MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Advice on FPA Bill policy and technical changes

Date:	22 June 2022	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2122-4865

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** to the recommendations. **Forward** this briefing to the Minister of Local Government	27 June 2022

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Beth Goodwin	Manager, Employment Relations Policy	04 901 1611	Privacy of Natural Persons	✓
Chris Pound	Principal Policy Advisor			

The following departments/agencies have been consulted
Department of Internal Affairs

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Fair Pay Agreements: Advice on FPA Bill policy and technical changes

Date:	22 June 2022	**Priority:**	Medium
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Purpose

This briefing provides you with advice on the following policy and technical issues with the Fair Pay Agreements Bill (the Bill) raised by submission to the Select Committee:

A. Whether it is appropriate that an FPA can state whether superannuation is included in the base wage rate

B. The role of Public Transport Authority funders in FPA discussions

C. Whether to include new criteria to the threshold for fixing the term of an FPA.

Executive Summary

A. Whether it is appropriate that an FPA can state whether superannuation is included in the base wage rate

1. We recommend removing the topic 'whether employer superannuation contributions are included in base wage rates' from the mandatory to agree category. Submitters raised concerns on the topic with a general sentiment that it creates confusion of how superannuation, in particular KiwiSaver, would function within the FPA system.

2. Confusion resulting from the inclusion of this topic could lead to bargaining sides agreeing terms which would be inconsistent with the Minimum Wage Act 1983 (MWA). Bargaining timeframes would be prolonged if illegal terms were present in their agreement at the time they submit for vetting. We view that removing the topic would mean that normal superannuation related legislation would apply and negate the possibility of bargaining sides agreeing to terms that could breach the MWA.

B. The role of Public Transport Authority funders in FPA discussions

3. We recommend expanding clause 46 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. We also recommend expand this obligation to include that local authorities (eg regional councils, territorial authorities) also receive regular updates if the bargaining party is aware of them providing funding to private employers.

C. Whether to include new criteria to the threshold for fixing the term of an FPA

4. The Bill enables the terms of an FPA to be fixed where there is a bargaining stalemate or if the FPA has failed to be ratified twice. Submitters raised concerns that the threshold for fixing terms is too high. A particular concern raised was that the requirement for both sides to have taken action to resolve a bargaining stalemate would mean the criteria could not be achieved if one side was not engaging in the process.

5. We recommend including new criteria to the threshold for fixing the terms of an FPA to enable 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:

    a. deliberate, sufficiently serious and sustained, or

    b. involves behaviour that they knew would undermine the process of bargaining (exact wording to confirmed during drafting).

6. This is intended to ensure there is a mechanism for finalising an FPA if one bargaining side is not engaging in the bargaining process.

Recommended action

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

a **Note** we have not been able to conduct a full analysis due to time and consultation constraints but due to Select Committee time constraints we seek your decision on these matters

Noted

A. Whether it is appropriate that an FPA can state whether superannuation is included in the base wage rate

b **Agree** to remove the mandatory topic 'whether the minimum base wage rates included or exclude the employer's contribution for superannuation (if any):' from the Bill

Agree / Disagree

B. The role of Public Transport Authority funders in FPA discussions

c **Agree** to amend the obligation in clause 46 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

Agree / Disagree

d **Agree** to expand the obligation in clause 46 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, if you agreed to the recommendation above), the employer bargaining party must provide regular updates about bargaining to the local authority responsible for that funding

Agree / Disagree

e **Agree** to forward this briefing to the Minister of Local Government

Agree / Disagree

C. Whether to include new criteria to the threshold for fixing the term of an FPA

f **Agree** to include new 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:

    a. deliberate, sufficiently serious and sustained, OR

    b. involves behaviour that they knew would undermine the process of bargaining (exact wording to confirmed during drafting)

Agree / Disagree

g **Agree** that the threshold should not include a criterion enabling the Employment Relations Authority to fix the terms of an FPA following a prescribed time-period for bargaining or following initiation

Agree / Disagree

h **Note** if you decide to include a threshold enabling the Employment Relations Authority to fix the terms of an FPA following a prescribed time-period for bargaining or following initiation, further work would be required to determine a suitable time-period.

Noted

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

22 / 06 / 2022

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. On 9 June 2022, MBIE officials sought your prioritisation of policy issues identified through a review of a subset of submissions on the Fair Pay Agreements Bill from union and business representatives, law firms and Crown Entities.

2. These issues were divided into significant and moderate-small policy issues in the following categories:

    a. Areas where change could improve workability of the FPA system without diverting from current policy intent

    b. Points raised by submitters that may justify a policy change

    c. Points made by submitters that we judged you would not wish to reopen for consideration.

3. On 10 June 2022, you confirmed your subset of priorities for further advice, including deciding that no further work was required for any of the issues included in category c above.

4. This briefing provides you with advice on following three moderate-small issues from category a. (with the policy issue number noted from the table that was discussed):

    A. Whether it is appropriate that an FPA can state whether superannuation is included in the base wage rate (policy issue 8)

    B. The role of Public Transport Authority funders in FPA discussions (policy issue 10)

    C. Whether to include new criteria to the threshold for fixing the term of an FPA (policy issue 5 and 17).

5. In preparing this advice, we have not been able to conduct a full analysis due to time and consultation constraints but due to Select Committee time constraints we seek your decision on these matters.

A. Inclusion of superannuation in stated FPA base wage rates

6. In April 2021, Cabinet agreed (CAB-22-MIN-0126) to draft the Bill with the inclusion of a mandatory topic of “whether superannuation contributions are included in base wage rates”. This topic was not included in the list recommended by the Fair Pay Agreements Working Group, but was subsequently added in 2019.

Submitters raised issues with how this provision works

7. Unions and employers who submitted on this topic queried that the Bill implies that compulsory employer contributions for KiwiSaver can be listed as inclusive within the minimum pay rate, which submitters believed is contrary to what the KiwiSaver legislation states. Many E tū members who provided submissions on the Bill recommended that KiwiSaver and other superannuation contributions should be in addition to the base rate.

8. These submissions highlighted that the inclusion of this topic creates confusion for how compulsory employer contributions should be treated under the FPA system. This confusion may also stem from how the KiwiSaver legislation is currently positioned as it provides options for employers regarding how compulsory employer KiwiSaver contributions can be included in employment packages. It is important to note that employee contributions always come out of the wage/salary.

The law requires superannuation contributions to be additional to the minimum wage

9. Current law enables employer KiwiSaver contributions to be on top or out of an employee's pay package. The KiwiSaver Act 2009 specifies that compulsory employer contributions must be paid on top of gross salary or wages except to extent that employers and employees negotiate and agree otherwise.

10. If the contribution is coming from out of the pay package, there must be a 'total remuneration' clause in the employment agreement. Employers cannot include a 'total remuneration' clause if their employees are on the minimum wage as this would place the employee under the minimum wage and be inconsistent with the Minimum Wage Act 1983 (MWA).

11. The MWA prescribes different rates for different classes of workers, and cannot be contracted out of under section 6.[1] An employee must receive payment for work at no less than that minimum prescribed rate.

12. Clause 119(3) of the Bill provides that where the FPA provides a minimum base wage rate higher than the minimum wage prescribed under the MWA, the FPA minimum base rate becomes the rate prescribed under the MWA. In line with the above paragraph, where an FPA details different classes of minimum base wage rates (ie adult/starting/training, differential terms), these specified wage rates in the FPA will also be treated as minimum wage rates under the MWA.

13. Due to the FPA minimum base wage applying as if it were the minimum wage rate prescribed under the MWA, KiwiSaver compulsory employer contributions cannot be deducted from a FPA minimum base wage under the FPA system.

We recommend removing the reference to superannuation from the mandatory terms

14. We recommend removing '"whether superannuation contributions are included in base wage rates" as a topic in the mandatory to agree category. We consider this topic currently increases confusion around the treatment of superannuation. Bargaining sides could mistakenly include compulsory employer contributions in such a way that the actual wage paid would be below the base rate term agreed within the FPA and become inconsistent with the MWA.

15. Such errors in bargaining would create illegal agreements and would prolong bargaining timeframes if these terms were submitted for vetting (FPAs containing illegal terms must be sent back to bargaining sides for further bargaining).

16. Removing the topic would mean normal superannuation related legislation would apply and negate the possibility of bargaining sides agreeing to terms that would breach the MWA.

17. We now turn to the point raised by submissions requesting that KiwiSaver and other superannuation contributions should be in addition to an employee's base rate. We recommend not amending the Bill to specify such a function – as we consider the change above would largely achieve the desired effect, and in the time available we haven't been able to fully disentangle how this would interact with the KiwiSaver Act, rules around other types of superannuation, and the existing practice of including total remuneration clauses in employment agreements.

[1] Section 6 of the Minimum Wage Act 1983 states that notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

18. We are also aware that there is work being done in the KiwiSaver space. We believe it is best to wait and see the progress of that work rather than making changes in the Bill that could create an immediate inconsistency and possibly extend to a strong inconsistency, depending on the direction of changes to KiwiSaver legislation.

B. Public Transport Authority funders' role

The Bill requires the employer bargaining side to regularly update relevant central government funders

19. In February 2021, you agreed to our recommendation that the employer bargaining side should keep relevant government agencies informed about the progress of bargaining (refer to briefing 2021-1725). We identified that many social, health, community and education services are contracted out and delivered through the funded sector[2] – and many receive a significant portion of their income from government sources. We raised a risk that bargaining sides representing businesses may agree to favourable terms (ie higher wages for workers) with the assumption that the government will provide the additional funding to cover such terms of agreement. If the government did not provide additional funding to cover the increased labour costs, the employers would need to cover the shortfall in other ways (such as reducing staffing volumes). We considered this obligation would ensure government agencies are provided with early indications of the potential content of an FPA. Legislation to the effect of this decision was agreed to be drafted by Cabinet in April 2021 (refer CAB-21-MIN-016).

20. Clause 46(2)(f) requires that "if a proposed FPA covers employees of a private sector employer and the employer bargaining party is aware that the private sector employer regularly receives government funding to deliver public services, [the employer bargaining party must] provide regular updates about bargaining to the department responsible for that funding".

21. We initially considered in our recommendation (refer briefing 2021-1725) that without legislating an obligation, employers would have likely kept their funders up to date on FPA bargaining (especially if funded significantly). This clause was intended to provide legislative backing for the provision of information between employers and their funders with the presumption that employers would be aware of their funders.

A submitter identified a gap relating to local government funders

22. Greater Wellington Regional Council (GWRC) have submitted on the Bill via the select committee process. GWRC commented the Wellington Public Transport network is delivered through partnership contracts between Greater Wellington and Public Transport operators. These operators employ front-line and support staff. Greater Wellington fund the operating costs, including wages, via rates and Waka Kotahi subsidies. GWRC have noted their concern with clause 46, commenting: "Specifically we note that clause 46, which relates to public sector funders being involved in the Fair Pay Agreement process, does not apply to Public Transport Authority funders". Following their concern, GWRC have requested that the Bill include provision for Public Transport Authority (PTA) funders to be involved in Fair Pay Agreement discussions, should they wish to.

23. We consider no change should be made to allow PTA funders (or local government funders) of private employers to be *involved* with FPA discussions. We believe GWRC's request suggests they may have misunderstood the current legislation. Their request for PTA funders to be *involved* in FPA discussions presents a greater obligation than the clause currently provides for government departments funding private employers (under clause 46(2)(f)), and

[2] The Funded sector refers to any private sector organisation that receives Government funding to deliver public services.

would be a major departure from a principle underpinning the Bill, that bargaining is between employers and workers' representatives.

24. GWRC's submission does however identify that there is no current obligation for the employer bargaining party to provide regular updates to local government entities who provide funding to private employers covered by a proposed FPA. We consider the same rationale (as raised in our initial advice) would likely apply to private employers funded by local government entities (like the PTA funders). We note that this rationale applies broader than the public transport industry: example, solid garbage disposal is often contracted and delivered via local government funding.

We recommend expanding the obligation to update to include local authorities, and clarifying that the obligation only applies if the funder is known

25. We recommend expanding the "regular updates" obligation in clause 46(2)(f) to include local government entities alongside government departments. This will enable local government entities to engage with those employers to discuss the implications (which could help inform the employers' feedback to their bargaining parties) if the employers have not been engaging with them during bargaining. No obligations or onus would be placed on local government entities, if this clause included them, in the same way that no onus is placed on government departments, via this clause, besides receiving information.

26. This expansion would increase the burden on employer bargaining parties as they may have to provide regular updates to an increased number of affected parties. Particularly, it may be that the funding relationships between employers and government departments are more easily identifiable than the funding relationships between employers and local government entities.

27. We also recommend amending the clause to only require the employer bargaining party to provide regular updates if they are aware of *which* department (or local government entity) a private employer receives funding from. This is practical, as it recognises the obligation can only be met if those two facts are known, and in particular mitigates the extra difficulty described above.

28. Expanding the "regular updates" obligation to include known local government entities will require a definition of who this covers. The Department of Internal Affairs have suggested the defined term of 'local authority' from section 5 of the Local Government Act 2002 would best capture all regional councils and territorial authorities, and is well understood among the funded sector, so we recommend transplanting the term 'local authority'.

29. We recommend forwarding this paper and your decision to the Minister of Local Government.

C. Whether to include new criteria to the threshold for fixing the term of an FPA

30. This section covers the following policy issues from the prioritisation table we sent you on 9 June:

- Policy issue 5: Include new threshold when fixing terms relating to a breach of good faith
- Policy issue 17: Threshold for fixing terms – include a maximum timeframe for bargaining after which the FPA can be fixed or lower the threshold.

Issues raised by submitters

31. Under the FPA Bill, the following threshold must be met for the Authority to fix terms (clause 218):

a. The bargaining sides must have exhausted all other reasonable alternatives for reaching agreement; or

b. The bargaining sides must have, for a reasonable period, used their best endeavours to identify and use reasonable alternatives to agree the terms of the proposed FPA, the proposed renewal, or the proposed replacement; or

c. The proposed FPA, the proposed renewal, or the proposed replacement must have been the subject of 2 failed ratification processes.

32. The New Zealand Council of Trade Unions (NZCTU), Aotearoa Legal Workers New Zealand, Public Service Association (PSA), First Union and NZ Nurses Organisation raised a concern in their submissions that the threshold for fixing terms was too high. To address this concern some submitters suggested that there should be a further criterion where the terms of an FPA could be fixed after a prescribed period of time.

33. Some submitters also raised a specific concern regarding the criteria that require 'bargaining sides' to have taken action to reach agreement (ie (a) and (b) above). Their concern is that an applicant side may be able to show that they have taken all reasonable steps towards resolution, but they cannot control the actions of the other bargaining side and the threshold may enable a vexatious or unreasonable bargaining party to hamper access to fixing by refusing or failing to make reasonable attempts to resolve a bargaining impasse.

34. MBIE had already identified this as a potential issue during the final stages of drafting but was unable to address this prior to introduction due to time constraints. The first two criteria (criteria (a) and (b)) are intended to provide a mechanism for the FPA to be finalised where there is a bargaining stalemate (via the FPA terms being fixed). We are concerned that these criteria may not adequately provide for when one side exists (meaning the backstop determination process wouldn't be triggered) but doesn't engage in bargaining, as it could be interpreted as requiring both bargaining sides attempting to bargain before a stalemate is reached. If the threshold was interpreted as requiring both sides to have taken action to reach an agreement, then the only mechanism available in the situation where one side was not engaging would be for the other side to seek a compliance order and/or a penalty[3]. While a compliance order or penalty may promote improved compliance and/or provide a deterrence, these would not provide a mechanism for finalising the FPA if the bargaining side continued to not engage.

Options analysis

35. The table below sets out the options to address this issue, including those suggested by submitters, and MBIE's assessment of the benefits and risks of each. The next section describes why we recommend option (c).

Table 1: Options in relation to the threshold for fixing the terms of an FPA

Option	Benefits	Risks
a) No change to current threshold	Limits the situations where the terms of an FPA can be fixed to those currently included in the FPA Bill.	The interpretation of the threshold may not cover situations where one side exists but has not engaged in bargaining on an ongoing basis, with the intention to delay or not engage in bargaining (or other dispute resolutions mechanisms).

[3] If the behaviour involved a breach of good faith that was deliberate, serious, and sustained or one intended to undermine the process of bargaining.

b) Include an additional criterion where the terms of an FPA could be fixed following a breach of the duty of good faith in relation to bargaining that was sufficiently serious and sustained as to significantly undermine the bargaining. *[Based on section 50J(3)(a) of the Employment Relations Act (ER Act) 2000[4]].*	Ensures there is a mechanism for ensuring an FPA can be finalised if one side is not engaging in the bargaining process. Aligns with one element of the ER Act, although this threshold would be lower than that of s50J because it decouples the grounds (ie it is not linked to having to also use all other reasonable alternatives for reaching an agreement, nor is there the threshold for it being the only effective remedy for the breach of the duty of good faith)	The threshold may be difficult to achieve (without significant litigation). Potentially impacts compliance with International Labour Organisation (ILO) obligations as it increases the situations where an FPA can be fixed (but not as much as the options below).
c) Include additional criteria where the terms of an FPA could be fixed where one bargaining side breaches the duty of good faith and the breach(es) are either deliberate, sufficiently serious and sustained, or involves behaviour that they knew[5] would undermine the process of bargaining. *[Based on clause 20 of the FPA Bill which outlines the breaches where a penalty can be applied]*	Ensures there is a mechanism for ensuring an FPA can be finalised if one side is not engaging in the bargaining process. Is focused on the identified potential gap and it is not as high as the threshold in option b (reducing the risk that it is difficult to achieve without significant litigation). Is consistent with the types of good faith breaches that can attract a penalty in the FPA Bill.	Potentially impacts compliance with ILO obligations as it increases the situations where an FPA can be fixed (but not as much as the options below). Is not consistent with the thresholds in other NZ bargaining systems. Unclear how it would be interpreted.
d) Remove the requirement that 'both bargaining sides' have exhausted/used reasonable alternatives to reach agreement (ie only require one side to have done so) *[suggested by NZCTU, NZ Nurses Organisation, PSA and First Union]*	Addresses the concern that one side cannot control the behaviour of the other side; however, it is unclear how one side could exhaust/use reasonable alternatives by themselves.	The thresholds in clause 218 (a) and (b) are intended to provide a mechanism to address a bargaining stalemate, so changing it to one side would shift it away from the situation it was intended to cover. Potentially impacts compliance with ILO obligations as it increases the situations when an FPA can be fixed but not as much as the option below. Is not consistent with the thresholds in other NZ bargaining systems. Unclear how it would be interpreted.
e) Include an additional criterion where terms can be fixed after a specific timeframe where no progress is made *[recommended by Aotearoa Legal Workers Union and PSA]* or since initiation	Ensures there is a clear mechanism for ensuring an FPA can be finalised if one side is not engaging in the bargaining process, which may incentive bargaining (to avoid a determination).	Does not account for the varying scope and complexities of different FPAs. This could result in an FPA being fixed even though bargaining was still making progress. It may incentive parties to "wait out" the time limit if they consider the

[4] https://www.legislation.govt.nz/act/public/2000/0024/latest/DLM59109.html

[5] Clause 20 requires the behaviour to be intentional, this is a very high threshold (effectively a criminal standard). We have proposed lowering this to 'known' to ensure the criteria is not so high that it makes it too difficult to achieve.

[recommended by NZCTU and First Union].	The threshold would be simple to implement and reduce the risk of litigation.	terms would be more favourable, which would be inconsistent with the intention that FPAs are bargained. Of the options, this is most likely to impact compliance with ILO obligations as it increases the situations when an FPA can be fixed. Is not consistent with the thresholds in other NZ bargaining systems.

We recommend including criteria relating to a breach of good faith

36. We consider that the existing threshold for the Employment Relations Authority (the Authority) to fix terms may not adequately provide a mechanism for finalising an FPA when one side exists but does not engage in bargaining. We consider this is best addressed by including new criteria focused on addressing this gap (in addition to the existing criteria), rather than making significant changes to the current criteria for fixing the terms of an FPA.

37. MBIE recommends option (c), where clause 218 is amended to include additional criteria where the terms of an FPA could be fixed where one bargaining side breaches the duty of good faith, and the breach(es) are either:

    a. deliberate, sufficiently serious and sustained, or

    b. involve behaviour that they knew would undermine the process of bargaining (exact wording to confirmed during drafting).

38. The proposed criteria are intended to capture situations where one bargaining side is either not engaging in bargaining, or only engaging in surface level bargaining over a period. It is not intended to capture situations where there are legitimate issues impacting the timing of bargaining meetings or reaching agreement. This is a lower threshold than option (b) as we are concerned that the threshold in option (b) would be too difficult to achieve (potentially requiring significant litigation).

39. The recommended option would address the potential gap in the current thresholds and ensure that there was a mechanism for finalising an FPA if one side refused to engage in bargaining or only engaged in surface level bargaining and then refused to engage in reasonable alternatives to reach agreement (ie dispute resolution services).

40. Including this additional threshold would increase the situations in which an FPA can be fixed. However, its inclusion is intended to provide an incentive to bargaining sides to actively engage in bargaining. We consider option (c) most appropriately balances the need to ensure there is a mechanism for finalising an FPA if this is unable to be achieved via bargaining (ie the threshold is not inaccessible) while ensuring the threshold does not undermine the intention that FPAs are bargained where possible.

41. The Chief of the Authority supports the recommended additional criteria.

We do not recommend including a criterion specifying a maximum timeframe after which the terms can be fixed

42. MBIE continues to not recommend enabling the terms of an FPA to be fixed following a prescribed time period for bargaining or following initiation (as per our advice in briefing 2021-1427). Including a prescribed timeframe would not account for the varying scope and complexity of FPAs and could lead to gaming.

43. The threshold for fixing terms, with the inclusion of the recommended criteria above, should provide suitable mechanisms for finalising an FPA following a bargaining stalemate and if one side is not actively engaging in bargaining. We consider further lowering the threshold for fixing terms would not be consistent with the intention that FPAs are bargained where possible.

Next steps

44. We seek your decisions on the topics in this paper on 27 June 2022, so we can start drafting the Cabinet paper to amend the FPA Bill, due to be provided to your office for your review by 7 July 2022.

45. We will provide you with further advice on the remaining significant issues by 30 June 2022, and will seek your decision on those topics on 4 July 2022.

46. It is intended that this Cabinet paper will be considered at the Cabinet Economic Development Committee's (DEV) meeting on 27 July 2022. This will enable Cabinet's policy decisions to be incorporated into MBIE's Departmental Report that will advise the Education and Workforce Committee on changes the Bill. The Departmental Report is due to be submitted to the Committee on 8 August 2022.