



## COVERSHEET

<b>Minister</b>	Hon Michael Wood	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of briefing</b>	Fair Pay Agreements Bill: Policy Changes for Inclusion in Departmental Report	<b>Date to be published</b>	27 October 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
August 2022	Fair Pay Agreements Bill: Policy Changes for Inclusion in Departmental Report	Office of the Minister for Workplace Relations and Safety
1 August 2022	Cabinet minute: CAB-22-MIN-0291	Cabinet Office

### Information redacted

**YES**

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- Confidential advice to government
- Maintain legal professional privilege



# Cabinet

## Minute of Decision

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### Fair Pay Agreements Bill: Policy Changes for Inclusion in Departmental Report

**Portfolio**                      **Workplace Relations and Safety**

On 1 August 2022, following reference from the Cabinet Economic Development Committee, Cabinet:

#### Background

1        **noted** that on 19 April 2021, Cabinet agreed to the key features of the proposed Fair Pay Agreement (FPA) system [CAB-21-MIN-0126];

2        **noted** that:

2.1      on 28 March 2022, Cabinet agreed to the introduction of the Fair Pay Agreements Bill (the Bill) [CAB-22-MIN-0095];

2.2      the Bill was referred to the Education and Workforce Committee following its first reading on 5 April 2022;

#### Limiting judicial review on bargaining parties' decisions in the FPA system

3        **agreed** that the Bill limit judicial review of the bargaining parties' exercise of statutory powers of decisions in the FPA system to only those situations where:

3.1      all alternative avenues have firstly been 'exhausted', namely dispute resolution and a compliance order have been sought, if available, to resolve a breach of obligation; and

3.2      the complaint is that the decision-maker was not authorised under the FPA legislation to make the decision in question or did not act in good faith in making the decision;

#### Clarifying how an FPA should apply when it only covers a portion of the employee's work

4        **agreed** to clarify that only one FPA can apply at a time to an employment relationship, and that the FPA should apply to the entire relationship;

5        **agreed** that for an FPA to apply to the employment relationship, it must cover at least 25 percent of an employee's work;

- 6 **agreed** that if two or more FPAs each cover 25 percent or more of an employee's work, the FPA that covers the largest portion of the employee's work should apply;
- 7 **agreed** that when assessing whether the FPA, or which FPA, applies to an employee, this should be based on work done within a reasonable period of the date of the assessment, considering the particular circumstances of the employee subject to the assessment;
- 8 **agreed** to clarify that the Labour Inspectorate and the Employment Relations Authority have the jurisdiction to determine whether an FPA, or which FPA, applies to an employment relationship to enable them to determine coverage based on paragraphs 4-7 above;

### **Defining coverage of an FPA via regulations**

- 9 **agreed** that the Bill be amended to require the parties to define coverage of an FPA in accordance with regulations (if any);
- 10 **agreed** that regulations require the parties to define coverage:
- 10.1 according to ANZSCO codes for occupational FPAs; and
  - 10.2 according to ANZSCO codes and ANZSIC codes for industry FPAs; unless
  - 10.3 the initiating party (or bargaining parties) considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, in which case the party/parties must describe that occupation and industry with sufficient detail for the Ministry of Business, Innovation and Employment (MBIE) to understand how the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry;
- 11 **agreed** that the Chief Executive of MBIE must reject an application to initiate bargaining for an FPA, or reject a change in coverage during bargaining, if the proposed coverage will only cover one employer;

### **Expanding the Bill's purpose to include the backstop process and broader policy intent**

- 12 **agreed** to amend the purpose of the Bill to the following, to incorporate the backstop process and broader policy intent:

*The purpose of this Act is to enable certain minimum employment terms for employees to be improved by providing –*

- a) *a framework that enables bargaining for fair pay agreements that specify certain industry-wide and occupation-wide minimum employment terms; or*
  - b) *in certain circumstances, for the Authority to determine those minimum employment terms.*
- 13 **noted** that the inclusion of a reference to the backstop process in the purpose of the Bill is subject to the Select Committee accepting the backstop Slip of Amendment (Slip), which will be submitted to the Select Committee as soon as practicable;

**Requiring 'low pay' to be demonstrated for all successful public interest test applications**

- 14 **agreed** to amend clause 29(4) of the Bill so that the public interest test can be applied to initiate an FPA if the employees within the coverage of the proposed FPA:
- 14.1 receive low pay for their work; plus one or more of the following:
  - 14.2 have little bargaining power in their employment; or
  - 14.3 have a lack of pay progression in their employment (for example, pay rates only increase to comply with minimum wage requirements); or
  - 14.4 are not adequately paid, taking into account factors such as:
    - 14.4.1 working long or unsocial hours (for example, working weekends, night shifts, or split shifts); or
    - 14.4.2 contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis;

**A two-stage approach for providing personal information for an FPA initiation, renewal, or replacement via the representation test**

- 15 **agreed** to set out in the Bill that an initiating union must provide, as part of its application to initiate a proposed FPA, renewal or replacement under the representation test:
- 15.1 the supporting employee's name and occupation;
  - 15.2 the supporting employee's employer's name;
  - 15.3 the date the employee(s) agreed to support the initiation (this may be by individual or by group depending on how the support was collected);
  - 15.4 if the application relates to an industry FPA, the industry that the supporting employee is in; and
  - 15.5 if the application is made under the 10 percent threshold, the total number of employees within proposed coverage of the FPA;
- 16 **agreed** that the regulations specify that MBIE may request the contact details of employees to verify the evidence provided by the union as part of their application to initiate bargaining under the representation test;
- 17 **agreed** to set out in the Bill that an initiating employer association must provide, as part of its application to initiate a renewal or replacement FPA under the representation test:
- 17.1 the name of each supporting employer within the proposed coverage, the total number of employees within coverage that the employer has, and the occupations of those employees;
  - 17.2 the date the employer(s) agreed to support the initiation (this may be by individual or by group depending on how the support was collected);
  - 17.3 if the application relates to an industry FPA, the industry that the supporting employer is in; and

17.4 if the application is made under the 10 percent threshold, the total number of employees within proposed coverage of the FPA;

18 **agreed** that the regulations specify that MBIE may request the contact details of supporting employers to verify the evidence provided by the initiating employer association as part of their application to initiate bargaining under the representation test for a renewal or replacement FPA;

### **Setting a timeframe for MBIE's assessment of applications**

19 **agreed** to require that the Chief Executive of MBIE has a maximum timeframe of 30 working days to assess an application for an FPA, which can be extended to 45 working days at the discretion of the Chief Executive of MBIE;

20 **agreed** that this provision comes into force six months after the main part of the Act;

21 **noted** that the timeframe referred to in paragraph 19 above will apply once MBIE has received all the information it requires to assess the application, and that any public submission period is not included within the assessment timeframe;

### **Including 'arrangements relating to training and development' and 'leave entitlements' as mandatory content for each fair pay agreement**

22 **agreed** to make 'arrangements relating to training and development' mandatory content for each FPA;

23 **noted** that the topic 'arrangements relating to training and development' will not be a minimum entitlement provision for the purposes of the Employment Relations Act 2000;

24 **agreed** to make 'leave entitlements' mandatory content for each FPA;

### **Removing the requirement to specify whether superannuation is included in stated FPA base wage rates from mandatory content for each FPA**

25 **agreed** to remove the mandatory content for each FPA 'whether the minimum base wage rates included or exclude the employer's contribution for superannuation (if any)' from the Bill;

### **Clarifying the obligation for an initiating union to notify other unions and employers**

26 **agreed** to amend the obligation in clause 36 of the Bill so that the initiating union must make best efforts to identify other unions and employers, and to notify all known parties;

27 **agreed** to include in clause 36 of the Bill an obligation for the initiating union to place a notice on a public and free internet site and in the daily newspapers circulating in Auckland, Tauranga, Hamilton, Wellington, Christchurch, and Dunedin;

### **Expanding the obligation to update in funded sectors to include local authorities, and clarifying that the obligation only applies if the funder is known**

28 **agreed** to amend the obligation in clause 46(2)(f) of the Bill to specify that the obligation to provide regular updates to a government department only applies if the employer bargaining party knows which government department is responsible for funding the private employer;

- 29 **agreed** to expand the obligation in clause 46(2)(f) of the Bill to include that, if the proposed FPA covers employees of a private sector employer and the employer bargaining party knows that the private sector employer receives funding from a ‘local authority’, and knows which local authority, the employer bargaining party must provide regular updates about bargaining to the local authority responsible for that funding;

### **Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details**

- 30 **agreed** to include a penalty for an employee bargaining party intentionally or recklessly failing to comply with obligations relating to the use and storage of employee contact details, as specified in clauses 40 and 41 of the Bill;
- 31 **agreed** that, for this type of breach, clause 196 (penalty for non-compliance with obligations during bargaining) would apply, and that the maximum penalty level would be \$20,000 for an individual or \$40,000 for any other person (i.e. a company or other corporation);

### **Adding new alternative criteria to the threshold for fixing the term of an FPA**

- 32 **agreed** to include new alternative criteria to the threshold for fixing the terms of an FPA, enabling the Employment Relations Authority to fix the terms of an FPA where one bargaining side breaches the duty of good faith, and the breach(es) are either:
- 32.1 deliberate, sufficiently serious and sustained; or
- 32.2 involving behaviour that had the effect of undermining the process of bargaining (exact wording to confirmed during drafting);

### **Amending the requirement for the Authority to consider certain matters when it recommends or fixes terms**

- 33 **agreed** to amend clause 220(a) of the Bill so that the Employment Relations Authority ‘may’ consider the list of matters noted in clause 220(a)(i)-(vii), rather than ‘must’ consider those matters;

### **Including a regulation making power to set a fees framework for fees that will be paid to experts who provide evidence sought by the Authority**

- 34 **agreed** to include an empowering provision in the Bill to set a fees framework in regulations for fees that will be paid to people that give expert evidence before the Employment Relations Authority, where their advice has been requested by the Authority as part of undertaking its functions under the Bill;

### **Legislative implications**

- 35 **invited** the Minister for Workplace Relations and Safety to direct officials to include the above decisions as recommendations for inclusion in the Bill in MBIE’s Departmental Report to be considered by the Education and Workforce Committee;
- 36 **authorised** the Minister for Workplace Relations and Safety to make decisions on minor amendments to the Bill for inclusion in the Departmental Report that are within the policy intent of the Bill and Cabinet decisions made in relation to the Bill;
- 37 **noted** that the Parliamentary Counsel Office will decide how to draft the above proposals and to make any other amendments necessary to give effect to the policy intent;

- 38 **noted** that the Education and Workforce Committee will report back to Parliament on the Bill by 5 October 2022;
- 39 **agreed** that the legislation drafted to give effect to the above decisions will bind the Crown.

Rachel Hayward  
Acting Secretary of the Cabinet