



BRIEFING

Fair Pay Agreements: Agreement to bargain variations by default parties and permitting changes between bargaining parties and a default

Date:	26 August 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2122-0514

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to the recommendations on whether a default party can bargain a variation. Agree to the recommendations on limiting changes between bargaining parties and a default.	30 August 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
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The following departments/agencies have been consulted
None

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

Fair Pay Agreements: Agreement to bargain variations by default parties and permitting changes between bargaining parties and a default

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Purpose

This briefing provides advice on:

- the process for BusinessNZ and the CTU to agree to bargain a variation, where they weren't one of the original bargaining parties to the FPA
- limiting the number of times a change is permitted between a bargaining party and a default bargaining party (and vice versa)
- whether a bargaining party can bargain alongside a default bargaining party.

Executive summary

At the Workplace Relations and Safety officials meeting on 9 August we undertook to provide you with advice on the process for BusinessNZ and the CTU to bargain a variation, where they weren't one of the original bargaining parties to the FPA. You indicated that this should have a high threshold. At the meeting, we also discussed your preference to limit the number of times a change is permitted between a bargaining party and a default bargaining party (and vice versa) that had stepped in to bargain where no bargaining parties were left on a particular side.

Bargaining a variation by a default party

This briefing recommends that there should be no additional threshold for a default party (that wasn't a bargaining party when the FPA came into force) to be able to agree to bargain a variation, where there are no longer any bargaining parties left on a particular side.

We consider that the agreement required to bargain a variation, and the ratification requirements, are sufficient safeguards to ensure that a variation is not bargained where it is not warranted. If you wanted to ensure that there was a high threshold before a default party could agree to bargain a variation, it would require further policy work to consider the types of circumstances that would be appropriate.

Changes between bargaining parties and a default

We recommend that, if a default party has undertaken bargaining from the outset, that two changes are permitted: from the default to a bargaining party (the default would need to step out) and then back to the default (it is important to allow a reversion back to a default). The default would need to continue to bargain from this point and would not be able to step out. We consider that it is too restrictive, and limits representation, to require the default to continue bargaining from the outset without permitting a change.

Considering the limit to the number of changes permitted between a default and a bargaining party, we recommend that another bargaining party should be able to join in the bargaining alongside a default (once the default can no longer step out). We consider this would allow for better representation compared with a default being required to bargain alone.

Recommended action

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

Process for BusinessNZ and the CTU to agree to bargain a variation, where they weren't one of the original bargaining parties to the FPA

- a **Agree** to one of the following options, to allow a default party to agree to bargain a variation where:

<u>Option 1 (recommended)</u> : All original FPA bargaining parties on that side have stopped being a bargaining party (with no additional threshold)	<i>Agree / Disagree</i>
<u>Option 2</u> : All original FPA bargaining parties on a side have left and there must be 'exceptional circumstances', before a default party can agree to bargain a variation (requires further policy work)	<i>Agree / Disagree</i>

- b **Direct** officials to report back to you on the situations that could be considered 'exceptional circumstances', if you agree to option 2 under recommendation a

Agree / Disagree

Limiting the number of times a change is permitted between a bargaining party and a default (and vice versa)

- c **Note** that, although you have decided that a bargaining party may only leave with the approval of its side, or in accordance with a bargaining side process agreement, any final remaining bargaining party on a bargaining side could decide themselves whether they wanted to stop being a bargaining party

Noted

- d **Note** that you wanted to limit the number of times a change should be permitted between a bargaining party and a default

Noted

- e **Agree** to one of the following options in situations where a default has undertaken bargaining from the outset:

<u>Option 1</u> : The default bargaining party must remain the default and continue to bargain	<i>Agree / Disagree</i>
<u>Option 2 (recommended)</u> : Two changes are permitted: from the default to a bargaining party, and back to the default, but then the default must remain and continue to bargain	<i>Agree / Disagree</i>

- f **Note** that, where a default party has stepped in partway through bargaining, they must remain the default and continue to bargain

Agree / Disagree

- g **Agree** that recommendation f, and the option you have chosen under recommendation e, applies to bargaining a variation

Agree / Disagree

h **Agree** to one of the following options:

<u>Option 1 (recommended)</u> : Another bargaining party <u>can</u> join in the bargaining alongside the default (once the default cannot step out)	<i>Agree / Disagree</i>
<u>Option 2</u> : Another bargaining party <u>cannot</u> join in bargaining alongside the default	<i>Agree / Disagree</i>

i **Note** that, if you choose option 1 under recommendation h, and option 2 under recommendation e, if the default was in place from the outset, any bargaining party initially seeking to bargain would replace the default, but if the default needed to step back in, then subsequent bargaining parties would be able to join (rather than replace) the default.

Noted



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

26 / 08 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. At the Workplace Relations and Safety officials meeting on 9 August we discussed your comments on the briefing *Fair Pay Agreements: Default bargaining parties and the ongoing role of bargaining parties once a Fair Pay Agreement is in force* [refer briefing 2021-3938].
2. You disagreed with our recommendation that BusinessNZ and New Zealand Council of Trade Unions (CTU) should not be permitted to bargain a variation if there were no original bargaining parties remaining on the bargaining side (recommendation h of that briefing). We undertook to provide you with advice on the process for BusinessNZ and the CTU to bargain a variation, where they weren't one of the original bargaining parties to the FPA. You indicated that this should have a high threshold.
3. At the meeting, we also discussed your preference to limit the number of times a change is permitted between a bargaining party and a default bargaining party (and vice versa) that had stepped in to bargain where no bargaining parties were left on a particular side. In the briefing on default bargaining parties [refer briefing 2021-3938] you decided that bargaining parties could stop being a bargaining party if all bargaining parties on their side agreed, or in accordance with any process set out in the Bargaining Side Process Agreement.
4. This briefing provides advice on both these issues.

Process for BusinessNZ and the CTU to agree to bargain a variation, where they weren't one of the original bargaining parties to the FPA

5. In the briefing *Fair Pay Agreements: Default bargaining parties and the ongoing role of bargaining parties once a Fair Pay Agreement is in force* [refer briefing 2021-3938], we recommended that BusinessNZ or the CTU should not be able to step in as a default and agree to bargain a variation if all original bargaining parties had ceased to exist or had stopped being a bargaining party. We considered that this was more consistent with the decision to only allow the original bargaining parties to decide whether bargaining for a variation should be agreed.
6. We acknowledge that the risk with this approach is that there may be no 'safety valve' to enable bargaining for a variation to be agreed if there are circumstances where a variation was required or justified and there are no parties left on a bargaining side (or both) to agree to bargain a variation (as agreement by both sides is required). Affected employers and employees would need to wait until the FPA was due to be renewed before any changes could be made (although we thought this should incentivise bargaining parties to remain as bargaining parties for the duration of an FPA).
7. You asked for advice on options for BusinessNZ and the CTU to bargain a variation, where they weren't one of the original bargaining parties to the FPA. You indicated that it should be a high threshold before a default could step in to agree to bargain a variation. The options we have assessed are:
 - Option one (recommended): Allow a default party to agree to bargain a variation where all original FPA bargaining parties on a side have ceased to exist or stopped being a bargaining party (with no additional threshold).
 - Option two: All original FPA bargaining parties on a side have left and there must be 'exceptional circumstances', before a default party can agree to bargain a variation.

8. We have assessed the options against the following criteria:
 - preserving adaptability – whether the option enables firms to adapt flexibly to shocks in the market
 - representativeness in bargaining – whether the option allows for the most representative party to be able to participate in bargaining the FPA
 - consistency – whether the option is consistent with the overall design and objectives of the FPA system
 - workability – whether the option is feasible and supports the smooth operation of the FPA system.
9. We consider that any option involves the same impact on the freedom of association as set out in paragraphs 77 to 80 in the briefing on default bargaining parties [refer briefing 2021-3938].
10. Both options are consistent with your decisions on the briefing on default bargaining parties, to allow a default if all original parties have stopped being bargaining parties, but less consistent with your decisions on variations and renewals [refer briefing 2021-3210] which specified that the only bargaining parties that could bargain a variation would be those that were involved in bargaining the initial FPA.
11. Allowing a default party to agree to bargain a variation would mean that they would be further removed from the employees or employers they represent than the original bargaining parties. However, the default parties would be subject to the same bargaining obligations as the original bargaining parties and any variation would still need to be ratified.

Option one (recommended): Allow a default party to agree to bargain a variation where all original FPA bargaining parties on a side have stopped being a bargaining party (with no additional threshold)

12. Under this option, BusinessNZ or the CTU could step in as default to agree to bargain a variation if all parties on the relevant bargaining side when the FPA came into force had stopped being a bargaining party, ie they had notified MBIE that they were no longer a bargaining party for that particular FPA.
13. This option provides the lowest threshold for default parties to be able to agree to bargain a variation. It is therefore the most likely to be used by default parties where either or both see a need. Even though there would be no further conditions before being able to agree to a variation, both bargaining sides would still need to agree before bargaining for a variation could go ahead. This would provide a safeguard to prevent a variation taking place via a default party(s) which either the employer or union bargaining side did not agree was warranted.
14. A further safeguard is that ratification is still required to confirm any variation. Therefore, this provides an incentive for any default party to only agree to bargain a variation if there is a clear need recognised in the industry or occupation and to negotiate a variation that would be acceptable to those that they represent.
15. Being able to verify whether there are no parties left on a bargaining side is workable as each bargaining party would need to notify MBIE that they were no longer a bargaining party.
16. Not requiring an additional threshold before the default bargaining can step in to agree to bargain a variation removes the risk that there may be a legitimate reason for a variation but it doesn't meet the threshold.

Option two: All original FPA bargaining parties on a side have left and there must be 'exceptional circumstances' before a default party can agree to bargain a variation

17. Under this option, the ER Authority is likely to interpret 'exceptional circumstances' as a very high threshold (based on previous case law) for any complaint that is brought before it.
18. We consider that there may be a range of options where a variation may be warranted. Therefore, if option two is your preferred option, we would need to do further policy work to define the types of circumstances that we considered would allow a default party to agree to bargain a variation, so it could be included in the drafting process.
19. Even if we did include the types of circumstances in legislation, there is a risk that some situations where parties may consider that a variation may be needed, would not be captured.
20. During an economic downturn, the requirement to apply an FPA's terms may have an impact on employers' ability to continue to employ all their staff. However, as discussed above, FPAs are intended to set minimum standards. As set out in the variations and renewals briefing, minimum standards tend not to be reduced in an economic downturn, instead the government utilises other mechanisms (if necessary) to support businesses to reduce job losses (e.g. the current wage subsidy). On the other hand, given the range of topics that FPAs can cover, there is a greater risk that an unexpected change in the economy may impact the appropriateness of a term.
21. Variations may therefore be required both because of a change in circumstance, but also because it has become apparent that a particular term is not having the intended effect or is having unintended impacts, which both sides agree is not appropriate.
22. Accordingly, we consider that this option is less workable than option one as we consider that it would be very difficult to set out the types of circumstances default parties should be able to step in to agree to a variation where all bargaining parties on a particular side had left.
23. Including a threshold could also create a risk that, if a party was unhappy with the outcome of a variation negotiation, they subsequently make a complaint to the ER Authority that there were no exceptional circumstances and that the variation was therefore invalid.
24. This option could also enable fewer variations to be agreed than under option one. While this would ensure that the threshold remained high for default parties to be able to agree to a variation, it would also mean that there may be circumstances that would warrant a variation where parties were unable to progress one.

Limiting the number of times a change is permitted between a bargaining party and a default (and vice versa)

25. During the 9 August meeting with you on the briefing on default parties [refer briefing 2021-3938], we discussed your comment on the briefing about limiting the number of times a change should be permitted during FPA bargaining between a bargaining party and a default, and vice versa.
26. You confirmed during that meeting, your decision that bargaining parties would not be able to stop being a bargaining party unless all other bargaining parties on the relevant side agreed or in accordance with the process set out in the Bargaining Side Process Agreement. We presume that this would mean that any final remaining bargaining party on a bargaining side could decide themselves whether they wanted to stop being a bargaining party. The alternative is that the final bargaining party would not be able to stop being a bargaining party. This means they would incur all the costs of bargaining which they would not be able

to avoid unless they ceased to exist. If the final party is not able to stop being a bargaining party, there is a risk that they will not allow other bargaining parties to leave the bargaining side, even in exceptional circumstances.

27. We pointed out during our meeting with you that, as any bargaining party could cease to exist, for practical reasons all scenarios need to allow for the default bargaining party to step in when necessary – as it is much less likely that NZCTU and BusinessNZ would cease to exist, than any given union or incorporated society which is a bargaining party.
28. We would like to clarify how many changes between bargaining parties and a default could be permitted. We have assessed the options against the following criteria:
 - minimal disruption to bargaining – the impact of the option on FPA bargaining, including the balance of rights and obligations on either bargaining side
 - representativeness in bargaining – whether the option allows for the most representative party to be able to participate in bargaining the FPA
 - consistency – whether the option is consistent with the overall design and objectives of the FPA system
 - workability – whether the option is feasible and supports the smooth operation of the FPA system.
29. We recommend that whichever option you choose in this section, it applies to the situation where a default party has agreed to bargain a variation.

The ability to change between a default and other bargaining parties, when a default is required to be in place from the outset

30. The options in this section relate to when a default bargaining party is in place from the outset. This can happen in FPA bargaining where the initiation test has been met and there is no employer association with members in coverage who is suitable or willing to be a bargaining party. It can also occur for a renewal where either the CTU or BusinessNZ is required to be the default where the other side has bargained the renewal.
31. We have assessed the following two options:
 - Option one: The default bargaining party must remain the default and continue to bargain.
 - Option two (recommended): Two changes are permitted: from the default to a bargaining party, and back to the default, but then the default must continue to bargain.

Option one: The default bargaining party must remain the default and continue to bargain

32. This option would require a default bargaining party that was in place from the outset of bargaining, either for FPA bargaining or for a renewal, to remain in place. A subsequent bargaining party would not be allowed to step into bargaining to replace the default.
33. This option would be workable and would provide continuity in bargaining.
34. However, we do not recommend this option as we consider that the opportunity for a bargaining party to decide to undertake FPA bargaining would be too limited, thereby limiting the opportunity for employers or employees to have an entity bargain on their behalf that was more representative. While a potential default party has three months from the outset of bargaining to find a bargaining party, it would be possible for an employer association (or union if it is a renewal initiated by the employer side) to realise the importance of an FPA for its members and decide it wanted to be a bargaining party.

35. This option also increases the size of the role of being a default (where one is required) as they cannot step away from bargaining even if another bargaining party is willing to take over bargaining after the three month window. This is most likely to impact BusinessNZ, ie at the outset of FPA bargaining where there is no willing or suitable party on the employer side.

Option two (recommended): Two changes are permitted: from the default to a bargaining party, and back to the default, but then the default must continue to bargain

36. This option would allow a bargaining party to step in after a default had been in place from the outset. If that bargaining party(s) subsequently ceased to exist, or if no one was left on the bargaining side, then the default could step back into the bargaining role again.
37. This option provides for bargaining to be more representative than option one as it permits a bargaining party to step into bargaining (and the default to step out) if they are suitable and willing to do so after a default has been put in place. It would reduce the requirements on BusinessNZ if they were always required to continue as the default from the outset. This is because BusinessNZ would be able to step out of bargaining if a suitable employer association became willing (or was created for the purpose of FPA bargaining). This would help them to provide assistance across FPAs where they were most needed.
38. However, this option would potentially involve more disruption to bargaining than option one, as more changes between a default and a bargaining party(s) would be permissible.

The ability to change between a default and other bargaining parties, when a default has stepped in partway through bargaining

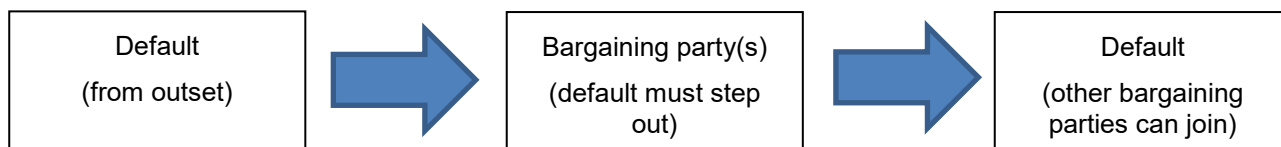
39. Your comments on the briefing *Fair Pay Agreements: Default bargaining parties and the ongoing role of bargaining parties once a Fair Pay Agreement is in force* [refer briefing 2021-3938] indicated that where a default party has stepped in partway through bargaining, because all bargaining parties have left the bargaining side, the default party must remain and continue to bargain.
40. We did not reconsider the option of allowing a further change between a default, that had stepped in part way through bargaining, and other bargaining parties, as you had ruled out this option in relation to the briefing on default bargaining parties [refer briefing 2021-3938]. As mentioned above, any option needs to allow for a default party to be the final bargaining party. An option that allowed a change to a default and back to a bargaining party(s) would therefore need to allow for a change back to a default party.

The ability of the other bargaining parties to join once the default is required to stay

41. When the default is required to stay as a bargaining party, we would like to clarify with you whether a union or employer association was able to join in the bargaining alongside the default. We have identified the following options:
- Option one (recommended): Another bargaining party can join in the bargaining alongside the default (once the default cannot step out).
 - Option two: Another bargaining party cannot join in bargaining alongside the default.
42. Whichever option is chosen in this section would apply to situations when BusinessNZ or the CTU had stepped in as the default bargaining party and was not able to step out.

Option one (recommended): Another bargaining party can join in the bargaining alongside the default (once the default cannot step out)

- 43. Under option one, the CTU or BusinessNZ would still need to remain as the default bargaining party throughout the negotiation and ratification of the FPA but another bargaining party would be able to join in the bargaining alongside the default. Bargaining obligations would apply to both default bargaining parties and other bargaining parties.
- 44. If you choose this option, and you have chosen option two in the section above, if the default was in place from the outset, any bargaining party initially seeking to bargain would replace the default, but if the default needed to step back in, then subsequent bargaining parties would be able to join (rather than replace) the default.



- 45. This option would ensure some continuity of bargaining (compared with if they had to step out) as the default would continue to bargain. By allowing any other bargaining party to join bargaining alongside the default, this option means that the bargaining side will be more representative than under option two. Allowing other employer associations or unions to join as a bargaining party would add some degree of disruption, as they would need to come up to speed with the negotiation that has happened to date. However, this is consistent with previous decisions that allowed for a bargaining party to join at any time, when the existing bargaining parties were unions or employer associations.
- 46. This option is also workable, although the default and bargaining party would need to work out how to work alongside each other.
- 47. In the briefing on default bargaining parties [refer briefing 2021-3938] we noted at paragraph 39 that the CTU had said that they would like to be able to delegate their role as the default bargaining party to other union affiliates where possible. It's unclear whether the CTU has specifically considered the possibility of working alongside another bargaining party (ie this could mean, for example, that the CTU could be obliged to bargain alongside non-affiliated unions in some circumstances), as opposed to delegating their role.
- 48. If this were to happen, both the default (whether the CTU or BusinessNZ) and the bargaining party would need to adhere to the bargaining obligations and requirements. The bargaining side process agreement would have been set at the start of bargaining. If other parties join, parties are required to consider whether to amend the agreement to reflect the new construct of the bargaining side, but they do not need to review it. There could be a possibility that further bargaining parties join which could mean that the default could be bargaining alongside multiple bargaining parties.

Option two: Another bargaining party cannot join in bargaining alongside the default

- 49. Under this option, if another eligible employer association or union subsequently wanted to be a bargaining party, they would not be allowed.
- 50. This option is likely to be slightly less disruptive to bargaining than option two.
- 51. However, this option raises freedom of association issues as it would not allow for an eligible bargaining party (ie they had members in coverage of the proposed FPA), that was more representative than the default, to be able to represent employers or employees in this situation. The Cabinet paper [refer CAB-21-MIN-0126] indicated that allowing any party to join bargaining if they were eligible was one way to mitigate any impact on the freedom of

association caused by bargaining sides not being required to demonstrate their ability to represent employers or employees.

52. This option would also be less consistent (than option one) with previous decisions on the FPA system which allowed any eligible bargaining party to join bargaining at any time. It would mean that bargaining parties could join a bargaining side if the existing bargaining party were a union or employer association, but they could not join the bargaining side if there was a default bargaining party in place.

Next steps

53. We will be providing you remaining advice on the FPA system imminently, and will continue to work on drafting instructions for the Bill.