



BRIEFING

Fair Pay Agreements Act 2022 – Employment Relations Authority and Employment Court forms required for Tranche 2 Regulations

Date:	1 December 2022	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2223-1552

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	We seek your agreement to changes required to the Employment Relations Authority Regulations and Employment Court Regulations to enable applications to be made for FPA matters.	6 December 2022

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Beth Goodwin	Manager, Employment Relations Policy	04 901 1611	Privacy of natural	✓
Latisha Kumar	Policy Advisor, Employment Relations Policy	04 830 7203		

The following departments/agencies have been consulted
Business New Zealand, the Employment Relations Authority, the New Zealand Council of Trade Unions.

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 Withdrawn |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



BRIEFING

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Date:	1 December 2022	Priority:	Medium
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Purpose

To provide you with the proposed Employment Relations Authority forms required for the *Fair Pay Agreements Act 2022*, and seek your approval to amend the Employment Relations Authority Regulations and the Employment Court Regulations to either amend existing forms or add a new form(s) based on those, as required for the Fair Pay Agreement (FPA) system.

Recommended action

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

- a **Note** that on 10 August 2022, the Cabinet Economic Development Committee (DEV) authorised you, as Minister for Workplace Relations and Safety, to make decisions consistent with the *Fair Pay Agreements Act 2022* to approve the design of the forms required for the FPA system (DEV-22-MIN-0185).

Noted
- b **Agree** that the Employment Relations Authority Regulations be amended to include the proposed application, and statement in reply, forms for the Employment Relations Authority set out in Annexes 1 to 9.

Agree / Disagree
- c **Note** that MBIE will provide further advice by 20 December 2022 on whether a Statement in Reply is permitted, and a form required, under the *Fair Pay Agreements Act 2022* for when an application is made to fix the terms of a proposed agreement in the absence of a bargaining side; and if so, will advise on the content of that form.

Noted
- d **Agree** that the Employment Relations Authority Regulations and Employment Court Regulations be amended to allow applications to remove a matter to the Employment Court and the Employment Court Regulations be amended for appeals and stay of proceedings to be made in relation to FPAs, where these are permitted under the *Fair Pay Agreements Act 2022*.


Agree / Disagree
- e **Note** that the forms are not final and minor wording changes may still be needed throughout the regulation drafting process to ensure they are legally and technically accurate.

Noted
- f **Agree** to delegate authority to MBIE to make technical changes to the content of the forms, and any consequential changes required to the Employment Relation Authority Regulations and Employment Court Regulations as a result of changes to forms, if these are identified as required during drafting.

Agree / Disagree

g **Agree** that decisions made in this briefing will be given effect in Tranche 2 of the regulations under the *Fair Pay Agreements Act 2022*.

Agree / Disagree

A handwritten signature in black ink, appearing to read 'BMS', with a long horizontal flourish extending to the right.

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

1 / 12 / 2022

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

..... / /

Background

1. The essential Fair Pay Agreements (FPA) regulations are being implemented in tranches to ensure critical regulations are in force on the commencement date (1 December 2022) of the *Fair Pay Agreements Act 2020* (FPA Act). The first tranche of regulations was recently approved by Cabinet.
2. The second set of the regulations (Tranche 2) will cover the minimum requirements for the FPA system to function once bargaining has been initiated. This includes:
 - a. the content and form of the mandatory terms for FPAs, and
 - b. the forms required for the Employment Relations Authority (the Authority) and the Employment Court.
3. This briefing covers the forms required for the Authority and the Employment Court.

Delegated authority to approve the design of the forms

4. On 10 August 2022, the Cabinet Economic Development Committee (DEV) authorised you, as Minister for Workplace Relations and Safety, to make decisions consistent with the FPA Act to approve the design of the forms required for the FPA system, later confirmed by Cabinet. The forms fall within the purview of regulations enabled under the *Employment Relations Act 2000*, including making changes to the substantive provisions of the regulations to give effect to the forms (DEV-22-MIN-0185).
5. There are several forms required to allow parties to file applications to the Authority and the Employment Court under the FPA system. These forms will be prescribed in the Employment Relations Authority Regulations and the Employment Court Regulations.

New forms required for applications to the Authority

6. New forms needed in the FPA system will cover applications to the Authority to:
 - fix terms of a proposed agreement,
 - make recommendations for a term or terms for a proposed agreement,
 - submit the proposed agreement for a compliance assessment,
 - submit a proposed agreement for a coverage overlap assessment, and
 - resolve fair pay relationship problems.
7. There will also be Statement in Reply forms which are applicable when there is a respondent party to an application.
8. Proposed draft versions of these forms are contained in Annexes 1 to 9 and, if approved, these will be used as the basis for drafting instructions to the Parliamentary Counsel Office (PCO).
9. We seek a delegated authority to make any technical changes to the content of the forms, and consequential changes required to the regulations because of including these forms, that are identified as required during drafting.

Consultation on the Employment Relations Authority forms

10. The following bodies were consulted during the development of the forms: BusinessNZ, the New Zealand Council of Trade Unions (CTU) and the Employment Relations Authority.

11. BusinessNZ provided minor feedback and overall are comfortable with the draft forms.
12. CTU and the Authority provided feedback and are comfortable with the draft forms, with the exception of the form discussed immediately below.

Further work is required as to whether an additional form is needed

13. We consulted with stakeholders on a further form, *Statement in Reply for Application to fix terms of FPA in the absence of a bargaining side* (ie when the FPA has moved into the 'backstop' scenario).
14. In the 'backstop' scenario there could still be a specified employer bargaining party (eg the Public Service Commission) ready to participate in bargaining, but a side is unable to be formed as that party is prohibited from representing all employers (e.g. private sector employers). As such, a mechanism to allow that specified employer bargaining party to respond *may* be warranted.

The Authority and the CTU expressed concern

15. The Chief of the Authority expressed concern with this form, questioning whether a Statement in Reply is permitted in this circumstance under the legislation. He considered it would open grounds for challenge if a form was created but no Statement in Reply was in fact permitted.
16. The CTU also do not find the Statement in Reply form necessary and have concerns about how it may turn the backstop mechanism into a different process which could encourage litigation.
17. Given the Authority and CTU's concern with this form, we consider further work is needed to determine whether the specified bargaining party is permitted or entitled under the *Fair Pay Agreements Act 2022* to make a Statement in Reply in this circumstance, and thus whether a form is required.

We'll provide advice later in December on this

18. We propose to explore this further, including further engagement with the Authority and CTU. As discussed with you at the officials meeting on 30 November 2022, we will provide advice on whether a Statement of Reply is permitted, and therefore a form required, in relation to an application to fix the terms of an FPA in the absence of a bargaining side by 20 December 2022.

Forms required for applications to Employment Court and the Authority under their existing functions

19. The existing Employment Court Regulations and Employment Relations Authority Regulations need to be amended to allow for matters to be removed to the Employment Court, and allow for appeals and stays of proceedings in relation to FPAs, where these are permitted under the FPA Act.
20. This includes either amending, or creating a new form based on, the following application forms:
 - a. Form 7 of the Employment Relations Authority Regulations, which enables a party to remove a matter, or part of a matter, to the Employment Court,
 - b. Form 1 of the Employment Court Regulations, which enables a party to elect to have a matter heard by the Employment Court,

- c. Form 3 of the Employment Court Regulations, which enables a party to apply for special leave to remove a matter to the Employment Court,
 - d. Form 14 of the Employment Court Regulations, which enables a stay of proceedings to be sought related to fair pay agreement matters.
21. We seek your approval to issue instructions to PCO to amend:
 - Employment Relations Authority Regulations and Employment Court Regulations to allow applications to remove a matter to the Employment Court, and
 - Employment Court Regulations for appeals and stay of proceedings in relation to FPAs
 22. If you agree this decision will be given effect either by amending existing relevant forms or creating new forms based on them. In the drafting instructions we will seek PCO's guidance on which approach (amend existing, or create new, forms) is the most appropriate way to give effect to your decision.
 23. We also seek a delegated authority to make technical changes identified during drafting and any consequential changes required to the regulations because of amendments to existing forms or the development of new forms.

Next steps

24. We will develop drafting instructions to the PCO based on your decisions in this paper.
25. Your office will receive advice on the content and form of the mandatory terms for FPAs on Thursday 8 December 2022. This briefing will also include advice on which forms applicable in the FPA system should attract a fee.
26. As described above, we will provide further advice in December 2022 on whether a Statement in Reply is permitted, and a form required, under the *Fair Pay Agreements Act 2022* when an application is made to fix the terms of a proposed agreement in the absence of a bargaining side and if so, the content of that form. If a form is required, we consider this can be developed within the intended timeframe for Tranche 2 regulations.
27. We anticipate Ministerial consultation on Tranche 2 regulations can begin in mid-February 2023. Consideration of the Tranche 2 regulations by the Cabinet Legislation Committee is expected to occur in mid-March 2023.

Annexes

Annex One: Form 1 – Application to Employment Relations Authority to fix the terms of a proposed agreement in the absence of a bargaining side

Annex Two: Form 2 – Application to Employment Relations Authority to fix the terms of a proposed agreement

Annex Three: Form 2A – Statement in Reply (regarding application to fix the terms of a proposed agreement)

Annex Four: Form 3 – Application to Employment Relations Authority for recommendation for proposed agreement or proposed variation

Annex Five: Form 3A – Statement in Reply (regarding an application for a recommendation for a proposed agreement or proposed variation)

Annex Six: Form 4 – Application to Employment Relations Authority for a compliance assessment for a proposed agreement or proposed variation

Annex Seven: Form 5 – Application to Employment Relations Authority for a coverage overlap assessment for a proposed agreement

Annex Eight: Form 6 – Application to Employment Relations Authority to resolve fair pay relationship problems

Annex Nine: Form 6A – Statement in Reply (regarding the resolution of fair pay relationship problems)