



## BRIEFING

### FPAs: Conceptualisation of new 'backstop' arrangements

<b>Date:</b>	14 October 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1366

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister of Workplace Relations and Safety</b>	Agree to the recommendation.	18 October 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Anna Clark	General Manager, Workplace Relations and Safety Policy			
Beth Goodwin	Principal Advisor	04 901 1611		✓

The following departments/agencies have been consulted

**Minister's office to complete:**

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

**Comments**



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### Purpose

To seek your decision between two ways to conceptualise of the new FPA backstop.

### Recommended action

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

- a **Agree** to one of the following concepts for the new backstop in the Fair Pay Agreement system:

Concept A: the determination backstop is a new process ( <i>MBIE recommends</i> )	<i>Agree / Disagree</i>
Concept B: the determination backstop is a part of bargaining	<i>Agree / Disagree</i>

Anna Clark  
**General Manager, Workplace Relations and  
Safety Policy**  
Labour, Science and Enterprise, MBIE

14 / 10 / 2021

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

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## Background

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1. Cabinet previously agreed that BusinessNZ would be the default bargaining party in the Fair Pay Agreement (FPA) system if there is no suitable and willing employer representative, and would be required to enter into bargaining [CAB-21-MIN-0126 refers]. You also agreed that the New Zealand Council of Trade Unions (NZCTU) would have the equivalent role if no union bargaining parties remain on the union bargaining side.
2. However, you have since agreed to reconsider this aspect of the FPA system, which is known as the 'backstop'. The default bargaining party backstop relies on social partners' ongoing willingness to participate. If the default is not willing, at any stage during the life of the FPA system, and does not participate, bargaining will be frustrated. This could mean that an FPA is not completed, and the policy intent of the FPA system would not be realised.
3. You instructed us to look further into the option where an FPA would go straight to determination if no willing bargaining party stepped up (eg after 3 months).
4. In preparing that advice, we have spoken with NZCTU. At that meeting, it emerged that they conceptualise the proposed new backstop differently. Their conceptualisation is inconsistent with the approach we are currently taking. The two different approaches would lead to different advice in relation to other design aspects of the system so we are seeking confirmation from you that we should continue with our current proposed approach. We have not yet discussed any aspect of this new backstop with BusinessNZ, as you indicated you wished to discuss the matter with them first.

## How the new backstop fits with the FPA system

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5. The FPA system has been designed as a bargaining framework which relies on two parties to bargain. If there is no entity who is willing to be a bargaining party on one side, there is no bargaining, and no 'dispute' to adjudicate on. So the FPA has moved into a different process. We had been thinking of the Employment Relations Authority's (the Authority) role as essentially a new function, fixing terms but not in a bargaining environment – more akin to law making which would involve different processes (eg a submissions process).
6. The NZCTU's alternative view is that bargaining has been lawfully initiated, so bargaining is live but one party hasn't organised itself or come to the bargaining table. The function of the Authority remains essentially the same as already provided for in the FPA system: it is resolving a dispute related to bargaining, by determining the terms.

### Concept A: a new process

7. This concept argues that for bargaining to exist, there must be two sides. If one side does not exist, then bargaining cannot exist. Therefore, the role of the Authority is not to determine a dispute, it is a new function – to determine terms of an FPA outside of the realm of bargaining. The role of the side that had successfully formed has changed – its role is no longer to bargain with the other side, it is to make a case to the Authority for its preferred FPA terms. In doing so, it may need some of the existing FPA processes, but not necessarily all. This may enable the process to be shortened, as many of the existing processes require time to elapse before the next step can occur.
8. This concept might lead us to advise different processes or support for the Authority, more directly targeted to enable the Authority to make an informed decision on appropriate FPA terms – eg providing the Authority with standard information about the nature of the industry, and a more open submissions system (in the sense of people being able to make submissions on their own behalf). The Australian Modern Awards system allows for submissions from any interested party.

## **Concept B: part of bargaining**

9. Under this concept, the Authority's role is essentially unchanged, it's making a determination on a dispute (caused by a frustration of bargaining due to one side not participating in bargaining).
10. Choosing this conceptualisation would suggest maintaining many aspects of the FPA system, eg unions still form a bargaining side and represent workers in the Authority hearing, so might lead you to maintain many of the existing processes (notification, workplace access, paid meetings) designed to support bargaining in the FPA system. It would also suggest maintaining the concept that only unions can represent employees (in this scenario, represent employees' views to the Authority). It does not resolve the question of how the Authority could learn of the possible effects to employers of proposed FPA terms – it is likely that the Authority would need to call for evidence in some way.
11. The NZCTU supports this concept, including the aspect that only unions should represent workers – NZCTU has said it does not support any ability for individual submissions to the Authority from employees, but appears less adamant about employer submissions.

## **MBIE recommends continuing with Concept A**

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12. MBIE has been designing the backstop in line with Concept A and we recommend that continues to be the approach taken. It is appropriate to think of this new backstop as a new process, not simply a new part of bargaining. In particular, we support the argument that if one side does not exist, then bargaining cannot exist. The Authority will need to significantly adjust its approach in order to gather the information necessary to make an informed decision, and to enable affected parties to be heard, which is a basic tenet of natural justice. We recommend you recognise those adjustments of process push this determination into being a new function for the Authority.
13. We consider it will be difficult to draft Concept B, as it involves awkwardly forcing the scenario into a 'bargaining' model, including continuing with the use of bargaining infrastructure when there is no bargaining, and trying to maintain the concept of a 'dispute' when one side of the 'dispute' has no entity, which may be because the industry is less organised with no employer body.

## **Next steps**

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14. Following your decision on one of the above concepts, we will prepare advice on specific design features to give effect to it. In particular, that next briefing will advise on how the Authority can gain some indication of the possible effects of proposed FPA terms on employers, to inform its decision. This would likely be a submissions process, or the Authority using its existing powers to call for evidence.
15. We will need to seek decisions at a level of specificity which will enable us to issue drafting instructions to Parliamentary Counsel Office (PCO).
16. As previously advised, this change in policy will need a new Cabinet agreement. That agreement could be sought once you have made policy decisions or you could seek agreement from the Attorney-General to enable PCO to draft in advance of Cabinet agreement. You have indicated you wish to do the latter. Following your next set of decisions on design aspects, we will provide you with a draft letter to the Attorney-General.