

Hon Michael Wood

Minister of Transport
Minister for Workplace Relations and Safety



Legislative statement for Fair Pay Agreements Bill 2022

31 March 2022

Introduction

- 1 This legislative statement supports the first reading of the Fair Pay Agreements Bill 2022 (the Bill) and is presented to the House of Representatives in accordance with Standing Order 272.
- 2 The Bill creates a framework for bargaining for Fair Pay Agreements (FPAs). The objective is to improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain for industry- or occupation-wide minimum employment terms and conditions.
- 3 The Bill:
 - 3.1 sets out general principles and provides for an obligation of good faith that applies to certain relationships. For example, between: an employer and employee; an employer and a union that is an employee bargaining party; or between employer bargaining parties where both are parties to the same proposed agreement¹ or proposed variation;
 - 3.2 sets out specific duties of good faith between bargaining parties on the same side, and for bargaining parties on different bargaining sides;
 - 3.3 provides criteria for who can be a bargaining party and prescribes the criteria and process for initiating bargaining (including when a default bargaining party may be required) and notifying affected parties when bargaining has been initiated;
 - 3.4 sets out obligations on bargaining parties to those they represent, including both members and non-members, such as ensuring there is an avenue to provide feedback;

¹ The term proposed agreement as used in this document also includes a proposed renewal or proposed replacement.

- 3.5 prescribes processes around the bargaining process, including that each bargaining side must have an inter-party side agreement that establishes a lead advocate to represent the side;
- 3.6 prescribes mandatory content that must be included in the FPA, including minimum base wages, penalty and overtime rates, as well as topics that the bargaining sides must discuss, but are not required to be included in the proposed agreement;
- 3.7 provides minimum process requirements for ratifying the proposed agreement or proposed variation and provides that it must be checked by the Employment Relations Authority for compliance with the minimum content of the fair pay agreement;
- 3.8 provides processes to resolve disputes that may arise during bargaining for proposed agreement, proposed variation, or once an FPA is in force and provides a process for fixing the terms of the proposed agreement if ratification has failed twice or where bargaining sides have failed to reach agreement and specified criteria are met;
- 3.9 provides a process for varying or renewing an FPA;
- 3.10 prescribes penalties for non-compliance with obligations during bargaining and when an FPA is in force; and for employers who to fail keep records, over and above their current time and wage records, to ensure an FPA can be enforced;
- 3.11 expands the existing powers currently available to the Labour Inspectorate, enabling them to make a determination on whether an employee is covered by an FPA. These powers would allow the Labour Inspectorate to question a party or require them to provide documentation as evidence.

Fundamental aspects of the Bill

General principles and obligations (Part 2)

- 4 The Bill provides that only those who have been approved as employee or employer bargaining parties may represent the collective interests of covered employees or employers during bargaining. Membership of unions or employer associations is voluntary. The Bill contains protections against undue influence being placed on persons involved in FPA processes.
- 5 The Bill creates a duty of good faith that is based on similar obligations in the Employment Relations Act 2000. These obligations will support efficient, constructive bargaining that is focused on finalising an FPA in a timely

manner. This obligation includes not doing anything to mislead or deceive one another.

- 6 The general obligation of good faith applies between certain parties in the FPA system including: between an employer and an employee; between employer bargaining parties bargaining for the same proposed agreement or, proposed variation; and between employee bargaining parties bargaining for the same proposed agreement or proposed variation.
- 7 The Bill also places specific good faith obligations on bargaining parties at two levels: between parties within the same bargaining side (e.g. between two or more bargaining parties on the employee bargaining side or employer bargaining side), and also between the bargaining parties on the opposite bargaining sides (e.g. the parties on the employee bargaining side and the employer bargaining side).
- 8 Industrial action will be prohibited within the FPA system.

Initiating bargaining (Part 3)

Initiation requirements

- 9 The Bill enables any eligible union to initiate bargaining for a proposed FPA. To be an eligible union, certain requirements must be met, such as having at least one member that is an employee within the coverage of the proposed FPA. The Chief Executive of the Ministry of Business, Innovation and Employment (CE MBIE) must be satisfied that the union meets the eligibility requirements and the union's application meets either:
 - 9.1 A representation test – at least 1,000 employees or 10% of the employees in proposed coverage (whichever is lower) support initiating bargaining for a proposed FPA, or
 - 9.2 A public interest test (i.e. it is in the public interest to support initiating bargaining for a proposed FPA) – based on specified criteria such as: low pay; little bargaining power; lack of pay progression; or long or unsocial hours, or contractual uncertainty, that is not adequately compensated.
- 10 The CE MBIE will assess applications based on either test. The CE MBIE can request further evidence and information from the initiator if required or invite submissions.
- 11 The Bill requires an initiating union to describe the coverage of a proposed FPA as either an industry-based agreement or an occupation-based agreement. All employers and employees within the proposed coverage will be bound by the terms of the FPA once validated.

Notification following initiation

- 12 The Bill creates notification and communication obligations for the initiating union and covered employers. The initiating union has obligations to notify employers that bargaining has been initiated and provide certain details, such as how the proposed FPA could impact on the employer's employee(s) and the work they do, and how to contact the employee bargaining side.
- 13 The initiating union must also provide each covered employer with a form that explains: the requirement for employers to provide each covered employee's contact details to the union unless the employee opts out of having their contact details passed on; the process in how they may go about doing this; and, the consequences of doing so.
- 14 Employers are then required to provide the contact details of employees, except those who have elected to not have their details provided to the initiating union (or another employee bargaining party if an updated address has been provided). Safeguards are provided relating to the use and storage of employee contact details.

Representation for bargaining

- 15 Bargaining will take place between employee bargaining parties and employer bargaining parties, who will represent the interests of all employees and employers covered by the proposed FPA (not just those who are members).
- 16 Any eligible union can apply to the CE MBIE to become an employee bargaining party and join the employee bargaining side.
- 17 To be an employer bargaining party, certain requirements must be met, including being an employer association (as defined in the Act) and having a member that is an employer of an employee who is within coverage of the proposed FPA. An exception is specified employer bargaining parties (e.g. the Public Service Commissioner) who are able to represent specified state sector employers and are not required to meet the requirements to be an employer association to bargain.
- 18 If the non-initiating bargaining side is unrepresented (or becomes unrepresented during bargaining), a default bargaining party (that is the most representative organisations of unions or employers and named in regulations) is required to step into bargaining. If the initiating side becomes unrepresented during bargaining, then a default bargaining part may step in during bargaining. If they do not, then development of the proposed agreement ceases.
- 19 After three months following the approval of the union's application to initiate bargaining, each bargaining side must agree an inter-party-side agreement

(which sets out their process for bargaining and making decisions) and appoint a bargaining side lead advocate.

Obligations to those the bargaining parties represent

- 20 The bargaining parties on each bargaining side must use their best endeavours to represent those within coverage; including to provide regular updates, provide an opportunity for those within coverage to submit feedback and consider all feedback received.
- 21 Each bargaining side must also use their best endeavours to ensure Māori employees/employers are represented effectively in the bargaining process.

FPA meetings and union access to workplaces (Part 4)

- 22 The Bill provides that an employee within coverage of a proposed agreement is entitled to, and employers must allow these employees to attend, two two-hour paid meetings for FPA purposes and one additional two-hour paid FPA meeting where ratification has failed, and the employee has already attended the (initial) two meetings. An employee within coverage of an FPA is also entitled to attend one additional paid meeting in relation to a proposed variation during the life an FPA.
- 23 A representative of an employee bargaining party will be able to access a workplace (without the employer's consent), during bargaining or while the FPA is in force, if there are employees in coverage at that workplace and the purpose of the visit is primarily FPA related.

Bargaining (Part 5)

- 24 The Bill specifies the requirements for providing information between bargaining sides when bargaining for a proposed agreement or proposed variation, including providing a process for providing confidential information between the sides.
- 25 This part provides criteria and notification obligations on bargaining parties relating to ceasing to be a bargaining party.
- 26 This part also provides for when the employer must provide specified information to new employees and the contact details of new employees (unless they opt out) to the employee bargaining side during bargaining. This includes situations when new employees come within coverage due to a coverage change or new employers within coverage are identified during bargaining.
- 27 When two FPAs are initiated for the same industry-based FPA, the Bill establishes rules for when the bargaining must be consolidated, when the

bargaining parties to the first FPA may agree that bargaining is consolidated, and when a subsequent agreement must be attached to an existing FPA as a schedule.

Content and form of FPAs (Part 6)

- 28 The Bill sets out what must, or may, be included in an FPA. Each FPA must specify: when it comes into force and expires; who the FPA covers with sufficient clarity (coverage); normal hours of work; minimum base wage rates, whether the minimum base wage will include or exclude superannuation contributions (if any), overtime rates, penalty rates, (including when and how these are adjusted); governance arrangements that will apply to the bargaining sides when the agreement is in force; and the process for bargaining sides to engage with each other if bargaining to vary the agreement.
- 29 Several other topics are also set out that bargaining parties must discuss whether to include in the FPA, e.g. health and safety requirements and leave entitlements. These do not need to be included in the FPA.
- 30 The Bill also specifies particular terms as minimum entitlement provisions (e.g. minimum base wage rates), meaning they can be enforced by the Labour Inspectorate.
- 31 Bargaining sides will also be able to agree different terms that apply to classes of employees; for example, based on the territorial districts the employees work in. Bargaining sides will be able, but not required, to discuss and include any other employment-related topics they consider to be relevant. An FPA can only set differential terms if they comply with the *Human Rights Act 1993* and minimum employment entitlements.
- 32 Bargaining sides can agree to provide for a process where employers can apply for a delayed commencement of certain, prescribed terms. The bargaining sides may only approve a delay in commencement of terms for an employer if they are satisfied that declining the application would result in a less favourable outcome for the employer's employees than approving the application and the delay will allow the employer to be able to comply with the terms of the FPA. The delay may only be up to a maximum of 12 months.

Finalisation of proposed FPA (Part 7)

- 33 After bargaining, to finalise an FPA, it must be:
 - 33.1 assessed and approved by the Employment Relations Authority; and

- 33.2 ratified separately by a simple majority of the employees and employers who would be covered by the proposed FPA²; and
- 33.3 verified by the CE MBIE; and
- 33.4 brought into force by the CE MBIE through secondary legislation.
- 34 If there is coverage overlap between a proposed agreement and FPA, the Employment Relations Authority will determine which agreement provides the better terms overall for the employees (covered by the overlap) and the coverage of either the proposed agreement or FPA is to be amended accordingly.
- 35 When an FPA has been finalised, all employers within coverage will be bound by it, regardless of whether they participated in the FPA bargaining process. Likewise, each employee within coverage will receive the benefit of each new minimum employment term set by the FPA, unless the existing corresponding term in the employee's employment agreement is higher.

Variation and renewal of Fair Pay Agreements (Part 8)

Variations

- 36 The Bill sets out that one bargaining side can request agreement from the other side to bargain for a proposed variation. Before bargaining for proposed variation may start, agreement is required between both bargaining sides that bargained for the FPA. New bargaining parties may join a bargaining side at any time after bargaining for a proposed variation has started if it makes an application and is approved by the CE MBIE.
- 37 A variation can relate to and change any term of the agreement, except for the date the FPA comes into force, the date the FPA expires and its coverage. A variation of an FPA may only occur before that FPA expires.
- 38 If one bargaining side withdraws its agreement to bargain a proposed variation, bargaining ceases.
- 39 A variation can only be made to an FPA if it is successfully ratified, and the variation meets the same requirements for finalising an FPA.

Renewal

- 40 Bargaining to renew a fair pay agreement must not start without the CE MBIE's approval.

² Employers have one vote per employee in coverage, with slightly higher vote weighting for employers with fewer than 20 employees in coverage.

- 41 If a renewal is applied for before the existing FPA expires, it is considered to be a 'proposed renewal' and the existing FPA will continue to be in force until the renewal comes into force.
- 42 If a renewal is applied for within two years of a previous FPA expiring (but after it expired), it is considered to be a 'proposed replacement'.
- 43 Eligible organisations on either the employee or employer side (e.g. unions and employer associations that met the requirements) can apply to initiate bargaining for a proposed renewal or proposed replacement. A union is able to apply for a proposed renewal 180 days before the expiry date of the existing FPA, and an employer association is able to apply 160 days before the expiry date).
- 44 The same initiation requirements apply when renewing an FPA, with the following amendments:
- 44.5 for an initiation application from an employer association, the representation test would require support from one or more employers who, between them, employ at least 10 percent of employees or 1,000 employees within coverage; and
- 44.6 if the original FPA was initiated by the public interest test, and the applicant again seeks to initiate bargaining through the public interest test, they can either demonstrate the criteria for the test are met, or that the criteria for the test would be met but for the FPA being in force.
- 45 Renewals must start with the same coverage as, or a broader coverage than, the existing or previous FPA. Bargaining to renew or replace a fair pay agreement must not reduce the coverage of the proposed agreement.

Penalties and Enforcement (Part 9)

- 46 The Bill includes a penalty regime for non-compliance that is consistent with other employment legislation. The Labour Inspectorate will monitor and enforce compliance with FPA terms that are minimum employment entitlements.
- 47 Penalties proposed for non-compliance with obligations when bargaining are:
- 47.1 for individuals, a penalty not exceeding \$20,000;
- 47.2 for any other entity, a penalty not exceeding \$40,000.
- 48 Penalties proposed for non-compliance with obligations when a fair pay agreement is in force are:

- 48.1 for individuals, a penalty not exceeding \$10,000;
- 48.2 for any other entity, a penalty not exceeding \$20,000.

Institutions (Part 10)

- 49 The Bill provides for a dispute resolution process based on the Employment Relations Act 2000. Parties may access mediation and bargaining support services under the Bill.
- 50 If parties cannot resolve their dispute using these services, a bargaining party may apply to the Employment Relations Authority for a determination. In addition, a bargaining side may apply to the Authority to fix the terms of the FPA via a determination: if parties cannot reach agreement during bargaining and all other reasonable alternatives have been exhausted or bargaining sides have for a reasonable period used their best endeavours to use reasonable alternatives to agree; or if ratification of an FPA has failed twice.

Miscellaneous provisions (Part 11)

Record keeping

- 51 The Bill requires employers to keep records in addition to their current wage and time records under the *Employment Relations Act 2000*, which include the days of the week and times of the day that employees in coverage worked, to enable the FPA to be enforced.
- 52 Employers may be liable to an infringement fee of \$1,000 per offence where they do not comply with the required record keeping requirements.

Labour Inspectorate powers

- 53 The Bill empowers the Labour Inspectorate to make a determination about whether an employee is within coverage of an FPA. The Labour Inspectorate can do so either during the course of investigating an employment matter (when coverage is in dispute) or when an employer or employee applies for a determination.
- 54 For the purposes of determining if an employee is covered by an FPA, the Bill
 - 54.3 extends the concept of ‘employer’ to include a ‘controlling third party’ when the Labour Inspectorate reasonably believes the party has information relevant to determining coverage of an FPA, this allows the Labour Inspectorate to question the controlling third party or require them to provide certain documentation;
 - 54.4 enables the Labour Inspectorate to interview, with their consent, employees of a business which holds a contract with the employer that is subject to the coverage determination, if the Labour Inspectorate

reasonably believes the information would be important in determining coverage;

- 54.5 enables the Labour Inspectorate to conduct any interviews with employees at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview;
- 54.6 allows appeals from Labour Inspector decisions to the Authority within 28 days.

Backstop to be introduced during the select committee process

- 55 The FPA system relies on union and employer representatives to bargain with each other for minimum employment terms. If there is no willing and suitable representative on one side, bargaining would not be able to take place. This challenges a principle of the FPA system: that an FPA should result once FPA bargaining has been initiated. To mitigate this, the Bill provides for mandatory default bargaining parties: when there is an absence of representation on the non-initiating side, the relevant default (to be specified in regulations) would be required to step in to bargain the FPA. It was intended that BusinessNZ and the New Zealand Council of Trade Unions (NZCTU) would be specified in regulations as the default bargaining parties.
- 56 As drafting progressed, it became clear that there is still a risk of bargaining being frustrated if the BusinessNZ or NZCTU were unwilling or unable to perform the default bargaining party role.
- 57 To address this risk the Government intends to introduce the following two changes to the Bill:
 - 57.7 Change the default bargaining party role from a mandatory role to a voluntary one, where the entity has discretion to step into bargaining in the absence of a willing or suitable representative on one side; and
 - 57.8 Introduce a 'backstop' in the FPA system. This will apply if no entity steps forward to be a bargaining party, or all bargaining parties withdraw during bargaining, on the non-initiating side and the default is not willing to step in. The backstop is that FPA terms and conditions would instead be fixed by the Employment Relations Authority.
- 58 The Government's policy for the backstop is detailed in the parliamentary paper titled "*Parliamentary paper: Proposed policy change to the Fair Pay Agreement Bill*", presented to the House under Standing Orders 381 and 382. Subject to the House's approval, the paper will be published under its authority. I intend to write to the select committee to ask it to consider the

parliamentary paper alongside the Bill and seek submissions from the public on the backstop policy.

- 59 I will provide the select committee with a Supplementary Order Paper introducing the backstop to the Bill, which the committee may include in the version of the Bill they report back to the House.

Administration of the New Act

- 60 Hīkina Whakatutuki, the Ministry of Business, Innovation and Employment, will administer the new Act.