



BRIEFING

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

Date:	29 June 2022	Priority:	High
Security classification:	In Confidence	Tracking number:	2122-5084

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the recommendations.	4 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	✓
Morgan Whiterod	Graduate Policy Advisor	04 896 5875		

The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

Fair Pay Agreements: Further advice on FPA Bill policy and technical changes

Date:	29 June 2022	Priority:	High
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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. Expanding the Bill's purpose to include a broader policy intent
- B. Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details

Executive Summary

A. Expanding the Bill's purpose to include a broader policy intent

1. We recommend changing the Bill's purpose to incorporate the backstop process. Officials noted during the submission process that with the addition of the backstop, there is now another path for the creation of an FPA which may not involve collective bargaining. The purpose statement does not currently mention this.

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

2. Prior to the introduction of the Bill, you suggested including a penalty for not complying with obligations relating to the use and storage of employee contact details provided to initiating union or the employee bargaining side (clauses 40 and 41).
3. We have discussed this with the Office of the Privacy Commissioner, who support the inclusion of such a penalty. We, therefore, recommend the Bill includes a penalty that would apply to an employee bargaining party that intentionally or recklessly failed to comply with obligations relating to the use and storage of employee contact details, as specified in clauses 40 and 41 of the FPA Bill.

Recommended action

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

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

Noted

A. Expanding the Bill's purpose to include a broader policy intent

- b **Note** we recommend not expanding the Bill's purpose to include a broader policy objective (such as addressing low wages), as the Bill itself cannot achieve those objectives – it relies on unions and employers bargaining suitable terms.

Noted

c **Agree** not to expand the Bill's purpose to include a broader policy intent.

Agree / Disagree

d **Agree** to change the Bill's purpose to incorporate the backstop process.

Agree/ Disagree

e **Note** the inclusion of a reference to the backstop process in the purpose of the Bill is subject to the Select Committee accepting the backstop Supplementary Order Paper (SOP), which will be submitted to Select Committee late July 2022.

Noted

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

f **Agree** 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 FPA Bill.

Agree / Disagree



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

29 / 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 one of moderate-small issues from category a. (with the policy issue number noted from the table that was discussed):
 - a. Expanding the Bill's purpose to include broader policy intent (policy issue 4).
5. In addition, it provides advice on a change you suggested for the draft Bill before introduction that was unable to be considered at that time:
 - a. Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details
6. 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 deadlines we now seek your decision on these matters.

A. Expanding the Bill's purpose to include a broader policy intent

Background

7. The Fair Pay Agreements Working Group (FPAWG) Report described the function of the FPA system as: "to allow employers and workers to set minimum employment terms and conditions across an industry or occupation".
8. In line with the recommended function of the FPA system in the FPAWG Report, Cabinet agreed (CAB-21-MIN-0126 refers) that the objective of the FPA system is to "improve labour market outcomes by enabling employers and employees to collectively bargain industry – or occupation – wide minimum terms".
9. With the objective in mind, you finalised the statement in the form currently found in the Bill (refer Briefing 2021-2100); "the purpose of this Act is to provide a framework for collective bargaining for fair pay agreements that specify industry-wide or occupation wide minimum employment terms".

Submitters raised issues with the Bill's purpose

10. There was a range of feedback from submissions on the Bill's purpose statement. Some submitters, particularly unions, wanted to see the purpose more accurately reflect the Bill's policy objective, including explicitly mentioning economic and labour outcomes, as well as

certain groups over-represented in lower paying jobs, such as Māori, young people, and people with disabilities. Those submitters want to ensure that that policy intent can guide the courts in litigation.

Other considerations

11. The Legislation Design and Advisory Committee (LDAC) Guidelines advise that the purpose clause should be designed with a clear function that is consistent with the substantive provisions of the Bill and should avoid “vague aspirational” statements.
12. With the addition of the backstop, there is now another path for the creation of an FPA which may not involve collective bargaining. The purpose statement does not currently mention this.

Recommendation

13. We recommend not changing the purpose clause to state that the Bill will raise labour standards or economic outcomes. We believe that the explanatory note of the Bill is the appropriate place to discuss the aspirations of the Bill. In line with LDAC’s advice, we continue to believe that the purpose clause should not specify desired outcomes (such as addressing low wages and inadequate working conditions) as the *Bill itself* cannot achieve those outcomes – it relies on unions and employers bargaining suitable FPA terms to achieve the outcomes.
14. We did consider when developing the purpose statement whether it should have mention to specific groups of workers who may benefit from FPAs, eg those facing labour market challenges that may trigger the public interest test. However, we advised that the different avenues for initiation mean it is not possible to predict which groups of workers will initiate for an FPA. That remains our advice.
15. In relation to the backstop,¹ we recommend that the purpose statement incorporates mention of the backstop process as a way of finalising the terms of an FPA, to better reflect what the Bill does. We believe the mention of the backstop process should be worded in a way that encourages bargaining between parties foremost, as the backstop was established to set terms only following a period during which bargaining parties have had an opportunity to form a bargaining side in the FPA system, and the social partners have declined the opportunity to participate.
16. A potential new purpose statement that incorporates the backstop could read something like: the purpose of this Act is to provide a framework for collective bargaining to agree terms or, if certain thresholds are met, a process for fixing terms, that specify industry-wide or occupation-wide minimum employment terms. This proposed purpose statement would still be subject to refinement with PCO’s input.

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

Background

17. The FPA Bill requires employers to provide the contact details of employees within coverage to the employee bargaining side. Clause 40 and 41 specify requirements for the use and storage of the employee contact details provided. The inclusion of these requirements is intended to ensure that the employee contact details are treated appropriately and in a

¹ This advice assumes the Select Committee will adopt the backstop SOP, as previously discussed with you.

manner that is consistent with the Privacy Act 2020. These clauses do not limit the obligations specified under the Privacy Act, including an individual's right to complain under Part 5 of the Privacy Act (as specified in clause 23).

18. In a meeting with officials on 9 March 2022 following your review of the draft FPA Bill, you suggested that the Bill could include a penalty for not complying with obligations relating to the use and storage of employee contact details provided to an initiating union or the employee bargaining side (clauses 40 and 41). At that time, it was not possible to consider the inclusion of another penalty, as it would have required consultation and a Cabinet decision, which would have delayed the introduction of the draft FPA Bill.
19. We also noted that it was already possible to issue a compliance order for failing to meet those obligations (as this is possible for all obligations in the Bill) and that non-compliance with a compliance order could then lead to a penalty being awarded under the Employment Relations Act.
20. We indicated we could consider the inclusion of a penalty specifically for non-compliance with these requirements as part of the Select Committee process. We have now done so and have discussed this with the Office of the Privacy Commissioner (OPC).

Consideration

21. The main benefit of including a penalty for a breach of the obligations relating to the use and storage of employee contact details would be highlighting the importance of the employee bargaining side meeting these obligations, which may incentivise more immediate and consistent compliance.
22. Including such a penalty would, however, be different to the remedies available under the Privacy Act.
 - a. Under the Privacy Act, a person can make a complaint to the Privacy Commissioner (under Part 5), who can then investigate whether there has been an interference with the individual's privacy (this requires a finding that an action has breached an Information Privacy Principle and has caused harm – see section 69 of the Act).
 - b. The Commissioner's processes include using its best endeavours to facilitate settlement between the parties (section 85 of the Privacy Act), which may include financial compensation, an apology, and/or assurances that there will not be a repetition of the action that gave rise to the complaint.
 - c. The Commissioner cannot order the payment of a penalty or damages, but the 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 (the remedies that the Tribunal can impose where an interference with privacy has been established are set out in section 102, and include damages, a declaration, and order requiring or restraining the respondent from taking certain actions).
 - d. Another option that may be available to the Commissioner is issuing a compliance notice (see section 123 and 124). An agency that fails to comply with the compliance notice may be subject to enforcement action by the Commissioner in the Tribunal and may be liable on conviction to a fine not exceeding \$10,000.
23. We were concerned about the potential for this to create jurisdiction issues between the role of the Privacy Commissioner (and Human Rights Review Tribunal) and the Employment Relations Authority. OPC has, however, advised that there are already jurisdiction overlaps between these entities, and similar overlaps exist in other regulatory systems. Section 74 of the Privacy Act recognises that there may be alternate avenues available to a complainant and concurrent jurisdiction between various entities. For example, the Commissioner may

decide not to investigate a complaint if there is an alternate dispute resolution process available to resolve the complaint because of the agency's membership of a particular profession or industry, or there is an adequate remedy or right of appeal that would be reasonable for the complainant to pursue. The latter arises not infrequently in the employment context (for example, where an employee's personal grievances include a privacy issue, or personal information is sought by way of 'discovery'). Another example is where wage and time records, or leave records are requested; with enforcement under the Employment Relations Act and Holidays Act including penalties. In those cases, the Commissioner may decide not to investigate if those avenues provide an appropriate remedy in the circumstances.

24. OPC have indicated they support the inclusion of a penalty in relation to the use and storage obligations for employee contact details on the basis that it doesn't restrict the Privacy Commissioner's enforcement and compliance powers under the Privacy Act 2020 (ie. even if a penalty is imposed by the relevant authority, the Privacy Commissioner can exercise its powers under the Privacy Act). The inclusion of a penalty wouldn't impact the Privacy Commission's enforcement powers as the Bill already includes a provision (clause 23(2)) that specifies that nothing in the Bill limits the rights of an individual under the Privacy Act².
25. OPC have also indicated that they consider the inclusion of a penalty would be useful for supporting enhanced privacy outcomes.

Recommendation

26. We therefore recommend including a penalty for intentional or recklessness failures to comply with obligations relating to the use and storage of employee contact details, as specified in clauses 40 and 41 of the FPA Bill.
27. The inclusion of the 'intentional or reckless' element is important to ensure that unions who are doing their best to comply with the obligations are not penalised for minor breaches (noting these types of breaches could nevertheless be addressed via a compliance order requiring them to take whatever action was required to ensure the breach did not occur again). The 'intentional or reckless' threshold is also consistent with the threshold for some of other penalties in the Bill that apply to bargaining parties³.

Next steps

28. We seek your decisions on the topics in this paper on 4 July 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.
29. 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.

² Noting, we are in discussion with OPC to ensure this provision is worded appropriately.

³ For example, clause 30 includes a penalty for intentionally or recklessly including inaccurate information in an initiation application.