



BRIEFING

Fair Pay Agreements: Final backstop Slip of Amendments and policy Cabinet papers for review and lodgement

Date:	20 July 2022	Priority:	High
Security classification:	In Confidence	Tracking number:	2223-0189

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Agree to lodge the Cabinet papers on referring the FPA backstop Slip of Amendments (Slip) to Select Committee and Fair Pay Agreements Bill: Policy changes for the Departmental Report with the Cabinet Office by 10am, Thursday 21 July 2022.	21 July 2022
	Agree to review the draft letter to the Select Committee Chair, requesting the Committee considers incorporating the backstop Slip into the Fair Pay Agreements Bill.	25 July 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	✓
Latisha Kumar	Policy Advisor, Employment Relations Policy	04 830 7203		

The following departments/agencies have been consulted on the Cabinet papers
The Department for Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Women, Public Service Commission, Department of Corrections, Ministry of Social Development, Ministry of Education, Inland Revenue, Ministry of Transport, New Zealand Police, Oranga Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, New Zealand Defence Force, New Zealand Transport Authority and Ministry of Health.

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 Withdrawn |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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Purpose

This briefing provides:

- Two Cabinet papers for your final review and lodgement with the Cabinet Office at 10am on Thursday 21 July 2022, entitled:
 - *Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee* – to be considered at Cabinet on 25 July 2022;
 - *Fair Pay Agreements Bill: Policy changes for Departmental Report* – to be considered at Cabinet Economic Development Committee on 27 July 2022;
- Talking points to support you at the above Cabinet meetings;
- A draft letter to the Chair of the Education and Workforce Committee (the Committee), requesting the Committee considers incorporating the backstop Slip of Amendments (the Slip) provisions into the Fair Pay Agreements Bill (the Bill) for your review; and,
- Supporting information for the Committee to aid its consideration of the Slip for your information.

Recommended action

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

- a **Agree** to lodge the Cabinet paper *‘Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee’*, by 10am, Thursday 21 July 2022 for consideration by Cabinet on Monday 25 July 2022;
- Agree / Disagree*
- b **Agree** to lodge the Cabinet paper *‘Fair Pay Agreements Bill: Policy changes for Departmental Report’*, by 10am, Thursday 21 July 2022 for consideration by the Cabinet Economic Development Committee on Wednesday 27 July 2022;
- Agree / Disagree*

- c **Agree** to review the draft letter to the Select Committee Chair, requesting the Committee considers incorporating the backstop Slip of Amendments into the Fair Pay Agreements Bill, and provide feedback to MBIE at the next weekly officials meeting on 25 July 2022.

Agree / Disagree



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

20 / 7 / 2022

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. On 21 March 2022, Cabinet agreed to incorporate an alternative process (referred to as the “backstop”) into the FPA system; to draft the backstop proposals as a Supplementary Order Paper (SOP) to be incorporated into the Bill; and rescinded the April 2021 decision that BusinessNZ will be the default representative for employers [CAB-22-MIN-0080.02 refers].
2. On 28 March 2022, Cabinet agreed that the Government introduce the draft Bill to Parliament [CAB-22-MIN-0095 refers], which referred the Bill to the Education and Workforce Committee (the Committee) following its first reading on 5 April 2022.
3. To enable the Backstop policy proposals to be considered by the Select Committee, you presented a parliamentary paper to the House, prior to the FPA Bill’s first reading, which was published under the authority of the House. On 6 April 2022, the Committee called for public submissions on the parliamentary paper alongside the Bill. Submissions closed on 19 May 2022.
4. We provided you draft Cabinet papers for both the backstop and policy papers on 8 July 2022, on which you consulted Ministers and we consulted departments.

Approval to lodge two FPA Cabinet papers

5. We now seek your approval to lodge the two finalised Cabinet papers:
 - *Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee* - to be considered at Cabinet on 25 July 2022;
 - *Fair Pay Agreements Bill: Policy changes for Departmental Report* - to be considered at Cabinet Economic Development Committee (DEV) on 27 July 2022;
6. The Parliamentary Counsel Office (PCO) has drafted a Slip of Amendments (the Slip) to be considered by the Committee. The Slip has the same effect as an SOP but has a different name as it is to be considered by the Committee, rather than the House. As the Slip is not a published public document, it should not be referred to as an SOP, but it does come within the scope of Cabinet’s approval on 21 March 2022. [CAB-22-MIN-0080.02 refers]. PCO will deliver the final version of the Slip to the Cabinet office for the meeting on 25 July 2022.
7. Other than referring to and explaining the purpose of the Slip, no other substantial changes have been made to the backstop Cabinet paper following feedback during departmental consultation. Since you last reviewed it, we have made some minor editorial changes and proofread it. We have provided tracked changed/highlighted and final versions of this paper in **Annex One** and **Annex Two**.
8. For the policy Cabinet paper, we have reframed the section on judicial review to focus more on the disincentives/workability of the FPA system and the rationale for the proposed limitation, following comments from the Ministry of Justice.
9. The paper has been updated to reflect the additional policy items that the Treasury has agreed are exempt from the requirement to analyse in a Regulatory Impact Statement (RIS) and has had some editorial changes relative to the version you reviewed last week to clarify the proposals and decisions sought. We have provided tracked changed/highlighted and final versions of this paper in **Annex Three** and **Annex Four**.
10. Talking points to support you for each paper at the Cabinet (25 July 2022) and DEV Committee (27 July 2022) meetings are provided in **Annex Five** and **Annex Six**.

Consultation of the Cabinet papers

11. Both papers have been consulted with your ministerial colleagues and with the following agencies: the Department for Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Women, Public Service Commission, Department of Corrections, Ministry of Social Development, Ministry of Education, Inland Revenue, Ministry of Transport, New Zealand Police, Oranga Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, New Zealand Defence Force, New Zealand Transport Authority and Ministry of Health.
12. We understand no substantive matters were raised on the papers during Ministerial consultation. No substantive comments were received on the backstop paper from government agencies.
13. For the backstop paper, the Ministry for Pacific Peoples commented that they would encourage *“specific capability relating to Pacific communications and engagement [to be] developed or assured in the Employment Relations Authority.”* We have passed this feedback on to our Employment Services colleagues.
14. On the policy Cabinet paper, the Office of the Privacy Commissioner (OPC) expressed concern that the threshold (intentional or reckless) for the penalty for a failure to comply with obligations relating to the use and storage of employee contact details is different to the criteria that defines an interference with privacy of an individual under the Privacy Act. OPC’s view is this creates an inconsistency in how privacy breaches of this nature are considered. It may also be difficult to prove, undermining the effectiveness of the penalty. They recommend the penalty be introduced simply for failing to comply and remove the potential criteria of ‘intentional or recklessness failures’.
15. We do not consider that the inclusion of this criteria creates a regulatory incoherence with the Privacy Act – as the Privacy Act does not include a civil penalty of this type for privacy breaches. One of the remedies available in the Privacy Act, a compliance notice¹, is similar to a compliance order under the FPA Bill. A compliance order can be sought in the FPA system for any breach of an obligation and does not require a ‘intentional or recklessness’ element. Therefore, we consider the approach in the two systems as to what is considered a breach, resulting in a potential compliance order/notice, are consistent. The Ministry of Justice has indicated that it supports the inclusion of the “intentionally or recklessly failing to comply with obligations” criteria, because *“this reflects that sometimes minor breaches do occur despite parties not intentionally or recklessly failing to comply, and the inclusion of mens rea elements appropriately narrows the scope of the offence to ensure only the behaviour you want to include is captured.”* We do not propose any change to the criteria.
16. The Office of the Privacy Commissioner has requested that the following comment is inserted into the Cabinet paper:

“The Privacy Commissioner supports a two staged approach for the provision of personal information, which is consistent with a data minimisation approach. Additionally, the Commissioner supports the introduction of a pecuniary penalty to ensure employee information is used and stored for the purposes it was collected. However, to ensure there is regulatory coherence between the FPA Bill and the Privacy Act 2020, the Commissioner recommends that the criteria of ‘intentional or recklessness failures’ is removed from the penalty for a failure to comply.”

¹ Noting, under the Privacy Act, the Privacy’s Commissioner’s processes include using its best endeavours to facilitate settlement between the parties. The Commissioner cannot order the payment of a penalty or damages, but an aggrieved individual can commence proceedings before the Human Rights Review Tribunal in the circumstances set out in section 98(1), which may include a claim for damages.

17. Te Puni Kōkiri noted that it supports the proposed policy changes as any improvements to the employment relations system around bargaining and negotiation of employment terms and conditions will be beneficial for Māori. However, they noted *“that the proposed changes are likely to make little difference for those, including Māori, in insecure (i.e. casual, part-time, contract) and low-income work. These jobs are also often in sectors (e.g. home care, aged care, health, construction) with many challenges (e.g. staff recruitment and retention). This is because these people are usually in sectors and jobs that are not covered by unions and FPAs. They also may not have the confidence, capability, and the information and tools that would enable them to participate in negotiations about their work conditions and pay. Further, they often do not have access to the tools and information, even if these were provided, because they do not have, for example, digital connections and equipment, e.g. broadband, computers.”*
18. In response to this comment, our view is the FPA system is intended to address the imbalance of bargaining power, including allowing for FPA bargaining in workforces with low unionisation rates. The FPA system is designed to enable people in insecure and low-income work, including Māori, to get the benefit of the improved terms even if facing those barriers to participation that are identified in the comment above.
19. MBIE’s FPA implementation team will engage with further with Te Puni Kōkiri on how MBIE could engage effectively with appropriate Māori groups to ensure implementation of the FPA system is best designed to meet the needs of low-skilled and low-income Māori workers.
20. The Ministry for Pacific Peoples also noted that it supported the work to develop FPAs and the proposed policy changes, highlighting *“the need for robust evaluation of outcomes from FPAs to be prioritised as they are implemented – to understand the distributional impacts in the affected industry, especially the impacts on population groups disproportionately represented in low skilled and low paid sectors.”* A monitoring and evaluation workstream has been established as part of the FPA implementation programme and a plan is in development.
21. The Ministry of Justice is providing advice to the Attorney-General the consistency of the Slip with the New Zealand Bill of Rights Act 1990. The Ministry is unable to confirm to MBIE the contents of this advice until they have confirmation that the Attorney-General has considered it.

Regulatory impact analysis

22. We have previously advised you that:
 - for the backstop Cabinet paper, there is no requirement for a RIS at this stage, as one was written when Cabinet considered the policy proposals.
 - for the policy Cabinet paper, Treasury’s Regulatory Impact Analysis Team has determined that most of the additional policy changes proposed are exempt from providing a RIS (BN 2223-0020 refers).
23. An addendum to the original RIS for FPA system (produced in April 2021) has been produced to reflect the proposed judicial review policy changes to the Bill and is attached for your information at **Annex Seven**. MBIE’s Regulatory Impact Analysis Review Panel has assessed that this meets the regulatory impact requirements. This RIS should be attached to the policy Cabinet paper at lodgement.

Letter to the Chair of the Education and Workforce Select Committee

24. For your review, we have prepared a draft letter to the Chair of the Education and Workforce Committee requesting that the Committee consider incorporating the backstop Slip into the version of the Bill it reports back to the House. The draft letter is attached at **Annex Eight**.
25. To assist the select committee's understanding and reading of the backstop Slip, we propose that you append to your letter:
 - A 'Plain English' explanation of the proposed changes to the Bill resulting from the Slip to assist committee members; and
 - An edited section of MBIE's departmental report outlining submitters' views on the proposed backstop policy received during the public consultation of the parliamentary paper.
26. The extract of the departmental report on backstop submissions is attached for your information at **Annex Nine**. We will provide you with the 'plain English' explanation of the proposed changes to the Bill for your information by 22 July 2022.

Next steps

27. Once you have reviewed the Cabinet papers, we recommend you lodge both papers with the Cabinet Office by **10am, Thursday 21 July 2022**.
28. The backstop paper will be considered at the Cabinet (CAB) meeting on 25 July 2022. Cabinet will be acting as the Cabinet Legislation Committee (LEG) for referring the backstop Slip to the select committee.
29. The policy paper will be considered at the DEV meeting on 27 July 2022. Subject to decisions at DEV, Cabinet ratification would occur on 1 August 2022.
30. We will ensure that Cabinet's decisions are incorporated in MBIE's departmental report to the Committee and will provide you with a draft of the report for your feedback on 28 July 2022. The Departmental Report is due for submission at midday on Monday 8 August 2022 and we will present it to the Committee on 10 August 2022.
31. We seek your feedback on the draft letter at the next weekly meeting with MBIE officials **on Monday 25 July 2022**. Subject to your approval of the letter, we will forward the letter, the final Slip and information documents noted above to assist the Committee to the Clerk of the Committee after Cabinet has made its decisions on 25 July 2022. The Committee next meets on 27 July 2022.

Annexes

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| Annex One: | Cabinet paper – Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee (marked up version for review) |
| Annex Two | Cabinet paper – Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee (final version for lodgement) |
| Annex Three: | Cabinet paper – Fair Pay Agreements Bill: Policy changes for Departmental Report (marked up version for review) |
| Annex Four: | Cabinet paper – Fair Pay Agreements Bill: Policy changes for Departmental Report (final version for lodgement) |

- Annex Five: Talking points for the Cabinet meeting on 25 July 2022
- Annex Six: Talking points for the DEV Committee meeting on 27 July 2022
- Annex Seven: Regulatory Impact Assessment – Fair Pay Agreements Regulatory Impact Assessment update on limiting judicial review of bargaining parties’ decisions
- Annex Eight: Draft letter to the Chair of the Education and Workforce Committee referring the Slip of Amendments to the Committee for consideration
- Annex Nine: Extract from the FPA Bill Departmental Report – Proposed new Backstop Determination Process