



AIDE MEMOIRE

FPAs: representation for private sector employers which receive public funding

Date:	13 August 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-0562

Information for Minister(s)

Hon Michael Wood
Minister for Workplace Relations and Safety

Contact for telephone discussion (if required)

Name	Position	Telephone	Privacy of Natural Persons	st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
Beth Goodwin	Principal Policy Advisor	04 901 1611		

The following departments/agencies have been consulted

Te Kawa Mataaho Public Service Commission

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 Withdrawn |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



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Purpose

To report back on further discussions with Te Kawa Mataaho Public Service Commission (PSC) about employer representation.

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

13 / 8 / 2021

Background

1. In our briefing 2021-4436, we advised you to choose option 3 in relation to representation for Public Service, Education Service and District Health Boards ('PEH employers'). That option was that PEH employers would be represented by a direct bargaining party (the Public Service Commissioner, or the Chief Executive of the new Health NZ organisation, as relevant) but would not have any bargaining obligations to private sector employers. Likewise, the private sector bargaining party/ies would not have any obligations to represent PEH employers.¹
2. You agreed with this recommendation, but also wrote a comment on the briefing that you would also like to incorporate an "option for the PSC to be able to represent the interests (and therefore have obligations back to) a small group of private sector employers if an industry structure of this nature is evident in a particular Fair Pay Agreement and the private sector employers were to request it."
3. At your regular meeting with officials on 2 August 2021, we discussed your comment. You elaborated that you were thinking of private sector employers which receive public funding for the services they provide. In that meeting, you asked us to discuss with PSC whether they considered there to be any situations where such a request may arise. We have now done so.

¹ See recommendation d, option 3, of briefing 2021-4436.

PSC continues to believe it would not be appropriate to represent non-PEH employers

4. PSC advised that it is difficult to predict whether such a request from private sector employers will arise, and that anecdotal evidence suggests that private sector employers are unlikely to seek representation from the Public Service in a bargaining process that may incur costs for them.
5. If such a request did arise, the PSC does not believe it would be appropriate to enable it, for the reasons outlined in the following section. PSC noted that it would be inconsistent to provide for funded sector employers to be represented by PSC, if public sector employers (who are closer to government) are not so represented. PSC does not currently have the expertise, resources or relationships to routinely represent employers beyond the Public Service.
6. Given Fair Pay Agreement (FPA) bargaining will result in higher labour costs, it is possible that both public sector and publicly-funded private sector employers may seek certainty during bargaining from central government, about whether funding will increase to reflect those higher costs. We would expect that the usual processes for dealing with other increases in minimum standards such as the minimum wage and sick leave entitlements would be used to deal such requests.
7. We continue to recommend the clean split between PEH employers; and all other employers, who can create or join an incorporated society or be represented by BusinessNZ as a backstop.

Different employment relations frameworks between private sector and public service make representation complicated

8. PSC reiterated their input into the earlier briefing, that the Public Service operates within a different employment relations framework. The various Acts that govern the public sector (Public Service Act, Education and Training Act, the new Health legislation) provide different accountabilities and requirements for public sector employers such as reference to Public Service purpose, principles and values, with unique employment provisions to support the Public Service to deliver on these (such as the Commissioner's role in Public Service collective bargaining and Government Workforce Policy Statements).
9. A funding relationship does not change that employment relations context – if anything, it would make it more complicated. One of the arguments provided by the Health Transition Unit for favouring option 3 is that it would “avoid a situation in which Health NZ would need to represent organisations with which it may have an arms-length funding agreement” and the conflict of interest that would arise as a result.

PSC also has no mandate to represent wider public sector employers

10. We also discussed whether it was possible that employers in the wider public sector may seek support or representation from the Public Service Commissioner for FPA bargaining, for example, a small Crown Entity without a large human resources department. Again, it is difficult to predict this likelihood.
11. The Public Service Commissioner has no mandate to represent public sector employers (outside the Public Service and Education Service) in bargaining. Crown Entities have no requirement to consult with the Commissioner on bargaining unless an Order in Council requires it. Public sector agencies outside of the legal Crown are able to join or form incorporated societies as individual members.
12. However, this conversation did bring an issue to light: there are some agencies that *are* part of the legal Crown (so would find it challenging to form an incorporated society since the

legal Crown is a person), but are not part of the Public Service, and are not Crown Entities. They are:

- New Zealand Police
- New Zealand Defence Force
- Parliamentary Counsel Office
- Office of the Clerk
- Parliamentary Services

13. We have not engaged with those agencies to date, so will work with them as a matter of priority, together with PSC, to conclude what form of representation will work in the FPA system.

Next steps

14. We wish to discuss this aide memoire with you at our meeting on 16 August 2021. If you still wish to proceed with an exception to the clean split between PEH employers and other employers, we will work on further details needed for drafting – including defining when an exception could apply, to whom, and using what process – then prepare drafting instructions. Regardless, we will discuss representation requirements with the 5 entities described in paragraph 12.