



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Fair Pay Agreements: Approval to draft	Date to be published	7 May 2021

List of documents that have been proactively released

Date	Title	Author
19 April 2021	<i>Cabinet Paper: Fair Pay Agreements: Approval to draft</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
19 April 2021	<i>Cabinet Minute: Fair Pay Agreements: Policy Approval</i>	<i>Cabinet Office</i>

Information redacted

YES

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- Confidential advice to Government



Cabinet

Minute of Decision

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Fair Pay Agreements: Policy Approval

Portfolio **Workplace Relations and Safety**

On 19 April 2021, following reference from the Cabinet Economic Development Committee (DEV), Cabinet:

Background

- 1 **noted** that on 23 May 2018, DEV agreed in principle, subject to a report from the Fair Pay Agreement Working Group, to introduce a legislative system that allows employers and workers to create Fair Pay Agreements (FPA) that set minimum employment terms and conditions across an industry or occupation [DEV-18-MIN-0100];
- 2 **noted** that on 23 May 2018, DEV also agreed to establish the Fair Pay Agreement Working Group, to make recommendations on the scope and design of the system, within set parameters, including that the system would not permit industrial action [DEV-18-MIN-0100];
- 3 **noted** that the Fair Pay Agreement Working Group submitted its report in December 2018;
- 4 **noted** that:
 - 4.1 on 25 September 2019, DEV agreed to the release of a discussion paper on the proposed design of a FPA system, and invited the Minister for Workplace Relations and Safety to report back on the outcome of the consultation [DEV-19-MIN-0266];
 - 4.2 in October to November 2019, the public were consulted on the design of a FPA system, and that feedback from the consultation has informed the proposed design features;

Application of FPA system

- 5 **noted** that contractors have not been included in the initial design of the FPA system as this would have substantially delayed the development and implementation of the system;
- 6 **agreed** that the FPA system will only apply to employees initially;
- 7 **noted** that the Minister for Workplace Relations and Safety is beginning work towards including some types of contractors in the FPA system;
- 8 **invited** the Minister for Workplace Relations and Safety to report back to DEV on progress on the inclusion of some types of contractors in the FPA system by the end of 2021;

Institution to oversee and implement the FPA system

- 9 **noted** that the Minister for Workplace Relations and Safety intends to create a new institution to oversee and implement (where appropriate) the FPA system;
- 10 **invited** the Minister for Workplace Relations and Safety to report back to DEV on a new institution to oversee the FPA system once options have been developed;

Objective of the FPA system

- 11 **agreed** 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 employment terms;

Initiation

- 12 **agreed** that to initiate bargaining for a FPA, a union with at least one member within coverage will be required to apply to the Ministry of Business, Innovation and Employment and meet one of the following tests:
- 12.1 a representation test that would require either 10 percent or 1,000 employees (whichever is lower) of the employees within proposed coverage to support initiation of a FPA; or
- 12.2 a public interest test based on at least one of the following criteria:
- 12.2.1 low pay;
- 12.2.2 low bargaining power;
- 12.2.3 lack of pay progression;
- 12.2.4 long or unsocial hours, or contractual uncertainty, that is not adequately compensated;
- 13 **agreed** that when assessing whether the public interest test has been met, the Ministry of Business, Innovation and Employment may take into account the indicators listed in paragraph 1 in Annex A of the paper under CAB-21-SUB-0126;
- 14 **agreed** that the Ministry of Business, Innovation and Employment will have powers to call for evidence and information from the initiator if further evidence is required for its assessment;

Coverage

- 15 **agreed** that coverage of a FPA must be defined by the initiator as either an:
- 15.1 Occupational Fair Pay Agreement, where the initiator would be required to describe the occupation, including a description of the work, that the FPA is proposed to apply to; or
- 15.2 Industry Fair Pay Agreement, where the initiator would be required to describe the industry that the FPA is proposed to apply to, and each occupation, including a description of the work, that the FPA is proposed to apply to;
- 16 **agreed** that all employers and employees within the proposed coverage would, by default, be covered by the FPA;

Representation

- 17 **agreed** that only registered unions with at least one member in coverage can represent employees (union and non-union members) in bargaining for a FPA;
- 18 **authorised** the Minister for Workplace Relations and Safety to make policy decisions regarding the eligibility requirements in relation to the structure/form and representativeness of employer bargaining representatives, and level of government oversight on the selection of employer bargaining representatives;
- 19 **agreed** that BusinessNZ will be the default representative for employers (where there is no willing and suitable representative), and that it will be required to:
 - 19.1 use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated; and
 - 19.2 be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months;
- 20 **noted** that the paper under CAB-21-SUB-0126 refers to the collective group of representatives for either employees or employers in bargaining for a FPA as a ‘bargaining side’;
- 21 **agreed** that any representative organisation that is part of a bargaining side, either a registered union or employer organisation, should have at least one member within coverage of the FPA being bargained;

Notifications and communication

- 22 **agreed** that there will be notification and communication requirements on the initiating union(s) and on employers with employees within coverage when FPA bargaining is initiated and at critical stages throughout the process (further detail is set out in paragraphs 24-40 of Annex A to the paper under CAB-21-SUB-0126);
- 23 **agreed** that employers be required to pass on the contact details of each employee within coverage of the proposed FPA to the union bargaining side within a specified timeframe, unless the employee opts out of having their contact details passed on;

Paid meetings

- 24 **agreed** that employers must provide up to two, two-hour paid meetings for each employee within coverage of a proposed FPA during bargaining (applying to both union and non-union employees), with two additional paid hours if a FPA is voted down at the first ratification process;

Union access to workplaces

- 25 **agreed** that the approach to union workplace access during collective bargaining in the Employment Relations Act 2000 be applied to FPA bargaining, and that union(s) may access a workplace with workers within coverage without the employer’s consent when a FPA is being bargained, if the primary reason for their visit relates to the FPA;
- 26 **agreed** that once a FPA is in force and there are workplaces with employees in coverage of the agreement (even if they are not union members), relevant unions will be entitled to access workplaces without the employer’s consent if the primary purpose of the visit is related to the FPA;

Bargaining obligations

- 27 **agreed** that the duty of good faith provided in the Employment Relations Act 2000 will apply to parties in employment relationships covered by a FPA (including between bargaining parties on the same bargaining side and those on different bargaining sides), with appropriate amendments reflecting the differences between the FPA system and collective bargaining (outlined in the table below paragraph 41 of Annex A to the paper under CAB-21-SUB-0126);
- 28 **agreed** that each bargaining side must:
- 28.1 use their best endeavours to represent affected parties within coverage (including non-union members or employers not affiliated with the representative parties) on their side;
 - 28.2 use their best endeavours to ensure Māori are effectively represented by seeking and considering their feedback, and considering whether there should be a Māori representative included in the bargaining side;
 - 28.3 inform the relevant government agency of the progress of FPA bargaining, if it is occurring in an industry or occupation that receives government funding to deliver public services;

Support to build bargaining capability and capacity during bargaining

- 29 **agreed** that bargaining costs will lie where they fall;
- 30 **agreed** that once a FPA has been initiated, each bargaining side (on the employee and employer side) is offered from the government the following support for bargaining:
- 30.1 bargaining training; and
 - 30.2 a one-off contribution of \$50,000 to each bargaining side; and
 - 30.3 an additional contribution of up to \$25,000 to each bargaining side if less than 20 percent of those in coverage on their side is a member of a union or industry group (as relevant);
- 31 **noted** that the Screen Industry Workers Bill and FPA systems are similar, as both allow for sector-wide bargaining, and that a decision to provide some funding to the FPA system would create an inconsistency between them;
- 32 **agreed** that a one-off bargaining support of \$50,000 is offered to each bargaining side, on initiation of bargaining for occupational-level collective contracts under the Screen Industry Workers Bill;
- 33 **agreed** that an additional contribution of up to \$25,000 is offered to each bargaining side, on initiation of bargaining for occupational-level collective contracts under the Screen Industry Workers Bill, if less than 20 percent of those in coverage on their side is a member of a union or industry group (as relevant);
- 34 **noted** that if the number of FPA initiations exceeds the number budgeted for, some form of rationing for the monetary contributions may be necessary;
- 35 **agreed** that a government funded bargaining support person, provided by Employment Services, be available to support bargaining sides throughout FPA bargaining;

- 36 **agreed** that peak bodies New Zealand Council of Trade Unions and BusinessNZ be given \$250,000 each per annum, for three years, with funding conditions attached (listed in paragraph 46 of Annex A to the paper under CAB-21-SUB-0126), once the FPA system comes into force;

Scope of an FPA

- 37 **agreed** that the terms that can be included in a FPA be limited to employment-related terms;
- 38 **agreed** that some topics will be ‘mandatory to agree’ and some will be ‘mandatory to discuss’ in FPA bargaining, as described in the table below:

Mandatory to agree	Mandatory to discuss
Base wage rates	Redundancy
How wage rates will be adjusted	Leave entitlements
Whether superannuation contributions are included in base wage rates	Objectives of the Fair Pay Agreement
Ordinary hours, overtime, penalty rates	Skills and training
Coverage	Health and safety
Duration of Fair Pay Agreement	Flexible working
Governance agreements	

- 39 **agreed** that bargaining sides may agree or discuss any other lawful employment-related terms (not included in paragraph 38 above) in FPA bargaining;
- 40 **agreed** that bargaining sides can agree a process or calculation that employers must use to set an employment term, as an alternative to specifying the exact term;
- 41 **agreed** that bargaining sides can agree to include an exemption from the terms of the FPA for up to 12 months for employers in significant financial hardship;
- 42 **agreed** that bargaining sides can agree to include regional differences, using specified regional definitions, in a FPA;
- 43 **agreed** that bargaining sides can agree to include a preferential payment for union members within coverage of a FPA, as long as it is no greater than a union member’s membership fees;
- 44 **agreed** that bargaining sides can agree differential terms within a FPA based on any characteristic, as long as they do not breach the Human Rights Act 1993 or minimum employment standards;

Dispute resolution

- 45 **noted** that the Fair Pay Agreement Working Group recommended that the dispute resolution system for FPAs should maintain, as far as possible, the existing processes under the Employment Relations Act, with additions or simplification as necessary for industry-wide bargaining;
- 46 **agreed** that the existing actors within the employment dispute resolution system will perform the dispute resolution functions in the FPA system:

46.1 Employment Mediation Services will do mediation;

- 46.2 the Employment Relations Authority will determine disputes between parties and may fix the terms of the FPA when the required threshold has been met;
- 46.3 the appellate courts will decide appeals (Employment Court, Court of Appeal and Supreme Court);
- 47 **agreed** that disputes about coverage following initiation can be determined by Employment Relations Authority, and will not require mediation in the first instance;
- 48 **agreed** that where there is a dispute between the bargaining parties or sides, a bargaining party or side may use mediation to try to resolve the matter;
- 49 **agreed** that where mediation has not been successful in resolving the matter, a bargaining party or side can apply to the Employment Relations Authority for a binding determination;
- 50 **agreed** that the Employment Relations Authority must consider, before making a binding determination, whether to direct parties to use mediation, further mediation, or recommend another process to resolve the matter;
- 51 **agreed** that where bargaining sides have agreed some topics, the Employment Relations Authority may make a recommendation(s) on the subset of disputed topics at the request of one bargaining side;
- 52 **agreed** that when a bargaining side applies for a determination to fix the terms of a FPA, the Employment Relations Authority must only make a binding determination to fix mandatory terms (and may make a determination to fix mandatory to discuss terms, and may fix other employment-related terms if both bargaining sides agree) if it is satisfied that:
- 52.1 the bargaining sides have first tried to resolve the difficulties by mediation or by other processes recommended by the Employment Relations Authority; and
- 52.2 either:
- 52.2.1 all other reasonable alternatives for settling the dispute have been exhausted; or
- 52.2.2 a reasonable period has elapsed within which the bargaining sides have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude a FPA;
- 53 **agreed** that:
- 53.1 following a first failed attempt to ratify a FPA, the parties would return to bargaining;
- 53.2 following a second failed attempt to ratify a FPA, the matter would be referred to the Employment Relations Authority to fix the terms of the FPA;
- 54 **authorised** the Minister for Workplace Relations and Safety to decide any process the Employment Relations Authority must follow when making a determination to fix terms, including any factors that the Employment Relations Authority must take into account in making its determination;
- 55 **agreed** that when the terms of a FPA are fixed by determination, the decision is made by a panel of Employment Relations Authority members;

- 56 **agreed** that the Employment Relations Authority, where reasonably necessary, may seek independent expert advice;
- 57 **agreed** that where the Employment Relations Authority has fixed the terms of the FPA by determination, the right to appeal this decision is limited to appeals on questions of law;
- 58 **agreed** that once a FPA is finalised, employers and employees within coverage will be able to enforce their rights and obligations through the dispute resolution processes set out in the Employment Relations Act 2000;

Vetting

- 59 **agreed** that unless it has been set by determination, a FPA is vetted by the Employment Relations Authority to check that it is compliant with the FPA legislation, minimum employment standards, and is not otherwise unlawful, before it is finalised;

Ratification

- 60 **agreed** that a FPA will be ratified if a simple majority, of those within coverage who vote from both employee and employer sides, vote in favour of it;
- 61 **agreed** that bargaining sides will decide their ratification processes, but that the processes must meet legislated minimum requirements set out in paragraphs 49-50 of Annex A to the paper under CAB-21-SUB-0126;
- 62 **agreed** that all employees within coverage will each receive one vote of equal value;
- 63 **agreed** that all employers will receive at least one vote per employee within coverage, with weighted votes for employers with 20 employees or less as outlined in the table at Annex B to the paper under CAB-21-SUB-0126;
- 64 **agreed** that before a ratified FPA is finalised, the Ministry of Business, Innovation and Employment will conduct a verification check of the ratification process and the ratification results reported by the bargaining sides within a reasonable timeframe;
- 65 **agreed** that the Ministry of Business, Innovation and Employment will have the power to call for further information in relation to ratification processes and results from bargaining parties only;
- 66 **agreed** that bargaining sides responsible for holding the ratification vote will be required to keep a record of the process undertaken and the votes collected;

Legal mechanism for finalising FPAs

- 67 **agreed** that the resultant FPA as ratified or determined must be put into secondary legislation by the Secretary for the Ministry of Business, Innovation and Employment, once the Secretary is satisfied that the proper process has been followed;

Employment Relations Authority compliance tools

- 68 **agreed** to enable the Employment Relations Authority to order compliance with any duties or requirements within the FPA system;

- 69 **agreed** that the Employment Relations Authority can apply a penalty of up to \$20,000 for an individual and \$40,000 for a company or other corporation, for the following breaches (which could occur during the development of a FPA):
- 69.1 an employer breaches its duty of good faith duty by doing anything with the intention of inducing an employee not to be involved in initiation, bargaining or the ratification vote for a FPA;
 - 69.2 an employer intentionally or recklessly fails to comply with the requirements to notify affected employees of the initiation, ratification or renewal of a FPA;
 - 69.3 an employer intentionally or recklessly fails to provide the contact details of employees within coverage to the union bargaining side;
 - 69.4 there is a breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is deliberate, serious, and sustained; or intended to undermine FPA bargaining;
 - 69.5 an employer unreasonably withholds consent in relation to a request by a union representative to enter a workplace, or refuses to permit entry for, or obstructs, a union representative who is entitled to enter a workplace;
 - 69.6 an employer fails to allow an affected employee to attend the minimum paid meetings they are eligible for in relation to FPA bargaining;
 - 69.7 a union intentionally or recklessly provides inaccurate information as part of the application to initiate a FPA;
 - 69.8 a union, employer bargaining representative, or employer intentionally or recklessly provides inaccurate information as part of the ratification evidence;
- 70 **agreed** that the Employment Relations Authority can apply a penalty of up to \$10,000 for an individual and \$20,000 for a company or other corporation for the following breaches (which could occur when a FPA is in force):
- 70.1 there has been a breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is intended to undermine a FPA;
 - 70.2 a party does not comply with a FPA once it is in force;
 - 70.3 an employer misclassifies an employment relationship as a contractor arrangement to avoid coverage of a FPA;
 - 70.4 a party obstructs or delays an Employment Relations Authority investigation or process that it is mandated to perform in the FPA system (noting that this can also apply for disputes that occur during bargaining);
- 71 **agreed** that the onus of proof be reversed for the offence of misclassifying an employment relationship as a contractor arrangement to avoid FPA coverage, and that, to avoid being penalised, an employer would need to prove that they took the action for reasons other than to avoid coverage;

Enforcement by the Labour Inspectorate

- 72 **agreed** that the FPA system be added to the laws that come within the Labour Inspectorate's jurisdiction;

- 73 **agreed** that the hourly base wage(s), adjustments to the hourly base wage across the lifetime of the FPA, increases to the minimum leave entitlements, the hourly overtime rate, and the hourly penalty rate set in a FPA will form new minimum entitlement provisions that the Labour Inspectorate can enforce in accordance with the Employment Relations Act 2000;
- 74 **agreed** that the Labour Inspectorate should enforce the minimum entitlement provisions specified per occupation or role and per region (where these are agreed in the FPA);
- 75 **agreed** that when the new minimum entitlement provisions described in paragraph 73 above are included in the FPA, they must be written in a prescribed format and include details as prescribed in secondary legislation;
- 76 **agreed** that, where a FPA applies, employers will be required to keep records to enable it to be enforced, which may include the days of the week and times of the day that employees within coverage worked; and where they worked (if the FPA includes regional differences);
- 77 Confidential advice to Government

Role of the Public Service Commissioner in bargaining FPAs in the public sector

- 78 **agreed** that:
- 78.1 the Public Service Commissioner be responsible for FPA bargaining that covers employees in the Public Service and the Education Service as if the Commissioner were the employer;
 - 78.2 the Commissioner can choose whether to delegate these functions and powers to Public Service chief executives and the Secretary for Education, respectively, with conditions;

Detailed design

- 79 **agreed** that, in addition to the core design features covered in paragraphs 12–77 above, the FPA system include the detailed design features as outlined in Annex A to the paper under CAB-21-SUB-0126;

Financial implications

- 80 Confidential advice to Government
- 81

82 Confidential advice to Government

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Legislative implications

85 Confidential advice to Government

86 **invited** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals;

87 **authorised** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy framework in the paper under CAB-21-SUB-0126, on any issues that arise during the drafting process, including transitional provisions, how exemptions from FPAs apply, record keeping requirements for employers, and how to vary and renew FPAs;

88 **authorised** the Minister for Workplace Relations and Safety to consult with the New Zealand Council of Trade Unions and BusinessNZ on draft legislation giving effect to the policy decisions outlined above;

89 **agreed** that legislation drafted to give effect to the above policy decisions will bind the Crown.

Michael Webster
Secretary of the Cabinet