MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Advice on contractors in the Fair Pay Agreements system

Date:	4 December 2020	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1541

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** that work on including contractors in the FPA system should be deferred.	22 December 2020

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Beth Goodwin	Acting Manager, Employment Relations Policy	04 901 1611		✓
Harry Chapman	Senior Policy Advisor, Employment Relations Policy	04 916 6091		

The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Advice on contractors in the Fair Pay Agreements system

Date:	4 December 2020	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1541

Purpose

To provide advice on the best way to 'future proof' the Fair Pay Agreements (FPA) system so contractors can be included at a later date.

Executive summary

The FPA Working Group identified a risk of 'regulatory arbitrage' if contractors were excluded from the FPA system, as such a system may create a perverse incentive to hire contractors outside FPA and employment regulation. Under current law, it would be lawful to engage in such behaviour if the real nature of the work is truly one of contracting (i.e. it was not misclassification).

We previously advised that to proceed with enacting an FPA system as quickly as possible, it would be necessary to exclude contractors from the initial coverage of the system.

You have asked for advice on how the FPA system can be future-proofed so that contractors can be incorporated smoothly into the system in future.

We do not recommend any of the options we considered for quickly incorporating contractors:

- A requirement that bargaining parties agree terms for contractors ahead of time
- A requirement that bargaining parties discuss terms for contractors ahead of time
- A prohibition on undermining the FPA by changing their business models to avoid its reach – this option would need further work to assess whether it would be practical and effective.

It would be difficult to have contractors 'half in' to the FPA system: either they need to be designed into the system at the start, or they should be included into the system later after design work. Therefore we suggest you defer work on including contractors.

Recommended action

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

a **Note** you have asked for advice on how to design the initial FPA system so that contractors could be easily added into the system in future.

Noted

b **Note** that there is a trade-off between the ease and speed of incorporating contractors into FPAs in future, versus ensuring contractors have adequate input into the terms of FPAs which affect them and the need to avoid policy work in the short term.

Noted

c **Note** there are significant and complex issues which will need to be worked through before contractors could be included in the FPA system, including competition issues, how pay rates would be set for contractors who may not be paid on an hourly basis, how to define contractors, and how contractors would be represented.

Noted

d **Confirm** that contractors should be included in the FPA system *in principle* (subject to further advice), but should not be included in the initial design of the system.

Agree / Disagree

e **Agree** that work on including contractors in the FPA system should be deferred, rather than attempting to actively future-proof the system.

Agree / Disagree / Discuss further

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

4 / 12 /20

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / ..... / .....

Background

Employees and contractors both have a role in our labour system

1. In New Zealand, there are two types of paid workers: employees and contractors. Employees have a range of minimum rights in law, including the right to be paid at least the minimum wage, the right to paid holidays, and the right to protection against unfair dismissal. Contractors have fewer statutory protections, but generally enjoy high levels of choice, flexibility and control in their work lives. They operate their own businesses, can work for multiple organisations, and usually set their own pay and hours of work.

2. Today, only employees are protected by employment law (with the exception of paid parental leave and health and safety), and can bargain collectively about their terms and conditions of employment. Instead of being subject to employment law, contractors are generally regulated by commercial and competition law. Contractors generally cannot bargain collectively, because this would amount to anti-competitive behaviour prohibited by the Commerce Act.

3. In many instances, contractor arrangements can be mutually beneficial for both firms and contractors. However, contracting relationships do not work for everyone, and some contractors are vulnerable to poor outcomes because they do not have employment protections and lack the bargaining power to negotiate a better deal. It is evident that for firms aiming to minimise labour costs and maximise workforce flexibility, there can be a range of incentives to classify workers as contractors rather than employees.

4. The boundaries between employment and contracting are often blurry, and there are situations where classification is or could be contested, or there could be different views on the appropriate or agreed classification. Whether a worker is an employee or a contractor depends on the 'real nature of the relationship' they have with the firm that hires them, and is determined by the courts on application. The tests to determine employment status have been developed in case law.

The FPA Working Group identified a risk of regulatory arbitrage if contractors were excluded from FPAs, and the former Minister agreed

5. The Fair Pay Agreements Working Group (FPAWG) report noted there was a risk that FPAs could create perverse incentives to define work outside employment regulation (regulatory arbitrage), and noted it was important for FPAs to cover all workers. However, it acknowledged that including contractors in FPA coverage would be a significant change to the employment relations model, and that the Government may wish to give effect to the recommendation through other work in the system.

6. The references to "arbitrage" in this briefing are to regulatory arbitrage, where market participants capitalise on loopholes in regulatory systems in order to circumvent regulations less favourable to them, and thereby undermining the purpose of the regulation.

7. The Minister accepted the recommendations of the FPAWG and considered it was important to mitigate the arbitrage risk. Therefore he agreed to "apply at least some FPA terms to at least some contractors, taking into account complementary work programmes underway". We were not able to provide advice on whether the arbitrage risk is significant enough to warrant including contractors in the FPA system, due to time constraints, a lack of data, and a fundamental uncertainty about how businesses would respond to the FPA system.

There is parallel work underway on developing better protections for contractors

8. In early 2020, MBIE consulted on the 'Better Protections for Contractors' document. The consultation sought public feedback on more general approaches to deal with misclassification risks and improve the outcomes for vulnerable contractors. The consultation sough feedback on options to:

- Deter the misclassification of employees as contractors.
- Make it easier for workers to access a determination of their employment status.
- Change who is an employee under New Zealand law.
- Enhance protections for contractors without making them employees.

9. Some of the policy options in relation to better protections for contractors could help minimise the risk of arbitrage we have identified in relation to FPAs, either by reducing instances of misclassification or increasing the likelihood of vulnerable contractors being recognised as employees (and therefore being brought within coverage of FPAs).

10. We will soon provide you with a briefing on the outcome of this consultation and possible next steps for the project. Once we have had an opportunity to discuss this project in depth with you we could establish the timeframes and exact options you want to pursue and how the project could interact with FPAs.

We have advised that it is not possible to include contractors in the FPA system if you want to proceed quickly with the project

11. We recently advised (briefing 2021-0627 refers) that a fast timeline for the project necessitates excluding contractors from coverage of the system.

12. At our recent discussion you indicated you would like to seek Cabinet agreement to including contractors 'in principle' at a future date. In effect contractors would be temporarily excluded during the setup of the system, and then there would be later work to build contractors into the FPA system through legislative and operational amendments. You asked for advice on how to design the framework so that contractors could be included in FPAs which are being negotiated – or have already been agreed – at a later date.

We have analysed a number of options for 'future proofing' the FPA system

13. We have identified a number of options which could enable contractors to be brought into the FPA system at a later date.

14. For the purposes of this work we have assumed that contractors will not be brought into the FPA system until it is in place and some FPAs are under negotiation or in force.

15. We explore the benefits, costs and risks of these options below. In assessing the options we have used the following criteria:

    - Ease of including contractors in future: given contractors will be eventually included in the system, the policy should enable contractors to be included smoothly in future.
    - Timeliness: brings contractors into existing FPAs as soon as possible after they are included in the system.
    - Mandate/representativeness: allows contactors an opportunity to have a say in the creation of FPA terms which regulate their work.
    - Avoids the need for immediate policy work: you have indicated that given the time constraints for this project, while contractors will be included in the system in principle, they will not be included in the initial iteration of the system. Therefore options which do not require substantial policy work now should be favoured.

16. The main trade off is between the ease of including contractors in the future, and the speed with which they could be rolled into the system, versus ensuring there is a proper mandate for contractors' terms being set and the need to avoid frontloading policy work.

We do not consider it is viable to actively future-proof the FPA system to include contractors

17. We have considered a number of options below which attempt to 'future proof' FPAs by planning ahead for the introduction of contractors to the system. However, we do not consider any these options are viable. We do not think it is possible to have contractors 'half in' to the FPA system: either they need to be designed into the system at the start, or they should be included into the system later after design work.

18. We consider any option which quickly retrofitted contractors into existing FPAs – without a proper framework and an inclusive bargaining process where contractors could have a say – would be problematic. Depending on how contractors are included it could raise issues of delegated and retrospective law making which could have significant rights implications (e.g. freedom to contract and freedom of association issues).

Requirement that bargaining parties agree terms for contractors ahead of time

19. Under this option, bargaining representatives would be required to discuss and agree terms for contractors during bargaining (ie contractors' terms would be "mandatory to agree"), prior to contractors being included in the system. The agreed FPA terms could then be activated if contractors were brought into the FPA system at a later date. This would provide a smooth transition for contractors and could occur quickly.

20. However, in practice this option would not be dissimilar from including contractors from the beginning of the FPA system in terms of the substantial quantity of policy work which would be required in the short term to develop it. For example, the Employment Relations Authority would need to be empowered to make determinations on contractors' terms if they were not agreed ahead of time. In addition, it would be necessary to design a mechanism for taking into account the views of contractors during negotiations. If contractors were not included in bargaining, this could effectively prohibit certain business models without contractors having a chance to provide input.

21. We do not recommend you proceed with this option.

Requirement that bargaining parties only *discuss* contractors terms ahead of time

22. This is similar to the first option above, but bargaining parties would only be required to *discuss* terms for contractors – and not agree them – prior to contractors being included in the FPA system (ie contractors' terms would be "mandatory to discuss"). When contractors were subsequently brought into the FPA system, the bargaining parties could be reconvened and the earlier discussion could form a starting point for how contractors should be covered by the FPA.

23. This option could be workable, and the requirement to discuss how the FPA will apply in future to contractors could act as a useful signal to the bargaining parties and the relevant occupation/industry that contractors will eventually be included. It would be conceptually and legally difficult to establish a system which requires discussion of contractors' terms when they were not yet part of the FPA system.

24. Even if the bargaining representatives were only discussing contractors' terms ahead of time, we still think it would be necessary to include contractor representatives in the initial discussion. This is because the initial discussion would likely shape how contractors' terms were set in future.

25. Like the above option, this option would require up front policy work and contractors would need to be essentially incorporated in the design of the system now.

A prohibition on companies undermining the FPA by changing their business models to avoid its reach

26. A complementary option – which could be combined with the others or pursued on its own – is that the legislation could create a prohibition on companies undermining the FPA through changing their business models to avoid the reach of the FPA.

27. In theory, this could act as a safeguard against regulatory arbitrage while contractors are not initially included in the system, by discouraging employers from engaging contractors instead of employees where that had the effect of undermining the FPA.

28. The risks of this approach are that it could be difficult to design in a way which was clear and enforceable. For example, it would be necessary to determine whether the test should be intent based (deliberately avoiding the coverage of the FPA) or effects based (engaging in action which had the effect of undermining the FPA, even if that was not the intention). Such a prohibition may also have unintended consequences, and could have the effect of discouraging the use of contractors for legitimate business reasons.

29. Another way of designing the prohibition could be to create a prohibition on dismissing employees for the purpose of hiring them (or others) as contractors. This would be similar to the Australian prohibition of 'sham contracting' arrangements, although the Australian rule is more focussed on individuals being replaced by contractors rather than wider changes to a workforce. We think this option would raise similar issues to the above prohibition, and could be circumvented by a new company hiring contractors to replace an incumbent employer.

30. For the prohibition to be effective, it would likely need to be accompanied by a penalty in the legislation and a mechanism for enforcement. One option could be for a breach of the obligation to be enforced by disadvantaged parties (e.g. unions or employees) themselves through the dispute resolution system. In assessing whether the engagement of workers as contractors rather than employees was undermining the terms of the FPA for employees, the dispute resolution bodies could be taken into account what the relative pay rates for the contractors and employees was.

31. If you want to pursue this option we would need to do further work on whether it would be practical and effective.

We recommend that work on including contractors should be deferred until a later date

32. Given we have not identified any obvious way to include contractors in the FPA system, we recommend you do not make decisions about including contractors now and the FPA legislation would be silent on the inclusion of contractors. That would mean it is clear to bargaining representatives that the system is focussed on employees for now, and they would come to the issue of contractors fresh later. You could still publicly indicate your intention to include contractors at a later date.

33. This is our preferred approach as it avoids frontloading a significant quantity of policy work. Examples of issues which would need to be worked through are included in Annex One.

34. One other advantage of excluding contractors initially is that the parallel project underway seeking better protections for contractors could develop further, and it could be that the project substantially mitigates the risk of regulatory arbitrage, thus reducing the imperative to include contractors within the FPA system.

We will work to proactively identify any issues which would make it difficult to include contractors in future

35. We recognise deferring the inclusion of contractors could potentially create some risk of unanticipated difficulties retrofitting contractors into the system in future.

36. The critical issue would be avoid drafting any provisions in the FPA legislation which made it difficult to subsequently include contractors in the system, or would need to be 'unwound' in future. It is difficult to anticipate these issues in advance of drafting. We consider that this risk can be mitigated, as we should be able to proactively consider whether the design of each feature of the system will create problems for the introduction of contractors at a later date.

37. Finally, we consider creating a standalone FPA Bill (rather than amending the Employment Relations Act) would make it much quicker to add contractors into the system later. We will provide more advice on this in a forthcoming briefing.

Future work could design a way to incorporate contractors into existing FPAs

38. Once a decision is taken to incorporate contractors into the FPA system at a later date, the FPA legislation would need to be amended. As part of this amendment, consideration would need to be given to how existing FPAs (agreed prior to the amendment) could have contractors incorporated into them. Future work could explore options such as:

    - Requiring bargaining representatives for all existing FPAs to amend the FPA to include terms for contractors (or convert employees' terms). Contractors and their engagers could be represented in the bargaining for the amendments.
    - Allowing parties to decide whether to amend the FPA by negotiation (e.g. triggered by notification from one party)
    - Allow bargaining parties to apply to a government body to convert terms in an existing FPA to apply to contractors.
    - Automatically converting the terms of existing FPAs to apply to contractors according to a statutory formula.
    - Requiring any new – or renewed – FPAs from a particular date to cover contractors. Existing FPAs would continue to cover only employees until they expired.

Deferring work could also be combined with enforcement measures

39. Subject to additional funding, before contractors are incorporated into the system it could be possible to actively identify sectors or employers where misclassification of employees as contractors is widespread or growing and target them with enforcement action. An option of increasing proactive enforcement by the Labour Inspectorate was included in the consultation on better protections for contractors and was widely supported.

40. However, we note that under current law, it could be lawful to engage in regulatory arbitrage. Therefore this action would necessarily be focussed on whether employers had employed 'contractors' when the real nature of the relationship was actually one of employment. Nonetheless we consider if companies do transition employees to contractors, we think in many cases this is likely to involve a significant degree of misclassification (i.e. the real nature of these workers engagement will actually be one of employment).

Next steps

41. We are preparing a number of other briefings on aspects of the FPA system for you, with the first set of briefings due to you by 11 December 2020.

42. The schedule for the project is set out in the table below:

Milestone	Date
Advice on design features requested by Minister	All provided by 11 December 2020
Advice on consequential changes to other design aspects Advice on remaining advice on system issues	All provided by 19 February 2021
Cabinet paper drafted RIA prepared	26 February 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	11 March 2021
Ministerial consultation completed (2 weeks)	25 March 2021
Cabinet Committee	7 April 2021

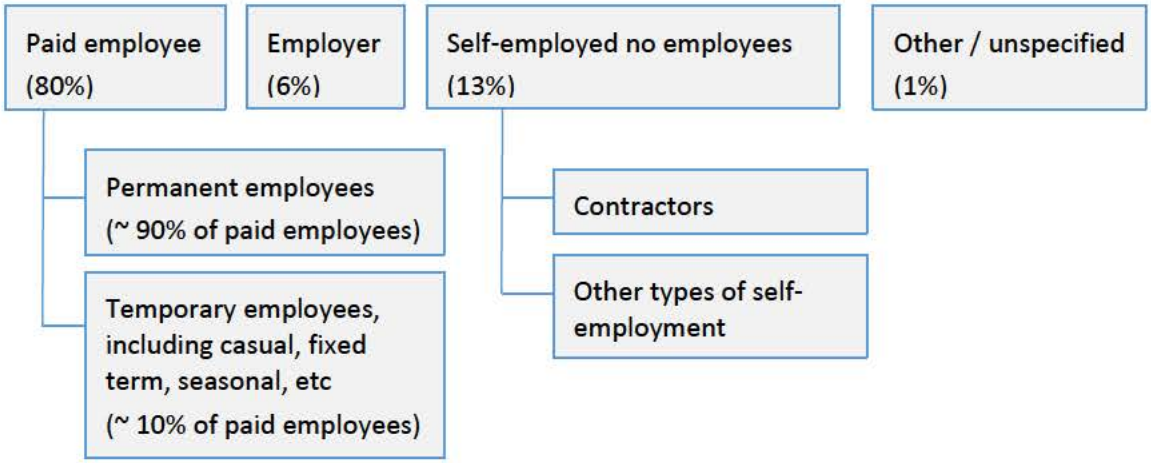
Annexes

Annex One: Issues which need to be resolved before contractors can be included in the FPA system

Annex One: Issues which need to be resolved before contractors can be included in the FPA system

43. It will be necessary to resolve a number of complex issues before contractors can be brought into the FPA system in future. We briefly explore these issues in the below sections.

44. A diagram setting out the percentage of workers across the different categories is set out below.



It will be necessary to determine what the inclusion of contractors means in practice

The term "contractor" can describe a range of business models and relationships

45. The term "contractor" can be used to describe a wide range of business models and contracting relationships. It can take the broad meaning of any business entity which is party to a contract (often engaged through a tender process) to provide goods or services to another, and which may in turn employ employees – for example, a firm which obtains contracts to clean hospitals, and employs people to do so. This type of business and its employees would already be within coverage of a hypothetical 'cleaners in the commercial cleaning industry' FPA (the "contractor" is the employer).

46. The term can also mean a self-employed person who provides labour or expertise by a contract for services, regularly or ad hoc. They may use a corporate entity (like a limited liability company), they may be in a partnership, or may be a sole trader. They may operate a unique business or have a franchise arrangement with a larger brand. In this example, it is less clear whether the person would be within coverage of an employee-only FPA system, as illustrated below:

- If the person's business is structured as a limited liability company, which employs the person and pays them a regular wage, that company and employee would technically be covered.
- If the person is not employed by the company, and is not paid any regular income but instead is distributed profits at the end of the year, the company and person would probably not be covered by the FPA – unless the Employment Relations Authority ruled that the 'real nature' of the relationship between the person and the engager of the company was one of employment.
- If the person is a sole trader, they would probably not be covered – again, unless the 'real nature' of their relationship with the engager was one of employment.

To what extent will contractors be included and integrated into the FPA system?

47. Including contractors within the FPA system could be done in a variety of ways. When contractors are included a number of fundamental design questions will need to be answered, such as:

    - At what point the bargaining process will contractors be included? For example, would contractors be included in bargaining from initiation, or would the FPA be extended to include contractors once it was in force?
    - What business models or working relationships will be covered? As we have set out above, contractors could be defined in a number of different ways. You could decide to focus the inclusion of contractors in the FPA system on a narrower subset of workers, such as just self-employed contractors, or just 'dependent' contractors or contractors with low bargaining power.
    - Who will decide whether contracted workers are within coverage? For example, should it be specified in legislation that all FPAs must include all contractors, or should the bargaining representatives have flexibility to agree which contractors should be included?
    - What FPA terms and conditions will be available for contractors? Should the FPA terms for employees all be converted into equivalent terms for contractors, or should only a subset of terms be set for contractors?

There may be difficulties in creating a collective bargaining system which includes both employees and contractors

48. It would be novel for both employees and contractors to be included within one collective bargaining system. In other countries, we are aware of collective bargaining systems which include some form of 'dependent' contractors, or which allow certain contractors to collective bargain outside the normal system. However, we are not aware of any system internationally which opens up collective bargaining to a wider range of contractors *in the same system as for employees*.

Various aspects of the FPA system could be difficult to put into practice for contractors

49. A number of practical aspects of the FPA system could be difficult to put into practice in relation to contractors, including:

    - Initiation: how contractors would be counted in the initiation procedures, and whether they should all be counted on the worker side.
    - Notification and communication: we have previously advised that a combination of union, employer and peak body efforts will help to ensure all affected parties are aware of FPA bargaining process. It is likely to be more difficult to identify and contact contractors.
    - Ratification: similarly to the initiation process, it may be difficult to both count the number of contractors and determine whether they fit more neatly into the 'employee' or 'employer' side.

Contractors are sometimes paid by output, which would not be easily compatible with a wage rate per hour

50. Another area of difference is how the service is remunerated under a contract for services – this could be specified by time, or by required output.

51. In some industries or occupations it is common to structure contractors for services in terms of outputs provided. For example, an engager may wish to hire a contractor to clean their building, provide security services, or complete a project. The engager may not know how long it will take for a contractor to provide the service – this could be left up to the contractor to estimate and submit a bid.

52. When contractors are included in the FPA system, and their pay was to be set by the terms of an FPA, the bargaining representatives would need to agree a method for regulating pay for workers. For contractors who are not normally paid per hour or with a salary, this could result in complex and technical terms being agreed (e.g. the minimum contract price for cleaning a property of a certain size is X).[1]

53. Depending on the extent to which contractors were integrated into the FPA system, another related issue could be how non-pay terms and conditions would be set for contractors, who do not normally have access to sick leave, annual leave, etc.

Contractors will need to be represented in bargaining, but they do not fit neatly into the employer or employee sides

54. As noted above, the term 'contractor' could potentially include a wide variety of different entities and business structures. In some cases, a contractor may most closely align with employers in an FPA sector (e.g. where a business owner and their family were self-employed in a cleaning franchise company), but in other situations a contractor may feel closer to the employee side (e.g. where a contractor was a sole-trader who drove a ride-hailing vehicle).

55. It may be necessary for contractors to either be represented by a third category of bargaining representatives, or divided between employer and employee/worker sides.

56. Finally, one additional complication for the representation of contractors within the bargaining process is that contractors may not have established representative organisations. Small 'contracting' companies could be members of employer organisations, but are likely to be very few individual contractors who are members of unions (who normally focus on employees, but in some cases such as the Public Service Association have widened membership criteria).[2]

Including contractors in FPAs will have implications for the overall regulatory system

57. The main focus of the Employment Relation/Employment Standards (ERES) regulatory system is on *employment* relationships. In contrast, contractors operate within a commercial law framework that generally maintains parties' freedom to contract and prevents collective bargaining as 'anti-competitive' behaviour.[3] For contractors, pay and how work is done are subject entirely to negotiation between the parties.

58. Consequently the ERES dispute resolution system focusses on resolving disputes in relation to employment relationships.[4] However, we note that the Screen Industry Workers Bill would broaden the ERES institutions to operate in the contract law jurisdiction.

59. Including contractors within the FPA system could blur the boundary between what it means to be an employee versus a contractor. In creating a system which includes both types of

[1] It may be necessary to force engagers and contractors to structure contractors on a per-hour basis. This may in turn require engagers and contractors to agree on how long a job would take in order to calculate what the hourly pay rate would be. These issues were explored in the development of a member's Bill which would have instituted a minimum pay rate for contractors, which was ultimately defeated in the House. This was the Minimum Wage (Contractor Remuneration) Amendment Bill in the name of Hon David Parker https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL63162_1/minimum-wage-contractor-remuneration-amendment-bill

[2] One complicating factor in the collective representation of contractors is the prohibitions on price fixing and cartel behaviour in the Commerce Act, which is discussed below.

[3] Two exceptions are the Health and Safety regulatory system, which governs both employment and contracting relationships, and parental leave payments which are available to self-employed workers.

[4] While s144A of the the Employment Relations Act specifies that MBIE is able to provide dispute resolution services to parties "work-related relationships that are not employment relationships", in practice we understand the use of mediation by contractors is rare.

workers we will need to carefully consider the impact of this change on the rest of the ERES system.

Depending on which contractors were included, competition issues would need to be resolved

60. Collective bargaining by contractors in relation to services provided in competition with each other is generally[5] prohibited under the Commerce Act 1986 because of the risks of price fixing, output restrictions or otherwise lessening competition for those services. Reducing competition in the supply of contractors' services could lead to higher prices or reduced output or innovation in relation to the goods and services produced, which could then be passed on to consumers.

61. Therefore if contractors were included in the FPA system a statutory Commerce Act authorisation would likely be required.[6] This would be similar to the Screen Industry Workers Bill which includes a Commerce Act exemption because collective bargaining by contractors would raise competition risks. In that case, the exemption recognises that the benefits of collective bargaining outweigh those risks.

62. However, in contrast to the Screen Industry Workers Bill, we think the competition issues in relation to FPAs could be much more complex and harder to justify. The extent of the competition risks will depend on factors such as:

    - To what extent FPAs are agreed in sectors or occupations with workers who have high bargaining power.
    - How contractors are included in the FPA system. For example, whether only a small number of contractor business models are included or their inclusion is comprehensive.

63. In a recent report, the OECD has commented that indiscriminately providing contractors with the right to bargain may create poor outcomes:

    "small cartels can induce suboptimal outcomes for consumers. For that reason any exemptions aimed at granting bargaining rights to self-employed in situations of power imbalance should be based on a comprehensive costs-benefits analysis. One way to focus on workers in real need of access to collective bargaining would be to prioritise [competition] exemptions to those groups of self-employed workers that are likely to have few outside options."[7]

64. If the FPA system is open to initiation in any sector – even those where the workers have high bargaining power – and contractors are deeply integrated into the FPA system it could create significant risks of price fixing (by potentially already well-compensated workers).

[5] Collective bargaining is permissible in some cases where contractors are not 'in competition with each other' for a service. For example, if two independent contractors get together to provide a joint service if the job was too big for each of them to provide on their own.
[6] The Commerce Commission does have a process through which it can authorise anti-competitive behaviour if the public benefits outweigh the negative effects from a lessening of competition. In theory this process could be applied to collective bargaining outside employment relationships, but is a complex and costly process.
[7] OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work,* OECD Publishing, Paris, p 240 https://doi.org/10.1787/1fd2da34-en