



## BRIEFING

### Fair Pay Agreements: How coverage will be determined during enforcement

<b>Date:</b>	23 June 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-3561

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister of Workplace Relations and Safety</b>	<p><b>Agree</b> for the purpose of determining whether or not an employee is within coverage of a Fair Pay Agreement:</p> <p>EITHER</p> <p>a. the existing employment dispute resolution and enforcement processes are applied;</p> <p>OR</p> <p>b. the Labour Inspectorate is empowered to make a decision on whether or not an employee is within coverage.</p>	28 June 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	██████████	✓
Ellen Stairmand	Policy Advisor, Employment Relations Policy			

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 Withdrawn           |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

Provides advice on whether the Labour Inspectorate in addition to the Employment Relations Authority should be empowered to determine whether or not an employee is within coverage of a Fair Pay Agreement.

### Executive summary

Cabinet has authorised you to make decisions on how coverage will be determined for the purpose of enforcing Fair Pay Agreements (FPA).

We recommend the existing employment dispute resolution and enforcement processes are applied.

Under this option, employees would have access to the Employment Relations Authority (Authority) to determine whether or not they are within coverage. In addition, if an employee believes they are within coverage, they may request enforcement from the Labour Inspectorate if they are not receiving the FPA minimum entitlements.

This option recognises the different skill sets of both bodies and enables the Labour Inspectorate to investigate and take enforcement action for relatively simple, clear cut cases. However, for more complex cases, the Authority has the capability to interpret the application of a coverage clause of an FPA.

An Authority determination will provide greater clarity for coverage related questions and reduce disputes over time.

Legal professional privilege

A key function of the Labour Inspectorate is to provide education and guidance, this option provides an appropriate solution to balance misunderstandings and actual disputes without overloading the Labour inspectorate.

Relative to the existing dispute resolution process, if the Labour Inspectorate is empowered to determine whether or not an employee is within coverage we believe the risk to the Crown and the demand for the Labour Inspectorate's resourcing is likely to increase and the development of precedent which helps to provide certainty to parties will be delayed.

### Recommended action

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

- a **Note** the Labour Inspectorate is able to investigate whether an employer is compliant with any provisions of an Act that is within the Labour Inspectorate's jurisdiction.

*Noted*

b **Note** that after investigating, the Labour Inspectorate may use a lower level enforcement tool such as an improvement notice.

*Noted*

c **Note** that Cabinet agreed that the Fair Pay Agreement legislation would be an Act within the Labour Inspectorate's jurisdiction.

*Noted*

d **Agree** for the purpose of determining whether or not an employee is within coverage of a Fair Pay Agreement:

EITHER

i. the existing employment dispute resolution and enforcement processes are applied (MBIE's preferred option);

*Agree / Disagree*

OR

ii. the Labour Inspectorate is empowered to make a decision on whether or not an employee is within coverage.

*Agree / Disagree*

e **Note** if the Labour Inspectorate is empowered to make a decision on whether or not an employee is within coverage, further design decisions will be required in order to draft the legislation. For example, the additional investigative powers are needed to gather information needed to make determinations.

*Noted*



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

23/06/2021

Hon Michael Wood  
**Minister for Workplace Relations and Safety**

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## Background

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1. You have received approval from Cabinet to begin drafting the Fair Pay Agreement (FPA) legislation. In order to draft the legislation, the Ministry of Business Innovation and Employment (MBIE) is providing a series of briefings on remaining issues.
2. FPA coverage is one of the key challenges in the FPA system. It is vital for the workability of the system that coverage is clear enough for parties to understand if they are in or out of the proposed bounds of an FPA. However, where coverage is not clear or is disputed, a mechanism that enables a quick determination of whether or not an employee is within coverage of an FPA is required to support the smooth operation of the FPA system.
3. You have asked us to explore the viability of the Labour Inspectorate being empowered to make decisions on coverage of an FPA if sufficient safeguards are in place. Accordingly, this briefing compares this possible approach with the existing enforcement processes in the employment relations and employment standards (ERES) regulatory system.
4. You have indicated that, over the long term, a new regulatory institution will be developed to undertake the broader functions and responsibilities of the FPA system. This advice has been prepared on the understanding that the mechanism for making decisions on coverage will potentially be an interim solution to support the smooth introduction of the FPA system until a new institution is established.
5. This briefing does not consider whether the Labour Inspectorate should have a role in determining whether a person(s) is an employee or contractor. This briefing assumes the existing dispute resolution processes are used to determine that aspect of coverage. That is, the Employment Relations Authority (Authority) may determine whether or not a person(s) is an employee<sup>1</sup>. We note this issue is being considered as part of the 'Better Protections for Contractors' work programme.

### **Parties will have a range of questions about FPA coverage, of varying complexity**

6. The coverage of an FPA will be proposed during initiation as either an:
  - a. occupation Fair Pay Agreement
  - b. industry Fair Pay Agreement.
7. There are a number of steps to clarify coverage of an FPA before bargaining begins:
  - a. The MBIE Chief Executive will check the description of the occupations and/or industries proposed to be in coverage for clarity. MBIE would work with the initiator of an FPA to ensure the described boundaries are sufficiently clear for impacted parties to identify whether they are in coverage.
  - b. Initiating union(s) will be required to notify and communicate with employers and employees within coverage throughout the bargaining process.
8. While these steps should increase the clarity at initiation, coverage can continue to change during bargaining and is not confirmed until it has been converted into secondary legislation. Once an FPA is in force, we still expect there will be questions about coverage raised.
9. Issues regarding coverage of an FPA will vary in complexity. For example, a relatively simple issue could be a gym owner that requests clarity around whether or not their gym cleaners are covered under an occupational 'cleaners' FPA. A more complex situation could be an employee whose job description contains work covered by different FPAs. For example, an

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<sup>1</sup> *A Labour Inspectorate (Ministry of Business Innovation and Employment) v. Gill Pizza Ltd* [2020] NZCA 192. Note – Gill Pizza Ltd has applied to the Supreme Court for leave to appeal.

employee in a motel is both a receptionist and a cleaner and they are unsure if they are covered under an occupational FPA for cleaners or an occupational FPA for administration staff.

10. The number of questions raised about coverage will be influenced by the nature of the determination process. If the process provides a low cost, fast, accessible and credible outcome, employees are more likely to use the system to establish whether or not they are within coverage.

### **There are existing dispute resolution mechanisms in the employment relations and employment standards regulatory system**

11. The Fair Pay Working Group recommended maintaining the existing dispute resolution processes under the ER Act with additions or simplifications where appropriate.
12. The two main avenues under existing legislation are:
  - a. employees can lodge an action directly with the Authority
  - b. for minimum entitlements, the Labour Inspectorate is empowered to commence an action on behalf of an employee(s).

#### *Employment Relations Authority*

13. The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.

#### *The Labour Inspectorate*

14. The Labour Inspectorate has a general role of enforcing compliance with the obligations specified in legislation within its jurisdiction.
15. Part of the Labour Inspectorate's role is to determine whether provisions in the Acts within their jurisdiction are being complied with and taking reasonable steps to ensure compliance. In most instances where there is an isolated breach of a provision in an Act, a lower level enforcement tool will be used. The tools available are:
  - a. improvement notices
  - b. enforceable undertakings
  - c. infringement notices.
16. A number of FPA terms will form new minimum employment entitlements that the Labour Inspectorate can enforce in accordance with the Employment Relations Act 2000 (the Act).

### **Comparison: Australia's Fair Work Ombudsman cannot determine the coverage of Modern Awards**

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17. Australia's Modern Awards system operates under the Fair Work Act 2009. Modern Awards are industry or occupation based minimum pay rates and conditions of employment.
18. Similar to the employment dispute resolution process under the ERES regulatory system, there are various dispute resolution processes under the Fair Work Act. A claim can be lodged directly with the Fair Work Commission for any employment related dispute. For minimum terms, the Fair Work Ombudsman (FWO) is empowered to commence action on behalf of an employee.

### *Determination of coverage*

19. The Fair Work Commission cannot determine the coverage of an award. Instead, employers and employees are directed to the FWO's education and guidance or to seek legal advice.
20. Issues surrounding Modern Award coverage are tackled through a preventative compliance approach. Online education, advice and guidance is provided by the FWO. For example, the 'Find My Award' tool provides a search function by occupation or industry and presents the most applicable Modern Award.
21. For traditional enforcement, the FWO may bring court proceedings to enforce a range of provisions of the Fair Work Act. However, the FWO will only commence proceedings if it considers there is sufficient evidence to do so and it would be in the public interest. This assumes that in the case of a coverage dispute, the FWO would be confident beyond reasonable doubt that a specific award applies. Given the subjective nature of coverage, applicants will likely be directed to seek legal advice.
22. Under the Modern Awards, many of the issues surrounding coverage will be resolved through education, advice and guidance. For more complex cases, only the court can make a determination whether or not an employee is within coverage of a specific Modern Award.

### **Identified options**

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23. We have considered an option based on the existing powers and functions in the ERES regulatory system against the option you asked for advice on, to empower the Labour Inspectorate to determine whether or not an employee is within coverage of an FPA. Most of the dispute resolution and enforcement system would be the same under the two options but there are some important differences between them.

#### **Option one: Existing dispute resolution and enforcement processes are implemented to determine FPA coverage**

24. If a process similar to the current ERES system is used for determining coverage, an employee would be able to lodge a case directly with the Authority to determine whether or not they are within coverage of an FPA. In addition, if an employee believes they are within coverage of an FPA they may directly request enforcement from the Labour Inspectorate if they are not receiving the FPA minimum employment entitlements.
25. Under this option, the Labour Inspectorate cannot explicitly determine coverage. However, by taking enforcement action (such as issuing an improvement notice) they would be, by default, implying they have good reason to believe an employee is within coverage of an FPA.
26. If the Labour Inspectorate decides to take on an enforcement case, they are able to use their investigative powers (entering premises, interviewing people, and viewing/copying documents) to obtain information that would allow them to ascertain whether or not an employee is within coverage of an FPA.
27. The Labour Inspectorate utilises a risk-based assessment in order to prioritise whether or not they take enforcement action. The clarity of coverage is one element of the risk-based assessment. If a case is clear cut, the Labour Inspectorate may decide to take enforcement action as the risk of appeal is low. However, for questionable coverage cases, they face a choice between taking enforcement action in uncertain circumstances which may be appealed or seek a determination from the Authority before deciding whether to take enforcement action. Both of these situations may result in costly processes.

## Option two: The Labour Inspectorate is empowered to decide whether or not an employee is in coverage of an FPA

28. Under this option, the Labour Inspectorate would be empowered to make a determination on whether or not an employee is within coverage of an FPA in addition to their enforcement functions.
29. Under this option, an employee would still be able to lodge a case with the Authority for a determination.
30. The process for the Labour Inspectorate to make an explicit determination on coverage will introduce the risk of judicial review. The complexity of some of the coverage questions will increase the likelihood that the Labour Inspectorate will be expected to make more determinations or take enforcement action in more complex situations. This will increase the risk of appeals of the Labour Inspectorate's coverage determinations.
31. There are some choices about the design of this option which would determine how it would operate and its impact. For example, how applications for a determination would be considered alongside other issues in the prioritisation process. Applications for coverage determination may not be prioritised unless they meet the risk-based criteria.
32. Other design choices that will be needed under this option include what investigative powers are needed to issue a determination and who can seek a determination of coverage and in what circumstances.

## Criteria

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33. For the purpose of this briefing, the criteria have been narrowed to the following:
  - a. *certainty*: does the option ensure a credible determination can be reached
  - b. *timeliness*: does the option provide a quick and simple process that avoids unnecessary complexity
  - c. *low cost/accessible*: does the option provide a low cost option for employees and employers
  - d. *cost effective/efficient*: does the option enable coverage questions to be answered in a way that represents good value for money.
34. We have also evaluated the potential risks of each option and considered whether or not they can be mitigated.

## Analysis of options

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35. We know from other sectoral/occupation based systems that questions of coverage can be significant points of dispute. Cases may come to either the Labour Inspectorate or the Authority where there is a difference of view between an employee or a union and an employer about whether an FPA applies or potentially which of two FPAs may apply. The question will most likely arise as part of an enforcement action but parties may also seek a clarification of the coverage question independent of immediate enforcement action.
36. In practice the differences between the two options are slight. The avenue for employees or employers applying to the Authority for a determination of coverage and clarification of relevant terms is available under both options, as is the ability for the Labour Inspectorate to enforce minimum entitlements and early resolution services. We have explored the nuanced differences between the impacts of the two options in order to highlight the most appropriate solution.

37. The key differences between the two options are:

***The timeliness of decisions for the parties***

38. Under option 2, it is likely that a determination by the Labour Inspectorate will be seen as a quicker, cheaper option for the parties than taking a case to the Authority. We think this will only be true in a subset of cases. In most cases, option 2 will simply create another layer of appeal.
39. The Labour Inspectorate will still have to triage cases using their risk-based criteria. It is likely that many FPA coverage questions would not meet the threshold for Labour Inspectorate action, leaving the Authority as the only avenue for pursuing a dispute anyway. The impact on timeliness would depend on the additional level of resourcing provided. If the Labour Inspectorate was under-resourced compared to the expected volume of applications, the result is likely to be either significant queuing of applications, or a reduction in other Labour Inspectorate functions or some combination of both.

40. Legal professional privilege



***The capability and skillset differences between the two bodies***

41. The Labour Inspectorate's primary function is to ensure minimum employment standards are complied with by identifying and investigating breaches and taking enforcement action. While these investigations do require discretionary decision making skills, the baseline (minimum standards) is constant. Therefore, the nature of these investigations is relatively simple. That is, there is either a breach or not.
42. The Authority's key function is to make determinations about employment relationship problems including disputes about the interpretation and application of an employment or collective agreement or the law. These determinations are complex and require weighing up a number of factors to arrive at a decision. This is a different skill set compared to the Labour Inspectorate. Interpreting how the law (coverage) applies sits squarely within the Authority's skillset.
43. Option one recognises the different skillsets of both bodies and enables the Labour Inspectorate to investigate and take enforcement action for relatively simple, clear cut cases. However, for more complex cases, the Authority has the capability to interpret the application of a coverage clause of an FPA to any given set of facts and make a determination.
44. Option two requires the Labour Inspectorate to act outside of their existing skillset, capability and the established function of the regulator (to enforce the law). It would require them to go beyond making decisions about enforcing the law, to interpreting and applying the law to a

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<sup>2</sup> Silver Fern Farms Ltd v Lewis [2015] NZERA Christchurch 192 at [23]

<sup>3</sup> Richard Lewis (Labour Inspector) and Silver Fern Farms Limited [2016] NZEmpC 103 EMPC 392/2015.



given fact set and making determinations about how the law applies. This could have significant consequences, such as incorrect determinations being made or reducing the time it takes to process a case and backlogging the system. To mitigate this, Labour Inspectors would need significant training about how to interpret and apply the law, so that they are capable of making determinations. Additional resourcing would also be required to ensure cases are processed quickly and correctly.

45. However, if the Labour Inspectorate was appropriately resourced under option two, the function of the Authority in relation to determination of FPA coverage will effectively be duplicated. The Authority would act as an appeals body to determinations of the Labour Inspectorate (essentially adding in a further layer of decision-making into the process).

***The speed at which decisions will improve certainty for parties***

46. Determinations made by the Authority do not formally set precedent which would be taken into account for future decisions. However, an Authority determination would provide greater clarity for coverage related questions and reduce disputes over time. Having the Labour Inspectorate making coverage decisions under option two, could disrupt this process and delay the clarity that comes with published decisions.

Legal professional privilege

***The expected volume of cases***

50. Under option two, employees and employers are more likely to seek a determination. The perception would likely be that the Labour Inspectorate provides a free and relatively fast service. This may encourage employees and employers to seek a determination with the Labour Inspectorate rather than the Authority.
51. One factor that could potentially increase the volume of cases, is that the Labour Inspectorate can only pursue an action in respect of minimum employment entitlements. Only a subset of an FPA's terms will be minimum employment entitlements. If an employer did not comply with other (non-employment entitlement) terms of the FPA, the employee may need to take a separate action, again increasing the pressure on the dispute system.
52. It is also possible that employers will seek a determination of coverage from the Labour Inspectorate proactively in order to provide certainty and as a way of mitigating future risk. However, such actions pass future risk onto the Crown as well as increasing the volume of determinations needed.
53. Option one reflects a similar approach to the Australian Modern Awards, where a preventative compliance approach is taken to deal with coverage related issues.

54. The use of information and education in the form of online tools alleviates the inevitable burden associated with a new system and questions that may arise. Given a key function of the Labour Inspectorate is to provide education and guidance, option one provides an appropriate solution to balance misunderstandings and actual disputes without overloading the Labour Inspectorate.
55. Some funding has been allocated in the Budget for the Authority to provide the range of additional services required for FPAs including determination of coverage. The 2021 FPA Budget Bid did not account for the Labour Inspectorate being empowered to make coverage determinations. Additional funding through Budget 2022 would be required to support the extra resourcing requirements of option two.

## **We recommend applying the existing dispute resolution and enforcement processes to determine FPA coverage**

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56. Relative to option one, we believe option two is likely to increase the risk to the Crown, increase the demand for Labour Inspectorate resourcing to a level that will potentially require tradeoffs with other Labour Inspectorate functions, and slow down the development of precedents which would help to provide certainty to the parties. It is possible that in a subset of simple cases, a Labour Inspectorate determination could improve the timeliness of enforcement action. However, we think that the triaging, queuing and the likelihood of appeals means the improvement in timeliness would not be universal.
57. We recognise that timeliness is a challenge under option one. It may be possible to explore ways of improving the timeliness of coverage questions at the Authority such as a fast-track system.
58. A fast track system would have further implications such as extra resourcing as well as needing to be legislated. Thought would also need to be given to the relative priority the Authority should be expected to accord to the various employment issues that fall within its mandate (i.e. is the determination of FPA coverage the most appropriate issue to prioritise?).
59. Focussing on the timeliness of the Authority to resolve cases may only be a temporary solution. For example, further exploration may identify that access to education and guidance will have a greater influence on the volume of disputes as employers and employees are easily able to establish whether or not they are within coverage.
60. It will be possible to return to the question of timeliness as part of the development of any new FPA institution.

## **Next steps**

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61. Over the coming weeks we will continue providing advice on the remaining aspects of the FPA system and developing drafting instructions.