms, including any factors that the ER Authority must take into account in making its determination [CAB-21-MIN-0126 refers].

This briefing compares three high-level options for the process to fix FPA terms:

- Option 1: Employment Relations Act 2000 (ER Act) approach - broad discretion to decide process.
- Option 2: ER Act approach plus ER Authority must consider mandatory factors (MBIE recommendation).
- Option 3: Final offer arbitration with modifications, similar to the Screen Industry Workers Bill (SIWB) approach.

We consider that while option three (final offer arbitration) has advantages in terms of ensuring a workable FPA and potentially encouraging bargaining sides to reach a settlement ahead of determination, option two (ER Act approach plus mandatory factors) is the most suitable approach for the FPA system and more likely to result in an effective outcome. Key stakeholders also support option two.

This briefing proposes a set of mandatory factors the ER Authority must consider when making recommendations and fixing terms and conditions. These are set out on page 10. Our proposed set of factors is largely consistent with the SIWB factors.

Cabinet has agreed that the ER Authority, where reasonably necessary, may seek independent expert advice [CAB-21-MIN-0126 refers]. We consider that the powers enshrined in the ER Act would be sufficient to allow the ER Authority to seek its own independent expert advice. However, we recommend, for the avoidance of doubt, that the ER Authority be required to disclose to bargaining sides any independent expert advice on which it may base its decision and provide sides with an opportunity to respond to the issues raised.

Finally, this briefing provides further advice on whether the ER Authority should, in making a determination on whether a mandatory to discuss topic must be included in an FPA, be required to apply weight to the fact that a bargaining party had applied for a determination on a ‘mandatory to discuss’ topic. We do not recommend introducing this requirement, as it unjustifiably limits the discretion of the ER Authority to balance the relevant considerations, and lacks legal clarity.

Recommended action

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

a **Note** that Cabinet has authorised you to decide any process the ER Authority must follow when making a determination to fix terms, including any factors that the ER Authority must take into account in making its determination [CAB-21-MIN-0126 refers].

Noted

High-level process for fixing terms

b **Note** that under the Employment Relations Act, the ER Authority has broad discretion to decide its own processes when fixing terms in collective agreements or investigating any matter.

Noted

c **Agree** to one of the following high-level options for the process the ER Authority must follow when fixing the terms of an FPA:

Option 1: ER Act approach - broad discretion to decide process.	*Agree / Disagree*
Option 2: ER Act approach plus ER Authority must consider mandatory factors (MBIE recommendation).	*Agree / Disagree*
Option 3: Final offer arbitration with modifications, similar to the SIWB approach.	*Agree / Disagree*

Proposed factors the ER Authority must consider

d **Note** that officials expect the purpose statement of the Bill to include the FPA system objective to improve labour market outcomes, which would require the ER Authority to take this objective into account when fixing FPA terms and conditions.

Noted

e **Agree** that the ER Authority should be required to consider the following factors in making determinations or non-binding recommendations on FPA terms and conditions:

The terms that the parties to the FPA have agreed.	*Agree / Disagree*
The relevant industry or occupational practices and norms, including their evolution and development.	*Agree / Disagree*
The likely impact on employees within coverage.	*Agree / Disagree*
The likely impact on the business or activity of employers with employees within coverage.	*Agree / Disagree*
Relativities within the proposed FPA, and between the proposed FPA and other relevant employment terms and conditions, in particular, national minimum standards and relevant collective agreements.	*Agree / Disagree*
The need to ensure the FPA is written in plain language and can be easily understood by employers and employees within coverage.	*Agree / Disagree*
Any other matter it considers relevant.	*Agree / Disagree*

f **Agree** that the ER Authority should be enabled, but not required, to have regard to any likely impacts on New Zealand's broader economic or social wellbeing in making determinations or non-binding recommendations on FPA terms and conditions.

Agree / Disagree

Expert advice and procedural fairness

g **Note** that Cabinet has agreed that the ER Authority, where reasonably necessary, may seek independent expert advice [CAB-21-MIN-0126 refers].

Noted

h **Note** that officials consider that the powers enshrined in the Employment Relations Act would be sufficient to allow the ER Authority to seek its own independent expert advice but that Parliamentary Counsel Office may choose to make this process explicit in the FPA legislation.

Noted

i **Agree** that the ER Authority should be required to disclose to bargaining sides any independent expert advice on which it may base its decision and provide sides with an opportunity to respond to the issues raised.

Agree / Disagree

j **Note** that officials are seeking legal advice on whether the provisions relating to awarding costs in the ER Act are fit for purpose in the context of the FPA system, and will engage with your office on this point**.**

Noted

Process for determinations on whether a mandatory to discuss topic must be included in the FPA

k **Note** that you have agreed that, during bargaining, either side will be able to apply for a determination on whether a 'mandatory to discuss' topic must be included in the FPA, and the ER Authority would then be able to decide whether it is appropriate for the FPA to include a term for this topic.

Noted

l **Note** that the fact that a side has applied for a determination, and the reasons likely to be presented with the application, are relevant considerations that the ER Authority should take into account in making its determination.

Noted

m **Note** that *applying weight* to the fact an application had been received indicates to the decision maker that this fact is more important than other relevant considerations, and significantly limits the discretion of the ER Authority to balance the relevant considerations in line with its investigative role and the principles of natural justice.

Noted

n **Note** that the ER Authority Chief has also indicated that it is not clear how in practice the panel could give weight to the fact that an application had been received compared to other considerations.

Noted

o **Note** that we have considered, and do not recommend, two options that would provide more legal clarity:

Option 1	An explicit requirement in the legislation that the ER Authority must take into consideration the application from the bargaining side and the reasons presented for the application having been made.
Option 2	The ER Authority must find in favour of including the topic in the FPA unless there is good reason not to. This is the closest option to 'applying weight'.

Noted

p **Agree** that the ER Authority's natural justice obligations, combined with the requirement to consider certain factors, are adequate to ensure procedural fairness for parties when the ER Authority is making a determination on whether a mandatory to discuss topic must be included in an FPA.

Agree / Disagree / Discuss

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

25 / 05 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / ..... / .....

Background

Cabinet decisions on fixing FPA terms

1. On 19 April 2021, Cabinet agreed that when a bargaining side applies for a determination to fix the terms of a FPA, the ER Authority must only make a binding determination to fix mandatory terms (and may make a determination to fix mandatory to discuss terms, and may fix other employment-related terms if both bargaining sides agree) if it is satisfied that:

    a. the bargaining sides have first tried to resolve the difficulties by mediation or by other processes recommended by the ER Authority; and either:

        i. all other reasonable alternatives for settling the dispute have been exhausted; or

        ii. a reasonable period has elapsed within which the bargaining sides have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude a FPA.

2. Cabinet also agreed that:

    a. When the terms of an FPA are fixed by determination, the decision is made by a panel of ER Authority members.

    b. Where the ER Authority has fixed the terms of the FPA by determination, the right to appeal this decision is limited to the appeals on the questions of law.

3. Cabinet has authorised you to decide any process the ER Authority must follow when making a determination to fix terms, including any factors that the ER Authority must take into account in making its determination [CAB-21-MIN-0126 refers].

What process should be followed in fixing FPA terms?

FPA Working Group recommendations on the approach to fixing terms

4. The FPA Working Group recommended the ER Authority or Employment Court fix terms that bargaining parties cannot agree, but said that the decision-maker should be assisted, potentially through expert advice or a panel. The FPA Working Group also suggested the government could consider an arbitration-based model as an alternative, but suggested this would require the establishment of a bespoke model and institutions to support it.

The ER Act gives broad discretion to the ER Authority when fixing terms or determining any matter

Natural justice requirement

5. The ER Act requires the ER Authority to comply with the principles of natural justice and act in a manner that is reasonable, having regard to its investigative role. Ministry of Justice guidelines note that the rules of natural justice prescribe what is necessary for issues to be fairly heard and determined. The concept usually includes the following minimum standards of procedural fairness:

    a. providing adequate communication and notice of proceedings and hearings to all parties

    b. providing all parties with a reasonable opportunity to present their cases

    c. treating all parties equally

d. making decisions impartially and independently[1].

The ER Authority has broad procedural discretion

6. In complying with the principles of natural justice, the ER Authority has broad discretion to decide its own processes when investigating any matter. Section 160(1) of the Employment Relations Act 2000, provides that the ER Authority may, in investigating any matter,—

    a. Call for evidence and information from the parties or from any other person.

    b. Require the parties or any other person to attend an investigation meeting to give evidence.

    c. Interview any of the parties or any person at any time before, during, or after an investigation meeting.

    d. In the course of an investigation meeting, fully examine any witness.

    e. Decide that an investigation meeting should not be in public or should not be open to certain persons.

    f. Follow whatever procedure the Authority considers appropriate.

There is a high threshold to access determination to fix terms

7. The threshold for accessing a determination to fix terms under the ER Act is high, requiring a serious and sustained breach of the duty of good faith in bargaining and all other alternatives for reaching agreement having been exhausted. The ER Authority has only once fixed terms under this Act[2].

There is a greater likelihood of the ER Authority fixing terms in the FPA system

8. We expect the ER Authority will be called on more frequently to fix terms in the FPA system because:

    a. The threshold in the FPA system to access a determination to fix terms is significantly lower than in the ER Act, particularly as there does not need to have been a breach of the duty of good faith in bargaining.

    b. Parties to FPA bargaining cannot take industrial action, so are more likely to seek third-party involvement if they reach an impasse during bargaining.

Options for the process the ER Authority must follow when fixing FPA terms

9. We have identified the following three high-level options for the process the ER Authority must follow when fixing FPA terms.

10. We have received legal advice that option 3: ‘final offer arbitration with modifications’ may not fit within the April 2021 Cabinet decisions on the FPA system, as an arbitration model could be seen to be distinct from the determination process prescribed in the Employment Relations Act. For completeness, however, we have included this option in our analysis; if it is your preferred option we will provide you with further advice on whether you will need to return to Cabinet to seek further decisions.

[1] Ministry of Justice, 2019, *Tribunal Guidelines*, p23.
[2] *First Union Inc. v. Jacks Hardware and Timber Ltd* [2019] NZERA 374 (Jacks Hardware case)

Options	Description
Option 1: *ER Act approach - broad discretion to decide process.*	This resembles the approach taken in the Employment Relations Act: the ER Authority would be able to use its normal powers to decide how to fix a disputed term in an FPA. This would involve submissions and information from all parties to the dispute, with the possibility for industry experts to give evidence.
Option 2: *ER Act approach plus ER Authority must consider mandatory factors (MBIE recommendation).*	Under Option 2, the ER Authority would craft the FPA terms taking into account certain factors set out in legislation. This would ensure the ER Authority turns its mind to factors considered sufficiently important before fixing terms, while allowing it to decide its process otherwise. There would be choices about what factors should be set out in the legislation, which is discussed further below.
Option 3: *Final offer arbitration with modifications, similar to the SIWB approach.*	Option 3 resembles the approach taken in the Screen Industry Workers Bill (SIWB). The ER Authority would choose between parties' proposals/offers to fix disputed terms. There would be choices about the exact design of any final offer arbitration process, such as whether the ER Authority must take certain factors into account and whether parties would have an opportunity to refine their final offer after viewing the other side's offer and/or receiving feedback from the ER Authority.

Approach in other sectoral bargaining systems

11. The proposal in the Screen Industry Workers Bill (SIWB) is that the ER Authority must use the final offer arbitration process to fix disputed terms of occupation-level collective contracts. This corresponds to option 3 above. Like parties to FPA bargaining, contractors in the screen industry cannot take industrial action. When fixing a term (or terms) of an occupation-level collective contract, the ER Authority must have regard to certain criteria. The arbitrating body can be a panel consisting of one member of the ER Authority (who becomes the chairperson) and one or two members nominated by the worker party and an equal number nominated by the engager party. Where the arbitrating body is a panel, its decision is by majority vote, and one of the voters in the majority must be the chairperson. In the SIWB proposal, a ratification vote is still required to bring an occupation-level collective contract into force.

12. For collective bargaining relating to the constabulary, who also cannot take industrial action, final offer arbitration is also used. The constabulary model of final offer arbitration blends mediation and arbitration, with the arbitrator present during mediation and having an optional role to play at that stage.

13. Under the pay equity bargaining regime, the ER Authority has full discretion to determine settlement terms. This corresponds to option 1 above. The ER Authority has to take certain mandatory considerations into account when deciding specifically whether to award back pay as part of a determination fixing terms and conditions (which corresponds to option 2).

14. In the Australian Modern Awards system, the Fair Work Commission must take into account a range of factors in setting the terms and conditions in modern awards. This corresponds most closely to option 2. Modern Awards are not intended to be bargained agreements; they are minimum terms and conditions for employees set by the Fair Work Commission.

Our considerations in assessing options

15. We have considered the extent to which each option is likely to:

    a. Encourage parties to reach agreement rather than proceeding to determination.

    b. Promote greater and more mature sector-wide dialogue and co-ordination.

    c. Be effective in improving labour market outcomes (the system objective).

d. Be workable for parties, in terms of producing an FPA that is workable for employers and employees to implement in the specific circumstances and context of their occupation or industry.

e. Provide sufficient flexibility to reach an optimal outcome for both sides.

f. Be cost effective / efficient in finalising an FPA in a way that represents good value for money.

g. Be consistent with parallel interventions in the ERES regulatory system, unless there is a good reason for divergence.

Final offer arbitration (option 3) may have some advantages for workability and encouraging settlement, but the risks outweigh the benefits

16. Under option 3, the ER Authority panel would have to choose between offers made by either party. This would mean a more limited set of potential outcomes for parties, but would prevent the ER Authority panel from crafting an FPA that may be unworkable in the specific circumstances and context of the industry or occupation. Final offer arbitration was considered more suitable for the screen industry bargaining system because of the likelihood that unique terms and conditions will be included in screen industry collective contracts (e.g. copyright clauses for writers, or residual/royalty clauses for performers). Parties in the screen industry preferred final offer arbitration (compared to conventional arbitration) because it would, at the very least, result in an outcome worded/crafted by the industry.

17. It is arguable whether option 2 or option 3 would better encourage parties to reach a settlement during bargaining rather than apply for a determination to fix terms. The literature points towards final offer arbitration being more likely to lead to settlement than conventional arbitration[3]. With conventional arbitration it is possible that parties might expect the ER Authority to select the "middle ground" and therefore prefer to defer difficult decisions to determination rather than try to reach agreement. Parties could also be incentivised to take more extreme positions to ensure they are not disadvantaged if the ER Authority selects the "middle ground".

18. On the other hand, where final offer arbitration might encourage settlement instead of determination, this may benefit risk-tolerant parties, as risk-averse parties are more likely to make concessions to avoid the risk of a negative outcome at determination. This could adversely impact the effectiveness of the resulting FPA.

We consider that option 2 (ER Act approach plus mandatory factors) is the most suitable approach for the FPA system

19. Under option 2, the ER Authority would craft the FPA terms taking into account parties' interests, certain factors set out in legislation, and other relevant considerations. The key difference between option 2 and option 3 is the latitude or flexibility they provide the ER Authority to make a determination.

20. In the FPA context, we consider option 2 is more likely to result in an effective outcome that improves labour market outcomes. This is because:

    a. We consider the risk is too high under final offer arbitration that the ER Authority will be forced to pick between two unreasonable or sub-optimal offers; the level of bargaining experience and expertise is likely to be variable in the FPA system and there is no guarantee bargaining parties will be genuinely representative. This risk is considerably reduced in the screen industry where final offer arbitration effectively codifies existing practice in the sector. There is also a high level of coordination in the screen industry, and the worker and engager organisations that we expect to be bargaining parties in

[3] See MBIE briefing: 'Screen Industry Workers Bill: Further policy issues', ref. 1752 19-20.

the SIWB system have established relationships, common interests, and a shared vision for the industry.

b. Option 2 allows the ER Authority to look at creative or innovative solutions to FPA disputes taking into account the relevant factors and evidence from parties and industry experts.

21. We consider sufficient safeguards can be built into the system to ensure the terms fixed by the ER Authority are workable in the specific context and circumstances of the occupation or industry. As discussed, the ER Act already requires the ER Authority to comply with the principles of natural justice and act in a manner that is reasonable, having regard to its investigative role. In addition to this, the ER Authority would be required to consider certain factors, such as the likely impact on employers and employees, the relativities between the FPA terms, and relevant industry or occupational practices and norms. Advice on mandatory factors is included below.

22. We acknowledge that including factors that the ER Authority must consider increases the risk of appeals on questions of law. However, we consider the advantages of including factors outweigh this risk, in particular:

    a. Fixing FPA terms is a new and significantly different function for the ER Authority, and there would therefore be benefit in establishing a legislative process to support decision making.

    b. We consider the intention for these terms to apply to an entire occupation or industry warrants setting a process in law for fixing terms. An FPA has the potential to impact a large section of the population or at an economy- or nation-wide scale.

23. While it is arguable whether option 2 or option 3 would better encourage parties to reach a settlement during bargaining, our mediation specialists advise that option 2 is more likely to promote an 'interest-based' approach to bargaining, focussed on joint problem solving[4]. Option 2 may therefore be more likely to encourage greater and more mature sector-wide dialogue and co-ordination, particularly in occupations or industries that lack mature employee-employer relationships.

We do not recommend option 1

24. Option 1 would replicate the approach taken in the ER Act, i.e. the ER Authority would not need to consider mandatory factors when fixing the terms of an FPA. Within the bounds of natural justice, the ER Authority would have broad discretion to decide its own processes when fixing terms. The Chief of the ER Authority could issue a code of conduct to guide the decision making of determination panels, but issuing a code of conduct would not be mandatory.

25. We do not recommend option 1 as it does not contain the safeguards to support decision-making discussed in paragraph 22 above.

[4] If parties take an 'interest based' approach, they are looking at issues, underlying interests, options for resolution and evaluating those options against agreed objective standards. It is a process that encourages brainstorming and creative thinking on the part of both parties to address the interests that have been identified. This expands the options away from set remedies or claims, and may come up with options that parties might not have considered on their own.

Stakeholders also support option 2

26. The NZCTU's first preference at the time the SIWB was being developed was not for final offer arbitration, but they deferred to industry parties on this matter. At the time, they stated that they did not want the SIWB position treated as a starting point for the FPA system. In recent discussions, the NZCTU has reconfirmed their objection to the use of final offer arbitration in the FPA system. The Business NZ Manager of Employment Relations Policy has also stated that employers would be resistant to final offer arbitration.

27. The Chief of the ER Authority supports the ER Act approach with mandatory factors (option 2). The Chief's view is that final offer arbitration works better where there are mature bargaining parties and less external factors, and that it would lack credibility in the context of a new bargaining system such as the FPA.

Proposed factors the ER Authority must consider

Recommended set of mandatory factors

28. We recommend that the ER Authority be required to consider the following factors when making recommendations or determinations to fix FPA terms and conditions. This set of factors could be used for option 2 (ER Act process plus mandatory factors) or option 3 (final offer arbitration with modifications). Each factor is described in the section below.

29. In developing this set of factors, we have considered:

- The objective of the FPA system, which is 'to improve labour market outcomes by enabling employers and employees to collectively bargain industry- or occupation-wide minimum employment terms' [CAB-21-MIN-0126 refers].
- Workability of the FPA being determined.
- Comparable legislation, including the SIWB and the Australian Fair Work Act 2009 (see Annex one and two).
- The ER Authority's role, capacity, and expertise.
- The outcome of consultation with the Chief of the ER Authority and the NZCTU.

30. We expect the purpose statement of the Bill to include the policy objective to improve labour market outcomes[5]. This means the ER Authority will be required to take this objective into account when making recommendations and determinations to fix FPA terms and conditions.

Proposed factors the ER Authority must consider[6]:

a. The terms that the parties to the FPA have agreed.

b. The relevant industry or occupational practices and norms, including their evolution and development.

c. The likely impact on employees within coverage.

d. The likely impact on the business or activity of employers with employees within coverage.

[5] 'To improve labour market outcomes' may not be the exact wording in the Bill, PCO will advise on this.
[6] The proposed factors express the intent rather than the exact words that would be used in the Bill. PCO will advise on the appropriate wording for the legislation.

e. Relativities within the proposed FPA[7], and between the proposed FPA and other relevant employment terms and conditions, in particular, national minimum standards and relevant collective agreements.

f. The need to ensure the FPA is written in plain language and can be easily understood by employers and employees within coverage.

g. Any other matter it considers relevant.

Description of each mandatory factor

The terms that the parties to the FPA have agreed

31. This factor requires the ER Authority to take into account what has already been agreed between the bargaining sides prior to determination, rather than starting from a blank page. The ER Authority would still have discretion to adjust terms that bargaining sides had agreed when looking at how the terms and conditions work together as a whole package. This factor is intended to achieve a more workable and supported outcome for parties to the FPA. It is also a mandatory factor in the SIWB.

The relevant occupational or industry norms and practices, and their evolution and development

32. The ER Authority may look at information on the specific context and circumstances of the industry or occupation, including the reasons behind industry norms and practice, and the future direction of practice. This could involve looking at submissions and information from bargaining sides and independent expert advice. This factor is intended to support a more workable outcome for parties, which takes into account current and future practice. It is also a mandatory factor in the SIWB.

The likely impact on employees within coverage.

33. When considering what is the likely impact on employees within coverage, the ER Authority may consider the current state of employment terms and conditions for employees within coverage, the nature and scale of any particular issues (problems or opportunities) impacting employees, and, in light of this, how the terms under consideration would affect employees.

34. The ER Authority may for example consider information on the impacts of additional income that employees could earn as well as any impact (positive or negative) from work pattern changes. It is likely that the ER Authority will need to consider how terms may impact differently on employees with different patterns of work e.g. full-time versus part-time. The ER Authority may also take into account any foreseeable effects on employment levels. The SIWB also requires the ER Authority to consider this element.[8]

The likely impact on the business or activity of employers with employees within coverage.

35. This factor mirrors the one above for employees. When considering what is the likely impact on business or activity within coverage, the ER Authority may consider the current state of business or activity within the industry or occupation, the nature and scale of any particular issues (problems or opportunities) impacting this business or activity, and, in light of this, what the terms under consideration would mean for business or activity within coverage.

[7] This includes relativities between terms and conditions for the same role, and between the terms and conditions for different roles, within the FPA.
[8] The wording in the SIWB is “the impact of the terms offered on current and potential screen production workers during the proposed term of the contract”.

36. The ER Authority may for example consider information on the likely impacts, positive or negative, on productivity, employment costs, and employment levels. This factor is similar to a factor included in the SIWB.

Relativities within the proposed FPA, and between the proposed FPA and other relevant employment terms and conditions, in particular, national minimum standards and relevant collective agreements.

37. When considering relativities within the proposed FPA, the ER Authority would look at whether the proposed terms and conditions create a coherent package, and any trade-offs between different terms and conditions, for example base wages and penal rates. The ER Authority would also look at relativities between terms and conditions for different roles or occupations within the FPA, where relevant. This factor is intended to ensure a workable FPA for employers and employees within coverage.

38. This factor also requires the ER Authority to consider the relativities between the proposed FPA and other relevant employment terms and conditions. Requiring the ER Authority to give particular consideration to national minimum standards and relevant collective agreements (e.g. in the industry or occupation, or a similar industry or occupation) gives priority to these instruments but does not exclude consideration of other relevant employment terms and conditions. This enables the ER Authority to gauge the proposed FPA terms and conditions against other relevant terms and conditions. Both elements of this factor are also included in the SIWB.

The need to ensure the FPA is written in plain language and can be easily understood by employers and employees within coverage

39. The ER Authority Chief suggested this factor be included, and noted that a similar provision is included in the Australian modern awards system. We agree that this is an important factor, particularly given the FPA system is designed to allow private enforcement.

Any other matter it considers relevant

40. This factor preserves the discretion of the ER Authority to consider any other matter it considers relevant, within the purposes of the Act. Any other matter is read within the scope of the other factors listed.

We recommend *enabling but not requiring* the ER Authority to have regard to macro-level considerations

41. Macro-level impacts are not within the ER Authority's area of expertise and, while it could seek expert advice, it would take significant time for the necessary information to be before the ER Authority to assist its determination. In many cases the importance of this factor in fixing the terms of the FPA would not justify the additional cost and time.

42. However, in situations where the impact of an FPA is likely to be significant at an economy or society-wide scale, we consider that the ER Authority should be able to consider the likely impact on New Zealand society or the national economy. Considerations could include the likely impact on economic indicators such as the sustainability and performance of the national economy, inflation, the unemployment rate, and employment growth, or national wellbeing indicators relating to New Zealand's current wellbeing or future wellbeing[9].

43. This would mean that the ER Authority would have the flexibility to take likely macro-level impacts into account in its determination to fix terms if it considers they are relevant to the decision, and choose not to in situations where they are not considered relevant. This approach is in line with the Chief of the ER Authority's view that while the ER Authority

[9] Economic and wellbeing indicators are monitored by Statistics New Zealand.

should be able to consider and seek expert advice on macro-level issues, they are less directly related to the FPA than the other mandatory factors.

44. PCO could achieve this approach in drafting in a number of alternative ways, for example by drafting the set of factors to allow consideration of macro-level economic or wellbeing issues under 'any other matter it considers relevant', or including a provision that the ER Authority 'may' rather than 'must' take this factor into account.

Comparable legislation

45. Our proposed set of factors is largely consistent with the factors in the SIWB, but includes a requirement to consider the need to ensure all employees have just and favourable working conditions, in line with the FPA system objective.

46. We looked closely at the Australian modern awards objective which sets out the factors the Fair Work Commission must take into account in ensuring modern awards provide a fair and relevant minimum safety net of terms and conditions. Several factors in the modern awards objective correspond with factors in our proposed set but many are not relevant to a system based on bargained agreements rather than government set minimum standards, such as requirements to provide additional remuneration for employees working overtime, unsocial hours, etc.

Stakeholder views

47. We met with the Chief of the ER Authority, Dr Andrew Dallas, on 27 April 2021 to seek his views on a draft set of factors. The Chief expressed support for the draft set of factors, with the exception of one factor – 'the likely impact on employment growth, inflation, and the sustainability, performance and competitiveness of the national economy' – as discussed above. Two factors have subsequently been excluded from the set of factors proposed in this briefing:

    a. *The need to ensure all employees have just and favourable working conditions*. This factor has subsequently been excluded as MBIE considers that the term 'just and favourable' may be too subjective in nature, and another process would have been required to define what was meant by that term. Additionally, that wording appears in Article 7 of the International Covenant on Economic, Social and Cultural Rights, to which New Zealand is party. NZ has already explicitly given effect to some of the elements in Article 7 through other legislation, for example through the Equal Pay Act, the Health and Safety at Work Act 2015, and the Holidays Act 2003. Repeating these elements in the FPA legislation risks misdirecting the purpose of FPAs to issues that are already directly addressed via other legislation.

    b. *The need to improve employment conditions for population groups disproportionately represented in workforces experiencing poor working conditions, such as Maori, Pacific peoples, women, young people, and disabled people*. This factor has subsequently been excluded as targeting specific population groups or workforces is not a key objective of the FPA system. Including this factor would prima facie engage the right to be free from discrimination under the New Zealand Bill of Rights Act (BORA) and require us to justify this discrimination for the BORA vet; without the targeting of specific groups as a key objective of the FPA system, the justification for its inclusion is weakened.

48. In recent discussions, the NZCTU proposed that the ER Authority should consider the following factors:

The Treaty of Waitangi	Housing
The living wage	Poverty

Environmental issues and sustainability	Migrant work
Parties' interests	The concept of justice

49. We consider that the Treaty of Waitangi, the concept of justice, and the parties' interests will already be relevant considerations and do not need to be explicitly stated.

50. We disagree that Housing and Poverty should be factors explicitly taken into account when fixing FPA terms because:

    a. Housing and Poverty are less directly related to the FPA than the other mandatory factors. The complex relationship between poverty, housing, and the labour market is outside the ER Authority's jurisdiction and area of expertise.

    b. Similarly, it would place an unreasonable burden on bargaining sides to identify links to these factors when presenting their proposals to the ER Authority.

    c. The ER Authority will already need to consider the role that terms and conditions can play in improving labour market outcomes and the likely impact on employees in coverage. This will enable the panel to consider issues such as the cost of living, particularly where there are regional differences.

51. We disagree that Migrant work should be specifically identified as a factor that the ER Authority must consider because, as discussed in paragraph 47(b) above, targeting specific population groups or workforces is not a key objective of the FPA system. As noted above, requiring the ER Authority to consider the impact on employees within coverage will enable the panel to look at particular issues facing employees, including migrant employees.

52. We consider environmental issues and sustainability are outside the scope of the FPA system, although these issues may indirectly be looked at as part of consideration of topics such as health and safety.

When the factors would apply

53. The factors would apply to the exercise of the ER Authority's powers in relation to making determinations or non-binding recommendations on FPA terms and conditions. These powers are:

    a. Non-binding recommendations on terms and conditions during facilitation.

    b. Determinations during the bargaining stage on whether a mandatory to discuss topic should be included in the FPA (i.e. not a determination to fix any specific terms of the FPA, but whether any terms relating to the *topic* must be included in the FPA).

    c. Determinations to fix FPA terms and conditions, including:

        i. mandatory to agree terms.

        ii. mandatory to discuss terms, if any are determined to be eligible for fixing.

        iii. any other terms and conditions, if requested by both parties.

54. The factors would not apply to other types of determinations, such as:

    a. Determinations on procedure.

    b. Determinations in relation to an FPA once in force.

Expert advice and other procedure

The ER Authority is allowed, but not required, to seek independent expert advice on FPAs

55. Cabinet has agreed that the ER Authority, where reasonably necessary, may seek independent expert advice [CAB-21-MIN-0126 refers].

56. We consider that the ER Authority is more likely to seek its own independent expert advice when fixing FPA terms than when making determinations under the ER Act, due to the broader coverage and potential impact of FPAs.

57. Parties to the FPA may be concerned about whether they will have an opportunity to review the ER Authority's independent expert advice and provide feedback on it.

Current process for expert advice in the Employment Relations Act

58. Under the ER Act and associated schedule and regulations, either or both parties to an application with the ER Authority can decide to call their own expert witness or witnesses. The form it takes is flexible – it could be an affidavit outlining the expert's opinion, witness statement, and or an expert report. Although in person evidence is expected of any witness, if the ER Authority or parties do not require them to attend and be questioned, their evidence could be 'taken as read'. The party that calls an expert witness must meet its own expert's costs but may recover those costs if the ER Authority awards costs to that party.

59. It is unusual for the ER Authority to call for evidence of its own volition, but it is possible under section 160 of the ER Act. The ER Authority may ask for evidence in any form it wants to receive it, but will always have natural justice in mind so that the parties are not prejudiced. This means parties should be able to review it, comment on it, have the opportunity to question the expert, and call their own expert.

60. If the ER Authority calls for evidence of its own volition, it is required to pay the person giving evidence fees, allowances, and travelling expenses[10].

We consider the ER Act approach to expert advice is largely fit for purpose but recommend some changes

61. We consider that the powers enshrined in the ER Act would be sufficient to allow the ER Authority to seek its own independent expert advice. However, because it is unusual for the ER Authority to use this power, Parliamentary Counsel Office (PCO) may choose to make the power explicit in the FPA legislation for the avoidance of doubt.

62. We recommend, however, that the ER Authority be required to disclose to bargaining sides any independent expert advice on which it may base its decision and provide sides with an opportunity to respond to the issues raised. While in accordance with natural justice we understand bargaining sides would be given the opportunity to review any independent expert advice and respond to the issues raised, the intention for the FPA to apply to an entire occupation or industry involves a degree of public interest that would be best served by ensuring a high level of transparency. This provision is in line with Ministry of Justice guidelines[11].

Whether any other constraints on procedural discretion are warranted

63. We have considered whether any other constraints on the ER Authority's procedural discretion are warranted in light of the novel nature of the system, the intention for the FPA

[10] ER Act, Schedule 2 (6) (5).
[11] Ministry of Justice, 2019, *Tribunal Guidelines.*

terms to apply to an entire occupation or industry, and the fact that an FPA will result once initiated.

64. During this process we identified a question around whether the provisions relating to awarding costs in the ER Act are fit for purpose in the context of the FPA system. Under the ER Act, the ER Authority has the power to award costs: Schedule 2 allows the ER Authority to order any party to a matter to pay any other party such costs and expenses (including expenses of witnesses) as the ER Authority thinks reasonable. In the FPA system, the threshold for applying for a determination to fix terms is much lower and determinations can occur even if bargaining sides reached agreement, for example if there are two failed ratification processes. We are seeking legal advice on whether the circumstances in which the ER Authority fixes FPA terms are sufficiently different to the ER Act to warrant a different approach to awarding costs. We will engage with your office on this point in June.

65. Overall, we consider the natural justice requirements, combined with the requirement to consider certain factors, are adequate to ensure a fair process for parties and a workable outcome when the terms of an FPA are being fixed. The Ministry of Justice guidelines note that giving a tribunal the power to regulate its own procedure provides it with the flexibility to effectively deal with any matter before it.[12]

Process for determinations on whether a mandatory to discuss topic must be included in the FPA – weighting issue

66. You have agreed that, during bargaining, either side will be able to apply for a determination on whether a 'mandatory to discuss' topic must be included in the FPA. The ER Authority would then be able to decide whether it is appropriate for the FPA to include a term for this topic.

67. In response to feedback from the NZCTU, you indicated in your Cabinet paper that you 'intend to require that the Authority, when considering whether a 'mandatory to discuss' topic should be included in an FPA, should give weight to the fact that a bargaining party had applied for a determination on a 'mandatory to discuss' topic'.

68. The fact that a side has applied for a determination on whether a topic must be included, and the reasons presented with the application, are relevant considerations that the ER Authority should, and would, take into account in making its determination. We note that a bargaining side is only likely to apply for a determination on whether a mandatory to discuss term must be included if they consider there is a need for it to be included, and in accordance with natural justice they would be given the opportunity to be heard and provide evidence to support their case.

Applying weight to the fact an application has been received is counter to natural justice principles

69. However, *applying weight* to the fact an application had been received indicates to the decision maker that this fact is more important than other relevant considerations. This significantly limits the discretion of the ER Authority to balance the relevant considerations in line with its investigative role and the principles of natural justice. As noted above, the role of the ER Authority is to establish the facts and make a determination according to the substantial merits of the case, without regard to technicalities. The Chief of the ER Authority agrees that any requirement to weight the fact an application had been made would be counter to a merits-based assessment.

[12] Ministry of Justice, 2019, *Tribunal Guidelines*.

It is also not clear how it could work in practice

70. The ER Authority Chief has also indicated that it is not clear how in practice the panel could give weight to the fact that an application had been received compared to other considerations. A requirement to apply weight to the fact an application had been made is likely to create considerable confusion for bargaining sides and the ER Authority itself.

Options

71. We have identified and considered other options that would provide greater legal clarity:

Option 1: An explicit requirement that the ER Authority, in making a determination on whether a mandatory to discuss topic must be included in an FPA, must take into consideration the application from the bargaining side and the reasons presented for the application having been made.

72. We do not recommend this option. Including this requirement essentially confirms what already occurs, but may provide extra assurance to bargaining parties that their application will be given due consideration. However, by specifically prescribing in legislation a process that is already expected to occur in accordance with the principles of natural justice, there is a significant legal risk of casting doubt on similar processes that are not explicitly prescribed in legislation. Including this requirement could therefore have wide-ranging unintended consequences for other ER Authority processes.

Option 2: Include a requirement that the ER Authority, in making a determination on whether a mandatory to discuss topic must be included in an FPA, must find in favour of including the topic in the FPA unless there is good reason not to. **This is the closest option to 'applying weight'.**

73. We also do not recommend this option. A requirement to find in favour 'unless there is good reason not to' is a clearer legal requirement to essentially apply weight to the fact an application had been made. The threshold for 'good reason not to' would be high, such as if there is not proper justification or if the application is frivolous or vexatious. We do not recommend this option for the following reasons:

    a. While this option provides more legal clarity than the concept of applying weight, as noted above, it almost entirely limits the discretion of the ER Authority to balance the relevant considerations in line with its investigative role and the principles of natural justice.

    b. This option would incentivise bargaining sides, most likely unions, to apply to the ER Authority to determine that a mandatory to discuss topic must be included in every case. The high threshold for finding against an application essentially makes mandatory to discuss topics mandatory to agree. This runs counter to broader considerations of encouraging a bargained outcome and promoting greater and more mature sector-wide dialogue.

    c. In light of the above, we consider this option undermines Cabinet's decision on mandatory to agree and mandatory to discuss topics.

Recommendation

74. We consider the ER Authority's natural justice requirements, combined with the requirement to have regard to certain factors, are adequate to ensure a fair process for applicants. We do not recommend requiring the Authority to give weight to the fact that a bargaining party had applied for a determination, as it unjustifiably limits the discretion of the ER Authority to balance the relevant considerations, and lacks legal clarity.

Next steps

75. We will incorporate your decisions on this briefing into the drafting of the FPA Bill.

Annexes

Annex One: Mandatory considerations in the Screen Industry Workers Bill

Annex Two: Mandatory considerations in the Australian modern awards system

Annex One: Mandatory considerations in the Screen Industry Workers Bill

6 Mandatory criteria for arbitrating body

The arbitrating body, in hearing and determining a dispute in relation to a proposed collective contract, must have regard to—

(a) screen industry practices and norms, including the evolution and development of screen industry practices and norms; and

(b) the impact of the terms offered on current and potential screen production activity during the term of the contract; and

(c) the impact of the terms offered on current and potential screen production workers during the proposed term of the contract; and

(d) the terms that the parties have agreed; and

(e) relativities within the proposed contract, and between the proposed contract and other collective contracts; and

(f) the nature of working relationships covered by this Act; and

(g) any relevant information provided by parties.

7 Application of criteria

In applying the criteria, the arbitrating body is not bound by historical precedent and practice of any sort.

Annex Two: Mandatory considerations in the Australian modern awards system

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.