MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Provision of information during bargaining

Date:	8 July 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-4266

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	Agree that the information provision requirements for collective bargaining will apply between FPA bargaining sides with one amendment. Agree that it will be voluntary for employers to provide information to their bargaining representatives.	16 July 2021

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

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- ☐ Withdrawn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

Following an initial discussion with you, this briefing seeks your agreement on whether any modifications are required to the information provision requirements in the Employment Relations Act 2000 (ER Act) when applying them in the Fair Pay Agreement (FPA) system.

Executive summary

The provision of information between bargaining sides

In the ER Act, the duty of good faith in bargaining for a collective agreement requires a union and employer to provide to each other, on request, information that is reasonably necessary to support or substantiate claims, or responses to claims, made for the purposes of bargaining (section 32). The ER Act also establishes requirements for the provision of this information (section 34).

In the FPA system these requirements would apply between the employee bargaining side (i.e. unions) and employer bargaining side (i.e. employer associations), not between unions and employers. We consider the requirements established under the ER Act are suitable and adequate, with the amendment proposed below, for the provision of information between bargaining sides in the FPA.

The Employment Court has identified that the ER Act does not include a clear answer to what happens if bargaining sides are unable to agree on an independent reviewer for reviewing confidential information. To avoid this lack of clarity in the FPA system, we recommend that if an independent reviewer is required during bargaining, bargaining sides should be required to agree to appoint one (if they had not already), and that they can access dispute resolution services if they cannot agree on who to appoint.

Provision of information between employers and their bargaining representatives

The requirements in the ER Act are focused on the provision of information between bargaining sides. In FPA bargaining, it is unlikely the employer bargaining side will have complete information about the current terms within that industry or occupation, so will need to collect this type of information from employers.

We recommend that it should be up to employers to voluntarily provide information to their bargaining representatives. Employers would have an incentive to provide views and/or information to the employer bargaining side to improve their bargaining strategy. We do not recommend requiring employers to provide information at the request of the employer bargaining side. It would be difficult to enforce, so may create compliance issues without increasing the information obtained. It would also increase the amount of compulsion in the system and further engage issues in relation to freedom of association and complexity to the system and legislation.

We also considered, but do not consider it is necessary, for the FPA legislation to specify requirements and obligation for when employers voluntarily provide information to the employer bargaining side. If the information provided was misused, employers will be able to seek recourse through existing laws in the courts.

Recommended action

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

a **Agree** that the requirements established under s34 of the Employment Relations Act 2000, relating to the provision of information during collective bargaining, should apply between the employee and employer bargaining sides during FPA bargaining, with the following amendment:

i. If a request for information includes information that the bargaining side required to provide it considers should be confidential, the bargaining sides must agree to appoint an independent reviewer (if they have not already done so).

Agree / Disagree

b **Agree** that it will be up to employers to voluntarily provide information to the employer bargaining side representing them (i.e. they will not be required to provide it) to inform bargaining.

Agree / Disagree

c **Note** if employers were required to provide information to the employer bargaining side representing them, further policy work would be required to develop safeguards to ensure the information required was limited to what is reasonably necessary and that there was adequate protection of confidential information.

Noted

d **Note** we consider information voluntarily provided by employers to the employer bargaining side is adequately protected by existing laws.

Noted

e **Agree** that the FPA legislation should not include any process requirements or obligations for when employers provide information to their bargaining representatives.

Agree / Disagree

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

08 / 07 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. The duty of good faith in bargaining for a collective agreement requires a union and employer to provide to each other, on request, information that is reasonably necessary to support or substantiate claims, or responses to claims, made for the purposes of bargaining (s32(1)).

2. Section 34 of the Employment Relations Act (ER Act) establishes requirements and processes for the provision of this information. In particular it:

    a. Requires the request to be in writing, specify the nature of the information requested in sufficient detail to enable the information to be identified, specify the claim or the response to a claim in respect of which information to support or substantiate the claim or the response is requested, and specify a reasonable time within which the information is to be provided.

    b. Establishes a mechanism where information can be provided to an independent reviewer if the union or employer providing it considers it should be treated as confidential information. The person acting as the independent reviewer must be appointed by mutual agreement of the union and employer. The independent reviewer can decide whether and to what extent the information should be treated as confidential. If they decide that the information should be treated as confidential, they must decide to what extent the information supports or substantiates the claim or the response to a claim and advise the union or employer concerned of this decision in a way that maintains the confidentially of the information. They must also answer any questions from the requester in a way that maintains the confidentiality of the information.

    c. Unless the union and employer agree otherwise, information provided and answers provided must be used only for the purposes of the bargaining concerned, treated as confidential, and must not be disclosed by those persons to anyone else, including persons who would be bound by the collective agreement being bargained for.

3. Cabinet has agreed that the same requirements for the provision of information as are in the ER Act (s34) will apply between bargaining sides during FPA bargaining, with any necessary modifications required to reflect the nature of the FPA system.

4. We have considered what modifications are required to reflect that in the FPA system the employer bargaining side will be bargaining on behalf of employers, which differs from collective bargaining where employers usually represent themselves. Officials discussed potential issues associated with information provision during FPA bargaining with you previously during a regular FPA catch-up. This briefing provides our advice on this matter following our further consideration.

Provision of information between bargaining sides

5. In general we consider that the requirements established under section 34 of the ER Act are suitable and adequate for the provision of information between bargaining sides in the FPA system. Representatives of BusinessNZ and NZCTU have indicated that they consider the duty of good faith obligations combined with the requirements established under section 34 are appropriate for FPA bargaining. We have also discussed this with public sector colleagues with experience in collective bargaining and pay equity bargaining, who similarly agreed.

6. Given the different framework for representation under the FPA system we consider it is, however, important to clarify how they will apply in the FPA system. There is also one potential gap in the ER Act requirements (in relation to the appointment of an independent reviewer) that it would be prudent to address in the FPA system, rather than carry over.

The requirements will apply between the employee bargaining side and employer bargaining side

7. The requirement for providing information in the ER Act apply between unions and employers, as the parties bargaining the collective agreement. Applying the equivalent concept means the requirements will apply between the employee bargaining side (i.e. unions) and employer bargaining side (i.e. employer associations), not between unions and employers.

8. We do not consider it appropriate, or in keeping with the intent of the provisions in the ER Act, for the union to be able to request information directly from employers (bypassing the employer bargaining side). Allowing the union to request information directly from an employer would mean that the information requested was not directly linked to a claim made by the employer bargaining side and would undermine the role of the employer bargaining side as the representative during bargaining.

Each bargaining side can only request information that the other bargaining side have based their claims (or responses to claims) on

9. We consider the limiting of information requests to information "reasonably necessary to support or substantiate claims or responses to claims" means the request should not require the employer bargaining side to obtain information from the employers if it does not already hold that information.

10. An Employment Court judgement[1] has clarified that:

    a. "Claims" (and "responses" to claims) include assertions of fact, because facts are possible to support or substantiate. An assertion of fact made without substantiation would be misleading and deceptive.

    b. The provision does not permit a party to collective bargaining to require the provision of information in relation to a claim it has made itself.

    c. Information is "reasonably necessary" if it is sufficient to demonstrate to an objective standard that the claim is well founded, but not necessarily any more. It does not mean "all possibly relevant information". There must be an element of proportionality: "the response required to a request for information should not be out of proportion to the importance of the claim in the bargaining".

    d. A claim may be withdrawn, and in that case the right to request information in relation to that claim must lapse.

11. In considering what information is "reasonably necessary" the Employment Court indicated that the scheme of the ER Act is that the bargaining process should operate efficiently and effectively to achieve a collective agreement within a reasonable time after the initiation of bargaining. Therefore, the bargaining process should not be diverted or unduly delayed by obligations imposed on the parties in the course of it[2]. If the employer bargaining side was required to attempt to collect additional information from employers, which they had not already obtained to inform their bargaining strategy, this would create a significant burden on them and could unduly delay bargaining.

12. Where a claim has been made during bargaining, the other side could request the information that the claim is based on, to determine to what extent it is substantiated. If the claim was based on limited information, then that is what that side would need to provide to

[1] *Auckland District Health Board v New Zealand Resident Doctors Association* [2010] NZEmpC 148.
[2] *Auckland District Health Board v New Zealand Resident Doctors Association* [2010] NZEmpC 148.

the other side or withdraw the claim. The bargaining side that received the request could seek further information to help substantiate the claim, but would not be required to.

Under the ER Act it is unclear what happens if bargaining sides don't agree who to appoint as the independent reviewer

13. The Employment Court[3] raised an issue that there is no clear answer in section 34 or elsewhere in the ER Act to what happens if parties are unable to agree on an independent reviewer for reviewing confidential information. The Court identified this as a gap in the legislation and urged the legislature to address this issue, because, as the legislation stands, it has the potential to allow one party to either delay the bargaining process indefinitely or to defeat the purpose of the requirement to provide information during bargaining

14. It would make sense to address this gap rather than bring it over to the FPA system. One way to do so would be to require bargaining sides to agree on who to appoint as an independent reviewer. Currently bargaining sides have a 'best endeavours' requirement to agree to a bargaining process agreement. Therefore, a requirement to agree an independent reviewer would be the only process aspect that bargaining sides would be required to agree.

15. Including this type of requirement would ensure that bargaining sides could access dispute resolution services (eg, mediation) if they could not agree. If bargaining sides could still not agree, then the ER Authority could made a determination on who should be appointed (based on the submissions of both sides), which the bargaining sides would need to bear the cost of.

16. Appointing an independent reviewer would create additional costs for bargaining sides. The size of the costs would depend on who is appointed and how often their services are utilised. These costs could be considered to be part of the standard costs associated with bargaining, as this role is included in the ER Act for collective bargaining. The proposed difference is that in the FPA system this role would be compulsory. This could be partly mitigated by only requiring bargaining sides to appoint an independent reviewer if one was required.

17. We, therefore, recommend that the system include a requirement that bargaining sides must agree to appoint an independent reviewer if one is required during bargaining. They could choose to appoint someone to this role at the start of bargaining or to wait to see if this role was necessary.

18. We considered, but do not recommend, the government providing an independent reviewer or providing a default independent reviewer if bargaining sides can't agree on one. If the government provided this service (or funded it) there is a risk that it would be utilised more, as there would be less incentive to consider whether it is necessary. Providing (or funding) this type of function for all the FPAs being bargained is likely to create substantial costs, which was not included in the 2021 FPA budget bid. If the government was to provide it, additional funding would need to be sought. We do not consider it should be provided as part of the bargaining support services provided during bargaining as it would require additional resourcing (particularly as funding is only available for four FPAs) and is not in line with the expertise of Mediation Services.

Provision of information between employers and their bargaining representatives

19. The requirements in the ER Act are focused on the provision of information between bargaining sides, not the provision of information to the bargaining sides from those they represent (if required).

[3] *Auckland District Health Board v New Zealand Resident Doctors Association* [2010] NZEmpC 148.

20. On the employee side this does not appear to be required. Unions have been able to represent their members adequately in collective bargaining without the ER Act specifying any requirements in relation to this. When bargaining an FPA, the union(s) will also need to seek input from non-members. The FPA system includes mechanisms to support this; in particular, the provision of paid meetings during FPA bargaining.

21. On the employer side, the bargaining parties will need some understanding of current employment terms and affordability of higher terms to inform their bargaining strategy and provide a basis for them to make claims to, or respond to claims from, unions during bargaining. It is unlikely the employer bargaining side will have complete information about the current terms within that industry or occupation. The expectation is that they will undertake some information gathering from employers (eg a survey) to inform their bargaining position.

We recommend that it should be up to employers to voluntarily provide information to their representatives

22. We previously discussed with you the possibility of requiring employers to provide information to the employer bargaining side representing them where requested. This would be a way to address the risk that employers do not provide sufficient information for the employer bargaining side to effectively bargain.

23. We have considered this further and no longer consider it would be appropriate or effective. Placing a positive duty on employers to provide information would be onerous on employers and difficult to enforce. In practice, it is likely to create compliance issues without substantially increasing the information obtained. For example, smaller employers may not have the capacity to comply with a request for information on top of running their business. Any enforcement by the employer bargaining side is likely to undermine their relationship with employers.

24. Including this type of requirement would have implications in domestic human rights law and international human rights obligations as it would:

    a. Increase the amount of compulsion in the system, which could further challenge the principle of voluntary collective bargaining.

    b. Further engage issues in relation to freedom of association. As well as being represented by parties they may have no affiliation with, employers would be compelled to provide information to them.

25. Creating a legislative requirement would also add complexity to the system and legislation, as the system would need to include safeguards to ensure the information required was limited to what is reasonably necessary to support bargaining and that there were adequate protections of confidential information.

26. Instead, we consider it should be up to employers to voluntarily provide information to the employer bargaining side representing them. Employers should have an incentive to provide views and/or information to the employer bargaining side, to ensure the outcome of bargaining will not cause excessive cost to employers. In the absence of this information the strength of the employer bargaining side's bargaining position is likely to be weaker because they would be less able to make and substantiate claims during bargaining.

27. BusinessNZ agreed that requiring employers to provide information for FPA bargaining would create a large number of issues. They suggested the employer bargaining side could obtain information for bargaining via surveys. They thought that even if the employer bargaining side only received information from their members that should provide a reasonably representative indication for bargaining. Instead of including a requirement for employers to

provide information, BusinessNZ emphasised the importance of the system allowing enough time for the employer bargaining side to collect information.

28. We also sought the views of those involved in public sector bargaining. They did not think it would be appropriate and workable to require employers to provide information. Instead they thought it would be important for employer bargaining side to be given support to identify and communicate with those they are representing (particularly the identification of small employers within coverage). They also emphasised the importance of allowing sufficient time for the employer bargaining side to build relationships and trust with employers.

We do not consider the legislation should specify the process or obligations for when information is provided by employers to the employer bargaining side

29. Under s34 of the ER Act, when information is provided between bargaining sides:

    a. There is a process involving an independent reviewer specified for when the request involves confidential information

    b. There is an obligation that when information is required it must be used only for the purpose of the bargaining concerned and treated as confidential.

It should be up to the employer bargaining side to decide a suitable process for obtaining information

30. When information is requested by a bargaining side the purpose is to substantiate claims (or responses to claims) made by the other bargaining side. The specified process involving an independent reviewer is intended to let the side making the request know the extent the information substantiates the claim when the information is confidential and can't be provided to them.

31. In contrast, the purpose of the employer bargaining side requesting information from employers is to inform their bargaining strategy. One way to achieve this could be to provide the information to an independent person to collate it into an aggregate and anonymous summary. However, there are other options for how information for bargaining could be collected and its confidentiality protected. For example, via an anonymous survey.

32. We do not consider it would be helpful for the legislation to specify process requirements for how the employer bargaining side collect information from employers (including when it involves potentially confidential information) as it may create unnecessary barriers or costs. We note that the employer bargaining side will also need to ensure that the information collected, and way it is used, does not breach competition law.

We do not consider it is necessary to include an obligation specifying that information provided is only used for FPA bargaining and treated confidentially

33. We have recommended that employers should have discretion about whether and what commercially sensitive information they provide. Their willingness to provide such information would, in part, depend on whether they were confident that it would be treated confidentially and not seen by their competitors.

34. The FPA system could include an obligation to specify that when information is provided it must only be used for FPA bargaining and treated as confidential (unless agreed otherwise). In practice, however, we consider it unlikely that it would have much of an impact on employers' willingness to provide the information. It will be up to the employer bargaining side to provide adequate assurance frameworks to employers (e.g. through confidentiality or non-disclosure agreements) so that they are willing to provide the requested information.

35. Employers would already be able to bring a breach of confidence action in relation to information which is inherently confidential or a breach of contract action in relation to any

confidentiality agreement between an employer and the employer bargaining side. Further, employers are able to seek an injunction in the High Court (including on an urgent basis) on either of these bases to prevent use or disclosure of confidential information. If a specific confidentiality provision was included in the FPA system, the appropriate jurisdiction for seeking recourse on this type of matter would not be clear.

36. We, therefore, do not recommend that the legislation specify any obligations for when employers provide information to their bargaining representatives. This is consistent with the approach taken on the employee side. BusinessNZ has indicated it does not consider the legislation needs to include any requirements or obligations for when employers provide information to their bargaining representatives.

Next steps

37. Decisions on this briefing will inform the drafting instructions in relation to the provision of information during bargaining.