MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: operationalising the representation and public interest initiation tests

Date:	22 January 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1978

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Decide** how the public interest test and representation test will be operationalised.	5 February 2021

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
Tayla Sumner	Policy Advisor, Employment Relations Policy	04 896 5343		

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- ☐ Withdrawn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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Purpose

To seek policy decisions on how to operationalise the public interest test and representative test in the Fair Pay Agreement (FPA) system.

Executive summary

We have reassessed our previous advice following your strong preference to ensure the system minimises ministerial decision-making and your decision to revert back to the Fair Pay Agreement Working Group (FPAWG) model, where a Fair Pay Agreement (FPA) can be initiated by a public interest test *or* a representation test. This briefing also provides new advice on how the public interest test and representation test could work in practice.

In relation to the public interest test, we now recommend the Employment Relations Authority (ER Authority) assess the application and makes the final decision (rather than the Minister) based upon criteria of *'the workforce in question experiences low bargaining power and there is evidence that the workforce is affected by one or more of a specified list of labour market challenges'.*

In regards to the representation test we consider that unions will be required to provide certain details about the 1000 or 10 per cent of workers upon application to allow the assessment body to verify that the representation threshold has been met. We do not think it is necessary to prescribe the data source that is evidenced by unions.

In order to comply with the principle of natural justice in the New Zealand Bill of Rights Act 1990 (NZBORA), we recommend legislating an assessment process for the public interest test and 10 per cent representation tests which allows an opportunity for those who will be affected by the decision to be heard. However this would not be appropriate for the 1000 worker threshold, as the names of the 1000 workers will not be publically available, and therefore interested parties will have no basis to submit.

Recommended action

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

Public interest test

a **Agree** to set '*the workforce in question experiences low bargaining power and there is evidence that the workforce is affected by one or more of a specified list of labour market challenges'* as the criteria for the public interest test.

Agree / Disagree

b **Agree** that the criteria will be specified in legislation.

Agree / Disagree

c **Agree** that the Employment Relations Authority should decide whether the public interest test has been met (amended from previous advice).

Agree / Disagree

d **Agree** that MBIE will continue to refine the specified list of labour market challenges and seek your agreement before drafting.

Agree / Disagree

e **Agree** to an assessment process that allows for submissions from interested parties within a set time frame.

Agree / Disagree

Representation test

f **Agree** that unions will be required to provide certain details about the 1000 or 10 per cent of workers upon application (such as the workers name and employer).

Agree / Disagree

g **Agree** that unions can choose the data source/s they use to prove that the representation threshold has been met.

Agree / Disagree

h **Agree** that MBIE should confirm whether the representation test has been met.

Agree / Disagree

i **Agree** to an assessment process that includes a submissions stage for the 10 per cent representation test.

Agree / Disagree

j **Agree** to a streamlined assessment process for the 1000 worker representation test, with no submissions stage.

Agree / Disagree

k **Note** we will provide you further advice about what the consequences of intentionally or recklessly providing false evidence might be in our upcoming briefing on offences and penalties.

Note

Pp Beth Goodwin

Tracy Mears
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

22 / 01 /21

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. On 17 November 2020 you met with officials to discuss the development of the FPA system. At this meeting you decided to return to the FPAWG model where an FPA can be initiated by a public interest test *or* a representation test.

2. The FPAWG recommended that a public interest test or representation test can initiate a FPA collective bargaining process in two circumstances:

    a. **Representativeness trigger:** in any industry or occupation, workers should be able to initiate a FPA bargaining process if they can meet a minimum threshold of 1,000 or 10 per cent of workers in the nominated industry or occupation, whichever is lower.

    b. **Public interest trigger:** where the representativeness threshold is not met, an FPA may still be initiated where there are harmful labour market conditions in the nominated industry or occupation.

3. MBIE had advised the previous Minister that parties initiating an FPA should have to meet the public interest test *and* the representation test. We have reconsidered our previous advice to take into account your decision to return to the FPAWG test of either the representation test *or* the public interest test, and your strong preference to ensure the system does not involve ministerial decision-making.[1]

4. This briefing provides further advice on the initiation tests in the FPA system, including:

    a. How the tests will be legislated

    b. What the tests will assess

    c. Who the assessment body/ies will be, and

    d. What the assessment process is.

We consider the following criteria to be important when assessing the options for the public interest test and the representative test

- 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: whether the option is consistent with parallel interventions in the ERES regulatory system, unless there is a good reason for divergence
- Cost effectiveness / efficiency: whether the option achieves the objective in a way that represents good value for money.

[1] Following your decision to revert back to the FPAWG model, MBIE provided advice on the implications and risks of changing initiation triggers (briefing 2021-1424 refers)

Public interest test

5. The public interest test is intended to allow a union to initiate an FPA where the representative threshold has not been met, but where an industry or occupation faces harmful labour market conditions and therefore it would be in the public interest for that workforce to bargain an FPA. The assessment of any public interest test is likely to be subjective and therefore requires a degree of expertise. For example, if the test is judged against criteria that require fact finding and significant judgement, it would not be appropriate for an administrative body to be the assessment body.

6. We consider it will be important to strike a balance between ensuring that there are sufficient public interest grounds for permitting an FPA (where there is not support for an FPA sufficient to reach the representation triggers), while ensuring that it is an accessible threshold.

You will need to decide what criteria are used to assess the public interest test

7. In order to support the workability and legitimacy of the system, we recommend a design for the public interest test which creates certainty and transparency for workforce participants, with scope for review as circumstances change – for example, different systemic issues in workforces may have more prominence at different times. The criteria will need to strike the right balance between certainty and flexibility. They will need to be clear enough that the assessment body is able to use them as a tool to aid decision making, and unions can use them to guide what evidence they provide to argue that it is in the public interest to initiate the FPA.

We recommend 'the workforce in question experiences low bargaining power and there is evidence that the workforce is affected by one or more of a specified list of labour market challenges' as the criteria

8. We consider workers' low bargaining power to be a root cause of, or contributing factor common across, most of the harmful labour market conditions outlined by the FPAWG. Unequal bargaining power enables employers to engage in a 'race to the bottom', holding down or reducing terms and conditions offered to workers. The *Employment Relations Act 2000* (ER Act) acknowledges the inherent inequality of power in employment relationships and legislates to attempt to correct this. However, the existing ER Act provisions are not sufficient to address that inequality in some workforces. As such, a lack of worker bargaining power should be a necessary condition for initiation as those workforces are more likely to benefit from a system designed to promote bargaining power by setting minimum standards across industries/occupations.

9. Part 6A of the ER Act has a similar test put in place to address situations where employees are subject to frequent restructuring and as a result receive poor terms and conditions. Low bargaining power is one of the criteria used when assessing applications. The full list of criteria is at **Annex One.**

10. We recommend using the criteria of 'the workforce in question experiences low bargaining power and there is evidence that the workforce is affected by one or more of a specified list of labour market challenges' as it enables the decision maker to take into consideration the specific circumstances of the workforce in front of them, as each workforce will have a different mix of the harmful labour market conditions suggested by the FPAWG.

11. One drawback of this option is that it could prevent workforces who have low bargaining power, but do not exhibit any of the labour market challenges on the specified list, from accessing and realising the benefits of an FPA. However we consider the list is sufficiently broad to encompass most situations where an FPA would be in the public interest.

Further work is required to refine the specified list of labour market challenges

12. The FPAWG recommended the Government consider some or all of the following conditions of a harmful labour market for the public interest test:

    a. historical lack of access to collective bargaining

    b. high proportion of temporary and precarious work

    c. poor compliance with minimum standards

    d. high fragmentation and contracting out rates

    e. poor health and safety records

    f. migrant exploitation

    g. lack of career progression

    h. occupations where a high proportion of workers suffer 'unjust' conditions and have poor information about their rights or low ability to bargaining for better conditions, and

    i. occupations with a high potential for disruption by automation.

13. We consider that list to be a good starting point for the specified list of labour market challenges.

14. As well as the list suggested by the FPAWG, we would suggest adding:

    a. long or unsocial hours, which are not reflected or adequately compensated in the terms and conditions

    b. wages have not kept up with productivity gains, and

    c. wages have not risen in response to skills shortages in the workforce.

15. We recommend you include the above as an indicative list in your April Cabinet paper and signal the list and its wording could be further refined in drafting.

We recommend you specify both criteria in primary legislation

16. The FPAWG recommended the conditions for harmful labour market conditions be set in legislation and assessed by an independent third party.

17. We consider there to be two viable options for where the public interest tests are specified:

    a. **Option 1**: Both criteria in legislation

    b. **Option 2**: Criterion 'low bargaining power' in legislation and specified list of labour market challenges in regulations

18. The first option strikes a suitable balance between certainty and flexibility for the unions and assessment body. It provides a degree of certainty and assistance to unions on how they may prove that the public interest test is met. Setting both criteria in legislation will mean they are not easily amendable i.e. to account for when new harmful characteristics emerge – setting the second criterion in regulations would address this. However, given the significance of the criteria in determining if the public interest test has been met and therefore whether workforces can access the FPA system, we agree with the FPAWG that it is appropriate that they be legislated.

MBIE considers the Employment Relations Authority to be the most appropriate body to assess the public interest test

19. The Legislation and Design Advisory Committee (LDAC) Legislation Guidelines provide factors that should be considered when deciding where to place power. This includes the level of expertise required, the level of accountability desired of the assessment body, the procedure commonly used by the decision maker and whether the power requires the making of broad judgements or the exercise of wide discretion.

20. When deciding if the public interest test has been met, the assessment body will have a large degree of discretion. We suggest it is a significant decision as to whether the public interest test has been met, given that, once the initiation test have been satisfied, an FPA will eventuate and bind those in coverage. Given these factors we think the Employment Relations Authority (ER Authority) is the most appropriate assessment body. The ER Authority in its current capacity is better suited to receive applications, hear any opposing arguments, and make decisions based on the merits of the application as it is a role that is similar to the one they currently perform.

Previously MBIE recommended that the assessment of the initiation triggers should be performed by a government body, with the Minister making the final decision.

21. Our previous advice was informed by advice from LDAC, who noted it may be difficult for the assessing body to make a decision which appropriately balances all interests, costs, benefits and risks. LDAC's Legislation Guidelines suggest that the more significant power, and the wider the group it applies to, the more likely it is that it should be exercised by the Governor-General in Council. An analogous example is the minimum wage process, where MBIE provides advice to the Minister who ultimately takes the decision to Cabinet and then makes a regulation by Order in Council. This is also essentially the existing process for adding or removing classes of employees to Schedule 1A in the ER Act, and therefore the protections under Part 6A. However we have ruled out this option because of your preference to ensure the system minimises ministerial decision-making.

Representation test

22. You have indicated your preference for the representation thresholds recommended by FPAWG of 1000 or 10 per cent of workers within coverage (whichever is lower). The FPAWG did not comment on how the evidence of 1000 or 10 per cent of workers should be presented.

23. We suggest that unions will be required to provide certain details about the 1000 or 10 per cent of workers to the assessment body upon application. This will allow the assessment body to confirm that the workers fall within coverage. We would expect the assessment body would need to perform some sort of check or audit of the validity of at least a sample of the details to be assured that the worker was an affected worker and they did support the initiation.

24. We note that the decisions you make about coverage will impact how the representation test is evidenced (briefing 2021-1837 refers). For example, if you decide that bargaining parties are able to expand coverage without having to retest the representation test (or public interest test), this could mean that bargaining parties have the ability to pull in other occupations or industries without the need to prove the triggers, thereby reducing the legitimacy of the triggers as a gateway to the FPA system.

25. The initiating union will be responsible for ensuring the accuracy of the 1000 or 10 per cent of workers they've evidenced as being in coverage. We will provide you further advice about what the consequences of intentionally or recklessly providing false or misleading evidence might be, in our upcoming briefing on offences and penalties.

We consider there to be two options on how to require unions to present evidence that the proportion of the workforce representation threshold has been met

a. **Option 1**: Prescribe what data sources unions must use to prove that the threshold has been met. For example, specifying that unions must use Australian and New Zealand Standard Classification of Occupations (ANZSCO) and Australia and New Zealand Standard Industrial Classification (ANZSIC) occupation and industry codes.

b. **Option 2**: Allow unions the discretion to decide what data sources they use to prove that the threshold has been meet.

We recommend allowing unions to decide what data sources they use to prove representation thresholds have been meet

26. In response to the FPA consultation, submitters almost universally opposed the use of ANZCO and ANZSIC classifications. Submitters said that the classifications are not fit for purpose as they fail to account for differences across industries and occupations.

27. On balance we consider that the most viable option is giving unions discretion on what data sources they evidence to prove the representation threshold has been met. This option strikes a suitable balance between certainty and flexibility for unions by allowing them the freedom to choose what data source they can utilise, and avoids unnecessary complexity. We have heard anecdotally that unions are likely to use data from a range of sources including their own data sets and information from the Household Labour Force Survey, Household Economic Survey, and using ANZSCO and ANZSIC classifications.

28. There are risks associated with requiring specific data sources to be used as evidence, namely that relevant and reliable data will likely not be available for all industry and occupation groups. This may hinder the unions' ability to prove that thresholds have been met through specified sources, and therefore act as an additional barrier to triggering an FPA.

We recommend that MBIE assess the representation test

29. The assessment of the representation test requires the assessment body to check that the evidence provided by the initiating union proves that the threshold of 1000 or 10 per cent of workers has been met.

30. We consider that the assessment body will need to be satisfied on the balance of probabilities that the evidence provided by the initiating union meets the representation threshold. If necessary, the assessment body should be able to verify the evidence presented by testing it against any opposing evidence that is later submitted.

31. There are two options for who could perform this function:

    a. Employment Relations Authority, or

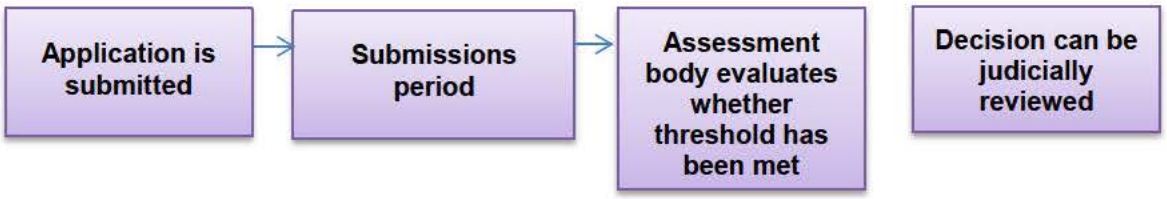
    b. MBIE.

32. On balance we consider MBIE to be the appropriate body to carry out this function due to the partial administrative nature of this decision. We do not consider this decision to be one that requires the level of judgement typically exercised by a judicial body such as the ER Authority, nor do we consider it to be cost-effective to legislate members of the ER Authority to perform this function.

Public interest and representation test assessment process

33. There are two options for how the assessment process may run:

    a. **Option 1**: An assessment process that includes a submissions stage



    b. **Option 2**: A streamlined assessment process

We recommend the assessment process for the public interest test and the 10 per cent representation test includes a submissions stage

34. We recommend that the assessment process provides an opportunity for public submissions to ensure the legitimacy of the FPA system, alignment with other assessment processes in the Employment Relations Employment Standards system and observance with the principles of natural justice in NZBORA.

35. We consider public notification and submissions period to be an important step in the assessment process in order to observe the principle of natural justice under NZBORA (**Annex Two**). NZBORA provides a right to the observance of natural justice in a broad range of circumstances. The requirements of natural justice vary depending on the particular context of the case, having regard to the importance of the rights and interests involved, but its purpose is to ensure people are dealt with fairly. Firstly, decision makers must be unbiased in respect of the matter before them. Secondly, decision makers must provide those affected by the decision with the opportunity to be heard.

36. An assessment process with a submissions stage also better aligns with the FPAWG recommendation, which stated that the assessor should invite comment from affected parties within a set time period, and with similar assessment processes in the ERES system. For example, in the Screen Industry Workers Bill, the ER Authority must, as soon as is reasonably practicable, give notice of any application to initiate bargaining, which includes inviting submissions within a set time frame (**Annex Three**).

37. We consider that a submissions period in both the public interest and the 10 per cent representation test will add legitimacy to the FPA system. It will give other stakeholders an opportunity to comment on whether the public interest test criteria are met. It will add legitimacy to the 10 per cent representation test by verifying that there is a mandate or social license for the FPA to be triggered. For the 10 per cent representation threshold, we consider it to be necessary that the assessor is able to seek alternative evidence to confirm the total number of workers proposed in coverage, and subsequently, that 10 per cent of the total number of workers supports the application.

We considered and dismissed a more streamlined process for the public interest test or 10 per cent representation test

38. While a streamlined process without public consultation would be faster and potentially less complex in the short term, we do not consider it to add to the legitimacy or consistency of the FPA system or align with the principles of natural justice for the public interest test or 10 per cent representation test. We consider that decision makers must provide parties who will be affected by the decision with the opportunity to be heard, particularly because once an FPA is initiated, there are significant implications for employers and employer representatives, including a duty to conclude bargaining.

However we recommend a streamlined assessment process for the 1000 worker representation test

39. A streamlined process is appropriate for the 1000 worker threshold, as we consider the names of the 1000 workers cannot be made publically available (for reasons of privacy), and therefore interested parties will have no basis on which to submit. This may raise issues in relation to the principles of natural justice, but we consider there is less room for differing interpretations for the 1000 worker threshold.

Costs

40. Confidential advice to Government

Next steps

41. 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. 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

Annexes

Annex One: Part 6A criteria for adding or removing classes of workers to Schedule 1A

Annex Two: New Zealand Bill of Rights Act – natural justice section

Annex Three: Screen Industry Workers Bill assessment process

Annex One: Part 6A criteria for adding or removing classes of workers to Schedule 1A

69A Object of this subpart

(1) The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person.

(2) The categories of employees—

(a) are the categories of employees specified in Schedule 1A; and

(b) are specified in Schedule 1A because they are employees—

(i) who are employed in sectors in which restructuring of an employer's business occurs frequently; and

(ii) whose terms and conditions of employment tend to be undermined by the restructuring of an employer's business; and

(iii) who have little bargaining power.

(3) The protection conferred by this subpart gives—

(a) the employees a right to elect to transfer to the other person as employees on the same terms and conditions of employment; and

(b) the employees who have transferred a right,—

(i) subject to their employment agreements, to bargain for redundancy entitlements from the other person if made redundant by the other person for reasons relating to the transfer of the employees or to the circumstances arising from the transfer of the employees; and

(ii) if redundancy entitlements cannot be agreed with the other person, to have the redundancy entitlements determined by the Authority.

Annex Two: New Zealand Bill of Rights Act – natural justice section

27 Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Annex Three: Screen Industry Workers Bill assessment process

39 Applications to be notified and submissions invited

(1) The Authority must, as soon as is reasonably practicable, give notice on its Internet site of any application to initiate bargaining received under **section 37**.

(2) The notice must—

(a) include a copy of the bargaining notice referred to in section 37(3); and

(b) invite submissions from any person; and

(c) state the date by which submissions must be received (being no earlier than 28 days after the date on which the Authority gives the notice); and

(d) state the manner in which submissions must be given (which may include by prescribed form); and

(e) state any minimum requirements that submissions must comply with (which may, if prescribed, be different requirements for different categories of person); and

(f) give the contact details of the Authority.

(3) The Authority may, if it considers it appropriate and in any manner it sees fit, extend the time within which submissions may be made.

40 Authority must decide whether to allow bargaining

(1) Once the submission period has closed, the Authority must decide whether to allow collective bargaining to be initiated.

(2) The Authority must approve an application if it is satisfied that there is sufficient support to do so.

(3) In this section, sufficient support means,—

(a) if the applicant is a worker organisation, that the Authority is satisfied (having regard to the application and any submissions it has received that comply with the requirements of section 39) there are, in total, more individuals who do the work of the occupational group to be specified in the coverage clause of the contract who want to bargain than who do not; and

(b) if the applicant is an engager organisation, that the Authority is satisfied (having regard to the application and any submissions it has received that comply with the requirements of section 39) there are more engagers who engage individuals who do the work of the occupational group to be specified in the coverage clause of the contract who want to bargain than who do not.

(4) For the purposes of determining the total number of individuals referred to in subsection (3)(a), the number of members of any relevant worker organisation is the total number of members of the organisation who do the work of the occupational group to be specified in the coverage clause of the contract.

(5) For the purposes of determining the total number of engagers referred to in subsection (3)(b), the number of members of any relevant engager organisation is the total number of members of the organisation who engage screen production workers who do the work of the occupational group to be specified in the coverage clause of the contract.