



BRIEFING

Fair Pay Agreements: Bargaining support service model

Date:	15 July 2021	Priority:	Medium
Security classification:	Budget - Sensitive	Tracking number:	2021-4084

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to give the Secretary of MBIE discretion to provide FPA bargaining support services, including on how those services are provided.	19 July 2021

Contact for telephone discussion (if required)				
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The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



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Purpose

This briefing seeks your agreement to give the Secretary of MBIE discretion to provide Fair Pay Agreement (FPA) bargaining support services, including on how those services are provided.

Executive summary

Cabinet agreed that a Government-funded bargaining support person, provided by Employment Services, be available to support bargaining sides throughout FPA bargaining [CAB-21-MIN-0126 refers]. The bargaining support person role is intended to provide advice and support before and during bargaining throughout the FPA process. This is in contrast to mediation, where assistance is generally sought when an impasse arises during bargaining, to enable bargaining to continue.

The resourcing provided at Budget 21 for the FPA system will significantly constrain the availability of bargaining support persons to only provide for up to four FPAs each year. This has led us to review whether making a single bargaining support person available throughout bargaining, as intended, is feasible. The likelihood of higher than expected levels of queuing for a bargaining support person has heightened risks that bargaining sides will choose not to wait for a bargaining support person, thereby missing out on receiving any FPA bargaining support at all and increasing downstream pressure on mediation and dispute resolution services. Further consideration of operational factors has also led us to consider that having a single consistent bargaining support person present throughout bargaining is unlikely to be the most effective and efficient way to deliver the service in all cases – in reality multiple individuals will make up the service depending on what support the parties need in practice for each FPA process.

We recommend giving the Secretary of MBIE discretion in the legislation to provide bargaining support services, including how those services are provided, while being clear on the purpose and that they are voluntary to take up rather than mandated. A more tailored approach by MBIE would better meet the needs of bargaining sides, by providing the services appropriate to them rather than one-size-fits all. It would also reduce queuing and avoid disputes over whether to wait for a bargaining support person to become available. This is in line with the approach in the Employment Relations Act which empowers the Secretary of MBIE to deliver dispute resolution services.

This approach would require you to clarify the previous Cabinet decision on bargaining support persons when you go to Cabinet Legislation Committee for approval to introduce the FPA Bill.

You have already indicated your preferred approach is to seek additional funding if more than four FPAs are initiated per year, and additional bargaining support and capability building funding can form part of that. We have considered, and do not recommend, targeting and prioritisation as alternative ways to ration access to bargaining support persons. Neither the New Zealand Council of Trade Unions (NZCTU) nor Business NZ support any rationing of access to bargaining support persons.

Recommended action

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

a **Note** that Cabinet agreed that a Government funded bargaining support person, provided by Employment Services, be available to support bargaining sides throughout FPA bargaining [CAB-21-MIN-0126 refers].

Noted

b **Note** that FPA Budget 21 outcomes and further consideration of operational factors have led us to review whether access to a single bargaining support person throughout bargaining, as intended, is feasible.

Noted

c **Agree** that the Secretary of MBIE should be empowered with the discretion to provide bargaining support services, including how those services are provided. This may include one or more bargaining support persons provided before and during bargaining, or through information provided over the phone or through email communication, in line with the approach in the Employment Relations Act to dispute resolution services provided by the Secretary of MBIE.

Agree / Disagree

d **Note** that if high numbers of FPA initiations result in demand for bargaining support services exceeding available resource, bargaining sides could choose to wait for more hands on in-bargaining support but process advice, information, and education resources would still be available to them.

Noted

e **Note** that as bargaining support services are not compulsory for bargaining sides, and would be provided at the discretion of the Secretary of MBIE, bargaining can proceed without MBIE-provided bargaining support.

Noted

f **Note** that in the event that bargaining sides disagree on whether to utilise bargaining support or wait until more hands-on bargaining support is available, they could access mediation to resolve the specific issue, as they would now under the Employment Relations Act.

Noted

g **Note** that if you agree to the recommendations in this briefing you will need to clarify the previous Cabinet decision that a Government funded bargaining support 'person' be available to support bargaining sides throughout FPA bargaining, when you go to Cabinet Legislation Committee for approval to introduce the FPA Bill.

Noted

h **Note** that we will provide you with a separate briefing on allocating financial bargaining support, and that decisions on financial bargaining support are not needed for drafting instructions.

Noted



Beth Goodwin
**Acting Manager, Employment Relations
Policy**
Labour, Science and Enterprise, MBIE

15 / 07 / 2021

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

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Bargaining support person model of provision

The intended bargaining support person role

1. Cabinet agreed that a Government funded bargaining support person, provided by Employment Services, be available to support bargaining sides throughout FPA bargaining [CAB-21-MIN-0126 refers]. In front-loading support to bargaining sides, the purpose of the bargaining support person is to support constructive and efficient bargaining and minimise pressure on the broader employment relations and standards (ERES) system by reducing demand for generally funded mediation and other dispute resolution services.
2. The bargaining support person role is intended to provide advice and support before and during bargaining throughout the FPA process. This could include helping bargaining sides understand the FPA system and its process requirements, assisting bargaining parties and sides to reach a bargaining process agreement, supporting constructive bargaining discussions, and de-escalating conflict where possible.
3. This is in contrast to mediation, where assistance is generally sought when an impasse arises during bargaining, to enable bargaining to continue. MBIE's mediation services also currently provide, on request, similar support before and during bargaining to build capability in 'regular' collective bargaining. However, the FPA approach sets an expectation that this service is a regular, but not mandatory, part of the FPA bargaining process.
4. Cabinet noted that the function, requirements and protections for a bargaining support person would be the same as those set out for mediation services in the Employment Relations Act 2000. The only exception is that bargaining support persons would not be able to make recommendations to bargaining sides or binding decisions, even at the request of both sides.
5. Cabinet noted that it will be up to bargaining sides to decide whether to utilise the support provided by a bargaining support person. Bargaining sides could agree to an alternative bargaining support person at their own cost. If bargaining parties or sides disagree on whether to have a bargaining support person they can access dispute resolution services to help them resolve the issue [CAB-21-MIN-0126 refers].

FPA budget constraints have led us to review whether the bargaining support person role, as intended, is feasible

6. As you are aware, at Budget 21 Cabinet agreed to fund the FPA system to support four FPA processes each year. Total operating funding of \$35.801m for implementing the FPA system includes funding for three bargaining support people, two bargaining educators (i.e. training providers) and two additional mediators for dispute resolution once FPAs are in force.
7. As noted in previous advice, we expect unions will initiate more than four FPAs per year. For example, six pay equity claims were received on the first day the legislation came into effect in November 2020. We consider that FPA bargaining sides are therefore likely to experience wait times for a bargaining support person, as well as for verification, mediation, and other dispute resolution services (including the Employment Relations Authority).
8. The likelihood of higher than expected levels of demand for a bargaining support person has heightened the following risks for the FPA system and ERES system more broadly:
 - a. Disputes may arise if one bargaining side would prefer to wait for a bargaining support person but the other side would prefer not to wait, adding further pressure to the dispute resolution system.

- b. Bargaining sides that agree not to wait for a bargaining support person may engage in less efficient and constructive bargaining and/or rely more heavily on mediation and dispute resolution, increasing downstream pressure on the ERES system.
 - c. Bargaining sides with less bargaining experience and expertise, who may be most in need of bargaining support, may miss out on receiving any bargaining support, either because they agree not to wait or they are required to commence bargaining without one.
9. Cabinet has already noted that if more than four FPAs are initiated per year you intend to return to Cabinet to seek further funding [CAB-21-MIN-0126 refers]. However, there would be a time lag between those FPA initiations, the receipt of any further funding and the hiring and training of new staff.

We have also further considered the most effective and efficient way to deliver bargaining support

10. While we still consider that bargaining support is an integral part of the performance of the FPA system, on further consideration we think a single bargaining support person, present throughout bargaining, is unlikely to be the most effective and efficient way to deliver the service in all cases. Effective support is likely to be a service offered that comprises a range of individual skill sets and people to inform and support the process and, at times, may require multiple people for a single process. For example, Employment Services often allocate two mediators to a single bargaining process mediation now where there may be 20-30 people involved in bargaining.
11. Requiring one particular bargaining support person to be available to support the development of a particular FPA at every bargaining session and over a period that could extend to a year or more is also not practical. It does not take into account scheduling issues such as sick leave and holidays, or variations in the type of bargaining support service that the FPA bargaining sides may require or benefit most from. The needs of bargaining sides will differ depending on factors such as their level of bargaining experience and the complexity of the FPA. A summary of our assessment of options against criteria is available at Annex Two.

We recommend a flexible and tailored approach to providing bargaining support services

12. In light of the FPA Budget constraints and operational considerations raised, we recommend enabling the Secretary of MBIE (through Employment Services) to take a more flexible and tailored approach to providing bargaining support services than was originally envisaged. Under a more flexible approach, MBIE would be given discretion to provide FPA bargaining support services as it deems appropriate, taking into account the specific circumstances of the case as well as available resource.
13. This more flexible approach would mean that a single in-bargaining support person would not necessarily be made available to support all bargaining sides throughout FPA bargaining. Employment Services would be given the discretion to determine how bargaining support services will be provided in any given case, in discussion and agreement with the parties involved. This may include one or more bargaining support persons before and during bargaining, using a variety of mediums (in person, remote, email communication), and capability building provided through training or information and education resources. This approach is in line with the Employment Relations Act dispute resolution provisions for mediation services.
14. Empowering the Secretary of MBIE with the discretion to provide bargaining support services would also reduce wait times and better support bargaining sides to move through the FPA system with some bargaining support, when there is high demand, without needing to wait

for a dedicated bargaining support person to become fully available. For example, if an in-bargaining support person is not immediately available when an FPA is initiated, Employment Services could provide information or advice to support bargaining to commence regardless.

15. This approach would also allow the bargaining support service to evolve over time as the FPA system becomes more ingrained in the employment relations landscape and better understood by employers and workers. Over time a hands-on in-bargaining support person may become less needed, although information, education, capability building and dispute resolution is expected to be an ongoing need. A more prescriptive approach could accidentally preclude as yet unknown needs or ways to deliver the service.
16. As bargaining support is not compulsory, in the event that bargaining sides disagree on whether to wait until more hands-on support is available they could access mediation to provide bargaining support or to resolve the specific issue, as they would now under the Employment Relations Act.
17. However, agreement to give the Secretary of MBIE the discretion to provide bargaining support services would mean the support to bargaining parties and sides may not match what was signalled in the Cabinet paper. This change is not significant enough to need a Cabinet decision now for drafting, but would require you to clarify the previous Cabinet decision that a Government funded bargaining support person be available to support bargaining sides throughout FPA bargaining when you go to Cabinet Legislation Committee for approval to introduce the FPA Bill.

We have identified alternative ways to ration access to bargaining support persons, which we do not recommend

18. We have considered, but do not recommend, alternative options to ration access where demand for a bargaining support person exceeds available capacity. A summary of our assessment against criteria is available at Annex Two.
 - a. **Targeting:** A bargaining support person would be provided at the start of bargaining if the workforce meets certain legislated criteria. If a bargaining support person is not available at the time, the eligible workforce would be queued according to the order in which the FPA initiation was approved. If the workforce does not meet the criteria, a bargaining support person would not be provided at all.
 - b. **Prioritisation:** Once an FPA initiation application is approved, MBIE would assign a priority to that FPA for receiving a bargaining support person (e.g. Priority 1, Priority 2, etc.) based on legislated criteria. Within each priority bracket, workforces would be queued according to the order in which the FPA initiation was approved.
19. Both targeting and prioritisation have the benefit of ensuring FPA processes most in need of a bargaining support person are able to progress through the FPA system in a timely manner without having to wait for, or potentially proceed without, support. The bargaining sides for these FPAs would receive the full level of intended support.
20. However, FPAs that are ineligible or a low priority for a bargaining support person would not receive the benefit of any additional support or guidance before and during bargaining and therefore may engage in less constructive bargaining and/or rely more heavily on mediation and dispute resolution, increasing downstream pressure on the ERES system.
21. Under a model of prioritisation, lower priority workforces may remain queued for a significant time while higher priority workforces jump ahead in the queue, creating uncertainty about whether to begin bargaining and potentially disputes over whether or not to wait for a bargaining support person.

22. Both targeting and prioritisation carry additional costs for MBIE to administer, as MBIE would be required to assess against a set of criteria, set out in the legislation, whether workforces are eligible or assign a priority to workforces. It is likely the costs of administering this approach would be high relative to the support actually available, further reducing the support MBIE could provide through allocated funding. More subjective criteria such as low pay or low bargaining power would require substantial analysis, requiring greater time and resource, and may cause confusion or inconsistencies with the public interest test if it was used at initiation. Subjective criteria would also place a burden on bargaining sides to provide evidence of their eligibility for a bargaining support person, resulting in time delays to the whole process, and creating risk of challenge of decisions made.

Stakeholder views

23. Neither NZCTU nor Business NZ support any rationing of access to bargaining support persons.
24. The NZCTU's view is that there needs to be sufficient capacity built into the system so that rationing is not required, and that more people should be appointed into these roles than what projections have accounted for in order to build some 'surge capacity' into the system. It considers that if there is an unexpected surge in FPA initiations, the social partners should meet and discuss and agree priorities. There is nothing to prevent social partners meeting to agree priorities for FPA initiations, but we have not put this forward as a viable option for allocating bargaining support services as any eligibility or prioritisation criteria for gaining access to a bargaining support person would need to be set out in the legislation and decisions would be open to legal challenge. The eligibility criteria or prioritisation system would need to be objective and unambiguous, in order to have consistent outcomes when it is applied and to ensure MBIE is able to justify its reasons for approving and/or denying a bargaining side access to a bargaining support person.
25. Business NZ considers that if bargaining support persons are a necessary feature of FPA bargaining but limited in availability, the efficiency of the whole process is cast into doubt.
26. Business NZ also considers that limiting access to resources such as bargaining support persons is contrary to the concept of fairness and the only safe approach is to resource either all FPA claims or none. It considers no industry organisations are internally resourced for the complexities of FPA level bargaining.
27. Our proposed approach would be consistent with social partners' priorities of maximising support where it is needed.

Next steps

28. We will incorporate your decisions on this briefing into the drafting instructions. As noted above, agreeing to the recommendations in this paper will require you to clarify the previous Cabinet decision that a Government funded bargaining support person be available to support bargaining sides throughout FPA bargaining when you go to Cabinet Legislation Committee for approval to introduce the FPA Bill.
29. If you prefer either the targeting or prioritisation option, we will do more work in order to advise you on the criteria to be applied.
30. We will provide you with a separate briefing on allocating financial bargaining support. Decisions on how financial bargaining support should be allocated are not needed for drafting instructions.

Annexes

Annex One: Factors that Employment Services is likely to consider when offering bargaining support.

Annex Two: Assessment of bargaining support allocation options.

Annex One: Factors that Employment Services is likely to consider when offering bargaining support services

The factors that Employment Services would typically consider when offering or tailoring bargaining support services would include:

- The level of bargaining experience of one or both bargaining sides.
- The number of bargaining parties on one or both bargaining sides.
- The number of employees and employers likely to be subject to the FPA.
- Any other relevant considerations.

Employment Services can actively communicate this approach through information and education materials and engagement with parties and the general public. Being transparent on resource limitations and what we can offer in practice will helpfully signal that where bargaining sides have limited bargaining experience, or are managing a higher level of complexity due to a large number of bargaining parties and interests, Employment Services will take this into account when offering bargaining support services. This does not unduly limit the discretion of Employment Services to consider any other relevant considerations when offering services.

Annex Two: Assessment of bargaining support allocation options

Options

We identified the following four options for providing bargaining support services to FPA bargaining sides.

Options	Description
<i>Option 1 (status quo): A bargaining support person is provided on a first come, first served basis (intended approach in the Cabinet paper).</i>	A single bargaining support person (BSP) would be allocated by Employment Services to each FPA process to provide advice and support before and during bargaining throughout the FPA process, currently up to a maximum of four FPAs per year. A bargaining support person would be provided on a first come, first served basis, but it would not be mandatory to utilise a bargaining support person. This is the model envisaged in the FPA Cabinet paper.
<i>Option 2: Give MBIE discretion to provide bargaining support services (MBIE recommendation).</i>	The Secretary of MBIE would be given discretion to provide FPA bargaining support services as she deems appropriate, taking into account the specific circumstances of the FPA as well as available resource. This approach is in line with the Employment Relations Act dispute resolution provisions for mediation services.
<i>Option 3: Access to a bargaining support person is targeted to eligible FPAs.</i>	A bargaining support person would be provided at the start of bargaining if the workforce meets certain legislated criteria. If a bargaining support person is not available at the time, the eligible workforce would be queued according to the order in which the FPA initiation was approved. If the workforce does not meet the criteria, a bargaining support person would not be provided at all.
<i>Option 4: Access to a bargaining support person is prioritised based on legislated criteria.</i>	Once an FPA initiation application is approved, MBIE would assign a priority to the workforce for receiving a bargaining support person (e.g. Priority 1, Priority 2, etc.) based on legislated criteria. Within each priority bracket, workforces would be queued according to the order in which the FPA initiation was approved.

Assessment criteria

We assessed the bargaining support allocation options against the following criteria:

- *Supports constructive FPA bargaining.* Bargaining sides are supported to understand and navigate the FPA system, and engage in constructive and efficient bargaining.
- *Minimises pressure on the ERES system.* FPA bargaining support reduces downstream demand for generally funded mediation and other dispute resolution services.
- *Ability to match bargaining support provision to available resource.* MBIE is able to match bargaining support to the level of available resource and also maximise the available resource.
- *Certainty for bargaining sides.* Bargaining sides have clear information about whether and when they will receive bargaining support.

- *Minimises complexity for bargaining sides.* This relates to the level and complexity of information or evidence that parties would need to provide in order to access bargaining support.
- *Minimises wait times.* Bargaining support is provided when it is needed in the FPA bargaining process and any delay to bargaining is minimised.
- *Minimises risk of judicial review.* MBIE is able to clearly justify its reasons for approving and/or denying an FPA access to bargaining support, and litigation-related delays are minimised.
- *Administrative cost to MBIE.* The cost for MBIE to administer the process is minimised.
- *Future-proofing.* FPA bargaining support is able to evolve over time as the system becomes more engrained and as needs change and develop.

Options analysis summary table

Assessment criteria	Single BSP, first come first served	MBIE discretion to provide bargaining support services	Single BSP - targeted	Single BSP - prioritised
Supports constructive bargaining	✓	✓✓	✓	✓
Minimises pressure on ERES system	✓✓	✓✓	✓	✓
Ability to match bargaining support provision to available resource	✓✓	✓✓✓	✓✓	✓✓
Certainty for bargaining sides	✓	✓✓	✓✓	✗
Minimises complexity for bargaining sides	✓✓✓	✓✓	✗	✗
Minimises wait times	✗	✓✓	✓	✗
Minimises risk of judicial review	✓✓✓	✓✓✓	✓	✓
Administrative cost to MBIE	✓✓	✓✓✓	✗	✗
Future-proofing	✓	✓✓	✗	✗
Total	15/27	21/27	8/27	5/27

