



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Fair Pay Agreements Regulations 2022	Date to be published	8 February 2023

List of documents that have been proactively released		
Date	Title	Author
November 2022	Fair Pay Agreements Regulations 2022	Office of the Minister for Workplace Relations and Safety
24 November 2022	Fair Pay Agreements Regulations 2022 LEG-22-MIN-0216 Minute	Cabinet Office

Information redacted

NO

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In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Legislation Committee

Fair Pay Agreements Regulations 2022

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of the Fair Pay Agreements Regulations 2022.
- 2 It also seeks a waiver of the 28-day rule so that the regulations outlined above can come into effect on 1 December 2022, at the same time as the Fair Pay Agreements Act 2022 (the Act).

Executive summary

- 3 On 1 November 2022, the Act received Royal assent. The substantive provisions of the Act commence on 1 December 2022. The Act's empowering provisions for regulations commenced the day after Royal assent, allowing regulations to be made before the rest of the Act comes into force.
- 4 There are several key provisions in the Act that require accompanying regulations to be made by commencement on 1 December 2022. These regulations are needed for the Fair Pay Agreements (FPA) system to operate adequately until bargaining commences, by establishing the following system components:
 - 4.1 Details on how applicants can satisfy the public interest test criteria;
 - 4.2 Who will be the default bargaining parties if either side is not able to be represented by a union or an employer association;
 - 4.3 Evidence that may be required by the Ministry of Business, Innovation and Employment (MBIE) from the applicant to satisfy the representation test; and
 - 4.4 How parties must define coverage of a proposed FPA when applying for approval to initiate bargaining.

Policy

- 5 The Fair Pay Agreements Regulations 2022 are made under the Act.

Background

- 6 On 1 November 2022 the Act received Royal assent. The substantive provisions of the Act commence on 1 December 2022, at which point unions can submit their applications to MBIE for approval to initiate FPA bargaining.

- 7 The Act's regulation-empowering provisions commenced the day after Royal assent. This enables regulations to be made before the rest of the Act comes into force (ie in time for first applications).
- 8 The Act contains several key provisions which require accompanying regulations by the date the Act comes into force. For example, regulations are required to detail the criteria against which MBIE will assess applications submitted via the public interest test to initiate bargaining for a FPA, and to require certain information from applicants (eg that coverage of the proposed FPA must be described using existing industry/occupation classification systems). If these regulations are not in place when the Act comes into force, this will impede the operation of the FPA system, especially at the stage of applying for approval to initiate bargaining.
- 9 Cabinet and the Cabinet Economic Development Committee (DEV) have previously approved the policy for these proposed regulations, which relate to the initiation of FPA bargaining:
- 9.1 Details on how to satisfy the public interest test criteria [DEV-22-MIN-0185];
- 9.2 Who will be the default bargaining parties if either side is not represented by a union or an employer association [CAB-22-MIN-0080.02];
- 9.3 Evidence required by MBIE from employees to satisfy the representation test [CAB-22-MIN-0291]; and
- 9.4 How parties must define coverage of a proposed FPA when applying for approval to initiate bargaining [CAB-22-MIN-0291].
- 10 Cabinet also authorised the Minister for Workplace Relations and Safety to make decisions consistent with the policy intent on any issues that arise on the above matters during the drafting process [DEV-22-MIN-0185, paragraph 14].
- 11 Two further sets of regulations will need to be made to fully implement the FPA system.¹ As these regulations do not relate to the initiation of FPA bargaining, they do not need to be in place when the Act commences. I intend to seek approval in 2023 for these subsequent regulations to be made.

Public interest test

- 12 For FPA bargaining to be initiated, an applicant must satisfy one of two tests set out in the Act. These are either a public interest test, or a representation test (ie a numerical threshold for support of a FPA from employees who would be in coverage). The chief executive (CE) of MBIE is responsible for deciding whether an application satisfies either of these tests.

¹ For example, these regulations are:

- Content and format requirements for mandatory FPA terms, and
- New forms required for the FPA system which fall under the purview of the ER Act (ie the Employment Relations Authority Regulations 2000 and Employment Court Regulations 2000).

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- 13 For the public interest test, section 29(1) of the Act sets out four criteria. These are: “low pay”, “little bargaining power”, “lack of pay progression”, and “not adequately compensated considering factors such as long or unsocial hours or contractual uncertainty”. For the public interest test to be met, the low pay criterion must be satisfied, as well as one or more of the three other criteria.
- 14 Section 29(2) of the Act allows for additional detail to be specified in regulations about how to meet the public interest test criteria. It also allows for regulations to prescribe the portion of employees that must satisfy the test. The following details were agreed by DEV in August 2022 [DEV-22-MIN-0185]:

<i>Criterion</i>	<i>Meaning agreed by DEV [DEV-22-MIN-0185]</i>
Low pay	<ul style="list-style-type: none"> • A significant proportion of employees are receiving an hourly rate of pay that is equal or close to the hourly minimum wage, and • A very small proportion of employees are receiving an hourly rate of pay that is close to the hourly median wage or higher.
Little bargaining power	<p>Employees within a proposed covered industry or occupation experience difficulties in being able to bargain collectively for employment terms and conditions, evidenced by:</p> <ul style="list-style-type: none"> • Low union representation or coverage, • Low collective employment agreement coverage, or • Examples of unsuccessful attempts to initiate collective bargaining.²
Lack of pay progression...	<p>A significant number of employees within a proposed covered industry or occupation experience no, or minimal, increases in wages over time, despite attainment of job-related training, skills, or experience, which is evidenced by low difference in pay between recently hired employees and employees who have been in the same role or occupation for a relatively long time.</p>
...not adequately compensated taking into account factors such as long or unsocial hours or contractual uncertainty	<p>The following is not reflected in the rate of pay or compensation for a significant number of employees in a proposed covered industry or occupation:</p> <ul style="list-style-type: none"> • Working more than 40 hours in a week, and the majority of hours or days worked are outside of standard business hours or days, or • Receiving variable levels of income from work on a weekly or fortnightly basis, or • High use of casual or temporary employment contracts.

Decisions made following policy decisions

- 15 Following DEV’s decisions above, the Act was amended during the legislative process in two relevant aspects.
- 16 First, the Act had previously specified additional factors which applicants could provide evidence of in their public interest test application (eg evidence of systemic exploitation of migrant workers). Those factors were removed during the committee of the whole House stage because it was not clear how

² This third component to the ‘little bargaining power’ criteria has been excluded from the regulations; see paragraph 19.

that evidence related to the criteria to meet the public interest test. Therefore, the policy decisions [DEV-22-MIN-0185] that were intended to further clarify these factors in regulations are no longer relevant.

- 17 Second, for the public interest test to be met, the CE must now be satisfied that the criteria are met in relation to a “*prescribed portion of employees who would be within coverage*”, rather than “employees within coverage”. This amendment mitigated the risk that all employees in the relevant industry or occupation would have to meet the criteria to meet the test, which would not be practical.
- 18 Under the delegated authority described in paragraph 10, I therefore decided that the “prescribed portion” in relation to each of the four criteria are as follows:
- 18.1 “Low pay” is where:
- 18.1.1 *At least approximately 60 percent* of employees who would be within the coverage of the proposed FPA are receiving an hourly rate of pay that is equal or close to the hourly adult minimum wage (under the Minimum Wage Act 1983); and
- 18.1.2 *Less than approximately 30 percent* of employees who would be within the coverage of the proposed FPA are receiving an hourly rate of pay that is close to the median wage or higher.
- 18.2 “Little bargaining power” is where there is:
- 18.2.1 *Less than approximately 20 percent* union representation or coverage; or
- 18.2.2 *Less than approximately 20 percent* collective agreement coverage.
- 18.3 “Lack of pay progression” is where *at least approximately 60 percent* of employees who would be within proposed coverage experience no, or minimal, increases in wages over time, despite attainment of job-related training, skills, or experience, which is evidenced by *less than 20 percent difference* in pay between recently hired employees and employees who have been in the same role or occupation for a relatively long time.
- 18.4 “Not adequately compensated taking into account factors such as long or unsocial hours or contractual uncertainty” is where *at least approximately 60 percent* of employees who would be in proposed coverage meet at least one of the three sub-components of this criterion.³

³ The three sub-components are: (a) working more than 40 hours in a week and the majority of hours or days worked are outside standard business hours or days; (b) receiving variable levels of income from work on a weekly or fortnightly basis; (c) there is a high use of casual or temporary employment contracts.

- 19 In addition to prescribing the above portions in the criteria, I have also decided not to progress drafting of the third limb to the “little bargaining power” criterion. Being able to provide evidence for this limb would be too administratively complex and not practical to demonstrate little bargaining power. This now keeps the “little bargaining power” criterion tied to a consistent portion of employees (ie 20 percent).

Voluntary default bargaining parties

- 20 If either side is not represented in bargaining (eg by a union or an employer association), Part 4 of the Act allows “default bargaining parties” to step in.
- 21 Section 5(3) provides for regulations to be made to name an employee default bargaining party and employer default bargaining party. I must first be satisfied that they are the most representative organisations of unions and employers (respectively) in New Zealand.
- 22 I am satisfied BusinessNZ and the New Zealand Council of Trade Unions are the most representative organisations of employers and unions for the following reasons:
- 22.1 Their respective levels of membership/affiliation,
 - 22.2 Their international and domestic recognition as a representative organisation of unions or employers, and
 - 22.3 The absence of other organisations claiming to be the most representative or representing a significant umbrella body of unions or employers.
- 23 BusinessNZ has confirmed that while they would not accept a compulsory role as the employer default bargaining party, they will decide on a case-by-case basis whether to participate if the circumstances in Part 4 of the Act arise.
- 24 The New Zealand Council of Trade Unions have confirmed that they accept the role as the default bargaining party for employees.
- 25 The regulations therefore name BusinessNZ and the New Zealand Council of Trade Unions as default bargaining parties for employers and unions respectively.

Evidence required by MBIE from applicants to satisfy the representation test

- 26 In August 2022, Cabinet agreed that MBIE may request the contact details of listed employees or employers (as required), to verify evidence provided by a union when applying to initiate FPA bargaining through the representative test, or to verify evidence provided by a union or employer association in the case of renewals or replacements for FPAs [CAB-22-MIN-0291].
- 27 Section 35(3) of the Act provides for regulations to be made on this topic. The proposed regulations allow for the CE to request the following information

from the applicant to verify that employees or employers who are named in the FPA application support it:

27.1 If the applicant is a union:

27.1.1 The work email address, or personal email address if there is no work email address, of employees; and

27.1.2 The work phone number, or personal phone number if there is no work phone number, of employees.

27.2 If the applicant is an employer association:

27.2.1 The email address of the employer or representative of employers; and

27.2.2 The phone number of the employer or representative of employers.

Coverage

28 Section 32(4) of the Act provides that the coverage of a proposed FPA must be specified in accordance with any regulations and include any other information that is required by the regulations.

29 In August 2022, Cabinet decided that bargaining parties can be required to define coverage of a FPA according to existing classification systems, unless this is not feasible [CAB-22-MIN-0291]. The proposed regulations therefore require coverage to be defined according to the Australian and New Zealand Standard Industrial Classification (ANZSIC) system or Australian and New Zealand Standard Classification of Occupations (ANZSCO) system unless this is not possible.

Consultation on the notice of intention to incorporate material by reference for the regulations

30 Under section 65 and Schedule 2 of the Legislation Act 2019, there is a requirement to publicly notify that the regulations propose to incorporate by reference the ANZSIC and ANZSCO classification systems.

31 This requirement was satisfied by publishing a notice in the Gazette and on MBIE's website, in accordance with Schedule 2, and providing an opportunity for the public to provide comment on the proposal to incorporate by reference.

32 BusinessNZ commented on the policy decision to require ANZSCO or ANZSIC codes. They did not consider the codes to be appropriate for describing proposed coverage because they may not adequately reflect the occupations or industry concerned. BusinessNZ did not comment on the public availability of the information or the ease of accessing the information. During the select committee stage, there were comments from submitters that the requirements for describing coverage were too vague and may lead to inconsistencies across agreements. As such, it was recommended that an

initiating party be required to use the existing classification systems, ANZSCO and ANZSIC, to assist in describing coverage. However, an initiating party is not required to describe coverage according to ANZSCO or ANZSIC codes if they are not appropriate for the particular occupation or industry.

- 33 MBIE is satisfied that the regulations clearly identify the material to be incorporated; the means of making the material publicly available is sufficient to enable persons to whom the law applies to find and obtain copies of the material incorporated with reasonable ease; and it is otherwise appropriate to incorporate the proposed material as part of the regulations.

Timing and 28-day rule

- 34 Notice of the regulations will be published in the Gazette the week they are made by the Governor-General in Executive Council, and will commence on 1 December 2022 (ie the same day as the Act). This is fewer than 28 days from notice of the regulations being given.
- 35 I seek a waiver of the 28-day rule on the grounds that the regulations confer only benefits on the public. Without these regulations, the public would lack clarity or certainty about what the public interest test criteria in the Act mean. Potential bargaining parties would not have sufficient clarity as to whether their industry or occupation would meet the public interest test. They may also not know what information they need to provide with an application to address the coverage requirements. In addition, the regulations largely relate to how the regulator will carry out their functions in the Act.
- 36 Regulations about default bargaining parties will also, in practice, not take effect for several months. This is because several preceding steps in the FPA bargaining process will need to first occur: a union must apply to initiate bargaining, the CE of MBIE must decide whether to approve initiation of bargaining, and a specified time period of three months for the formation of bargaining sides must first elapse. It is only after all of these steps have occurred that a default bargaining party could potentially be given the opportunity to step into bargaining.

Compliance

- 37 The regulations comply with:
- 37.1 The principles of the Treaty of Waitangi;
 - 37.2 The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 37.3 The principles and guidelines set out in the Privacy Act 2020;
 - 37.4 Relevant international standards and obligations; and
 - 37.5 The Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 38 There are no grounds for the Regulations Review Committee to draw the regulations to the attention of the House of Representatives under Standing Order 327.

Certification by Parliamentary Counsel

- 39 The draft regulations have been certified by the Parliamentary Counsel Office (PCO) as being in order for submission to Cabinet.

Impact Analysis

- 40 The details in regulations for satisfying the public interest test criteria are exempt from providing a Regulatory Impact Statement (RIS) on the grounds that they have no or only minor impacts on businesses, individuals and not-for-profit entities, in the context of the broader set of policy changes supported by the previous RIS ["Impact Statement: Fair Pay Agreements"; CAB-21-MIN-0126].

Publicity

- 41 The regulations will be notified in the Gazette. MBIE intends to notify stakeholders when the regulations have been made.

Proactive release

- 42 This paper will be proactively released (subject to redactions in line with the Official Information Act 1982) within 30 business days of decisions being confirmed by Cabinet.

Consultation

- 43 The following agencies were consulted on the draft regulations: Department of Corrections, Department of the Prime Minister and Cabinet, Inland Revenue, Ministry of Education, Ministry of Foreign Affairs and Trade, Ministry of Health, Ministry of Justice, Ministry for Pacific Peoples, Ministry of Social Development, Ministry of Transport, Ministry for Women, New Zealand Defence Force, New Zealand Police, New Zealand Transport Agency, Oranga Tamariki, Public Service Commission, Te Puni Kōkiri, Treasury, Whaikaha - Ministry of Disabled People.
- 44 The Employment Relations Authority and the Office of the Privacy Commissioner were consulted on the draft regulations.
- 45 The following non-Crown bodies were consulted on the draft regulations: BusinessNZ and several of its members (Business Central, Business South, Canterbury Employers' Chamber of Commerce, and the Employers and Manufacturers Association), and the New Zealand Council of Trade Unions.
- 46 The notice about the proposal to incorporate the ANZSCO and ANZSIC classification systems by reference in regulations was publicly available on

the MBIE website for consultation from 7 to 11 November 2022 and was notified in the Gazette.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 1 November 2022 the Fair Pay Agreements Act 2022 (the Act) received Royal assent;
- 2 **note** that the Act's regulation-making powers in section 283 commenced on 2 November 2022;
- 3 **note** that on 16 March 2022, the Cabinet Economic Development Committee (DEV) made policy decisions relating to the default bargaining parties for a Fair Pay Agreement [DEV-22-MIN-0040];
- 4 **note** under section 5(3) of the Act, if either side is not represented in bargaining (eg by a union or an employer association), regulations can specify an employee default bargaining party and an employer default bargaining party, but only if the Minister for Workplace Relations and Safety is satisfied they are the most representative organisations of unions and employers respectively;
- 5 **note** that the Minister for Workplace Relations and Safety is satisfied that BusinessNZ and the New Zealand Council of Trade Unions are the most representative organisations of employers and unions respectively;
- 6 **note** that on 1 August 2022, Cabinet made policy decisions relating to how information should be provided for the representation test to initiate bargaining [CAB-22-MIN-0291];
- 7 **note** that on 1 August 2022, Cabinet made policy decisions relating to the coverage of a Fair Pay Agreement [CAB-22-MIN-0291];
- 8 **note** that on 10 August 2022, DEV made policy decisions relating to regulations for the Fair Pay Agreements system, including how to satisfy the public interest test criteria to initiate bargaining [DEV-22-MIN-0185];
- 9 **note** that on 10 August 2022, DEV authorised the Minister for Workplace Relations and Safety to make decisions consistent with the policy intent on any issues that arise during the drafting process [DEV-22-MIN-0185, paragraph 14];
- 10 **note** that the Minister for Workplace Relations and Safety used the authority described in paragraph 9 to establish approximate numeric thresholds for the public interest test criteria, to provide an adequate level of specificity for the regulations in line with the policy intent [DEV-22-MIN-0185];
- 11 **note** that the Fair Pay Agreements Regulations 2022 will give effect to the decisions referred to in paragraphs 3, 5 – 8 and 10;

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- 12 **note** that two further sets of regulations will need to be made to fully implement the remaining components of the Fair Pay Agreements system;
- 13 **note** that the Minister for Workplace Relations and Safety intends to seek approval in 2023 for these subsequent regulations to be made;
- 14 **authorise** the submission to the Executive Council of the Fair Pay Agreements Regulations 2022;
- 15 **note** that the Fair Pay Agreements Regulations 2022 come into force on 1 December 2022;
- 16 **note** that a waiver of the 28-day rule is sought:
- 16.1 so that the regulations can come into force on the 1 December 2022, the same day as the rest of the Act commences;
 - 16.2 on the grounds that the regulations confer only benefits on the public, since they provide certainty and clarity about the operation of the Act's provisions and are primarily to enable a regulator to assess applications to initiate bargaining for a Fair Pay Agreement; and
 - 16.3 regulations about default bargaining parties will also, in practice, not take effect for several months while preceding steps in the application and bargaining process are completed;
- 17 **agree** to waive the 28-day rule so that the regulations can come into force on 1 December 2022.

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety