



BRIEFING

Fair Pay Agreements - Remedies and penalties

Date:	18 February 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1989

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Approve the proposed application of compliance orders and penalties within the Fair Pay Agreement system.	26 February 2021

Contact for telephone discussion (if required)				
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The following departments/agencies have been consulted

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

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Purpose

This briefing provides advice on the compliance responses available via the Employment Relations Authority (ER Authority) (in addition to those already proposed for the dispute resolution system) in relation to Fair Pay Agreements (FPA). It also provides advice on the proposed responses to instances of intentionally or recklessly providing inaccurate information in the initiation application for an FPA and not complying with the duty of good faith in relation to bargaining.

Executive summary

The design of the FPA system includes a number of features that are intended to help parties to be aware of the duties and requirements and encourage them to comply with them. These include the provision of training and funding to bargaining parties, support via a navigator, and access to the employment dispute resolution system.

The FPA system also includes proactive checks to ensure critical requirements are met before an FPA proceeds to the next stage. We will provide advice on the role of the Labour Inspectorate in relation to FPA's in a separate briefing.

In addition to these features, we recommend that the ER Authority has the same enforcement tools as it does under the Employment Relations Act 2000 (ER Act) and be able to:

1. **Order compliance** with any duties or requirements within the FPA system (i.e. issue a compliance order). This includes compliance with any orders or determinations made by the ER Authority in relation to an FPA.
2. **Apply financial penalties** in response to non-compliance with duties or requirements that are critical to the development and implementation of an FPA. This includes behaviour that deliberately obstructs the relevant regulatory agencies involved in the system.

We have also considered whether any additional consequences should be included in the system to incentivise compliance, or respond to non-compliance, in relation to:

1. **Intentionally or recklessly providing inaccurate information in the initiation application for an FPA** – We recommend including a penalty for this type of breach. In addition, we considered what this would mean for the progression of the FPA. If the issue is identified during the application process, the application should be declined. If it is identified during bargaining, bargaining must pause until the union has provided an updated application that meets the initiation requirements. If the issue is identified after the FPA is in force, then a party could apply for judicial review regarding the decision made by the government body that approved the initiation application. There is a risk that the validity of the FPA would be challenged and subject to the remedies of the Court. We consider the risk of this to be low.
2. **Not complying with the duty of good faith** – We recommend including a penalty for serious breaches of this duty. We also considered, but do not recommend, removing a union's or employer representative organisation's ability to be a bargaining party as a penalty. We consider this would raise issues in relation to the freedom of association, as it would affect a workers' or employers' ability to be represented by their chosen organisation.

We consider it more appropriate for bargaining teams and parties to attempt to resolve the issue themselves. If they cannot, then they can access the dispute resolution system (which includes the ability to seek a determination to set the terms and conditions if bargaining has become prolonged), or applying for a compliance order or penalty. However, the system should be clear that if an organisation no longer meet the requirements to be a bargaining party (e.g. they no longer have any members within coverage) then they can no longer be a bargaining party.

Recommended action

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

- a **Note** the powers proposed for the Employment Relations Authority within the Fair Pay Agreement (FPA) system are based on the powers it holds under the Employment Relations Act 2000.

Noted

- b **Agree** to enable the Employment Relations Authority to order compliance with any duties or requirements within the FPA system.

Agree / Disagree

- c **Agree** that the FPA system include penalties for the following offences:

- i. An employer breaching its duty of good faith duty by doing anything with intention of inducing employee not to be involved in initiation of an FPA, FPA bargaining or the FPA ratification vote.
- ii. An employer intentionally or recklessly failing to comply with the requirements to notify affected workers of the initiation, ratification and renewal of an FPA.
- iii. An employer intentionally or recklessly failing to provide the contact details of affected workers to the union(s) representing them.
- iv. A breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is:
 - deliberate, serious, and sustained; or
 - intended to undermine FPA bargaining; or
 - intended to undermine an FPA.
- v. An employer unreasonably withholding consent in relation to a request by a union representative to enter a workplace; or refusing to permit entry for, or obstructing, a union representative who is entitled to enter a workplace.
- vi. An employer failing to allow an affected worker to attend the minimum paid meetings they are eligible for in relation to FPA bargaining.
- vii. A party not complying with an FPA once it is in force.
- viii. An employer misclassifying an employment relationship as a contractor arrangement to avoid FPA coverage.
- ix. A union intentionally or recklessly providing inaccurate information as part of the application for an FPA to be initiated.

- x. A union, employer bargaining representative, or employer intentionally or recklessly providing inaccurate information as part of the ratification evidence.
- xi. Obstructing or delaying an Employment Relations Authority investigation or process that it is mandated to perform in the FPA system
- xii. Obstructing any Labour Inspector while the Labour Inspector is lawfully exercising or performing any power, function, or duty in relation to FPAs (if applicable).

Agree / Disagree

- d **Note** that further advice on the detail of the offence in relation to the misclassification of an employee, including where the burden of proof will lie, will be included in the upcoming briefing on enforcement.

Noted

- e **Note** if future policy advice includes recommendations for additional duties or requirements, we will consider as part of that advice whether any additional penalties should be added.

Noted

- f **Agree** to apply the same maximum penalties as per the Employment Relations Act 2000 of up to:

- i. \$10,000 for an individual
- ii. \$20,000 for a company or other corporation.

Agree / Disagree

- g **Agree** that the FPA Bill should clarify that industrial action in relation to FPA bargaining is not covered by the provisions in the ER Act that allow industrial action in relation to collective bargaining (i.e. industrial action in relation to FPAs is unlawful).

Agree / Disagree

- h **Agree** to provide:

- i. The Employment Relations Authority with the same enforcement powers (in relation to calling for evidence and information and summoning and cross examining witnesses) as under the Employment Relations Act 2000
- ii. The government body responsible for verifying initiation representation tests and ratification results (subject to upcoming advice) with powers to call for evidence and information.

Agree / Disagree

- i **Agree** to require:

- i. The union applying to initiate an FPA to keep a record of the information that the application is based on.
- ii. The bargaining teams responsible for holding the ratification vote to keep a record of the process undertaken and the votes collected.

Agree / Disagree

- j **Note** that you have indicated an intention to create a new FPA institution and we will consider what compliance tools and powers are appropriate for the new institution as part of the establishment work.

Noted

- k **Note** that we will provide advice on the proposed functions and powers of the Labour Inspectorate in relation to FPAs in an upcoming briefing.

Noted

- l **Agree** that if a union purposefully or recklessly included inaccurate information in an initiation application and it was identified during:
 - i. The application assessment – the application would be declined and the union must re-apply.
 - ii. During bargaining – bargaining must pause until the union has provided an updated application that meets the initiation requirements.

Agree / Disagree

- m **Note** that if a union purposefully or reckless included inaccurate information in an initiation application and it was discovered after the FPA was in force it could result in a judicial review of the government body’s decision to approve the initiation application.

Noted

- n **Note** that if a union or employer representative organisation no longer meets the specified requirements for being an FPA bargaining party then its approval to be a bargaining party would be revoked.

Noted



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

..... / /

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

1. A number of policy decisions are still needed on design features of the proposed Fair Pay Agreement (FPA) system, including some key features, in order to obtain sufficient decisions for PCO to begin drafting a Bill [refer briefing 2021-0627].
2. You have requested advice on the remaining design features be provided to you so that Cabinet agreement to the FPA system and approval to draft can be sought in April 2021.
3. The Fair Pay Agreement Working Group (FPAWG) considered that the existing dispute resolution and mechanisms under the Employment Relation Act 2000 (ER Act) should be used to enforce FPAs.
4. This briefing provides advice on additional compliance responses that we recommend should be available via the Employment Relations Authority.
5. In addition, the briefing provides advice on aspects of the system where we intended to consider additional consequences for non-compliance, but were unable to within the timeframes for that advice. This is in relation to potential consequences for:
 - a. Intentionally or recklessly providing false evidence in the application for of the FPA initiation
 - b. Not complying with the duty of good faith in relation to bargaining.
6. We have already provided advice on the dispute resolution system [refer briefing 1920-2210] and will be providing advice on the role of the Labour Inspectorate in relation to FPAs shortly.

The design of the FPA system includes a range of features intended to encourage compliance or respond to non-compliance

7. To ensure the FPA system achieves its intended outcomes, it should, where possible, focus on encouraging and supporting parties to comply. As such, the proposed design of the system already includes a number of features that are intended to help parties to be aware of the duties and requirements within the system and support them to comply with these.
8. The features of the system, where decisions have already been made, or are covered in briefings awaiting your decisions, that are relevant from a compliance perspective are:

a. Education and support

Education and support will be provided to support parties to be aware of their obligations and duties in relation to FPAs. This will include:

- i. Government education and information activities
- ii. The provision of funding to national level social partners to enable them to support unions and employer organisations involved in FPA bargaining
- iii. The provision of funding and training bargaining teams to support them to build their capability and capacity for bargaining
- iv. The ability to access a government funded navigator to assist bargaining teams throughout the bargaining process.

b. Proactive checks within the system

For critical requirements, we have recommended that the system include a proactive check to ensure these have been met before the FPA proceeds to the next stage. These are intended to avoid the risk of a stage occurring when it is not valid as the relevant requirements have not been complied with. The system will include a proactive check at the following stages:

- i. The initiation stage – A government body will check that the threshold for the representation test has been met. The ER Authority will assess whether the public interest test requirements have been met. We have recommended that applications based on a representation test demonstrating support by 10% (or more) of workers or the public interest test should include a submission process (noting, you have not yet made a decision on whether this should be required for the 10% representation test) This will provide an opportunity for anyone that has concerns regarding whether the required threshold has been met to raise them before the FPA is initiated [refer briefing 2021-1978].
- ii. Vetting of an FPA before ratification – The ER Authority will conduct a light touch assessment (vet) of FPA to ensure terms are compliant with minimum requirements under FPA legislation, as well as with limited wider key legal requirements [refer briefing 2021-1615].
- iii. Ratification – We are still to provide advice on the detail of this check, but the intention is that a government body will review the evidence of a successful ratification vote before the FPA is put into force.

c. Dispute resolution

Parties are able to access the dispute resolution system, which includes mediation and a determination process [refer briefing 1920-2210]. The intention is to utilise the existing dispute resolution, so the ER Authority will have the same powers and remedies in response to an FPA dispute as it has in relation to an employment dispute.

The ER Authority will be able to set the terms and conditions of an FPA in certain circumstances, including when a reasonable period has elapsed within which the parties have used their best endeavours to identify and use reasonable alternatives. Therefore, a potential consequence of bargaining parties or teams not meeting their good faith obligations is that it results in prolonged bargaining, which triggers the FPA to be set by determination [refer briefing 2021-1427].

9. We will be provide advice on the role of the Labour Inspectorate in relation to FPAs in a separate briefing.

Additional compliance responses proposed for the ER Authority

Under the ER Act, the ER Authority is able to order compliance, apply penalties, and require the recovery of wages

10. The ER Act establishes a number of duties and requirements that apply or relate to collective bargaining. These include:
 - a. A duty of good faith for parties to employment relationships and what this means during collective bargaining
 - b. Requirements during collective bargaining (e.g. in relation to the provision of information, initiation, ratification, the form and content of the agreements, and passing on the terms and conditions of a collective agreement where appropriate)

- c. Requirements in relation to the operation of unions (e.g. in relation to paid meetings and workplace access).
11. The ER Authority has the power, in specified circumstances of non-compliance with these duties and requirements, to order a payment of wages or other money in arrears, make a compliance order, or apply a financial penalty.
12. We recommend similar powers be granted to the ER Authority within the FPA system. This is covered in more detail below.
13. We acknowledge that issues have been raised regarding the effectiveness of the current set of compliance tools including via the ER Authority. This will be considered as part of the intended review of the employment dispute resolution process [refer briefing 2021-1104].
14. You have also indicated an intention to create a new FPA institution. We will consider what enforcement tools and powers are appropriate for the new institution as part of the establishment work.

Compliance orders should be available in relation to all duties and requirements within the FPA system

15. Under the ER Act, an employee, employer, union, or employer organisation who alleges that that a person has not observed or complied with the duties or requirements in relation to collective bargaining can apply to the ER Authority to make a 'compliance order'.
16. If the person does not comply in the specified time period, the Employment Court can order that the person in default be fined a sum not exceeding \$40,000, be sentenced to imprisonment for a term not exceeding 3 months, or that the property of the person in default be sequestered.
17. We recommend adopting the same approach in the FPA system, where the Authority is able to issue an order to take or cease action to prevent further non-compliance (referred to as a 'compliance order') for all the duties and requirements set within the system.
18. Consistent with the ER Act, the ability to issue compliance orders should also apply to any orders or determinations made by the ER Authority in relation to an FPA.

Penalties should apply for duties or requirements that are critical to the development and implementation of an FPA

19. In the ER Act, failure to comply with specified duties or requirements in certain circumstances can result in a penalty of up to \$10,000 for an individual or \$20,000 for a company or other corporation. Penalties can be applied to breaches of the following duties or requirements that relate to collective bargaining:
 - a. Failure to deal with each in good faith, where the failure was deliberate, serious, and sustained, or intended to undermine bargaining for a collective agreement, or intended to undermine a collective agreement.
 - b. Failure to meet the requirements in relation to a union representative's workplace access and to allow an employee to attend a union meeting (where provided for in the ER Act).
 - c. Breach of an employment agreement (which includes the terms and conditions in a collective agreement).

20. The ER Act also applies penalties for behaviour that undermines the operation of the system. These include:
- Failure to keep required records
 - Obstructing or delaying an ER Authority investigation
 - Breaching a term of a decision made by the Authority (in situations where both parties had requested a binding decision)
 - Non-attendance or refusal to co-operate during Employment Court proceedings
 - Obstructing any Labour Inspector while the Labour Inspector is lawfully exercising or performing any power, function, or duty.
21. We consider that in most situations the first response should encourage parties to address the compliance failure. However, if the non-compliance continues, or in situations where the impact of non-compliance has serious implications on the workability of the system, stronger responses, such as penalties, should be available.
22. When identifying which duties or requirements should include a penalty we considered the following factors:
- Whether the ER Act, Equal Pay Act 1972 (EP Act), Screen Industry Workers Bill (SIWB) includes a penalty for a similar duty or requirement
 - The importance of the duty or requirement to the effectiveness of the system
 - Whether a penalty is required to incentivise compliance in the first instance, as enforcement action taken after the fact (i.e. compliance orders) would be too late to sufficiently address the impact the non-compliance would have on the system
23. It is worth keeping in mind that for the duties and requirements that do not include a penalty provision there could still be a financial consequence if the person did not comply with a compliance order. The key difference is whether there is an ability to apply a penalty, without first providing an opportunity to comply.
24. Table 1 identifies the breaches of a duty and requirement, including behaviour that obstructs the operation of the system, where we recommend a penalty should apply.

Table 1: Breach of a duty and requirement where a penalty should apply.

Duty or requirement	Rationale for applying a penalty
An employer breaching its duty of good faith by doing anything with intention of inducing employee not to be involved in initiation of an FPA, FPA bargaining or the FPA ratification vote.	This is consistent with the approach under the ER Act and SIWB. NZCTU have expressed concern that employers will try to deter workers from being involved in bargaining or supporting an FPA at ratification. The system needs to include a deterrent.
An employer intentionally or recklessly fails to comply with the requirements to notify affected workers of the initiation, ratification and renewal of an FPA	This is not consistent with the ER Act, but there is a penalty within the EP Act in relation to the requirement to notify employees of a pay equity claim. This is another area where the NZCTU expressed concerns regarding the risk of employers attempting to undermine the system.

<p>An employer intentionally or recklessly failing to provide the contact details of affected workers to the union(s) representing them</p>	<p>This is consistent with the penalty within the ER Act for failing to share new employee information with a union (unless the employee objects). It is also an area where the NZCTU has raised concerns.</p>
<p>A breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is:</p> <ul style="list-style-type: none"> • deliberate, serious, and sustained; or • intended to undermine FPA bargaining; or • intended to undermine an FPA. 	<p>This is based on the penalty provided for in the ER Act in relation to collective bargaining. Effective bargaining is a critical aspect of the system.</p> <p>We considered whether the inclusion of a penalty might impact the willingness of organisations (particularly employer organisations) to be a bargaining party. As the penalty would only apply for poor conduct of a serious nature we consider this unlikely.</p> <p>We considered, but have not recommended, applying a penalty for a failure to represent all affected parties in good faith. This is an additional obligation placed on the bargaining teams for FPAs, which may take some time for them to work out how to effectively implement. Therefore, we think the more appropriate response would be to address it via a compliance order (which could then result in a penalty if it is not complied with).</p>
<p>An employer unreasonably withholding consent in relation to a request by a union representative to enter a workplace; or refusing to permit entry for, or obstructing, a union representative who is entitled to enter a workplace.</p>	<p>This is consistent with the ER Act, which includes penalties for unreasonably withholding consent for workplace access or refuses or obstructing workplace access when the worker representative is entitled to enter. The ability for unions to communicate with the affected workers is critical for them to be able to adequately represent them.</p>
<p>An employer failing to allow an affected worker to attend the minimum paid meetings that they are eligible for in relation to FPA bargaining.</p>	<p>This is consistent with the ER Act. The ability for unions to communicate with the affected workers is critical for them to be able to adequately represent them.</p>
<p>A party not complying with an FPA once it is in force.</p>	<p>This is consistent with the ER Act and is a critical for the system to improve outcomes for workers. It is important that there is a range of enforcement responses available to ensure employers comply with an FPA once it is in force.</p> <p>Note, we will provide advice on the role of the Labour Inspectorate in relation to FPAs in a separate briefing.</p>

<p>An employer misclassifying an employment relationship as a contractor arrangement to avoid FPA coverage.</p>	<p>To address the risk of regulatory arbitrage, we recommended that the system include an ability to penalise employers who misclassify an employment relationship as a contractor arrangement to avoid FPA coverage. You have not yet made a decision in response to this advice [refer briefing 2021-2154].</p> <p>Note: further advice on the detail of this offence, including where the burden of proof should lie, will be included in the upcoming briefing on enforcement.</p>
<p>A union intentionally or recklessly providing inaccurate information as part of the application for an FPA to be initiated.</p>	<p>Under the FPA system, a government body will have a role in verifying initiation applications. The inclusion of a penalty is intended to incentivise unions to take adequate care when collecting votes and not to include fraudulent votes or information (e.g. including worker who are not in coverage).</p>
<p>A union, employer bargaining representative, or employer intentionally or recklessly providing inaccurate information as part of the ratification evidence.</p>	<p>Under the FPA system, a government body is expected to have a role in verifying ratification results (subject to upcoming advice). The inclusion of penalty is intended to incentivise bargaining teams to take adequate care when collecting and counting ratification votes.</p> <p>This penalty also applies to employers, as employer bargaining representatives will be relying on employers to provide an accurate count of workers they have, as this impacts the weight of their vote.</p>
<p>Obstructing or delaying an ER Authority investigation or process that it is mandated to perform in the FPA system.</p>	<p>These replicate penalty grounds in the ER Act and are required in order to ensure the ER Authority, Employment Court and Labour Inspectorate are able to undertake their dispute resolution and enforcement functions.</p>
<p>Obstructing any Labour Inspector while the Labour Inspector is lawfully exercising or performing any power, function, or duty (if applicable).</p>	

26. For the breaches that include a penalty, we recommend aligning the maximum penalty amounts to those within the Employment Relations Act, which are:

- a. \$10,000 for an individual
- b. \$20,000 for a company or other corporation.

27. Under the FPA system industrial action is prohibited. We have not recommended including a penalty for this, as we consider it is already covered by the strike and lock-out provisions within the ER Act, as any industrial action in relation to an FPA would be unlawful.

28. We recommend that it should be explicit in the FPA Bill that industrial action in relation to FPA bargaining is not covered by ER Act provisions that allow industrial action in relation to collective bargaining. This would avoid the risk of parties thinking that FPA bargaining is the same as collective bargaining in this context.

The ER Authority will be able to order the recovery of wages under an FPA, as the FPA would set what was legally payable

29. Under the ER Act, the Authority is able to require an employer to pay any wages or other money where the employer has been in default of what they should be providing either under an employment agreement, contract of apprenticeship, or what is legally payable.
30. As an FPA will be set in secondary legislation, it will become the basis of what is legally payable for that industry or occupation. As such the ER Authority's ability to require wage payments in arrears would apply.

Enforcement powers

31. To ensure the relevant regulatory bodies are able to perform their roles effectively, the system will need to include appropriate powers for those bodies.
32. Under the ER Act, the ER Authority has the power to:
- a. call for evidence and information from the parties or from any other person:
 - b. require the parties or any other person to attend an investigation meeting to give evidence:
 - c. interview any of the parties or any person at any time before, during, or after an investigation meeting:
 - d. in the course of an investigation meeting, fully examine any witness:
 - e. decide that an investigation meeting should not be in public or should not be open to certain persons:
 - f. follow whatever procedure the Authority considers appropriate.
33. We recommend that:
- a. The ER Authority have the same powers as under the ER Act.
 - b. The government body that will be responsible for verifying the initiation representation test and potentially the ratification results (subject to upcoming advice) is provided with powers to call for further information and evidence to support an initiation application or ratification result. To support this verification process, the union that made the initiation application and the bargaining parties responsible for the ratification process should be required to keep full records of the process and votes that the results are based on.
34. The potential functions and powers of the Labour Inspectorate in relation to the FPA system will be covered in a separate briefing.

We have considered whether additional consequences should be included for non-compliance with particular aspects of the system

35. When we were developing advice on the initiation process and bargaining obligations we considered whether the system should include additional consequences for particular non-compliant behaviour, but were unable to consider this fully within the timeframes for this advice.

36. The section below provides advice on whether the system should include additional consequences for:
 - a. intentionally or recklessly providing inaccurate information in the application for an FPA initiation
 - b. not complying with the duty of good faith.
37. The upcoming briefing on the ratification process will include advice on the consequence of including inaccurate information in the evidence for ratification.
38. In considering the potential consequences, the main criteria we considered were:
 - a. Effectiveness: whether the option supports improved outcomes for workers
 - b. 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
 - c. Workability: whether the option supports the smooth operation of the FPA system.
 - d. Simplicity: the process is clear to all parties and avoids unnecessary complexity.
 - e. Balance: whether the option strikes a suitable balance between certainty and flexibility for participants.

If initiation was based on inaccurate information then it would impact the progress of the FPA

39. In the recent briefing on operationalising the representation and public interest initiation tests [refer briefing 2021-1978] we indicated that we would provide further advice on the consequences of intentionally or recklessly providing false evidence in the application for the FPA initiation [refer briefing 2021-1978].
40. In the section on penalties above, we have recommended that a financial penalty apply if a union or employer representative intentionally or recklessly provided inaccurate information to the government body as part of the application for an FPA to be initiated or evidence in support of the ratification results.
41. In terms of the impact on the progress or validity of an FPA we recommend that if it is discovered during:
 - a. The application process – the Application should be declined and the union required to re-apply again. If the union reapplies then the application should go to the back of the queue before it is considered again. We considered, but do not recommend, including a temporary ban on subsequent initiation applications to further deter unions providing applications based on poor information. However, this would have a negative effect on the effectiveness of the system (as it would delay workers in a particular industry or occupation having access to bargaining).
 - b. Bargaining – bargaining should pause and the initiating union be required to provide an updated application that meets the initiation requirements. Once this has occurred bargaining could resume.
42. If the issue is identified after the FPA is in force, then a party could apply for a judicial review regarding the decision made by the government body to approve the initiation application. There is a risk that this could result in the validity of the FPA being challenged and subject to the remedies of the Court. To mitigate this risk, the verification of the evidence supplied to meet the initiation test will need to be a robust process. The risk of this situation occurring

seems very low, as the initiation threshold is low and any concerns or issues with the initiation would likely be raised by affected parties during the initiation process or bargaining.

We considered, but do not recommend, removing an organisation as a bargaining party as a way to ensure compliance with bargaining obligations

Duty of good faith between bargaining parties and bargaining teams¹

43. We have recommended that a number of obligations be placed on bargaining parties and teams in order to promote efficient and effective bargaining and for the FPA to progress.
44. If bargaining parties and teams do not comply with their obligation of good faith in relation to bargaining, then the following remedies or consequences have been included in the system:
 - a. Bargaining parties on the same team could require one party to amend their behaviour in line with its bargaining process agreement (as we have recommended that the FPA system require that they develop one [refer briefing 2021-1725])
 - b. Bargaining parties or teams could access the dispute resolution system [refer briefing 1920-2210]
 - c. One bargaining party or team could apply to the ER Authority for a compliance order and/or penalty to be applied (for serious breaches) [as proposed in this briefing].
 - d. If the failure to comply results in prolonged bargaining that could trigger the terms and conditions to be set by the ER Authority [refer briefing 2021-1427].
45. The other consequence we have now considered, but do not recommend, is to remove a unions' or employer representative organisation's ability to be a bargaining party if they fail to comply with their duty of good faith in relation to bargaining.
46. Some stakeholders have raised concerns regarding the negative impact a bargaining party can have on bargaining if they are purposefully attempting to undermine it.
47. While we share this concern, we consider the removal of a bargaining party would raise issues in relation to the freedom of association. Removing a representative organisation from the bargaining team would mean that the workers or employers that were members of that organisation, and wanted it to represent them, would have other organisations representing them instead. We are also concerned about the risk that this could be used as a mechanism to get rid of a bargaining party that represented a viewpoint that was at odds from the other bargaining parties.
48. We discussed this idea with representatives of NZCTU who indicated that they considered it was more appropriate for bargaining teams to work out any issues themselves.
49. We agree with this view. If parties are unable to resolve the issues, then they can utilise the dispute resolution system or apply for a compliance order or penalty.
50. If a bargaining party no longer meets the requirements specified for being a bargaining party (e.g. they no longer had any members affected by the FPA), however, then their approval to be bargaining party should be removed. This would apply if it was discovered that the approval of their application to be bargaining party was based on fraudulent information. This is consistent with the approach proposed under the SIWB.

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).

The obligation to represent all affected workers or employers

51. We also considered whether a failure to adequately represent all affected parties should affect the ability of a union or employer representative organisation to be a bargaining party.
52. This would not be workable, however, as the obligation to represent all affected parties is intended to apply to the entire bargaining team so it would mean removing the entire bargaining team.
53. We consider the risk of bargaining teams not adequately representing all affected parties is better mitigated through the notification requirements and government activity to increase awareness of FPAs. This will enable workers and employers to identify if they are affected. If they are affected and not being sufficiently communicated with, then they can raise this with the relevant bargaining team and if necessary utilise the dispute resolution system or seek a compliance order.

Next steps

54. We will continue to provide advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval in April to draft the Bill. The updated timeframes for this advice will be provided in the progress report contained in the weekly report.