MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Further advice on employer representation

Date:	28 January 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1724

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations & Safety**	**Agree** to the amended approach for specifying requirements for the employer bargaining representatives. **Seek** agreement from Business NZ to be the default bargaining representative for when there is no suitable organisation willing to represent employers.	19 February 2021

Contact for telephone discussion (if required)			
Name	**Position**	**Telephone**	**1st contact**
Beth Goodwin	Acting Manager, Employment Relations Policy	04 901 1611	✓
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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- ☐ Withdrawn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

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Date:	28 January 2021	**Priority:**	Medium
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Purpose

To recommend a change in approach for the requirements for employer bargaining representatives and further detail on the mechanism to include in the Fair Pay Agreement (FPA) system for when there is no suitable organisation willing to represent employers.

Executive summary

We previously recommended allowing employers flexibility in who represents them, based on the feedback from submitters. Further consideration of other aspects of the system, however, has raised issues with how this approach would work in practice. The most serious issue is how one or more employers would be able to represent all employers covered by an FPA, in 'good faith'.

We now recommend adopting the approach in the Screen Industry Workers Bill, meaning employer bargaining representatives would need to meet the similar requirements as worker representatives in the Employment Relations Act, including being an incorporated society. This is intended to ensure that they have a legal form, constitution and rules that enable them to represent affected parties.

If there are a number of organisations that meet the requirements, they would all be able to be part of the bargaining team and should make their own arrangements about how to work together. We do not think it would be appropriate to require a single 'most representative' bargaining party, require a minimum level of 'representativeness', or limit the number of bargaining representatives per side as such measures would impact workers' and employers' ability to choose who they are represented by.

A major risk with the FPA system is that it does not incentivise employers to participate in the system. The system, therefore, needs to include a mechanism to overcome the risk that bargaining cannot commence due to a lack of willing and suitable employer representation.

In earlier advice, we had recommended that a government body appoint a representative after a set period if no agreement can be reached. We now consider the most viable option is for Business NZ to be the default representative, in reflection of their role as the social partner for businesses. This option would only work if Business NZ was willing and we recommend that you seek Business NZ's formal agreement to this approach.

If Business NZ is not willing to be the default bargaining representative for employers, then we consider the next most workable option is a backstop where if employers have not arranged a suitable bargaining representative within a set time period, then the terms of the FPA would be set by a panel of Employment Relations Authority (ER Authority) members, based on the advice of relevant experts. This option would, however, have implications for our international obligations as it would increase the amount of compulsory arbitration in the system. It would also be an expansion of the ER Authority's role and require additional resourcing.

Recommended action

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

1. **Agree** that each employer organisation bargaining on behalf of employers should be required to be an incorporated society and meet specified requirements (which are similar to requirements in the Employment Relations Act for the registration of unions):

    - the object or an object of the society is to promote its members' collective work interests; and
    - the society's rules are democratic, not unreasonable, not unfairly discriminatory or unfairly prejudicial, and not contrary to law; and
    - the society's rules contain a provision relating to the process for holding one or more secret ballots for the purposes of the FPA; and
    - the society is independent of, and is constituted and operates at arm's length from,—
        - any employer or employer organisation, if the society is seeking to be registered as a worker organisation; and
        - any worker organisation, if the society is seeking to be registered as an employer organisation.

Agree / Disagree

a **Agree** to modify the requirements for employer bargaining representatives to allow public sector bargaining entities or agents to be an employer bargaining representatives if they have a legal form, constitution, and rules that would enable them to represent all affected parties on that bargaining side.

Agree / Disagree

b **Agree** that the system will allow any incorporated society (on both the worker or employer side) that meets the requirements specified in recommendation (a) and has member(s) affected by the FPA to be a bargaining party and therefore:

a. Not require a single 'most representative' bargaining representative on each side
b. Not require bargaining representatives to meet a minimum threshold of representativeness or include any limits on the number of bargaining representatives that can be part of the bargaining party on one side.

Agree / Disagree

c **Note** that due to a lack of incentives for employers to participate in the FPA system, there is a risk that no suitable employer organisations are willing to bargain on behalf of employers.

Noted

d **Agree** to seek formal agreement from Business NZ that it is willing to be appointed as the default bargaining representative for employers if there is no suitable organisation willing to perform the role.

Agree / Disagree

e **Agree** to either:

Option 1 (If Business NZ agrees to be the default bargaining representative): Require Business NZ to: a. use its best endeavours to find a willing and suitable employer bargaining representative(s) once an FPA has been initiated; and b. be the employer bargaining representative if it cannot find a willing and suitable representative within six months (**MBIE preferred)**.	*Yes / No*
Option 2 (Alternative option if Business NZ <u>do not</u> agree to be the default bargaining representative): That in the event that no suitable entity employer organisation agrees within six months of initiation of an FPA to represent employers in bargaining, this will trigger the terms and conditions of the FPA to be set by a panel of Employment Relation Authority members based on the advice of relevant experts.	*Yes / No*

f **Note** you have indicated an intention to create a new FPA institution. If option two (recommendation f) was progressed, the Employment Relations Authority would only perform this function until the new institution was created.

Agree / Disagree

g **Agree** that when the terms and conditions of an FPA are set by determination, that the decision is made by a panel of Employment Relations Authority members.

Agree / Disagree

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

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Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

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

3. 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.

4. In February 2020, the former Minister agreed with our advice that:

   a. Employers should decide on a case-by-case basis, possibly with support from Business NZ, how they will be represented [in bargaining].

   b. A government body may step in to appoint representatives after a set period if no agreement can be reached [refer briefing 1920-1893].

5. This briefing provides:

   a. Updated advice on the requirements for employer representatives based on subsequent consideration.

   b. Advice on the detail of how the backstop option for the government to appoint a representative could work.

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

   - Effectiveness: whether the option supports improved outcomes for workers
   - Legitimacy: whether the option ensures there is a mandate or social licence for an FPA, as well as including checks and balances appropriate to the scale of the intervention
   - 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 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.

Requirements for bargaining representatives

Our earlier advice on employer representatives now appears less workable than we thought

7. The FPA Working Group (FPAWG) recommended that employers may be represented by employer organisations and that they must be incorporated entities. It noted that different groups of employers may wish to have their own representatives and the system should accommodate this within reason.

8. In the 2019 discussion document we sought feedback on whether employer organisations should be the major bargaining representative. Most submitters took the view that either employer organisations alone, or together with individual employers, would be the most appropriate representatives to negotiate FPAs. Unions generally supported the FPAWG's recommendation that employers should be represented by an employer organisation. Other submitters, however, stated that it may not be appropriate for only employer/industry organisations to represent all employers for the following reasons:

    a. Such organisations do not have the capability, capacity or infrastructure to undertake collective bargaining on behalf of the sector, as collective bargaining is normally undertaken by individual employers.

    b. Not all employers were members of the employer organisation. Business NZ argued that it would be almost impossible to represent non-members in 'good faith'.

    c. A small number of larger employers argued that because of their size they wanted to be directly represented at the bargaining table.

    d. Some industry organisations noted they would not want to be put in the position where they had to bargain for employers for an FPA, as they try to represent the interests of all industry participants.

9. As a result of the concerns raised, we revised our advice and recommended that employers should decide on a case-by-case basis, possibly with support from Business NZ, how they will be represented.

10. Further consideration of other aspects of the system, however, has raised issues with how allowing employers to be the bargaining representatives would work in practice. In particular the requirement for bargaining representatives to represent all affected parties in good faith.

11. Individual employers are usually companies. Directors acting on behalf of a company have a duty under the Companies Act 1993 to "act in good faith and in what the director believes is the best interests of the company" (s131). This obligation may at times conflict with the requirement that employer bargaining parties represent all affected employers in 'good faith', which would include their competitors. For example, in a situation where an employer had a strong view in bargaining which directly conflicted with its competitors' views, its obligations under corporate law to act in the best interests of the company and under the FPA system to represent all affected employers could be in conflict. We have not discussed with the Commerce and Consumer Affairs team at MBIE what would be required, or the implications, if the FPA legislation sought to over-ride this obligation. We consider this would be likely to raise a number of policy issues and risks.

12. We are aware that in the bargaining of some Multi Employer Collective Agreements (MECA) one employer agrees to represent other employer(s). However, in this situation there is a clear arrangement (including a contract for service) in relation to the bargaining between the two (or more) employers and employers are able to opt-out of the resulting collective agreement if they do not agree with the terms and conditions that have been bargained. In contrast, in the FPA system those at the bargaining table would be obligated to represent all affected employers, which is likely to be a large number of organisations and there is no ability to opt-out of the resulting FPA. As a result, we consider that if an employer was representing other employers in an FPA there is a greater risk of conflicting views, which could cause conflict of interests and disputes about whether the single employer (or group of employers) was adequately representing the others.

13. Allowing individual employers to represent themselves could also result in a large number of bargaining representatives at the table, which would be more difficult to coordinate during bargaining. Any restrictions or oversight by a government body to mitigate this risk would

create further issues in relation to which employers should be allowed to be bargaining representatives and why.

14. We, therefore, no longer consider allowing employers complete flexibility to determine how they are represented will be workable in practice and have legitimacy with all affected employers. We believe that some requirements are needed in order to ensure that the bargaining representative can effectively represent affected employers.

The Screen Industry Workers Bill has already considered this issue

15. The Screen Industry Workers Bill (SIWB) requires that in order to be a bargaining party, an entity must be a registered 'worker organisation' or 'engager organisation'. To be registered, they must be an incorporated society and either be a registered union or meet specified requirements (which are similar to requirements in the Employment Relations Act for the registration of unions):

    - the object or an object of the society is to promote its members' collective work interests; and
    - the society's rules are democratic, not unreasonable, not unfairly discriminatory or unfairly prejudicial, and not contrary to law; and
    - the society's rules contain a provision relating to the process for holding one or more secret ballots for the purposes of the SIWB; and
    - the society is independent of, and is constituted and operates at arm's length from,—
        - any engager or engager organisation, if the society is seeking to be registered as a worker organisation; and
        - any worker organisation, if the society is seeking to be registered as an engager organisation.

16. These legal requirements will be checked by a Registrar of Screen Industry Organisations.

17. Any registered worker or engager organisations with members covered by proposed collective bargaining will automatically be included as a SIWB bargaining party. They are able to make a request to the Employment Relations Authority (ER Authority) to be exempt (i.e. to opt-out). The Bill does not allow the ER Authority to excuse an organisation if it represents a large proportion of the affected workers or engagers, or would mean a substantial number of distinct class of workers or engagers would not have their interests adequately represented. However, that does not necessarily mean that the most representative engager organisations have chosen to register in the first place.

18. Where there are a number of bargaining parties on the same bargaining side, it is up to them to decide how to approach bargaining. Any disagreements regarding the approach to bargaining can be taken through the dispute resolution process.

As a general principle, a bargaining representative needs to have a legal form that enables it to represent affected parties on that bargaining side

We recommend requiring bargaining parties to meet the same requirements as the SIWB to ensure they have the legal form, constitution and rules to represent broader interests

19. There are no straight forward options in relation to this issue. This is due to the nature of FPAs, in that they are intended to cover an entire industry or occupation with no ability to opt-out, and the current lack of infrastructure to support this type of bargaining from an employer perspective.

20. As FPAs will apply to all employers within coverage we consider it is necessary for the system to include requirements for their bargaining representatives to ensure they are able to represent others (rather than just their own interest). This is already the case on the worker

side, as the previous Minister agreed that they should only be represented by unions (which have to meet specific requirements to be registered).

21. We recommend adopting the same requirements as in the SIWB for employer bargaining representatives in the FPA system. In particular, we recommend that it require that representatives of employers must be an incorporated society and meet specified requirements that are similar to requirements in the Employment Relations Act for the registration of unions. To be registered as an incorporated society an organisation must satisfy various requirements, including that the society must not operate for the financial benefit of any member.

22. This approach aligns with the FPAWG's recommendation that employers generally be represented by employer organisations (although it would be a more stringent requirement). It is also consistent with the approach under the Employer Relations Act 2000, as it applies similar requirements to representing workers in collective bargaining (ie only registered unions are allowed to represent workers).

23. The recommended requirements are intended to ensure that the bargaining party(ies) representing employers has a legal form, constitution and rules that more easily allow it to represent others (rather than its own commercial interests). It will also mean that employers affected by the bargaining have the option to join the relevant bargaining representative if they consider this would be beneficial.

While we recognise this option may create additional compliance costs for employers in some sectors, we consider it is necessary to ensure employers can be represented effectively

24. Officers of incorporated societies have a duty to act in what they believe are the best interests of the society. This will be informed by the statement of objectives in the society's constitution. Any existing employer organisation (or union) wanting to be a bargaining representative for FPAs would need to ensure that its constitution is broad enough to allow for it to represent non-members during FPA bargaining. If it does not then it would need to amend its constitution (following the process for this set out in its rules) to enable this. If the process failed to obtain the level of support required to make this amendment then the society could not be a bargaining representative. However, if the society could not get the support required to make this amendment that suggests it does not have the mandate to be a FPA bargaining representative.

25. If there was no existing industry body that meets the requirements, then the affected employers may need to create one for the purpose of bargaining. If they are unwilling to so, then the system needs to include a mechanism to ensure bargaining can occur - advice on this mechanism is provided below. We have also recently recommended that additional funding be available for bargaining sides where there is low membership to the relevant representative organisation(s) [refer briefing 2021-2007]. This additional funding could be available when employers are required to form an incorporated society for FPA bargaining (unless the incorporated society once formed had high membership across the affected sector).

26. We recognise that these requirements may be difficult to meet in some sectors and may increase the risk that there may not be a suitable employer organisation willing to represent employers. However, allowing employers' flexibility in how they represent themselves is likely to result in even more complicated issues, particularly in relation to the obligation to represent all affected parties.

27. We are not, however, proposing to require employer bargaining representatives to register in advance of an FPA being initiated (which is required in the SIWB). That would be onerous, given the many different potential coverage options for FPAs. Once an FPA had been initiated it would be up to an employer organisation to apply to the government body to be a

bargaining party. The independent body would check that they meet the requirements, which would also include having members within coverage.

There are other options that we considered, but do not recommend

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

    a. **Allowing employers to be a bargaining representative as long as at least one of the bargaining representatives is an incorporated society –** We are concerned that this will reduce the likelihood of there being a suitable organisation willing to represent the employers that are not representing themselves. It is likely that larger employers would choose to represent themselves, meaning the relevant incorporated society would have to bear all the costs and obligations of representing the smaller, affiliated and non-affiliated, employers. It could also result in a large number of bargaining representatives at the table, which would be more complicated to organise.

    b. **Having a general requirement for employer representatives to be incorporated societies, but allowing exceptions in some circumstances –** We have not been able to think of any circumstances in which an exception to the proposed requirements (particularly if it enabled an employer to be the bargaining representative) would avoid the issues outlined above. The process for assessing and approving such exceptions would add further costs and complexity to the system and reduce the certainty around what is required to be a bargaining representative. The one area where some form of modification to the requirement may be relevant is in the public sector, which is discussed below.

29. While we do not recommend enabling employers to be bargaining representatives, we think they should be able to be present during bargaining if the employer representative considers it appropriate. This might be beneficial if a particular employer is able to provide a certain expertise or an important perspective during bargaining. The obligations and ability to agree for a FPA to go to ratification would, however, would still rest with the bargaining representatives.

The system may, however, need to include flexibility for public sector bargaining entities or agents if they still meet the intent of the requirements

30. FPAs may occur in sectors where the Crown is the only, or the main, employer. Some of these sectors already have bargaining entities or agents responsible for collective bargaining. For instance:

    a. Central Region Technical Advisory Services Limited (TAS) bargains on behalf of District Health Boards as an employer and is a crown-owned subsidiary.

    b. The Secretary of Education bargains on behalf of School Boards during collective bargaining in the Education Sector.

31. We have not had time to fully understand the legal status and obligations associated with the public sector bargaining entities or agents. However, if any public sector bargaining entities or agents have a legal form, constitution and rules that enable them (or could be suitably amended to enable it) to represent all affected parties (including any private employers) it would make sense to enable them to be a bargaining representative in the FPA system.

32. We will consider this further as part of the drafting of the Bill and modify the employer representative requirements as appropriate, if required.

We do not recommend placing any numerical limits, or representativeness requirements, on bargaining representatives

33. Within the proposed approach, the system could include additional requirements on bargaining representatives (on both sides) for the purpose of promoting effective and efficient bargaining. Options include requiring:

    a. a single 'most representative' bargaining party

    b. bargaining representatives to have a minimum level of 'representation' of affected parties and/or limiting the number of bargaining representatives on each bargaining team.

Requiring a main 'most representative' bargaining party on each side would impact affected parties' freedom of association

34. The requirements proposed in paragraphs 15 above are focused on ensuring the bargaining parties are able to represent affected parties, not that they are the most representative.

35. The FPAWG recommended that all workers or employers potentially covered by an FPA should be able to vote on their bargaining representatives. This suggests an intention for there to generally be a single (voted for) bargaining representative on each side. However, the FPAWG also acknowledged that different groups or worker and employers may wish to have their own representatives and that the system should accommodate this within reason.

36. We do not consider the system should require a single 'most representative' bargaining representative on each side. This type of limitation would impact workers' and employers' right to freedom of association, by impacting their ability to choose which organisation represents them. As there is currently a lack of infrastructure for sector-wide bargaining in New Zealand we also consider requiring a 'most representative' bargaining representative would be difficult to implement in practice. If there were a number of potential representatives the process for appointing a single representative could add complexity to the system and lead to disputes regarding the result.

37. We recommend that any union or industry body that meets the requirements for being a bargaining representative and has affected members should be able to join the worker or employer bargaining side. If there is more than one organisation willing and able (ie they meet the requirements) to be a bargaining party, it would be up to those organisations to determine how they work together during bargaining. If there is disagreement about how the bargaining parties on one side work together they could access the dispute resolution system.

38. The risk of a bargaining party(ies) not being the 'most representative' can be mitigated to some extent by the combination of:

    a. Allowing any incorporated society that meets the specified requirements and has affected members to be able to be part of the bargaining party on that bargaining team (at any stage in bargaining)

    b. The obligation for bargaining parties to represent all affected workers or employers (regardless of whether they are members)

    c. The ratification process requiring the majority support of <u>both</u> workers and employers.

Requiring bargaining representatives to have a minimum level of representation and/or limiting the number of representatives on one bargaining team would also affect freedom of association rights

39. The discussion document asked whether there should be a limit on the number of bargaining representatives at the bargaining table. Responses were mixed, with a similar number supporting a limit as opposing, and a few saying it may be appropriate in some situations.

Supporters of a limit expressed concerns regarding the number of bargaining representatives that would want to be at the bargaining table if there was not a limit. Opponents generally considered it should be left up to the bargaining parties to decide. A number of submitters made more general comments about the difficulties that will be associated with bargaining FPAs.

40. Limiting the organisations that could be a bargaining representative could include either a numerical limit or a requirement for the bargaining representative to represent a minimum percentage of affected workers or employers. Any limit of this type when an incorporated society meets the requirements and has affected members would, as mentioned above, impact their right to the freedom of association. As FPAs are intended to cover an occupation or sector it is important that all representative bodies within that occupation or sector are able to have a voice during bargaining if they wish to.

41. We, therefore, do not recommend including any such limits. We also note that the requirement for bargaining parties to be incorporated societies will to some degree reduce the number of potential bargaining representatives.

42. As mentioned above, it would be up to bargaining representatives to determine how they work together during bargaining, with the support of the dispute resolution system (if required). If a particular bargaining representative attempts to frustrate the bargaining process, action could be taken against them for not complying with their good faith bargaining obligations. Advice on the bargaining obligations, which will include obligations for bargaining parties on the same side and a requirement for each bargaining side to appoint a lead advocate, will be provided in an upcoming briefing (scheduled for 4 February 2021).

We continue to recommend allowing other parties/interests to be present at bargaining if both parties agree

43. As per our previous advice, other parties or interests (which could Māori views or interests or a funder perspective) would be able to be present during bargaining if both parties agree. The obligations and ability to agree for a FPA to go to ratification, however, would rest with the bargaining parties. We continue to recommend this approach.

44. We previously considered, but 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.

45. We have been considering whether there are other options for ensuring key perspectives, in particularly Māori and public funders, are appropriately considered during bargaining. We are intending to provide advice on this as part of the upcoming advice on the obligations for bargaining parties.

What happens if there is no suitable organisation willing to represent employers

There is a risk that employers will be unwilling to participate in bargaining

46. There is a connection between the requirements set for how employers are represented and a risk we identified in our earlier advice that the FPA system does not incentivise employers to participate in the system [refer briefing 2021-0627]. Public consultation highlighted that the proposed FPA system provides few or no incentives for employers to participate constructively. We noted a key social partner, Business NZ, are opposed to the system and its views were endorsed by many employers who submitted.

47. There will be a similar lack of incentive for employers to arrange a suitable bargaining representative. Rather, employers may be incentivised to avoid any party becoming the

bargaining representative so that bargaining would be frustrated and could not commence. As noted above, setting requirements on who is able to represent employers could exacerbate this risk, as it may require an existing organisation to amend its constitution or rules, or to establish an incorporated society if the sector does not have an existing organisation that meet the requirements.

48. In the SIWB, bargaining cannot commence if, for example, all engager organisations refuse to register under the new system. However, the Screen Production and Development Association (SPADA) had expressed a willingness to be involved in the SIWB which reduces the risk of this occurring.

49. In contrast, the consultation feedback on the FPA system indicated there is low employer buy-in to the FPA system, meaning the risk of organisations refusing to cooperate is high. The system therefore needs to include a mechanism to reduce this risk and respond when it does occur.

50. This risk does not apply on the worker side, as the initiation of an FPA requires a union to make an application (and meet the initiation requirements). Therefore there would always be at least a union willing and able to represent affected workers (noting, other unions may then apply to also be part of the worker bargaining party).

The most workable option is for Business NZ to be specified as the default representative when there is no suitable employer organisation that is willing

51. In earlier advice, we had recommended that a government body be able to appoint a representative after a set period if no agreement can be reached.

52. We now consider the most viable option is for Business NZ to be the default representative. This obligation would reflect its role as the peak body for businesses and as the business social partner in the tripartite relationship with the government and NZCTU. This approach is simple to implement and the consequence of not organising a suitable bargaining representative would be clear.

53. This obligation would need to be specified in the law in order to ensure that the system had a suitable backstop and to enable Business NZ to be a bargaining representative in an FPA even though it wouldn't have any directly affected members (noting it is already an incorporated society).

54. To encourage more direct representation from a relevant industry body wherever possible the obligation could include two elements, requiring Business NZ to:

    a. use its best endeavours to find a willing and suitable employer bargaining representative(s) once an FPA has been initiated; and

    b. be the employer bargaining representative if it cannot find a willing and suitable representative.

55. While this would create costs for Business NZ, it would receive the funding available to bargaining representatives, in addition to the funding that would be provided to it as the peak body representing employers [refer briefing 2021-2007].

56. This option would need to specify a time period after which Business NZ becomes the bargaining representative. Our indicative recommendation is that employers to be given six months to organise a suitable bargaining representative, with some flexibility if they are in the final stages of forming a representative organisation that meets the requirements. Allowing six months could be seen as quite a long time, as it could cause delays before bargaining starts. A shorter time would, however, increase the risk that employers are willing but unable to get organised in time, especially if they need to set up an incorporated society or amend the constitutional of an existing society.

57. This could engage freedom of association rights as employers would then be represented by Business NZ without having any say in this, and despite an intention to organise alternative representation. However, the employers could set up an incorporated society to represent them even after the 6 month limit. At that stage, the representative organisation would take over the bargaining.

We recommend that you seek Business NZ agreement to be appointed the default representative for employers

58. This option would only be workable and have legitimacy if Business NZ was willing. In an informal meeting this month, a representative of Business NZ did signal a potential willingness. He suggested the most appropriate backstop would be for the system to include a 'proxy default' and mentioned that would be similar to the role Business NZ had under the awards system of representing employers when there was not suitable organisation able to.

59. Given the importance of this backstop and that it would be specified in law, we recommend that you seek formal agreement from Business NZ in order to proceed with this option.

We considered other options for a government body to appoint a representative

60. We also considered, but do not recommend, the following options for a government body appointing a representative:

    a. Requiring an industry body to be the default – It would be highly coercive to require an existing and unwilling industry body to be a bargaining representative, particularly as the funding provided is intended to reduce the burden on bargaining representatives but would not cover all the costs. If it was a small organisation, the requirement to be a bargaining representative for an FPA could completely override their ability to do the work it was formed to complete. If there was no existing industry body then Business NZ would still have needed to be the default under this option.

    b. Setting up an agent or panel to represent employers – This option does not have the same issues regarding coercion as the option above. However, there are issues regarding who would pay for the cost of the agent/panel. Attempting to recover the costs from employers would require some form of levy, which would be difficult and costly to administer. If the government were to cover the costs, it would add significant costs to the system and create a fairness issue (as the Government would be fully funding the bargaining representative for employers, but not employees).

If Business NZ is unwilling to be the default representative, then the next most workable option is for the FPA to be set by determination

61. When considering this advice, an alternative option we considered was to include a backstop where if employers have not arranged a suitable bargaining representative within a set time period, then the FPA would be set by determination.

62. This option could, however, have implications for our international obligations as it would increase the amount of compulsory arbitration in the system. When we mentioned this potential option to a representative of Business NZ, he indicated that this option would be legally challenged. Business NZ has already raised an issue with the International Labour Organization (ILO) relating to the recent reintroduction of a duty to conclude in the ER Act. It is likely that it will raise a similar issue in relation to the inclusion of compulsory arbitration in the FPA system (which is already included as part of the dispute resolution process). Including further situations where compulsory arbitration is possible in the FPA system may increase the likelihood and strength of such a complaint. This option would also represent a significant departure from the core concept that FPAs are bargained.

63. If, however, Business NZ is unwilling to be the default representative, then we consider this is the only workable alterative option, despite its significant risks. The intent of this option

would be to incentivise employers to organise themselves to avoid an FPA being set for them. This is based on the assumption that employers would prefer a bargained outcome rather than one set by a government appointed function.

64. If this option was to go ahead, we recommend that the terms and conditions of the FPA are set by a panel of ER Authority members (rather than a single member) and based on the advice of relevant experts. You have indicated your intention to create a new FPA institution at a later stage, but until that time, the most suitable institution to perform this role would be the ER Authority.

65. Setting an entire FPA without any bargaining to base the decision on would be a more difficult task and be a significant expansion of the ER Authority's role. We have concerns with enabling and requiring a single ER Authority member to set the terms and conditions that would apply to an entire sector in this type of situation. Requiring a panel of ER Authority members to set the terms and conditions would promote a consistent approach (by reducing the risks of different members taking a different approach) and would allow the determination to be based on wider range of expertise. The Chief of the ER Authority, Dr Andrew Dallas, has indicated that he supports the proposed panel approach.

66. The ER Authority would also need to seek expertise (eg economic, legal and sector based expertise) to inform its identification of suitable terms and conditions for the FPA.

67. As outlined in relation to the preferred approach (where Business NZ is the default employer representative) we recommend that employers have six months to organise a suitable bargaining representative before this backstop mechanism is triggered.

We don't recommend a tripartite panel at this stage or other backstop options

68. Dr Dallas also suggested that a worker and business representative should be included on the panel that set the terms and conditions of an FPA when there was no employer representative. Dr Dallas considered this would help the panel's understanding of the issues being raised by both sides and would give the panel additional authority/legitimacy.

69. While we agree that it would likely have benefits, this option would require significant changes to the current form, role and make-up of the ER Authority. If this option went ahead, the idea of including a worker and employer representative on the decision-making panel would be best considered as part of the future consideration of a new structure/institution for FPAs. In the meantime, the ER Authority members would be able to seek input from worker or employer representatives, as a part of their ability to seek advice from experts.

70. We also considered but do not recommend:

    a. **A backstop option where the terms and conditions are set in a similar manner to the minimum wage setting process** – Decisions regarding minimum wages are made by you, as the Minister of Workplace Relations and Safety, based on advice developed by MBIE officials. This type of approach would shift the system away from being a bargaining system. It would also be inconsistent with your preference for the FPA system to not include any ministerial role in decision making. A potential variation would be for the decision to rest with a government body. This would require the development of a new function or institution, so we are not recommending this now as it should considered as part further decisions regarding the creation on institution for FPA.

    b. **A backstop where the terms and conditions are set by the Remuneration Authority** - The Remuneration Authority's role is to set the remuneration (salary, fees, certain allowances, superannuation) of key office holders such as Judges, Members of Parliament, local government representatives, and some individual office holders and board members of independent statutory bodies. Setting the terms and conditions of a FPA would be a substantial expansion of this role, as it would cover a wider range of

employment terms and conditions and apply across a range of occupations and industries. While this is also an expansion of the role of the ER Authority, the ER Authority's experience in setting terms and conditions for industries and occupations will increase, to some degree, through its role within the FPA dispute resolution system. We also do not think it would be workable to have two different decision makers setting FPA terms, based only on the route that was taken to the step of determination.

There is merit in applying the ER Authority panel approach for any situations when the terms of an entire FPA are set by determination

71. The idea of a panel of ER Authority members setting the terms and conditions was developed during discussions on the backstop option discussed above. We now consider there is merit in amending the dispute resolution approach to apply this approach in all situations within the system when an entire FPA is set by determination (eg when bargaining parties cannot agree on any terms or after two failed ratifications).

72. The previous Minister agreed that appeals would not be possible on substantive determinations (ie the terms and conditions set by the ER Authority) in order to avoid costly and lengthy litigation processes. This does, however, place a large responsibility on a single ER Authority member, as once they have fixed the terms and conditions of an FPA it cannot be challenged.

73. Requiring a panel of members to make decisions regarding the terms and conditions of an entire FPA would reduce the risk that the resulting FPA had unintended negative consequences for the sector. It would also promote a consistent approach and allow these decisions to be based on the wider range of expertise. Dr Andrew Dallas indicated that he supports adopting the panel approach in all situations where the terms and conditions of an entire FPA are set by determination.

Business NZ and NZCTU should have a role to coordinate bargaining representatives

74. As part of the default option proposed above, Business NZ would be required to use its best endeavours to find a willing and suitable employer bargaining representative(s) once an FPA has been initiated.

75. Given the wide coverage of FPAs, it will be important that all unions and employer representatives are aware of any initiated FPA that affects their members and are given the opportunity to consider whether they would like to be a bargaining representative.

76. We are providing advice on the notification and communications requirements next week. This will cover the role NZCTU and Business NZ should have in notifying unions and industry bodies if a FPA has been initiated that may affect their members.

77. As part of their role as the social partners for workers and businesses, we consider NZCTU and Business NZ should have a role ensuring relevant organisations have an opportunity to consider whether they would like to be a bargaining representative and in assisting them to coordinate their bargaining side if there are a number of bargaining representatives involved.

78. We do not consider that this should be a statutory requirement (aside from Business NZ's obligation within the option above to try to find at least one willing and suitable employer bargaining representative). As there is an intention to provide funding to NZCTU and Business NZ, we consider this funding could come with conditions that the peak bodies must assist sectors to identify and coordinate bargaining representatives. A requirement to assist sectors to identify and coordinate bargaining representatives was included in the list of

conditions proposed to be attached to the funding in the briefing on FPA bargaining support provided on 27 January 2021 [refer briefing 2021-2007].

Costs

Requirements for employer representatives

79. The recommended change in approach for employer representatives will not create any additional costs for the government support system, as our planned costs already included a verification function for a government body to check that the employer bargaining team is sufficiently representative. Under the current recommendation, this verification function would shift to checking the bargaining representatives for employers are incorporated societies and that their legal form, constitution and rules meet the specified requirements. This has been factored into the Budget bid as part of the functions performed by the verification officers.

The backstop mechanism for when there is no suitable organisation willing to represent employers

80. The preferred option of appointing Business NZ as the default employer representative would not add any new costs to the system. We are not proposing to provide any additional funding to it for this role, as there is already a proposal for funding to be provided to peak bodies and bargaining sides [refer briefing 2021-2007].

81. If Business NZ did not agree to be the default employer representative, the alternative option is that the terms and conditions of the FPA are set by a panel of ER Authority in the event that no suitable employer organisation agrees to represent employers. If this alternative option was progressed, the resourcing proposed for the ER Authority would need to increase (both in terms of ER Authority members and support staff). The process for setting the terms and conditions of an FPA without any bargaining to base it on would be time consuming and require substantial input from a range of experts.

82. If the FPA was set without any bargaining occurring, this is likely to negatively impact the awareness and support for the resulting FPA. Therefore, additional funding is also likely to be required for compliance and education activities.

Applying the ER Authority panel approach for any situations when the terms and conditions of an entire FPA are set by determination

83. Increasing the number of ER Authority members involved when the terms and conditions of an entire FPA were being set by determination would require additional resources in these situations. It is unclear how often situations where the FPA is entirely set by the ER Authority (as opposed to a single ER Authority member considering a sub-set of disputed topics) would occur, but we do not expect it to be infrequent given the requirements in place before this can occur. Confidential advice to Government

Requiring Business NZ and NZCTU to coordinate bargaining representatives

84. This requirement would be attached to the funding already being proposed for social partners.

Next steps

85. 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.

86. The scheduled 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
Cabinet Committee	14 April 2021