

Legislative statement for the third reading of the Fair Pay Agreements Bill 2022

Presented to the House of Representatives in accordance with Standing Order 272

Introduction

The Fair Pay Agreements Bill (the Bill) creates a framework for bargaining for fair pay agreements (FPAs). The objective is to improve employment terms, by enabling employers and employees to bargain collectively for industry- or occupation-wide minimum employment terms.

Following the committee of the whole House, the following substantive changes were made through a supplementary order paper (SOP):

The SOP amended the definitions of overtime rates, penalty rates and standard hours to:

- Introduce a new definition of standard hours in relation to an FPA term. Standard hours are the set hours each day as specified in the FPA that attract the minimum base wage rate. This was previously covered by clause 114(1)(c).
- Amend the definition of overtime rate to make it clear that the rate is applicable where an employee works more than a total number of hours per day or per week. Previously the definition had focused on overtime applying outside of the specific employee's ordinary hours, rather than standardising overtime across an occupation.
- Amend the definition of penalty rates to make it clear that penalty rates apply outside of standard hours, or on a particular day, or public holiday. The previous definition had again linked to a particular employee's normal hours and not the standard hours set within the FPA.
- Set out that if one or multiple rates are payable to an employee, that highest rate is the applicable rate that the employee is entitled to receive.

The SOP added a new empowering provision

- This new empowering provision will allow the Chief Executive of MBIE to request information to verify the representativeness test (new clause 32B(3)).

The SOP removed the additional factors from the public interest test

- The SOP amended the public interest test to remove the further evidence that could be provided in an application to demonstrate that an application met the public interest test criteria set out in clause 29A(1). This is because they do not clearly link into to public interest test criteria and could lead to increased risk of litigation and delay in the system as a result.

Fundamental aspects of the Fair Pay Agreements Bill

Preliminary provisions (Part 1)

The purpose of the Act is to enable employment terms to be improved for employees by providing a framework for bargaining for fair pay agreements that specify industry or occupation-wide minimum employment terms, or, in certain circumstances, for the Authority to determine those minimum employment terms.

General principles and obligations (Part 2)

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 exerted on persons involved in FPA processes.

The Bill creates a duty of good faith that is based on similar obligations in the Employment Relations Act 2000 (the ER Act).

The Bill also places specific good faith obligations on bargaining parties at two levels: between parties on the same bargaining side (eg between two or more bargaining parties on the employee bargaining side or the employer bargaining side), and also between parties on opposing bargaining sides (eg the parties on the employee bargaining side and the employer bargaining side).

The Bill prohibits strikes and lockouts during the FPA process.

Preliminary requirements for initiating bargaining and forming bargaining sides (Part 3)

Initiation requirements

The Bill enables any eligible union to initiate bargaining for a proposed FPA. The Chief Executive of the Ministry of Business, Innovation and Employment (CE MBIE) will assess applications to initiate bargaining. The CE MBIE must be satisfied that the union meets the eligibility requirements to be an employee bargaining party and the union's application meets either:

- a representation test – at least 1,000 employees or 10 per cent of the employees in proposed coverage (whichever is lower) support initiating bargaining for a proposed FPA, or
- a public interest test (ie it is in the public interest to support initiating bargaining for a proposed FPA) – based on a prescribed portion of employees who would be within the coverage of the proposed FPA receiving low pay and meeting one or more of either: little bargaining power; lack of pay progression; or long or unsocial hours, or contractual uncertainty, that is not adequately compensated.

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.

Notification following initiation

Once bargaining for an FPA has been initiated, the Bill requires the initiating union and employers to carry out several notification and communication tasks.

Representation for bargaining

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.

Any eligible union can apply to the CE MBIE to become an employee bargaining party and join the employee bargaining side.

To be an employer bargaining party, certain requirements must be met, including being an incorporated society.

Obligations to those the bargaining parties represent

The bargaining parties must use their 'best endeavours' to represent those within coverage. This includes providing regular updates, providing an opportunity to submit feedback, and considering all feedback received.

Each bargaining side must also use their 'best endeavours' to ensure Māori employees/employers are represented effectively in the bargaining process.

Specified employer bargaining parties and default bargaining parties (new Part 3A)

The Bill enables certain "specified employer bargaining parties" to represent state sector employers and "default bargaining parties" to represent the employer or employee side (whichever is relevant) if there is no eligible union or employer association willing or able to be a bargaining party. The default bargaining party role is voluntary. The Bill sets out what happens in the event a default bargaining party does not elect to step into bargaining (in some situations, a remaining bargaining party may be able to apply to the ER Authority for a determination, or bargaining may be discontinued).

FPA meetings and union access to workplaces (Part 4)

An employee within coverage of a proposed FPA is entitled to two two-hour paid meetings for FPA purposes. If ratification has failed, the employee is entitled to attend an additional two-hour paid FPA meeting. An employee is also entitled to attend one additional paid meeting in relation to a proposed variation of an FPA, during the lifetime of that FPA.

A representative of an employee bargaining party will be able to access a workplace (without the employer's consent) during bargaining or while an FPA is in force, if there are employees in coverage at that workplace and the purpose of the visit is primarily related to the FPA.

Bargaining (Part 5)

The Bill contains processes for resolving overlaps between FPAs in terms of work covered and for proposed FPAs initiated in the same industry to be consolidated.

Content and form of FPAs (Part 6)

Each FPA must include a set of mandatory terms, including standard hours of work, minimum base wage rates, overtime rates, penalty rates, and leave and training entitlements.

During bargaining, parties must also discuss whether to include certain terms in the FPA.

Some FPA terms (eg minimum base wage rates) will be minimum entitlement provisions, meaning they can be enforced by the Labour Inspectorate.

Bargaining sides will also be able to agree to differential terms that apply to classes of employees; for example, based on the territorial districts.

Finalisation of proposed FPA (Part 7)

After bargaining, to finalise an FPA, it must be:

- assessed and approved by the ER Authority,

- ratified separately by a simple majority of the employees and employers who would be covered by the proposed FPA,
- verified by the CE MBIE,
- brought into force by the CE MBIE through secondary legislation.

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. Each employee within coverage must be provided with at least the new minimum employment term set by the FPA, unless the existing corresponding term in the employee's employment agreement is higher.

Variation, renewal, and replacement of FPAs (Part 8)

Variations

One bargaining side can request agreement from the other side to bargain for a variation to an FPA that is in force. A variation can change any term of the FPA except for its dates and coverage.

Renewal or replacement

An eligible union or an eligible employer association can apply to initiate bargaining for a 'proposed renewal' (when the renewal is applied for before the existing FPA expires) or 'proposed replacement' (when a renewal is applied for within two years of a previous FPA expiring).

Approval from the CE MBIE is required to bargain a renewal or replacement of an FPA. Bargaining to renew or replace an FPA must not reduce the coverage of the FPA. For a renewal or replacement of an FPA, the same initiation requirements that exist in the case of a new FPA also apply, including the representation test and public interest test.

Penalties and enforcement (Part 9)

The ER Authority can impose financial penalties for certain breaches, such as, non-compliance with an obligation when bargaining.

Institutions (Part 10)

The Bill allows certain parties to access mediation and bargaining support services in the event of a dispute.

If parties cannot resolve their dispute using these services, a bargaining party may apply to the ER Authority for a determination. In addition, a bargaining side may apply to the ER Authority to fix the terms of the FPA via a determination in certain circumstances, outlined in Part 10A.

Determinations in absence of a bargaining side (Part 10A)

The Bill enables the side that initiated bargaining to apply for a proposed FPA to be fixed by the ER Authority when:

- there is no eligible bargaining party willing to represent the non-initiating bargaining side (or if there was a representation gap on the initiating side); and
- the relevant default bargaining party does not elect to step in to fill the gap.

The Bill provides the ER Authority with the power to determine the terms of the FPA in this situation.

Miscellaneous provisions (Part 11)

Record keeping

The Bill requires employers to keep records to enable the FPA to be enforced.

Labour Inspectorate powers

The Bill empowers the Labour Inspectorate to make a determination about whether an employee is within coverage of an FPA.

Administration of the new Act

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

Commencement

Most of the Bill will come into force on 1 December 2022. The regulation-making powers and the CE MBIE's ability to approve forms will come into force the day after Royal assent.