MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Bargaining Obligations

Date:	5 February 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1725

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations & Safety**	Approve the proposed obligations for FPA bargaining parties	19 February 2021

Contact for telephone discussion (if required)			
Name	**Position**	**Telephone**	**1st contact**
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	✓
Hannah Adams	Senior Policy Advisor	04 896 5262	

The following departments/agencies have been consulted
Public Service Commission, Te Puni Kōkiri, Ministry for Education and Ministry of Health

Minister's office to complete:

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- ☐ Withdrawn

Comments

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Purpose

This briefing provides advice on the bargaining obligations for bargaining parties and bargaining teams[1] for Fair Pay Agreements (FPAs).

Executive summary

The FPA system needs to include obligations to support efficient bargaining that is constructive and focused on achieving an FPA in a timely manner.

Obligations between bargaining parties on the same bargaining team

The duty of good faith in the Employment Relations Act 2000 (ER Act) applies between unions, and between employers, that are bargaining for the same collective agreement. We recommend that the same duty of good faith apply between bargaining parties on the same side of FPA bargaining (i.e. the unions on the worker bargaining team and the employer representatives on the employer bargaining team).

We also recommend requiring:

- Bargaining parties on the same bargaining team to enter into a process agreement on how they will progress, and make decisions for, FPA bargaining and use their best endeavours to enter into this process agreement in an effective and efficient manner
- Each bargaining team to elect a lead advocate to ensure that there is an orderly process and that the process agreement is complied with.

Obligations between bargaining teams

The ER Act also specifies what the duty of good faith means in relation to unions and employers bargaining a collective agreement. We recommend that the same rules apply to bargaining teams in the FPA system, with the following exceptions:

- Excluding the restriction on individual or collective bargaining (which requires the approval of the bargaining representatives) – So the FPA bargaining does not impact on employers' and workers' ability to enter into individual and collective agreements while the FPA is being bargained.
- Replacing the duty to conclude (unless reasonable grounds exist not to) with a requirement for bargaining teams to use their best endeavours to come to agreement on the terms and conditions of the FPA in an orderly, timely, and efficient manner. A duty to conclude would be inconsistent with the system design requiring that if bargaining teams cannot agree on the terms and conditions of an FPA, then they are set by determination.

[1] A bargaining party(ies) refers to a union or employer bargaining representative(s) for an FPA. A bargaining team refers to the group of bargaining representatives that are bargaining together to either represent workers or employers (i.e. they are on bargaining from the same perspective).

Obligation to represent all affected workers or employers (including non-members)

The ER Act applies the duty of good faith between a union and members of another union where both unions are bargaining for the same collective agreement. This does not, however, extend to workers that are not members of any of the unions involved in the bargaining.

Requiring bargaining teams to establish and maintain a productive relationship with all the workers or employers affected by an FPA would place a significant burden on them. We instead recommend the FPA system include tailored obligations for bargaining teams to represent affected workers or employers by:

- Providing updates to affected parties regarding the progress and content of bargaining
- Providing an avenue for affected parties to provide feedback
- Taking any feedback received into consideration during bargaining
- Informing affected parties of the ratification vote.

Obligation to consider Māori interests and views

In recognition of the Crown's Te Tiriti o Waitangi obligations, we recommend the bargaining teams for both workers and employers should be required to:

- Use their best endeavours to seek and consider feedback from relevant Māori worker or employer representatives
- Consider whether there should be a Māori representative included in the bargaining team.

Obligation to ensure relevant government agencies are kept informed

Fiscal implications or service delivery challenges may arise from FPAs for workforces in publicly funded sectors if those employers are unable to meet any higher labour costs resulting from an FPA from within their existing funding or baselines, and/or are unable to meet those costs without reducing service quantity and/or quality.

The Government will need to consider how it organises itself to engage with FPA bargaining when it covers workforces either directly employed by public sector employers or in the funded sector (where private sector organisations receive Government funding to deliver public services). We have raised this issue with the Public Service Commission, Department of Prime Minister and Cabinet and Treasury and will continue to discuss it with them as the FPA system is developed.

Where the government is the employer, the obligation outlined above for the employer bargaining team to represent all affected employers would apply. In the funded sector, the obligation to represent affected employers will apply between the employer bargaining team and private sector organisations (that receive government funding). When an FPA is occurring in a funded sector it is important that the relevant government agencies are aware of the progress of bargaining in order to ensure they can appropriately manage the potential implications for delivery of public services. We consider it would be prudent in situations where an FPA covers private sector organisations that receive public funding, the employer bargaining team should be required to inform the relevant government agency of the progress of the FPA bargaining.

Recommended action

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

Obligations between bargaining parties on the same bargaining team

a **Agree** that the same duty of good faith that is provided in the Employment Relations Act 2000 will apply between unions on the same bargaining team and between employer bargaining representatives on the same bargaining team.

Agree / Disagree

b **Agree** to require bargaining parties on the same bargaining team to enter into a process agreement on how they will progress, and make decisions on, FPA bargaining and to use their best endeavours to enter into this process agreement in an effective and efficient manner.

Agree / Disagree

c **Agree** to require each bargaining team to designate a person from one of the bargaining parties to:

i. Chair the bargaining team

ii. Act as the primary spokesperson (noting, this would not preclude the participation of others in speaking roles in accordance with the groups operating protocols).

Agree / Disagree

Obligations between bargaining teams

d **Agree** that the duty of good faith apply between bargaining teams and require bargaining teams to:

i. Use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner

ii. Meet each other, from time to time, for the purposes of the bargaining

iii. Consider and respond to proposals made by each other

iv. Continue to bargain about any other matters on which they have not reached agreement even if they have come to a standstill or reached a deadlock about a matter

v. Recognise the role and authority of any person chosen by each to be its representative or advocate

vi. Not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining

vii. Provide to each other, on request and in accordance with specified requirements, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.

Agree / Disagree

e **Note**, the proposed obligations between bargaining teams (listed in recommendation d) do not include any restrictions on individual or collective bargaining during FPA bargaining to reflect the different characteristics of the bargaining process (see paras 32-33).

Agree / Disagree

f **Agree** to require bargaining teams to use their best endeavours to come to agreement on the terms and conditions of the FPA in an orderly, timely, and efficient manner.

Agree / Disagree

g **Agree** to apply the same requirements in relation to the provision of information during collective bargaining as are in the Employment Relations Act 2000, with any necessary modifications required to reflect the nature of the FPA system.

Agree / Disagree

Obligation to represent all affected workers or employers (including non-members)

h **Agree** that the obligation for bargaining teams to represent all affected workers or employers should require them to:

i. Regularly update affected workers or employers on the bargaining progress and content of the bargaining

ii. Provide an avenue for affected workers or employers to provide feedback on the terms and conditions being discussed

iii. Take into consideration the feedback provided by affected workers or employers during bargaining

iv. Inform affected workers or employers of the ratification vote.

Agree / Disagree

Obligation to seek and consider Māori interests and views

i **Agree** that worker and employer bargaining teams should be obligated to:

i. Use their best endeavours to seek and consider feedback from relevant Māori worker or employer representatives

ii. Consider whether there should be a Māori representative included in the bargaining team.

Agree / Disagree

Obligation to ensure relevant government funding agencies are kept informed

j **Agree** that if an FPA covers private sector organisations that receive public funding, the employer bargaining team should be obligated to keep relevant government funding agencies informed regarding the progress of bargaining.

Agree / Disagree

Tracy Mears
Manager, Employment Relations Policy
Workplace Relations & Safety Policy, MBIE

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Hon Michael Wood
Minister for Workplace Relations & Safety

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

Background

1. There are a number of policy decisions still needed on some design features of the proposed FPA system, including some key design features, in order to obtain sufficient decisions for PCO to begin drafting a Bill (refer 2021-0627).

2. You have requested advice on these remaining design features be provided to you by 19 February 2021, so that Cabinet agreement to the FPA system and approval to draft can be sought in April 2021.

3. The former Minister agreed that:

    a. Unions should have an obligation to represent workers within coverage in good faith

    b. Employer representative should have an obligation to represent employers within coverage in good faith [refer briefing 2021-1893].

4. This briefing provides more detailed advice on the bargaining obligations of bargaining parties for FPAs.

5. When considering the options in relations to these topics, we considered the following criteria:

    - Workability: whether the option supports the smooth operation of the FPA system.
    - Simplicity: the process is clear to all parties and avoids unnecessary complexity.
    - Balance: whether the option strikes a suitable balance between certainty and flexibility for participants.
    - Consistency with other ERES interventions: whether the option is consistent with the current approach under the Employment Relations Act 2000 or Equal Pay Act 1972 or the approach being developed for the Screen Industry Workers Bill (depending on which is more relevant for that particular aspect).
    - Impact on international obligations: whether the options would engage our international obligations. For instance, the voluntary nature of collective bargaining and freedom of association.

Section A: Obligations between bargaining parties on the same bargaining team

The Employment Relations Act 2000, Pay Equity Act 1972, and Screen Industry Workers Bill apply obligations to bargaining parties on the same bargaining team

6. The Employment Relation Act 2000 (ER Act) requires parties to an employment relationship to not do anything directly or indirectly to mislead or deceive each other; or that is likely to mislead or deceive each other and to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. This obligation applies between:

    a. A union and another union that are bargaining for, or parties to, the same collective agreement

    b. An employer and another employer that are bargaining for, or parties to, the same collective agreement.

7. The Equal Pay Act 1972 (EP Act) applies the duty of good faith to parties to a pay equity claim, meaning it would apply to parties on the same bargaining team for the same claim. In

a multi-employer pay equity claim, employers must enter into a pay equity process agreement for the purposes of deciding whether the claim is arguable and for the purposes of the pay equity bargaining process. Employers are required to use their best endeavours to enter into this agreement in an effective and efficient manner. In a multi-union claim (where a number of unions are involved in a claim with the same employer), unions must use their best endeavours to agree on how they will progress the consolidated claim, but are not required to enter into a process agreement. If they cannot agree on how the consolidated claim will be progressed, any of them may apply to the Employment Relations Authority (ER Authority) for a direction.

8. The Screen Industry Workers Bill (SIWB) establishes a good faith obligation that applies to parties to a workplace relationship (which includes contractors) and is therefore more limited than the obligation between employers and employees created by the ER Act. This applies to a worker organisation and any other worker organisation that is bargaining for the same collective contract and an engager organisation (i.e. the equivalent of employer bargaining representative) and any other engager organisation that is bargaining for the same collective contract.

9. Annex 1 includes a table of the good faith obligations that apply during collective bargaining in the ER Act, EP Act, and SIWB.

The duty of good faith should apply between bargaining parties, plus additional requirements to ensure they have an agreed approach for bargaining

10. To support the smooth operation of the system (i.e. the workability criterion), we consider the system needs to include obligations to promote efficient bargaining that is constructive and focused on achieving an agreed outcome in a timely manner. Inefficient bargaining will lead to delays and create additional costs for the parties involved.

11. Of those who commented, submitters to the 2019 consultation on the discussion paper 'Designing a Fair Pay Agreement System' generally supported that a duty of good faith should apply to bargaining parties in their dealings with each other and this duty should involve the same responsibilities as under the current ERA.

12. FPA bargaining is similar to collective bargaining, but with wider coverage as the FPA will cover an entire industry or occupation. In particular, the employer bargaining team will be representing all employers, not just themselves (as is the case for collective bargaining under the ER Act and the EP Act), and there may be several bargaining representatives on each bargaining team. As such it will be important that bargaining parties on the same bargaining team work together constructively during bargaining.

13. The same duty of good faith as provided in the ER Act should, therefore, apply between unions on the same bargaining team and between employer bargaining representatives on the same bargaining team.

14. You have decided that unions should represent workers [refer briefing 1920-1893] and employer bargaining representatives that meet specified requirements (including being an incorporated society) should represent employers [refer briefing 2021-1724]. Therefore, the duty of good faith that applies to unions and employers during collective bargaining in the ER Act would apply to unions and employer bargaining representatives during FPA bargaining.

Each bargaining team should be required to develop a process agreement

15. We have recommended that if there are a number of organisations that meet the requirements to be a bargaining party, they should all be able to be part of the bargaining team. This is intended to enable affected parties to continue to have a say in who represents them (i.e. via the organisation they are a member of being able to be a bargaining party) and in recognition that the wide coverage FPAs may mean there are a number of unions or employer representative organisations with affected members in that occupation or sector

[refer briefing 2021-1724]. These organisations may have limited or no experience in working together and could have quite different perspectives.

16. We consider it important that where there is more than one bargaining party on a bargaining team that the bargaining parties agree how they are going to bargain together. As they may have different perspectives on what the terms and conditions for an FPA should be, it is particularly important that they agree in advance how decisions for the bargaining team will be made. This is the approach that has been adopted for multi-employer pay equity claims in the EP Act.

17. We recommend that bargaining parties on the same bargaining team should be required to:

    a. Enter into a process agreement on how they will progress, and make decisions for, FPA bargaining

    b. Use their best endeavours to enter into this process agreement in an effective and efficient manner.

Each bargaining team should also designate a lead advocate

18. The FPA Working group recommended that each bargaining team should elect a lead advocate to ensure there is an orderly process.

19. We understand that in collective bargaining currently, parties generally appoint a lead advocate. A representative of Business NZ has advised us that lead advocates generally have two primary functions:

    a. To chair the bargaining team, which includes ensuring that group operating protocols are developed and adhered to and group interests are developed on bargaining issues by consensus.

    b. To act as primary spokesperson for the bargaining team in advancing the group's interests (noting, this would not preclude the participation of others in speaking roles in accordance with the groups operating protocols).

20. Given the potential for there to be a number of bargaining representatives on each bargaining team it would seem sensible for the system to require each team have a specified person to promote an organised approach to developing the process agreement and during bargaining.

21. The functions of this role are likely to vary for different FPAs so the system should allow some degree of flexibility. As such we recommend that the system require each bargaining team to designate a person from one of the bargaining parties to chair the bargaining team and act as the primary spokesperson.

Section B: Obligations between bargaining teams

The ER Act specifies what a duty of good faith means for unions and employers bargaining a collective agreement

22. Section 32 of the ER Act specifies that when bargaining a collective agreement unions and employers are required to, at least, do the following things:

    a. Use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner.

    b. Meet for bargaining and responding to each other proposals.

c. Must consider and respond to proposals made by each other.

d. Continue to bargain on matters where they have not reached agreement, even if they have come to a standstill or reached a deadlock on a particular matter.

e. Recognise the role and authority of the bargaining representative.

f. Not bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise.

g. Not do anything, or anything likely, to undermine the bargaining authority of others in bargaining.

h. Provide, on request and in accordance with requirements specified, information that is reasonably necessary to support of substation claims or responses made for the purposes of bargaining.

23. The ER Act requires unions and employers bargaining a collective agreement to conclude a collective agreement, unless there is a genuine reason, based on reasonable grounds not to.

24. It also establishes the process for providing information, including the use of an independent reviewer if the union or employer providing the information reasonably considers that it should be treated as confidential information.

The EP Act and SIWB generally include these obligations, but with variations to reflect the nature of those bargaining systems

25. The EP Act includes most of the obligations specified in the ER Act for unions and employers bargaining a collective agreement, but sets out its own process requirements for pay equity claims.

26. The EP Act does not include a duty to conclude. If a pay equity issue has been found, parties are required to use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner. If parties cannot settle the pay equity claim there is a process for fixing the terms and conditions of the claims by determination (once the threshold has been met).

27. The SIWB applies the same obligations for parties bargaining a collective agreement as the ER Act, with the following departures:

a. Excluding the restriction on concurrent individual or collective bargaining (which requires the approval of the bargaining representatives) – In collective bargaining under the ER Act, the collective agreement negotiated between a union and employer normally forms the entirety of an employee's employment agreement (in conjunction with a letter of appointment). That is not the case with collective contracts negotiated under the SIWB, which do not replace individual contracts. Engagers and workers need to continue to be able to enter into individual contracts even if bargaining is happening for a collective contract that may later apply to those individual contracts.

b. The duty to conclude an agreement does not allow any exceptions once bargaining is initiated – The Film Industry Working Group recommended that once collective bargaining has commenced, parties have a duty to enter into an agreement. This is to prevent surface bargaining, where a party may superficially bargain without any real intention of entering into an agreement. If parties are unable to conclude there is a process for fixing the terms and conditions of the agreement by determination (although the resulting occupation-level collective contract would not come into force until it has been successfully ratified).

28. The requirements in relation to the provision of information from the ER Act apply in both the EP Act and SIWB.

The same obligations for bargaining teams as the ER Act should apply in the FPA system, with some differences to reflect the wider coverage and nature of FPAs

29. The majority of the requirements specified for unions and employers bargaining a collective agreement would also be appropriate for the bargaining teams bargaining an FPA. This includes requiring them to use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner.

30. We intend to base the requirements for providing information when requested during bargaining on those within the ER Act, with any necessary modifications required to reflect the nature of the FPA system.

31. There are two areas, however, where we consider departure from the ER Act is required.

Individual and collective bargaining should be able to occur without the approval of the FPA bargaining teams

32. We do not consider the FPA system should include the obligation to not bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the bargaining representatives agree otherwise. FPAs will set industry or occupation-specific minimum standards. Individual and collective agreements will still apply and may include terms and conditions above those specified in the FPA. It is also important that employers and employees/unions are able to continue to agree to changes to individual or collective agreements during the potentially lengthy process of FPA bargaining,

33. This obligation should be omitted from the FPA system in order to enable employers and employees (with the support of their union) to bargain for individual or collective agreements while the FPA is being bargained. This is consistent with the approach in the SIWB.

The FPA system should require parties to use their best endeavours to agree to the FPA, rather than a duty to conclude

34. The FPA system has been designed so that once the initiation requirements are met, then an FPA should result. To achieve this, the system includes a process for the terms and conditions of a FPAs to be set by determination. The intention is for bargaining teams to do their best to reach agreement, including accessing dispute resolution support. If they still cannot reach agreement (or if bargaining has been protracted) one team can apply for the FPA to be set by determination (once the threshold has been met – refer briefing 2021-1427).

35. Including a duty to conclude with an ability to not conclude due to “a genuine reason, based on reasonable grounds” would suggest there can be situations when this determination process would not apply and an FPA would not result. This is not consistent with the intended dispute resolution approach.

36. We consider an absolute duty to conclude (i.e. that does not allow for genuine reasons not to conclude) is not necessary, or appropriate, as the dispute resolution system includes a process for the terms and conditions of an FPA to be set by determination if parties cannot reach an agreement. An absolute duty to conclude would mean that if parties bargained constructively, but were unable to conclude, not only would a determination setting the terms and conditions of the FPA be triggered, but the parties would also be in breach of this obligation (and potentially penalised). Requiring an absolute duty to conclude would also raise further issues regarding New Zealand’s international obligations in reaction to voluntary bargaining.

37. We recommend requiring bargaining teams to use their best endeavours to come to agreement on the terms and conditions of the FPA in an orderly, timely, and efficient manner. This is consistent with the approach in the EP Act (once a pay equity issue has been confirmed). If bargaining teams cannot reach an agreement, then one bargaining team could apply for a determination to set the FPA's terms and conditions.

Section C: Obligation to represent all affected workers or employers (including non-members)

38. The obligations above are between bargaining parties and bargaining teams. FPAs differ from current collective bargaining in that they cover all affected workers (regardless of whether they are members of the union) and all affected employers who would need to be represented during bargaining (as opposed to representing themselves).

39. The FPA Working Group recommended that bargaining teams should have an obligation to represent affected employers or workers within coverage in good faith, even if they are not a member of the organisation doing the bargaining. In some sectors union membership may be quite low and many employers are not aligned to, or members of, existing employer representative organisations. As such it is likely that the bargaining parties' existing membership will only cover a small proportion of affected workers or employers.

40. While affected workers and employers will generally have an opportunity to have their say through the ratification process, the ratification process only requires a majority of those that vote to support the FPA for it to pass. Therefore there is a risk that even if a sizeable proportion of the sector has serious concerns with the terms and conditions of the FPA, the FPA will still pass (e.g. if the proposed terms and conditions would be unaffordable for small businesses). The inclusion of an obligation to represent affected parties in good faith is intended to reduce this risk, although it is not possible to remove it entirely.

The ER Act, EP Act and SIWB apply some obligations to represent non-members

41. The ER Act applies the duty of good faith to parties in an employment relationship to unions and members of another union where both unions are bargaining for the same collective agreement. It does not extend the duty to workers that are not members of any of the unions involved in the bargaining. There is no obligation for employers to represent interests other than their own as each employer is directly represented during bargaining (although they may agree a process where one employer represents another).

42. Pay equity claims cover all affected employees employed by the same employer (those who perform work that is the same, or substantially similar). The EP Act specifies that the duty of good faith in section 4 of the ER Act also applies to the relationship between a union and an employee who is not a member of the union if the employee is covered by the union-raised claim. There is no obligation for employers to represent interests other than their own (although they may agree a process where one employer represents others during the claim process).

43. The SIWB establishes a good faith obligation that applies to parties to a workplace relationship. This is much more limited than the obligation under the ER Act, as it applies to contractors (not just employees). This obligation only requires that parties not do anything to mislead or deceive each other, or do anything that is likely to mislead or deceive each other. This obligation covers all affected parties, as it applies to:

    a. a worker organisation and any other screen production workers to whom the collective contract they are bargaining for may apply

    b. an engager organisation and any other engager to whom the collective contract they are bargaining for may apply.

We recommend developing tailored obligations that set clear expectations while being realistic about what bargaining parties can achieve

44. The ER Act applies the duty of good faith between unions and members of other unions involved in the same collective bargaining. This does not, however, extend to workers that are not members of any of the unions involved in the bargaining.

45. As an FPA will cover an entire industry or occupation the obligation to represent all affected parties will cover a large number of workers and employers, many of which will not be members of any of the bargaining representatives. Requiring bargaining teams to establish and maintain a productive relationship with all the affected workers or employers would, therefore, place a significant burden on them.

46. Instead, we recommend the FPA system include tailored obligations that set clear expectations on what bargaining teams should do to ensure all affected parties are adequately represented.

47. A risk associated with this approach is that existing case law on the nature of the duty of good faith would not apply (which is also the case with the SIWB obligations), which could lead to an inconsistent application of the obligation or disputes until sufficient case law has developed. This risk reflects the unique nature of the FPA system and is one that would reduce as case law develops.

48. We recommend that tailored obligations be designed that require bargaining teams to:

    a. Regularly update affected workers or employers (as applicable) on the bargaining progress and content of the bargaining

    b. Provide an avenue for affected workers or employers to provide feedback on the terms and conditions being discussed

    c. Take feedback received from affected workers or employers into consideration during bargaining

    d. Inform all affected workers or employers of the ratification vote.[2]

49. These obligations would need to recognise that affected parties are likely to have different views. While bargaining teams would be required to consider these views when developing their bargaining position, it will not always be possible for them to reflect all views during bargaining.

50. The obligation will apply to all bargaining parties on a bargaining team. It will be up to those parties to agree how they will allocate the responsibilities associated with the obligation. This could be covered in the process agreement.

51. The concept of ‘good faith’ has an established meaning in the ER Act. To avoid confusion regarding the nature of these obligations, we recommend that the legislation avoid the use of the term ‘good faith’ when describing the obligation to represent affected parties.

52. We considered, but do not recommend, the following options:

    a. Applying the same type of good faith requirements as in the ER Act (which is the approach under the EP Act) – As outlined above, we are concerned that an obligation to establish and maintain a productive relationship with all the workers or employers in the sector would place a significant burden on the bargaining teams. It may also increase the risk that there is no organisation willing to represent employers.

[2] Noting, any requirements for bargaining parties to hold, or support participation in, the ratification process will be considered as part of subsequent advice on the responsibility and process for the ratification process.

b. Applying the same good faith requirements as the SIWB – This would only require bargaining teams to not do anything to mislead or deceive each other, or do anything that is likely to mislead or deceive each other. This obligation is unlikely to ensure non-members are appropriately represented as it does not include any proactive requirements to communicate with, or consider the views of, affected workers or employers.

Section D: Obligation to consider Māori interests and views

53. We have recommended that other parties or interests (which could include someone representing Māori interests and views) would be able to be present during bargaining if both bargaining teams agree. We did not recommend requiring specific seats at the bargaining table for other interests as it is unlikely to be applicable to every sector and would not be effective if there is no individual/organisation actually willing to participate. When providing this advice, we noted that unions commonly have established mechanisms to incorporate views of women, Māori, Pacific peoples and others into bargaining.

In recognition of the Crown's Te Tiriti o Waitangi obligations, the system needs to ensure Māori interests and views are considered

54. It is important that the system, however, includes a mechanism to ensure that Māori views and interests are actively considered, in recognition of the Crown-Māori Treaty partnership. Māori are overrepresented among those in low paid jobs. NZCTU Rūnanga has also indicated that Māori are overrepresented in jobs where liveable pay rates, job security, health and safety, and upskilling are lacking. This is particularly evident for Māori women, as raised by the Mana Wāhine claims.

55. The requirement to identify and consider Māori interests and views would apply to both the workers and employer bargaining teams. Most unions already have mechanisms for connecting with and considering the views of Māori members, so this obligation would simply reiterate the importance of this within the FPA system. We also consider this requirement should apply on the employer bargaining team to reduce the risk that the terms and conditions agreed could have a disproportionate negative impact on Māori-owned or led businesses in that sector.

56. Ensuring bargaining includes Māori interests and views will be relevant and important in all sectors, however, the degree of prominence may vary depending on the proportion of the Māori workers or Māori-owned or led businesses in the sector covered by the FPA. We consider the practical approach will be to include an obligation for bargaining teams to:

    a. Use their best endeavours seek and consider feedback from Māori worker representatives or employer representatives – This would be similar and in addition to the obligation proposed above to seek and consider the views of all affected parties (which would include Māori workers and business), but with a specific focus on engaging Māori representatives to ensure there is a specific consideration of Māori views and interests; and

    b. Consider whether there should be a Māori representative included in the bargaining team – If there is a high proportion of Māori workers or businesses within an occupation or industry where an FPA is being bargained, including a Māori representative from one of the unions or industry bodies in the bargaining team may be an effective way to ensure Māori views and interests are raised and considered during bargaining.

Section E: Obligation to ensure relevant government agencies are kept informed

The government will need to consider how it provides support and input into FPAs being bargained in publically funded sectors

57. Fiscal implications or service delivery challenges may arise from FPAs for workforces either employed directly by public sector employers or in the funded sector[3] if those employers are unable to meet any increased labour costs resulting from an FPA from within their existing funding or baselines, and/or are unable to meet those costs without reducing service quantity and/or quality. Public sector funders are not part of the bargaining process, but employers and unions are likely to expect that bargained outcomes will result in additional funding for the contracted services to reflect the higher labour costs.

58. At this point, it is not possible to estimate the additional costs that may arise for the Crown or the likelihood of this risk, given the uncertainty about what FPAs will be initiated and when, their coverage, and the make-up of employer bargaining team.

59. The Government will need to consider how it organises itself to engage with FPA bargaining when it covers workforces either directly employed by public sector employers or in the funded sector. We have raised this issue with the Public Service Commission, Department of Prime Minister and Cabinet and Treasury and will continue to discuss it with them as the FPA system is developed.

60. It is worth noting that regardless of how the government engages with FPA bargaining, the amount of influence that public sector employers and funded sector employers have on the terms and conditions agreed in the FPA will depend on the composition of the sector. If public sector employers and/or funded sector employers represent only a small portion of the affected employers they may have little influence during bargaining.

The employer bargaining team should keep relevant government agencies informed about the progress of bargaining

61. Many social, health, community and education services are contracted out and delivered through the funded sector. The funded sector is made up of thousands of primarily medium to small sized organisations. The majority of these organisations are not for profit organisations, meaning there is no ability to accumulate surpluses for profit, distribution to shareholders, members or staff. For most organisations in the funded sector, a significant majority of their income is from government sources. Funded sector contracts are often based around bulk, contributory or output based funding models. Many organisations rely on independent (non-Government) revenue streams, such as fundraising, philanthropy or commercial enterprises, to supplement Government funding in order to deliver contracted services.

62. When an FPA occurs in a funded sector there is a risk of a perception that the costs associated with the decision do not fall on those that make it. For instance, the bargaining side representing businesses may agree to favourable terms based on an assumption that the government will provide the additional funding to cover the increased labour costs. Once the FPA has been agreed, if the government did not provide additional funding to cover the increased costs, the employers would need to cover the shortfall in other ways, which may include reducing staffing volumes. This is likely to result in pressure on the government to provide additional funding or risk negative impacts on the delivery of public services. If a

[3] The Funded sector refers to any private sector organisation that receives Government funding to deliver public services.

number of FPAs come into force in publicly funded areas, this could put significant pressure on the government's overall budget and funding decisions.

63. We expect there are likely to be a number of FPAs occurring in the funded sector, as NZCTU has signalled cleaning, security and public transport as early priorities.

64. Where a public sector agency is the employer, the employer bargaining team will be required to engage with it (as part of the obligation to represent all affected employers). In the funded sector, the obligation to represent affected employers will apply between the employer bargaining team and private sector organisations (that receive government funding). When an FPA is occurring in a funded Sector there is a risk that the relevant government agencies are not made aware of the progress of bargaining early enough to appropriately manage the potential implications for delivery of the public services.

65. We recommend that in situations where an FPA covers private sector organisations that receive public funding, the employer bargaining team should be required to keep the relevant government agency informed of the progress of the FPA bargaining.

66. This obligation may not be necessary, as employers that rely largely on public funds are likely to engage with the relevant government agency during FPA bargaining to ensure the terms and conditions agreed to do not negatively impact on the delivery of services. However, given the potential impact of an FPA in the funded sector on public services, we consider it would be prudent to include this obligation to ensure government agencies are provided with early indications of the potential content of an FPA. This will enable them to consider the potential fiscal implications and potentially discuss these with the employers before agreement on terms and conditions of the FPA is reached.

67. The method and timing of providing updates to the relevant government agency could be considered as part of the process agreement developed by bargaining parties on the employer bargaining team at the start of bargaining.

68. We are not proposing any obligations for a representative of the relevant government agency to be present during FPA bargaining as it would not be appropriate for the funders to be at the bargaining table. This could be seen as interfering with the good faith bargaining between workers and employers.

Next steps

69. We are providing advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval to draft the Bill and to inform the drafting instructions.

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

Milestone	Date
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	12 March 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	26 March 2021
DEV Cabinet Committee	14 April 2021

Annex One: Requirements for collective bargaining systems

ER Act for Collective Bargaining	Equal Pay Act	Screen Workers Industry Bill	Recommended for the FPA System
Section A: Obligations for those on the same bargaining team			
The duty of good faith in section 4 requires parties to an employment relationship: • Not do anything directly or indirectly to mislead or deceive each other; or that is likely to mislead or deceive each other • To be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. 'Employment relationships' include those between: • A union and another union that are parties bargaining for, or parties to, the same collective agreement • An employer and another employer where both employers are bargaining for, or parties to, the same collective agreement.	The duty of good faith in section 4 of the ER Act applies to the parties to a pay equity claim (s13C). In a multi-employer pay equity claim, employers are required to enter into a pay equity process agreement for the purposes of deciding whether the claim is arguable and for the purposes of the pay equity bargaining process (s13K). Employers are required to use their best endeavours to enter into a pay equity process agreement in an effective and efficient manner (s13C). In multi-union claims, unions must use their best endeavours to agree on how they will progress the consolidated claim (s13C). Unions are not required to enter into a process agreement, but if they cannot agree on how the consolidated claim will be progressed, any of them may apply to the Authority for a direction (s13M).	The parties to a workplace relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or do anything that is likely to mislead or deceive each other (c13). This applies to a worker organisation and any other worker organisation that is bargaining for the same collective contract and an engager organisation (i.e. representing employers) and any other engager organisation that is bargaining for the same collective contract.	The duty of good faith as in section 4 of the ER Act 2000 apply between unions on the same bargaining team and between employer bargaining representatives on the same bargaining team. Require bargaining parties on the same bargaining team to enter into a process agreement on how they will progress, and make decisions on, FPA bargaining and to use their best endeavours to enter into this process agreement in an effective and efficient manner. Require each bargaining team to designate a person from one of the bargaining parties to chair the bargaining team and act as the primary spokesperson.

ER Act for Collective Bargaining	Equal Pay Act	Screen Workers Industry Bill	Recommended for the FPA System
Section B: Obligation between the bargaining teams			
Section 32 of the ER Act also specifies what the duty of good faith means in relation to unions and employers bargaining a collective agreement. They are required to, at least: Use their best endeavours to enter into an arrangement, as soon as possible after the start of pay equity bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner.	Same as ER Act (s13C)	Same as ER Act (c26)	Same as ER Act
Must meet each other, from time to time, for the purposes of the bargaining.	Required to follow process specified in other clauses to resolve claim.	Same as ER Act	Same as ER Act
Must consider and respond to proposals made by each other.		Same as ER Act	Same as ER Act
Even if parties have come to a standstill or reached a deadlock about a matter, they must continue to bargain about any other matters on which they have not reached agreement.		Same as ER Act	Same as ER Act
Recognise the role and authority of any person chosen by each of the parties to be that person's representative or advocate.	Same as ER Act	Same as ER Act	Same as ER Act

ER Act for Collective Bargaining	Equal Pay Act	Screen Workers Industry Bill	Recommended for the FPA System
Must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise.	Same as ER Act	Not included	Not include
Must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining.	Same as ER Act	Same as ER Act	Same as ER Act
Must provide to each other, on request, and in accordance with the specified requirements, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining.	Required to follow process specified in other clauses to resolve claim.	Same as ER Act	Same as ER Act
Duty to conclude			
Required to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to (s33).	If a pay equity issue is found, parties are required to use their best endeavours to settle the pay equity claim in an orderly, timely, and efficient manner (s13C).	Requires the parties bargaining for a collective contract to conclude a collective contract, but does not allow for genuine reasons not to conclude (c27).	Require bargaining teams to use their best endeavours to come to an agreement on the terms and conditions of the FPA in an orderly, timely, and efficient manner.

ER Act for Collective Bargaining	Equal Pay Act	Screen Workers Industry Bill	Recommended for the FPA System
Providing information			
Establishes process for providing information, including the use of an independent reviewer if the union or employer providing the information reasonably considers that it should be treated as confidential information (s34).	Same (s13ZC)	Same (c30)	Same, with any necessary modifications required to reflect the nature of the FPA system.
Section C: Duty to represent non-members and consider particular perspectives			
The duty of good faith in section 4 to applies parties in an employment relationship, which includes: • A union and a member of the union • A union and a member of another union where both unions are bargaining for, or parties to, the same collective agreement.	The duty of good faith in section 4 of the ER Act, which applies to the relationship between a union and a member of the union, also applies to the relationship between a union and an employee who is not a member of the union if the employee is covered by the union-raised claim (s13C).	The parties to a workplace relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or do anything that is likely to mislead or deceive each other (c13). This obligation it applies to: • A worker organisation and any other screen production workers to whom the collective contract they are bargaining for may apply • An engager organisation and any other engager to whom the collective contract they are bargaining for may apply.	The obligation for bargaining teams to represent all affected workers or employers should require them to: • Regularly update affected workers or employers on the bargaining progress and content of the bargaining • Provide an avenue for those they represent to provide feedback on the terms and conditions being discussed • Take into consideration the views of the affected workers or employers during bargaining • Inform affected parties of the ratification vote.