MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Advice on a backstop process if one side has no bargaining party

Date:	16 December 2021	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2122-1223

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** to the proposed design of the backstop determination process.	22 December 2021

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

The following departments/agencies have been consulted
Te Kawa Mataaho Public Service Commission, Ministry of Justice, Parliamentary Counsel Office, New Zealand Defence Force, and Police

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Date:	16 December 2021	**Priority:**	High
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Purpose

To provide advice on a backstop process for when there is a lack of bargaining parties on one side (which would be on the employer side in most situations) where the Fair Pay Agreement (FPA) can be fixed by determination.

Executive summary

Cabinet has agreed that BusinessNZ will be required to be the default bargaining party to bargain on behalf of employers for an FPA if there is no eligible employer association willing to represent employers [CAB-21-MIN-0126 refers].

BusinessNZ has now signalled it is no longer willing to perform the role. As a consequence of this, you have decided that the system should include an alternative process (referred to as the 'backstop process') that will apply where no entity steps forward to be a bargaining party, in which case the FPA may go directly to a determination process.

Section A: When can the backstop process occur?

We recommend that the system be amended to allow BusinessNZ and New Zealand Council of Trade Unions (CTU) discretion to be the default bargaining party when there is no bargaining party(ies) on one side (rather than it being a mandatory requirement, as currently agreed by Cabinet). Allowing default bargaining parties to undertake the role would provide an additional opportunity for an FPA to be bargained before the backstop process is triggered.

The initial deadline for forming the bargaining side should remain as three months for an initial FPA and should be two months for a renewal. If after that time, no organisation has applied to be bargaining party, or all the bargaining parties on the non-initiating side withdraw during bargaining, the default would have one month to decide to step in. If they do not, then the employee bargaining side will be able to apply to the Employment Relations Authority (and can do so for up to three months) for the backstop process to occur.

You have decided on different representation requirements for 'specified employers' in the public sector[1]. There is a risk that an FPA that covers employees employed by any of the 'specified employers' (even if they employ the majority of employees within coverage of the FPA) and 'other employers', could end up being set by determination because there is no willing and eligible bargaining party for 'other employers'. We continue to consider it would not be appropriate or workable for a 'specified employer' bargaining party to represent 'other employers'.

[1] These 'specified employers' could be represented by the following 'specified employer' bargaining parties: Public Service Commissioner, Director-General of Health (to later transfer to the forthcoming Chief Executive of Health NZ), Parliamentary Counsel Office, Police, and New Zealand Defence Force.

Section B: What entity should perform the backstop determination function?

Until a new FPA institution is formed, we consider the Employment Relations Authority is the most appropriate existing body to perform the backstop determination function.

Section C: What are the process requirements and obligations?

You have indicated that in the backstop process the role of unions as the employee bargaining parties representing employees should be retained. Therefore, in the backstop process the employee bargaining side (ie the unions that were approved to be bargaining parties) will provide input from an employee perspective[2]. Where an FPA covers both 'specified employers' (eg in the public sector) and 'other employers', the 'specified employer' bargaining party would be the party providing input from the 'specified employers'.

The biggest issue within this process is how to fill the gap created by the lack of representation on one side, which we expect in most cases would be on the employer side. To fill the gap created by a lack of representation of employers (or employees in situations where the backstop is triggered by a lack of an employee bargaining party), we recommend the ER Authority appoint an 'Authority advisor' who provides independent advice to assist the ER Authority to fulfil their role in assessing the relevant criteria that apply when fixing terms in respect of employers (eg the likely impact the business or activity of employers).

The Authority advisor is not intended to be a 'representative' of employers as this would result in de facto government funded representation on the employer side and may make the process more attractive to employers than participating in bargaining. A significant risk of this approach is that it has Bill of Rights Act implications, as employers within coverage will not be able to be a party or have a direct say in the process (unless invited to by the ER Authority), even though they are affected by the decision. We have not been able to identify a way of enabling all employers to have a say without making the determination process a more attractive option, thereby potentially undermining the policy intent that FPAs are bargained. Employers would, however, have the opportunity to have a say in the development of the FPA if they coordinate themselves to participate in the bargaining (meaning the backstop process would not occur).

When the relevant bargaining party(ies) apply(ies) to have the FPA fixed by the backstop process, only those who were bargaining parties at the time the backstop process was triggered are able to be a party to the proceedings. As a result, only those that are a party to the proceedings would have the ability to appeal the determination. Consistent with the FPA bargaining system, we recommend that any appeal rights should be limited to questions of law only. Full judicial review rights will be available once appeal rights (if any) have been exhausted.

Where a party has the ability to appeal the determination, we have recommended that the Employment Court be required to appoint an amicus curiae to provide the point of view to fill the gap of the other side of the proceedings (as this is a legal function) and that the Authority advisor that was appointed to the original proceedings be required to brief the amicus curiae.

The ER Authority would have the same requirements when fixing terms under this process as when fixing terms following a bargaining dispute or two failed ratifications and would require similar powers (with amendments where necessary).

Section D: How do other aspects of the FPA system apply if the backstop process is triggered?

We recommend aspects of the FPA system that are relevant in the backstop system would apply in a consistent manner, with minor amendments where necessary.

[2] The backstop determination process could involve a lack of bargaining side on the employee side if a renewal was initiated by the employer side and there was no employee bargaining parties willing to bargain or all employee bargaining parties withdrew during bargaining. In this situation the employee bargaining side would represent employers in the backstop process and the Authority advisor would provide information on the potential implications for employees.

Once the backstop process has begun, the coverage of the FPA should not be able to change. The consolidation requirements will need to be amended to take into account situations where one or both FPAs is/are being fixed by determination. We do not consider it would be appropriate to require an FPA to be removed from the backstop process once it has started (although an applicant will have the ability to withdraw their application, in which case development of that FPA would cease).

Additional notification requirements will be needed to ensure those affected are keep up to date with the process the FPA will be following (or if it has ceased).

As unions that are bargaining parties will represent employees in this process, we consider they should have the same obligations to represent employees within cover (including non-members).

To do this, they also need the same opportunities to obtain input from employees via:

1. The provision of contact details for new employees within coverage during the backstop process
2. Employers being required to provide paid time for two, two-hour meetings for each employee within coverage of a proposed FPA during the backstop process
3. Workplace access during the backstop process (and once the FPA is in force).

In the case of a renewal initiated by the employer side, the employer bargaining parties would have an obligation to represent employers within coverage. As there would not be any unions that are bargaining parties, the obligations in relation to the provision of contact details, paid meetings and workplace access would not apply.

When an FPA has been fixed under this process, the variations requirements should be the same as when a FPA is ratified or fixed following a bargaining dispute or two failed ratifications. Therefore, the FPA can only be varied if the employee bargaining side and BusinessNZ (as the default bargaining party) agree to bargain a variation and the proposed variation is supported at ratification.

Recommended action

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

a **Note** following BusinessNZ's initial indication that it is no longer willing to be the default bargaining party whenever there is a lack of an eligible employer bargaining party, you have requested advice on a backstop process to cover the situation where no eligible entity steps forward to be the bargaining party and the FPA goes directly to a determination process.

Noted

b **Note** BusinessNZ has now confirmed it is not willing to be the default bargaining party for employers.

Noted

c **Note** there are risks associated with including a backstop process where the FPA is fixed by determination; in particular, it has implications for our International Labour Organisation obligations, capability and capacity risks and a risk that employers consider it is a more attractive option thereby potentially undermining the policy intent that FPAs are bargained.

Noted

d **Note** we have attempted to mitigate these risks, where possible, in the design of the backstop process.

Noted

e **Note** that implementing the proposals recommended below will require seeking Cabinet's approval to rescind an existing Cabinet decision and seeking Cabinet's approval to the design of the proposed backstop process.

Noted

Section A: When can the backstop process occur?

Discretionary default bargaining parties

f **Agree** to enable BusinessNZ and New Zealand Council of Trade Unions discretion to step in as a default bargaining party (rather than making it mandatory, as previously agreed by Cabinet) if there is no bargaining party on the relevant side. If they agree, the FPA would be bargained, rather than fixed via the backstop process.

Agree / Disagree

g **Agree** to amend existing decisions, reflecting the shift from mandatory to discretionary default bargaining party, so that once a default bargaining party has stepped into bargaining it can:

a. withdraw as a bargaining party if it meets the normal requirements for doing so.

Agree / Disagree

b. remain a bargaining party even if other bargaining parties join (ie there are no situations where it required to step-out).

Agree / Disagree

Timeframe requirements

h **Agree** the initial deadline for forming the non-initiating bargaining side from when the Chief Executive of MBIE publicly notified the successful initiation of an FPA:

a. remain as three months for an initial FPA. *Agree / Disagree*

b. be reduced to two months for a renewal. *Agree / Disagree*

i **Agree** the default bargaining party has one month (after being notified by the Chief Executive of MBIE) to decide whether to step in if the following situations occur:

a. No organisation on the non-initiating side (excluding any 'specified employer' bargaining parties) is approved to be a bargaining party within three months for an initial FPA or two months for a renewal

Agree / Disagree

b. All bargaining parties on the non-initiating side withdraw for either an initial FPA or a renewal.

Agree / Disagree

j **Agree** that Chief Executive of MBIE notify the bargaining parties of the initiating side once the backstop process is able to be commenced.

Agree / Disagree

k **Agree** that once the timeframes recommended above have occurred (ie after four months for an initial FPA and three months for a renewal):

a. the employee bargaining side can apply for the backstop process.

Agree / Disagree

b. if they do not apply within three months, the development of the proposed FPA will cease.

Agree / Disagree

l **Confirm** that the existing decisions that:

a. bargaining parties may only leave with the approval of its side, or in accordance with a bargaining side process agreement

b. where the bargaining parties on the side that initiated the FPA all withdraw, and the relevant default bargaining party does not agree to step in, development of the FPA will cease (meaning the backstop process cannot be commenced).

Agree / Disagree

When an FPA covers both 'specified employers' and 'other employers'

m **Agree** that if an FPA covers 'specified employers' and 'other employers' and there is no willing bargaining party for 'other employers', to continue to not allow the 'specified employer' bargaining party to represent 'other employers'. This means the initiating side could apply for the FPA to be fixed by the backstop process.

Agree / Disagree

n **Note** we have identified a gap in the representation requirements for 'specified employers', as Parliamentary Counsel Office, New Zealand Defence Force and Police could choose to be unrepresented in the bargaining of the FPA even if the FPA only covers employees employed by them.

Noted

o **Agree** that if PCO, NZDF and Police are the only employers within coverage of an FPA the following applies:

a. PCO, NZDF and Police must represent themselves or request the Public Service Commissioner to represent them.

b. If the Public Service Commissioner declines to represent them (or is unable to), they must represent themselves as a bargaining party (rather than triggering the backstop process).

Agree / Disagree

Section B: What entity should perform the backstop determination function?

p **Note** you have indicated an intention to form a new regulatory institution for FPAs.

Noted

q **Agree** that until the new FPA institution is formed, the Employment Relations Authority (ER Authority) will perform the backstop determination function.

Agree / Disagree

r **Agree** that an ER Authority member that participates in the panel that fixes the terms of an FPA via the backstop function should not consider disputes regarding the enforcement of that FPA.

Agree / Disagree

Section C: What are the process requirements and obligations?

Employee and employer input into the process

s **Note** you have previously decided that unions that were approved as bargaining parties to an FPA would represent employees in the backstop process.

Noted

t **Agree** that if the FPA covers 'specified employers' and 'other employers', the 'specified employer' bargaining party(ies) that had been approved to bargain the FPA would be the representative of 'specified employers' in this process.

Agree / Disagree

u **Agree** that organisations cannot apply to be a bargaining party on a proposed FPA once a successful application has been made for the FPA to be fixed via the backstop process.

Agree / Disagree

v **Agree** to one of the following options for how the ER Authority obtains input from/about the implications of potential FPA terms on the 'other employers' that are not represented by a bargaining party in the backstop determination process:

Option 1: Discretion on how it seeks input from employers (ie they are not a party to the process); OR	*Agree / Disagree*
Option 2 (recommended): Required to appoint an Authority advisor to provide independent input on the likely impacts on employers of the potential FPA terms and other relevant criteria in respect to employers (ie employers are not a party to the process); OR	*Agree / Disagree*
Option 3: Enable employers to be a party and input directly into the process.	*Agree / Disagree*

w **Note** that the recommended option (option 2 in recommendation v) has Bill of Rights Act implications as employers would not have a right to be heard in the process, but any option giving employers a right to be heard could risk making the backstop process a more attractive option than bargaining.

Noted

x **Note** you have previously decided that the ER Authority could seek input or information from any person, which would be in addition to the input provided by the employee bargaining side and Authority advisor.

Noted

y **Agree** that the equivalent backstop process as covered by recommendations s, t, u, and v will apply if a renewal of an FPA is initiated by the employer side and the backstop process occurs due to a lack of bargaining party(ies) on the employee side.

Agree / Disagree

Appeal and judicial review rights

If you agree to option 2 (recommended) or option 1 (in recommendation v):

z **Agree** that where the ER Authority issues a determination fixing terms of the FPA through the backstop process:

a. Only those who are a party to the proceedings (eg the bargaining parties on the initiating side or any 'specified employer' bargaining parties if no bargaining side for 'other employers' forms on initiation) may appeal the determination.

Agree / Disagree / Not applicable

b. Appeal rights are limited to questions of law (consistent with appeal rights in the bargained process).

Agree / Disagree / Not applicable

aa **Agree** that where a party appeals a determination of the ER Authority that has fixed terms via the backstop process, the Employment Court must appoint an amicus curiae to provide the view of the opposing side (who is not able to be a party to proceedings).

Agree / Disagree / Not applicable

bb **Agree** that where the ER Authority issues a determination fixing terms of the FPA through the backstop process, appeal rights (if any) must be exhausted before accessing judicial review.

Agree / Disagree / Not applicable

cc **Note** a consequence of the decision above is that the judicial review rights would be wider than the judicial review rights that apply to a determination made following a bargaining dispute or two failed ratifications (as in that situation the determination can only be judicially reviewed once any other appeal rights are exhausted and if the Authority 'lacked jurisdiction' to make the determination). The difference reflects the lack of appeal rights for those that a not a party to the backstop process.

Noted

If you agreed to option 3 (in recommendation v):

dd **Agree** that the appeal and judicial review rights of the parties to the backstop process apply in the same manner as when an FPA has been fixed following a bargaining dispute or two failed ratifications, where:

a. Parties can only appeal on questions of law.

b. Parties can only judicially review the determination of the ER Authority if appeal rights have been exhausted first, and then, only if the ER Authority lacked jurisdiction consistent with section 184 of the Employment Relations Act 2000.

Agree / Disagree / Not applicable

If you agreed to option 2 (recommended) (in recommendation v):

ee **Agree** that the Authority advisor should have immunity from liability in proceedings.

Agree / Disagree / Not applicable

Process requirements and powers

ff **Agree** that the requirements that apply to the ER Authority when performing the backstop process will be consistent with the requirements the ER Authority uses when fixing terms following a FPA bargaining dispute or two failed ratifications, in particular:

a. The decision should be made by a panel of members

b. They will be required to apply the same criteria

c. They will be required, or able, to include the same terms (with the exception of the terms that required both sides agreement to include).

Agree / Disagree

gg **Agree** that the powers of the ER Authority when performing this process will be consistent with the powers when fixing terms following a bargaining dispute or two failed ratifications (eg to require information, interview parties etc.) with modifications where required.

Agree / Disagree

Section D: How do other aspects of the FPA system apply if the backstop process is triggered?

hh **Note** the following recommendations cover the areas of the system where we consider a new decision, or a change of an existing Cabinet or Ministerial decision (including where this is required in order to apply an existing requirement during the backstop process), is required.

Noted

Coverage

ii **Agree** coverage of an FPA cannot change once the backstop process has begun (ie an applicant can't change the coverage of the proposed FPA at any point during the process and the ER Authority cannot amend it as part of its determination).

Agree / Disagree

Consolidation

jj **Agree** that if an FPA (covering some occupations in that industry) is being bargained and a subsequent FPA in the same industry (covering different occupations) is initiated and lacks an employer bargaining party, the standard consolidation rules should apply.

Agree / Disagree

kk **Agree** that if a subsequent FPA is initiated in the same industry as one where there is no employer bargaining party, the two FPAs can only be consolidated if the first FPA has not transitioned to the backstop process and there is an employer bargaining party for the second FPA.

Agree / Disagree

ll **Agree** that if a second FPA is initiated for the same industry after six months from when the first FPA in that industry is initiated, and both FPAs enter the backstop process, the ER Authority has discretion to merge backstop processes.

Agree / Disagree

mm **Agree** that where a second FPA is initiated for the same industry as an FPA that is currently being bargained or an FPA that has been determined via the backstop, and the agreements are not required to be consolidated, that the second-in-time FPA is attached as a Schedule to the first-in-time FPA, and that both the FPA and the Schedule expire at the same time (consistent with the current consolidation approach).

Agree / Disagree

Notification

nn **Agree** where the FPA was initiated by the employee side, to require the employee bargaining parties to notify known employers and employees in coverage and MBIE of its decision regarding whether to apply for the backstop process or cease development of the FPA.

Agree / Disagree

oo **Agree** where the FPA renewal was initiated by the employer side, to require:

a. the employer bargaining parties to notify known employers and MBIE of its decision regarding whether to apply for the backstop process or cease development of the FPA.

Agree / Disagree

b. each employer, once notified, to notify employees within coverage of the proposed FPA whether the backstop process has been applied for or development of the proposed FPA has ceased.

Agree / Disagree

Duty of good faith and bargaining obligations

pp **Agree** that where an employment relationship still exists in the context of the backstop process, the duty of good faith applies during the backstop determination process (ie between employer and employees, unions and their members, and unions (or employer associations) that are bargaining parties for the same FPA).

Agree / Disagree

qq **Agree** that the penalties for a breach of good faith that apply during bargaining also apply during the backstop process, therefore the Employment Relations Authority can apply a penalty of up to $20,000 for an individual and $40,000 for a company or other corporation, for the following breaches:

a. an employer breaches its duty of good faith duty by doing anything with the intention of inducing an employee not to be involved in the backstop process (eg by impeding their engagement with the union bargaining parties).

b. there is 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 the backstop process.

Agree / Disagree

rr **Agree** that the obligations that apply during bargaining (eg to use best endeavours to represent affected parties within coverage) should apply to the bargaining parties involved in the backstop process during the backstop process.

Agree / Disagree

Provision of employee contact detail, paid meetings and unions access

ss **Confirm** that the obligations that apply during bargaining to enable the employee bargaining side to represent employees within coverage should apply during the backstop process (where it has been started by the employee side). In particular:

a. for employers to provide the details of those newly within coverage to the union bargaining parties periodically.

Agree / Disagree

b. for employers to provide each employee within coverage of a proposed FPA paid time to attend up to two, two-hour FPA meetings organised by the union bargaining parties.

Agree / Disagree

c. the union bargaining party(ies) to be able to access a workplace with employees within coverage without the employer's consent (if the primary purpose of the visit is related to the FPA).

Agree / Disagree

Vetting and better off overall test

tt **Agree** that the vetting and better off overall test requirements will apply, where required, during the backstop process.

Agree / Disagree

Variations

uu **Agree** that the same variation requirements that would apply to an FPA that was concluded after bargaining would apply to an FPA that has been fixed via the backstop process.

Agree / Disagree

Next steps

vv **Agree** to seek Cabinet's agreement to rescind the decision referred to in paragraph 19 of CAB-21-MIN-0126 (which *required* BusinessNZ to be the default representative for employers where there is no willing and suitable representative) and instead seek Cabinet's agreement to provide BusinessNZ and the New Zealand Council of Trade Unions with *discretion* to be the default bargaining party if there is no willing and eligible bargaining party on the relevant side.

Agree / Disagree

ww **Agree** to seek Cabinet's approval to the policy design for the proposed backstop determination process, based on the recommended detailed design outlined in recommendations above.

Agree / Disagree

xx **Note** further detail design decisions will be needed to draft the backstop process. To ensure the efficient progress of this work, MBIE will make detailed decisions consistent with the policy decisions above and seek your confirmation of these decisions at the appropriate stage.

Note

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

16 / 12 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / ..... / .....

Background

A number of decisions have been made regarding the default employer representative in the design of the FPA system

1. We previously provided advice on the risk that employers are unwilling to participate in bargaining [briefing 2021-1724 refers]. We considered the most workable option would be for BusinessNZ to be the default representative for employers. However, we noted this option would only be workable and have legitimacy if BusinessNZ was willing, and recommended you seek formal agreement from BusinessNZ to proceed with this option. You discussed the matter with Kirk Hope, Chief Executive of BusinessNZ, who indicated BusinessNZ would play this role.

2. Following BusinessNZ's confirmation that it would perform this role, Cabinet agreed that BusinessNZ will be the default representative for employers (where there is no willing and suitable representative) and that it will be required to:

    a. use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated, and

    b. be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months [CAB-21-MIN-0126 refers].

3. We provided further advice regarding default bargaining parties and you agreed [briefing 2021-3938 refers] that BusinessNZ:

    a. will be the default employer bargaining party if all employer bargaining parties cease to be bargaining parties during FPA bargaining and there is not suitable employer association willing to be a bargaining party, and

    b. will be remaining the default bargaining party once it had stepped in, except where it was the bargaining party from the start of the bargaining and an eligible employer association agreed to become a bargaining party.

BusinessNZ has confirmed it does not want to be the default bargaining party for employers

4. On 16 September 2021, Paul MacKay, Manager Employment Relations Policy at BusinessNZ, indicated that BusinessNZ was no longer willing to perform the default employer bargaining representative role.

5. On 8 December, BusinessNZ confirmed that it does not agree to act as the default employer with respect to a union claim for a Fair Pay agreement.

If there is no willing default employer bargaining party, the system will be frustrated

6. The current approach relies on BusinessNZ bargaining on behalf of employers when there are no eligible employer associations willing to bargain on behalf of employers.

7. If the default bargaining party is unwilling to participate, then bargaining would be frustrated. This would challenge the policy intent of the FPA system, whereby after an FPA is initiated it should end with an FPA being concluded in an efficient and timely manner. To mitigate this risk and ensure that the policy intent of the FPA system is achieved it is, therefore, necessary to design an alternative backstop function.

You asked us to develop a backstop process where the FPA is fixed by determination

8. On 20 September, we asked which of five possible alternative backstop models you wanted advice on:

    a. continue with status quo, where BusinessNZ is legislated as the default bargaining party

    b. FPAs go straight to determination if there is no willing employer bargaining party after set time period

    c. the Government appoints a panel of employer representatives

    d. remove bargaining entirely from the FPA system, that is, redesign the system to allow for a government or other appropriate entity to always set the employment terms for an industry or occupation.

    e. shift to a voluntary extension system in which current Multi Employer Collective Agreements could be expanded to cover entire industries or occupations if they reach a certain coverage.

9. You asked us to look further into the model where an FPA would go straight to determination if no willing bargaining party stepped up. This briefing provides advice on the design, and implications for the rest of the system, of this alternative backstop.

10. Note: we have prepared this briefing under time pressure (partly due to a focus on drafting instructions for the FPA Bill), with limited time to explore options, test our assumptions, or gather evidence.

There are risks involved with this approach

This option challenges the International Labour Organisation's principles of freedom of association and voluntary bargaining

11. The International Labour Organisation's (ILO) freedom of association principle recognises the right of employees and employers to freely establish and join organisations of their own choosing. While employers would be given the choice to join an employer association, the backstop of going straight to determination if no willing bargaining steps up may undermine this principle.

12. The ILO promotes the principle of voluntary bargaining and generally recommends against compulsory arbitration in the event that the parties have not reached an agreement. However, in some special circumstances, compulsory arbitration is considered acceptable: in essential services; in the case of disputes in the public service; and when, after protracted and fruitless negotiations it becomes obvious that the deadlock will not be broken without some involvement from authorities. Voluntary arbitration accepted by both parties is always considered to be legitimate.

13. In the situation where no willing employer bargaining party steps up (including BusinessNZ), going straight to determination would increase the potential application of compulsory arbitration in the system.

Determining an FPA outcome without bargaining is a crucial role, with corresponding capacity and capability risks

14. The role of determining the terms of an FPA without bargaining occurring beforehand could have wide impacts in the economy (depending on the coverage of the FPA): the employment terms for entire industries or occupations will be affected by these decisions. It will be

important that the decision maker/s have the necessary skills, input and capacity to make informed decisions on the FPA terms.

15. You have indicated that in the future you intend to create a new institution to take over many of the roles in the FPA system. Until then, the most appropriate body to perform the determination role is the Employment Relations Authority (ER Authority) (this is considered further in Section B). However, this function is a significant expansion of the ER Authority's role. It will require different skills, different processes and may increase its workload significantly. Expanding the ER Authority's role in this way would require commensurate resourcing to ensure their existing services are not compromised and timely decisions are made in fixing FPA terms.

This option may further reduce incentives for employers to coordinate a bargaining party to represent them in bargaining

16. Previous advice has highlighted that the FPA system creates costs and risks, with limited incentives, for employers to participate in the system [briefings 2021-0627 and 2021-1724 refer]. This model risks further reducing incentives for employers, through their representative associations, to participate in bargaining. This may occur if:

    - The process risks and costs to employers of a determined FPA are significantly less than engaging in bargaining.
    - There is a perception that the outcome of a determined FPA would be more advantageous.

17. We have attempted to mitigate this risk, as much as possible, when making recommendations on the design of the backstop process.

Structure of this briefing

18. The briefing is divided into four sections:

    a. Section A: When can the backstop process occur?

    b. Section B: What entity should perform the backstop determination function?

    c. Section C: What are the process requirements and obligations?

    d. Section D: How will other aspects of the FPA system apply if the backstop process is triggered?

19. The options in this briefing are assessed against the following criteria (where relevant):

    a. Effectiveness: whether the option supports improved outcomes for workers

    b. Preserving adaptability: whether the option enables firms to adapt flexibly to shocks in the market, and adopt innovative practices without undue restrictions

    c. Avoiding excessive impacts on employers: whether the option would have an excessive impact on employers relative to the benefits for workers

    d. Legitimacy: whether the option ensures there is a mandate or social licence for an FPA, as well as including appropriate checks and balances

    e. Workability and simplicity: whether the option supports the smooth operation of the FPA system and the process is clear to all parties and avoids unnecessary complexity

    f. Balance: whether the option strikes a suitable balance between certainty and flexibility for participants

g. Consistency: whether the option is consistent with design of the FPA bargaining process, unless there is a good reason for divergence

h. Cost effectiveness / efficiency: whether the option achieves the objective in a way that represents good value for money.

i. Risk of undermining the intention of FPAs to be bargained: whether the option would incentivise employers and/or employee representatives to not bargain

j. Enduring: The system is enduring, with minimal chance of frustration by key actors.

Section A: When can the backstop process occur?

20. This section is focused on the aspects of the system that would impact when the backstop process is triggered. It provides advice on:

    a. Whether to enable BusinessNZ and CTU the discretion to step in as a default bargaining party if there is no willing and eligible bargaining party (ie as a step before determination).

    b. Whether the threshold for ceasing to be a bargaining party is still appropriate.

    c. Whether to retain the current approach where bargaining can cease if the bargaining parties on the side that initiated the FPA withdraw.

    d. When the backstop process could occur.

    e. What happens if an FPA covers 'specified employers' (that have different representation requirements) and 'other employers' and there is no willing bargaining party for 'other employers.'

BusinessNZ and CTU should have discretion to be a default bargaining party as this provides another opportunity for the FPA to be bargained

21. BusinessNZ has indicated that they no longer support a compulsory role for BusinessNZ to be the default bargaining party for employers. However, it may be that they would be willing to perform this role for an FPA on a discretionary basis. For this to be possible the FPA system would need to allow them to be the default when there are no bargaining parties on that side. This approach could also be applied to the employee side (although it is expected to be required less).

22. CTU has indicated that they are willing to be a default bargaining party for employees. Under the previous approach their default role would have been largely discretionary, as you had agreed that if a union has initiated bargaining (either the initial FPA or a renewal) and then withdrew from being a bargaining party (and there were no other unions with members within coverage willing to be bargaining party), then CTU can choose whether to step in as the default bargaining party. The only time the CTU would have been required to perform the role of the default bargaining party for an FPA would have been if a renewal was initiated by the employer side and there was not a union bargaining party willing to bargain it, or if the union bargaining parties that were bargaining the FPA withdrew before it was concluded.

23. We consider it would be more in keeping with the intent of the FPA system to allow BusinessNZ and CTU to have discretion to decide whether or not to be a default bargaining party to an FPA if there is no willing bargaining party on their side (including if all bargaining parties on their side withdraw during bargaining).

24. While this would add complexity to the system, it will provide another opportunity before the backstop process is triggered for the FPA to be achieved as a bargained outcome. Although

this will would depend on the relevant default's willingness to step into the role. A BusinessNZ representative has indicated BusinessNZ would consider stepping as the default bargaining party if this was something their members supported.

25. BusinessNZ's recent letter to you stated it would not agree to act as the default employer bargaining party, which may also apply to a discretionary default role. We consider it is still useful to include the concept of discretionary default bargaining parties in case either CTU or BusinessNZ are willing to use it in a particular situation. It would also mean that it is still possible for variations to be bargained if there are no bargaining party on one side and the relevant default is willing to step into that role (this is considered further in Section D).

The default would be able to step out if it meets the requirements for withdrawing as a bargaining party and could choose whether to remain if another bargaining party joins

> *Previous decisions*
>
> When the intention was that the system would include mandatory defaults (ie situations when the default had to step in) it also specified when the defaults were required to step out or must remain a bargaining party. In general, the intention was that the default would not be able to step out even if another bargaining party joined their side, as this would disrupt bargaining.
>
> The one exception was when the default was the bargaining party at the start of bargaining (due to a lack of willing eligible bargaining party on that side after initiation) and a bargaining party later joined. In this situation the default would be required to step out and the new bargaining party would take over the bargaining. In situations when the default was required to remain, other bargaining parties could join alongside them in bargaining.

26. We have reassessed these decisions considering the shift to a discretionary default approach and recommend:

    a. BusinessNZ and CTU can withdraw from bargaining as long as they meet the requirements for withdrawing as a bargaining party[3] – an argument could be made that if a default stepped into bargaining, they should make a commitment to perform the role until the FPA is concluded. However, requiring the default to stay, if for some reason they no longer wanted to, could lead to the same risks as making it mandatory for them to step in in the first place. It may also reduce the likelihood that the default would ever agree to perform the role in the first place. The risk of allowing them to withdraw is that the default could choose to step in and then withdraw to delay the conclusion of the FPA. This seems like a low risk as the most it would do is delay the FPA (as the FPA would still be concluded).

    b. Once they had stepped in, the default should be able to remain a bargaining party even if other bargaining parties join the FPA – it is more in keeping with the discretionary nature of this approach to allow the default to remain a bargaining party if another bargaining party joined their side, regardless of when it stepped in (rather than requiring them to step out in some situations). One risk of this option is that if an employer organisation agrees to be a bargaining party in the early stages of bargaining, the default may choose not to step out even though there was an organisation more directly representative of employers willing to bargain. However, this seems to be a low risk as the costs associated with bargaining are likely to incentivise the default to only remain a bargaining party when they consider it necessary.

[3] This means that if they are the only bargaining party they can decide themselves to withdraw. However, if other bargaining parties have joined bargaining, then the default could only withdraw with the approval of its bargaining side (ie the other bargaining party(ies)), or in accordance with a bargaining side process agreement.

The same threshold for withdrawing as a bargaining party, and the same consequence of the initiation side withdrawing, should apply

27. We consider the following decisions remain appropriate:

    a. A bargaining party may only leave with the approval of its side, or in accordance with a bargaining side process agreement [briefing 2021-3938 refers] – while setting a higher threshold could reduce likelihood of the backstop process being triggered by all bargaining parties on one side withdrawing, it may disincentivise parties from agreeing to be a bargaining party in the first place. Issues relating to requiring a bargaining party to remain at the table until they become insolvent, or other such high threshold is meet, still apply.

    b. Development of an FPA should cease if the initiation side withdraws and the relevant default bargaining parties decides not to step in [briefing 2021-3938 refers] – if the consequence of the initiating side (which in most cases would be the employee side) withdrawing was that the FPA would be fixed by determination, this could result in the initiating side making a strategic decision to withdraw from bargaining as an FPA would still result. If this occurred, it is inconsistent with the intention that FPAs are bargained where possible.

The backstop process would be triggered when specified timeframes are met

Previous decisions

If BusinessNZ:

a. agreed to be the default bargaining party, it would have four months to find an alternative bargaining party before it became the default bargaining party

b. did not agree to the default, the FPA would be fixed by determination if no eligible employer organisation agreed to be bargaining party within six months.

28. As we are now progressing the alternative backstop option where the FPA will be set by determination, we have reconsidered the associated timeframes. Allowing longer timeframes before the backstop process is triggered would provide a greater opportunity for employers to organise themselves, so that the FPA could be developed through bargaining rather than fixed. However, our understanding is that you would prefer to avoid delays in the FPA process, therefore our recommendations are based on what we consider to be the shortest appropriate timeframes.

29. We recommend:

    a. The initial deadline for forming the bargaining side remain as three months for an initial FPA and be reduced to two months for a renewal[4].

    b. The default bargaining party has one month (after being notified by the Chief Executive of MBIE) to decide whether to step in if the following situations occur:

        i. No organisation on the non-initiating side (excluding any ‘specified employer’ bargaining parties) is approved to be a bargaining party within three months for an initial FPA or two months for a renewal.

[4] You had previously agreed (in a discussion with officials) there would be a set time period of three months for the initial formation of the bargaining side in order to allow organisations an equal opportunity to contribute to the decision on the bargaining side process agreement and lead advocate and to provide a clear time period for when the twenty days’ time requirement for agreeing a bargaining side process agreement begins. For renewals we consider the bargaining parties should require less time to coordinate their bargaining side, so have recommended reducing it to two months.

ii. All bargaining parties on the non-initiating side withdraw for both an initial FPA and a renewal[5].

30. A representative of BusinessNZ has indicated they consider one month should be adequate for BusinessNZ to decide whether it wishes to bargain a FPA, as they would have already been involved in discussions with the industry/occupation about the FPA and representation.

31. When the specified timeframes have been met, it is recommended that MBIE notify the employee bargaining side that they are able to apply for the backstop process to begin. We recommend that the employee bargaining side should have up to three months to apply. If they do not apply within that time the development of the FPA was cease. If an employer association was approved to be a bargaining party and the employee bargaining side had not yet applied for the FPA to be fixed, then the FPA would be bargained. As the applicant, the employee bargaining side would also be able to withdraw their application during the backstop process, which would mean development of the FPA would cease.

If an FPA covers 'specified employers' and 'other employers' and there is no willing bargaining party for 'other employers', this would trigger the backstop

Previous decisions

Some public sector employers (referred to as 'specified employers') would have different representation requirements. In particular:

a. Public Service Commissioner (the Commissioner) will represent the public and education services in bargaining, and the Chief Executive of Health NZ will represent Health NZ (jointly referred to as PEH in the earlier briefing). They are required to always participate in bargaining when there are public and education service employers within coverage.

c. The three non-public service departments (Parliamentary Counsel Office (PCO), Police, New Zealand Defence Force (NZDF)). They can also decide to ask the Commissioner to represent them, or not to participate as a bargaining party. If they chose not to participate (and/or the Commissioner declined a request to represent them), the result would be that no other bargaining party would have an obligation to represent them. The outcome of the FPA would still, however, apply to them.

d. Other state service agencies may use the main representation option of being represented by an incorporated society (eg an employer association), or may ask the Commissioner to represent them.

If an FPA is initiated in an occupation covering both 'specified employers' and 'other employers', the Commissioner, the Chief Executive of Health NZ, PCO, Police and/or NZDF would not have any bargaining obligations to 'other employers', and the bargaining party for 'other employers' would not have any bargaining obligations to the 'specified employers'. This means that when an FPA covers 'specified employers' and 'other employers', representatives of both are required.

Therefore, under the previous approach involving mandatory default bargaining parties, if there was no eligible organisation willing to be a bargaining party for 'other employers', BusinessNZ would have been required to step in and bargain alongside the 'specified employer' bargaining party(ies).

[5] If all the bargaining parties on the initiating side withdraw during bargaining development of the FPA would cease.

32. This raises the question of what would now happen in a situation where an FPA covers employees across both ‘specified employers’ and ‘other employers’, but there is no eligible organisation willing to be a bargaining party for ‘other employers’.

33. We propose that if there is no willing bargaining party for ‘other employers’ this means that the entire FPA would be set by determination (ie the FPA is determined for both ‘specified employers’ and ‘other employers’). This creates a risk that an FPA that covers ‘specified employers’ (even if they are the majority employer) could end up being set by determination due to the lack of a willing bargaining party for the ‘other employers’ within coverage. This could be seen as contrary to the policy intent of having a bargained outcome where possible but is a consequence of having coverage that can cross public and private sector and different representation requirements for them.

34. We considered an alternative rule that would have allowed ‘specified employer’ bargaining parties to represent ‘other employers’ but continue to consider this would be inappropriate. Allowing this would be inconsistent with the previous decision that employers should be represented by incorporated societies as the bargaining parties need to have a legal form and constitution that allows them to represent all employers within coverage (without any conflicts of interest). Our proposed approach is supported by Te Kawa Mataaho Public Service Commission (TKM) as they do not believe they could represent ‘other employers’. From a practical perspective, TKM also indicated that the Commission is not resourced to do this.

35. We also note that the employee bargaining side would have the choice as to whether to apply for the FPA to be fixed by the backstop process or choose to withdraw the FPA and either initiate collective bargaining with a particular employer(s) or initiate a new FPA with narrower coverage (if they thought that meant it could be bargained).

36. We considered, but do not recommend, allowing the FPA to be split so that an FPA covering ‘specified employers’ would be bargained and an FPA covering ‘other employers’ fixed by the backstop process. Splitting an FPA and setting the terms via two processes would add complexity to the system. There is also a risk of creating an expectation that the terms bargained for ‘specified employers’ would be extended to ‘other employers’ (or vice versa, depending on the timing), even when there are more employees in that industry/occupation employed by ‘other employers’ and the terms may not be appropriate to them. This could potentially be addressed by including a threshold, but this would add further complexity and it is likely to be difficult to determine whether the threshold is met (leading to a risk that the decision is challenged).

We have identified a gap in the representation requirements for ‘specified employers’

37. We are concerned that the previous decisions for PCO, Police and NZDF are unclear on whether the backstop process could be triggered in a situation where PCO, Police and NZDF are is the only employer within coverage. Previous decisions provide PCO, Police and NZDF with the discretion to represent themselves if they wish to participate in bargaining. This reflects the burden that would be placed on them if they were required to be a bargaining party regardless of how many employees were in coverage. We have since identified this creates a risk that an FPA covering only PCO, Police and/or NZDF could end up being set by determination due to the lack of a bargaining party. Our advice provided this discretion with the expectation that PCO, Police and NZDF (or the Commissioner) would be the bargaining party if they were the only employer in coverage as no one else would be able to represent them was [briefing 2022-0637 refers].

38. We recommend that if an FPA only covers their employees, PCO, Police and/or NZDF should be required to represent themselves or request the Commissioner to represent them. In line with previous decisions, if PCO, Police and/or NZDF request representation and the Commissioner chooses not to, or is unable to do so, these entities should be required to represent themselves.

39. PCO, NZDF, Police, and Te Kawa Mataaho Public Service Commission have confirmed they are comfortable with this approach.

Section B: What entity should perform the backstop determination function?

The backstop function is a hybrid function

40. The backstop determination function requires the decision-making body to determine the full suite of FPA terms. As the resulting FPA will be given effect via secondary legislation, it could be seen as being more akin to a legislative than judicial function. This is also the case when the ER Authority is fixing terms following a bargaining dispute. However, in the backstop situation the function shifts further away from a judicial function as it does not involve adjudicating a matter between two sides (due to the lack of a party on the employer side[6]). A legislative function would typically be undertaken by Parliament or Parliament can agree to delegate to the Executive Council or a Minister.

41. You have indicated your clear intention that you do not wish any decision-making function in the FPA process to be undertaken by Ministers.

42. At Cabinet you also signalled your intention that a new regulatory institution will be required to undertake the wider breadth of functions and responsibilities and those functions that already exist throughout the Employment Relations and Employment Standards (ERES) system.

43. Ideally we would develop a new institution that was resourced to undertake this new function. However, given that there is not currently a new regulatory institution, we focused our assessment on which existing entities could feasibly undertake this function now.

We consider that the ER Authority is the most appropriate body to provide the new backstop function until the new institution is created

44. We have received advice from Ministry of Justice and Legislation Design and Advisory Committee (LDAC) that the ER Authority would be able to undertake the backstop function as a quasi-judicial body.

45. LDAC advised that while the ER Authority is a judicial body, it is inquisitorial in nature and does not operate in the manner of an adversarial court. While the role of the ER Authority will be complicated by the absence of an employer bargaining party, so long as the law provides the ER Authority with sufficient mechanisms to inquire into and investigate the employer side, the ER Authority's decision-making will remain judicial in nature. How the ER Authority assembles that evidence and how those powers are framed will be critical to the ER Authority discharging its natural justice obligation to "hear the other side".

46. LDAC has also advised that the closer the mechanisms for setting FPA terms align with the existing functions of the ER Authority, the more effective the ER Authority will be, and will be seen to be, when determining FPA terms.

47. We consider the ER Authority would be the most appropriate body for fixing the terms of an FPA. The ER Authority already has the function of determining an FPA where ratification fails twice or due to a bargaining impasse where certain thresholds have been reached. The concentration of like functions in the ER Authority will ensure efficiencies from an expertise, resourcing and cost effectiveness perspective. This function can effectively build on the ER

[6] Although if the FPA covers both 'specified employers' and 'other employers', there could be 'specified employer' bargaining parties that were ready to bargain. They would, however, only be able to feed into the process from the perspective of 'specified employers' and there would still be a gap due to the lack of a bargaining party for 'other employers'.

Authority's existing role fixing terms in the FPA system, and other bargaining systems, following bargaining disputes.

48. We note that further thinking around functions and powers of the new institution can be done when work begins to develop it.

49. We considered whether an alternative body could be a viable option, however, dismissed these for the following reasons:

    a. Employment Court – to provide this function to the Employment Court would risk creating separation of power issues, as the body creating the law would also be the body enforcing it. This would also create disparities in decision making across the determinations in the bargained system compared with the backstop process. For example, the Employment Court would be the appeal body when it came to bargained determinations, but the Court of Appeal would need to be the appeal body for backstop determinations.

    b. The Remuneration Authority – the Remuneration Authority does undertake a similar function for setting salary and wage entitlements for certain groups of people. However, the FPA process will involve setting broad terms and conditions across an industry and occupation, which is a substantially different function. To consider whether the Remuneration Authority should be the entity that fixes FPA terms in the backstop process would require significant time and resource to ensure it had the appropriate functions and powers to undertake the role. We do not consider that practical in the timeframe available.

We do not consider that there would be any significant risks to the separation of powers created by this function, and any risks can be mitigated

50. There may be concern that the backstop function would create a perception that the ER Authority is both making the law and applying it when there are disputes concerning the law's application.

51. Chapter 4.1 of the Legislation Guidelines 2021 states that "Legislation should be consistent with fundamental constitutional principles, including the rule of law." This includes the separation of the functions of the executive, legislative and judicial branches of the Government.

52. We recommend that any actual or perceived risk of conflict should be managed by restricting those ER Authority members who have fixed the terms of an FPA from subsequently enforcing or otherwise adjudicating on it. This is consistent with the approach applied when ER Authority members have fixed terms following bargaining.

Section C: What are the process requirements and obligations?

Previous decisions

You have confirmed that:

a. You consider the determination backstop to be a new process, not just a continuation of bargaining

b. You want to retain the role of the union bargaining side in representing workers in the determination

c. The ER Authority can seek input from anyone it reasonably needs to [briefing 2122-1366 refers].

53. Taking these decisions as the starting point, this section outlines options for how the determination backstop process could work.

54. In most situations, the risk of a lack of bargaining parties is greatest on the employer side, as the first FPA in a sector or industry can only be initiated by a union. Therefore, for simplicity, this briefing focuses on the scenario where there is an employee bargaining side (made up of unions) willing to bargain the FPA and a lack of representation on the employer side.

55. It is, however, possible that an employer association could initiate a renewal of an FPA and there is no union willing to bargain it, or all union bargaining parties could withdraw during bargaining of a renewal initiated by the employer side. If this was to occur, we consider the CTU would have the option of stepping in as default (as recommended above). If the CTU did not agree to bargain the FPA on behalf of employees, then the same process would apply as outlined below, with the wording switched to reflect the existence of an employer bargaining side and absence of an employee bargaining side[7].

The bargaining parties on the employee bargaining side will represent employees

56. You have decided that in this process the role of unions as the employee bargaining parties representing employees should be retained. Therefore, in the backstop process the employee bargaining party(ies) will be the party(ies) providing input from an employee perspective.[8]

Where a 'specified employer' bargaining party is representing 'specified employers', they should be the representative for them in this process

57. As outlined above, the backstop process could not be triggered by the lack of a bargaining party for 'specified employers'[9]. If an FPA covers public, education, or health sectors then the Commissioner or Chief Executive of Health NZ (as relevant) must participate. If the FPA covers Police, PCO, or NZDF, they can either choose to represent themselves, ask the Commissioner to represent them, or opt-out of being represented during bargaining.

58. We consider that where an FPA covers 'specified employers' and 'other employers' and the backstop process is triggered by a lack of a bargaining party for 'other employers', then the relevant 'specified employer' bargaining party should be allowed to be a party to the determination and provide input into the backstop process from the perspective of the 'specified employers' they represent. This reflects the fact that they are a bargaining party to the FPA and were willing and ready to bargain the FPA (consistent with the approach for bargaining parties on the employee side).[10]

59. The ability to be involved in the backstop process would apply, however, only to the union and 'specified employer' bargaining parties that had applied to be a bargaining party before the backstop process was triggered. This may help encourage relevant organisations to apply to be a bargaining party following initiation, as if they do not and the backstop process was triggered, they would not be able to participate in that process.

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[7] The determination backstop process would not be triggered if the union bargaining parties withdrew during bargaining if the FPA was initiated by a union. Paragraph 27(b) outlines the rationale for why the previous decision that progress of the FPA should cease is still appropriate, even with the change in the backstop options.

[8] Note that any freedom of association issues that exist in the FPA bargaining process would also occur in the backstop determination process, as under both processes employees do not have an ability to choose who represents them.

[9] The one exception is if an FPA covered only 'other state sector service agencies' and there were no eligible incorporated societies (ie employer associations) willing to represent them and the Public Service Commissioner declined to represent them, then the backstop determination process would be triggered.

[10] This could include the Public Service Commissioner providing input on behalf of 'other state service agencies' if they requested it and Public service Commissioner agreed to it.

There are choices about how information on the impact on 'other employers' is obtained

60. As the backstop process is triggered by a lack of a bargaining party for 'other employers', there needs to be away to fill this gap so that the ER Authority has the appropriate information to make its decision.

61. As employers will be affected by the decision, natural justice requirements suggest they should have a voice in the process. However, there is a direct trade-off between designing the system in a way that ensures requirements of natural justice are met and the risk that the costs of participation are shifted from employers to the government, potentially making the backstop more attractive than participating in bargaining.

62. We have considered the following options for how the ER Authority could obtain information on the implications for employers when considering the criteria relevant when fixing the terms of an FPA[11]:

    a. Option One: Discretion for the ER Authority – in this option, employers would not be a 'party' to proceedings[12], but the ER Authority would be able to request information from whatever employers or employer representative organisations it considers to be appropriate.

       This option may incentivise employers to organise themselves to participate in the bargaining process, as their ability to input is clearer under that process. It aligns with the ER Authority's current investigative approach, but may affect its perceived independence (eg by those affected by the determination), as it would be directly engaging with a range of employers (compared with the employee side where they would only be engaging with the unions representing employees). The ER Authority may also be overrun with submissions. This option has potential natural justice implications as employers would be impacted by the decision, but not have a right to be heard (any involvement would be at the discretion of the ER Authority).

    b. Option Two (recommended): Require the ER Authority to appoint an 'Authority advisor' – Under this option employers would not be able to be a 'party' to the process. Instead, the ER Authority would appoint an Authority advisor to provide independent advice to assist it to understand the implications for employers when considering the criteria relevant when fixing the terms of an FPA.

       The Authority advisor would not be representing or advocating for employers. While the Authority advisor would need to obtain some degree of input from employers to fulfil its role, they would not be required to consult with all employers or report their views verbatim to the ER Authority. The Authority advisor would, based on the information they have gathered from employers and any other research they considered relevant, provide a report to the ER Authority on the information they have gathered that describes the industry or occupation practices and norms and the likely impact on the business or activity of the employers with the employees within coverage.

       The intention of including this role would be to protect the perceived independence of the ER Authority, by making it more akin to an adjudicative process, where the ER Authority is considering input from all sides. It would enable the ER Authority to consider a consolidated view on the likely impact on employers (rather than hearing from a range of employers directly). As per option 1, this option has potential natural justice implications, as employers would not have a right to directly participate in the process even though it impacts them. The appointment of this role would add

[11] In the bargained system, the ER Authority is required to consider specified criteria when fixing the terms of an FPA following a bargaining dispute. We recommend in paragraphs 83(b) below that these same criteria be applied when the ER Authority is fixing terms via the backstop process.

[12] Which also impacts appeal rights.

complexity to the system, as the ER Authority would need to identify someone with the suitable expertise to adequately perform this role. While the Authority advisor would be appointed by the ER Authority, they would be contracted by MBIE. When the ER Authority is appointing the individual, the ER Authority would be required to apply specified criteria to ensure a person with relevant knowledge, skills, and experience is appointed.

c. Option Three: Enable employers to be a party and input directly into the process – under this option, employers would be able to become a 'party' to the backstop process, meaning they could make submissions and be heard at any proceedings.

   This option would protect the rights of employers and ensure the requirements of natural justice are met. As per option 1, it could impact the perceived independence of the ER Authority (as the ER Authority would be hearing directly from employers but indirectly from employees). There is also a risk that a large number of employers apply to be a party, creating a lengthy and expensive process. The main risk associated with this option is that it could undermine the policy intent that FPAs are bargained where possible, as employers may prefer the backstop process: they are ensured a voice and do not have to bear the costs of coordinating that voice. The costs to the government would be greater under this option.

63. You have already decided that the ER Authority can seek information from any person it considers appropriate, Therefore, under all the options (including the recommended option) the Authority would be able to seek input directly from employers if it chose to do so.

64. Employers may also choose to make a submission to the ER Authority. Under options one and two, the ER Authority would have discretion as to whether it considered any submissions. Under option two, we would expect that the ER Authority referred any employer submissions to the Authority advisor, who would then have discretion as to whether and how they considered that input. Under option three, the ER Authority would be required to consider that submission (as the employer would be party to the process).

65. If we were designing this process as a standalone function, we would recommend option three (where employers can be a party to the process), as under this option the rights of employers are clear and protected.

66. However, this function is intended to be a backstop to the FPA system that should only be utilised if there is a lack of representation on one side. Therefore, it is important that the design of the backstop does not deter employers from forming a bargaining side to participate in bargaining. Therefore, we recommend option two (where the ER Authority appoints an Authority advisor). This approach is intended to enable the ER Authority to be able to fulfil its role in assessing the likely impact on employers when making its determination, while reducing the risk that employers find this a more attractive option than coordinating themselves to participate in bargaining.

67. As outlined above this approach may have natural justice implications, which will need to be managed and justified. As the policy intent of the FPA system is that FPAs are bargained where possible, we consider a key objective of the backstop determination system is that it should not be more attractive to employers than forming a bargaining side. If the system included the ability for employers to be a party to determination there is a significant risk that it could disincentivise employers to participate in bargaining. As they may view the backstop as a more cost-effective way of influencing the terms, rather than coordinating and funding bargaining (particularly as in the bargaining system employers are not able to participate directly but must be represented by eligible employer associations). The recommended approach is, therefore, intended to encourage employers to coordinate themselves to participate in bargaining, because under the backstop process they will not be able to be a party. In the backstop process, employers would still have an opportunity to coordinate themselves to engage with the Authority advisor.

68. Other options we considered, but do not recommend, are:

    a. Requiring the ER Authority to appoint a representative of employers – We have previously recommended against funding an employer representative in bargaining as the backstop mechanism because it would result in the government funding only one side (creating an issue of fairness). It would have disincentivised employers from coordinating themselves, as they could avoid incurring the costs of bargaining. The same issues would apply if the ER Authority appointed a representative of employers in the backstop process, with the additional consequence that, as well as transferring the costs to government, it may make the backstop process more attractive than bargaining (as only in the backstop process would their representative be paid for).

    b. Including representatives of employers and employees in the panel of decision makers – This would add complexity and risk in terms of how to appoint appropriate representatives on the employer side. It could also blur the line with government funded bargaining, as the representatives would need to be compensated for their role. It would be a significant change to the ER Authority's current form, so would add time and complexity to the development of the FPA Bill. It is, however, something that could be considered further as part of the development of the new institution.

Agency and stakeholder views' on the recommended approach for obtaining employer input

69. LDAC and the Ministry of Justice recommended we consider enabling an approach where the ER Authority appoints an investigator[13] or employer representative/expert role to fill the gap created by a lack of an employer bargaining side. LDAC highlighted the importance of ensuring the design of the backstop doesn't deter potential employer representatives from representing employers in bargaining, while also acknowledging the potential for natural justice concerns.

70. BusinessNZ considers that in the absence of a bargaining party on the employer side there should be a submissions process. We raised the concern with BusinessNZ that the design of the backstop needed to mitigate the risk that it became a more attractive option than participating in bargaining, which BusinessNZ acknowledged. It considered the idea of an Authority advisor would be workable and was similar to how it worked in the past (when the Labour Court fixed terms). BusinessNZ would expect to be consulted when the ER Authority was deciding who to appoint.

71. The CTU reiterated the view that the obligation to use best endeavours to come to agreement on the terms of the FPA in an orderly, timely and efficient manner falls on employers. The CTU does not agree with the intention that this obligation applies to the bargaining parties and therefore, does not apply when no organisation has agreed to be a bargaining party on the employer side. In terms of the backstop process, CTU considers it is critical that the system incentivise employers to participate in bargaining and that employers will be motivated to participate in bargaining if this is the only way they can be assured of having a voice.

72. We also discussed the recommended option with the Chief of the ER Authority. His main concern was that the ER Authority would need impartial information on the employment terms, history wage rates etc of the industry and occupation (eg research provided by MBIE) and ER Authority members should not have to rely only on the information provided by the union bargaining side and Authority advisor. Under the proposed approach, the ER Authority would still be able to seek information and expert input as it saw fit. He was unsure about the value of the role of the Authority advisor and how the advisor would be selected, but indicated he was comfortable with this approach as long as the ER Authority was also able to

[13] A similar concept is included in the Disputes Tribunal Act 1988, where the Tribunal may, if it thinks fit, appoint a person (termed an investigator) to inquire into, and report to it upon, any matter of fact having a bearing on any proceedings and may give such directions as to the nature, scope, and conduct of the inquiry as it thinks fit (section 41).

obtain impartial contextual information. This is something that we will need to factor into resourcing estimates.

Appeals and judicial review rights will need to reflect the lack of a bargaining party on one side

Previous decisions

Cabinet agreed that where an FPA is determined under the bargained FPA system the union and employer bargaining sides have the right to appeal the decision, however, this right is limited to appeals on questions of law only [rec 57, CAB-21-MIN -0126 refers]. The rationale for limiting the appeal on determinations that fix terms to questions of law and not substance is to avoid lengthy delays and provide certainty and finality to the parties about what terms and conditions apply.

You also agreed to apply the existing ER Act approach to judicial review in the FPA system to all statutory powers of decision in the FPA system [briefing 2021-4352 refers][1]. This means that:

a. Appeal rights (if any) must be exhausted before a judicial review challenge can be taken;

b. Judicial review applications must be heard by the Employment Court; and

c. Judicial review of decisions of the ER Authority is limited to situations where the ER Authority lacked the jurisdiction to make a determination.

The ER Authority only 'lacks jurisdiction' where:

a. It had no entitlement to 'enter upon the inquiry in question'; or

b. The determination was one the ER Authority is not authorised to make; or

c. The ER Authority acted in bad faith.

We recommend for the backstop process that only parties to the determination proceedings have appeal rights

73. We have recommended that when the relevant bargaining party(ies) apply(ies) to have the FPA fixed by the backstop process, that only those who were bargaining parties at the time the backstop process was triggered should be able to be a party to the proceedings. As a result, only those that are a party to the proceedings would have the ability to appeal the determination. This will, in most instances, mean the union bargaining side and 'specified employers' (if covered) have appeal rights (ie where an FPA is initiated and no employer bargaining side forms). However, in some instances, for example where an employer applied to renew an FPA and the union bargaining side did not form in the requisite time period, it would be the employer bargaining side that has the appeal rights.

74. Consistent with the FPA bargaining system, we recommend that any appeal rights should be limited to questions of law only. This means that employers who have inputted into the FPA process via an Authority advisor cannot appeal the decision (as they are not party to the proceedings).

75. Where a party has the ability to appeal the determination, we recommend that the Employment Court be required to appoint an amicus curiae to provide the other sides' point of view and the Authority advisor that was appointed to the original proceedings be required to brief the amicus curiae. An amicus curiae is necessary in addition to the Authority advisor because the Authority advisor may not be a lawyer and therefore may not be appropriate to represent the other side's point of view on appeal. The amicus curiae will be responsible for

considering the matter from the perspective of those that are not a party to the proceedings (for example, for employers where the employer bargaining side did not form) and consult as they consider appropriate.

As appeal rights are necessarily limited, we recommend ensuring that full judicial review rights are available

76. Under the FPA bargained system, the determination can only be judicially reviewed if:

    a. any other appeal rights are exhausted and

    b. the Authority 'lacked jurisdiction' to make the determination (refer to description on previous decisions above for an outline of what this covers).

77. We recommend that where appeal rights exist, they should be exhausted first (consistent with the FPA bargained system).

78. This process will mean a group directly affected by the determination, but not a party to it, will not be able to appeal the determination. As such, some ability to challenge the decision is a vital safeguard. Therefore, we are recommending a different approach to judicial review than exists in the FPA bargained system. We recommend that if a party has appeal rights, they must exhaust them first, but then there will be no further limitation on judicial review. This means we will not be applying a requirement that the Authority must 'lack jurisdiction' first before the decision is judicially reviewable.

79. We considered applying the additional requirement of 'lacking jurisdiction' before being able to access judicial review to those parties that do have appeal rights but have been advised by Ministry of Justice officials that natural justice requirements would suggest a balanced approach should be taken, with the same access to judicial review.

80. Union bargaining parties, 'specified employer' bargaining parties, and employees and employers within coverage would, therefore be able to judicially review the ER Authority's actions and decisions in determining the terms of the FPA. This would include:

    a. Whether the ER Authority applied the criteria correctly

    b. The selection of the Authority advisor

    c. The acceptance of the advice provided by the Authority advisor - The advice of the Authority advisor itself would not be subject to judicial review, as they are not exercising a statutory power of decision. However, the ER Authority would need to be satisfied that the information provided from the advisor is robust when fixing the terms of the FPA.

81. When discussing this process, BusinessNZ indicated that it would be important for employers to have an ability to challenge (in some form) the determination, due to their lack of ability to patriciate directly in the process.

The Authority advisor should have immunity from liability in proceedings

82. There is a risk that employers take civil proceedings against the Authority advisor if they consider the Authority advisor has not fully or accurately reflected the implications for employers or to undermine/delay the process. The Authority advisor will, therefore, need some form of protection, such as a statutory immunity from liability, for the advice it provides in good faith, as without this protection it is unlikely that anyone would be willing to perform this role.

The requirements and powers of the ER Authority would be consistent, where appropriate, as when fixing terms in a bargained process

83. We recommend that when fixing terms in the backstop process similar requirements should apply as when the ER Authority is fixing terms due to a bargaining dispute or two failed ratifications, with some amendments. In particular:

    a. The decision should be made by a panel of members – This will promote a consistent approach and allow decisions to be made based on a range of expertise.

    b. They must apply the same criteria[14] – These criteria are still relevant, as they are intended to ensure the terms fixed by the ER Authority are workable in the specific context and circumstances of the occupation or industry.

    c. When fixing terms in this process, the ER Authority must and may include the same topics as when fixing terms in bargained process – This is intended to provide consistency between FPAs fixed under both processes, although some terms may not be appropriate to include due to the lack of two 'sides' to agree their inclusion. Therefore, when fixing terms under the backstop process, the ER Authority;
        i. must fix mandatory to agree topics
        ii. can fix mandatory to discuss topics but must include and fix a 'mandatory to discuss' term if requested by one side, unless there is a good reason not to[15].
        iii. can include regional variations and other differential terms for 'mandatory to agree' and 'mandatory to discuss' terms.
        iv. cannot include other employment terms - as there are not two sides to 'agree' to include them.
        v. cannot include exemptions - as these can only be fixed when there are two bargaining sides to both agree and run an exemptions process.

84. The ER Authority will need suitable powers to enable it to obtain the information it requires to make the determination. 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 ER Authority considers appropriate.

85. We consider the ER Authority will require similar powers but note some amendments may be required to reflect the different nature of this process. For instance, we may need to consider whether the terminology (eg investigation meeting) is appropriate.

86. The Authority advisor would not have any powers (ie they could not call for information or require other persons to meet with them).

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[14] The ER Authority must consider: terms previously agreed (if any bargaining had occurred); relevant industry or occupational practices and norms; likely impact on employees and the business of activity of employers; relativities within the FPA and between the FPA and other relevant employment terms and conditions; and ensuring the FPA can be easily understood by employers and employees within coverage. They may (but are not required to) consider: any likely impacts on New Zealand's broader economic or social wellbeing in making determinations or non-binding recommendations on FPA terms and conditions.

[15] If the same concept was not applied in the determination backstop process it would increase the risk that employers prefer this process, as an FPA fixed by the backstop process is likely to include fewer terms compared to one developed in the bargained process.

Section D: How do other aspects of the FPA system apply if the backstop process is triggered?

87. This section covers the other aspects of the system that are affected when an FPA shifts to the determination process and decisions are required on whether the same obligations/requirement should apply and/or be amended.

88. Annex A outlines the aspects of the FPA system that would automatically apply (or not apply) when the backstop process is triggered (so do not require any decisions).

Coverage – coverage should not change once this process has begun

Previous decisions

The initiating union will outline the intended coverage of the FPA as part of the initiation process.

When an FPA is being developed through bargaining, the two bargaining sides can agree a change in coverage from what was proposed by the initiating union.

89. When an FPA is being fixed by the backstop process, we do not consider coverage should be able to be changed:

    a. This is only changed under bargaining when both sides agree – allowing one side to apply to the ERA to change it would not be consistent with this.

    b. It could incentivise employers to bargain if this was the only way they would have an opportunity to amend coverage.

    c. It adds further complexity to this process.

    d. It does not seem appropriate for the determining body to be able to change the coverage that the initiation (and initiation test) was based on.

90. The risk of this approach is that is removes the opportunity to clarify or refine coverage if issues are identified while the terms are being considered. The requirement for coverage of an FPA to be checked at initiation would mitigate this risk to some degree. In addition, the employee bargaining side could withdraw their application for the FPA to be fixed via the FPA process if it considered a change in coverage was required and initiate a new FPA with different coverage.

Consolidation requirements – additional requirements are needed for situations where one or more FPAs in the same industry have gone to the backstop process

Previous decisions

It will be possible for a union to initiate bargaining for an FPA that is in an industry where an FPA is already being bargained by another union(s). For example, a union may have initiated for checkout operators in a Supermarket and Grocers Industry FPA (FPA1) and subsequently, another union may initiate for deli employees and butchers in the same industry (FPA2).

Under the FPA bargaining system, Cabinet agreed that bargaining will be required to be consolidated if the subsequent FPA is initiated within a 6-month period and it is within the same industry as FPA1 [CAB-21-MIN-0126 refers]. After that time the FPA can only be consolidated with the agreement of both existing bargaining sides on FPA1.

If the existing bargaining sides do not agree to consolidate, the bargaining parties to FPA2 must bargain a Schedule to FPA1. Only the parties to the Schedule (FPA2) would be required to ratify it, however, and no substantive changes could be made to the terms in the FPA1. The FPA, and its Schedules, would expire at the same time, so that any renewal covers all occupations within the Industry FPA (including the Schedule), bargained together.

91. We consider the following requirements should apply if two FPAs are initiated in the same industry and one or both FPA(s) lack representation on one side:

    a. <u>If FPA1 is being bargained and FPA 2 lacks an employer bargaining party, the standard consolidation rules should apply (</u>with any variations required to give effect to the lack of bargaining party(ies) on one side) where:

        i. If FPA2 is initiated within six months of FPA1, the bargaining parties must consolidate bargaining.

        ii. If FPA2 is initiated after six months from the initiation of FPA1, the bargaining sides from FPA1 can choose whether to consolidate bargaining with FPA2. If they choose not to, the bargaining side on FPA2 could apply to the ER Authority for the FPA to be fixed by the determination process.

    b. <u>If FPA1 lacks an employer bargaining party and FPA2 is initiated, consolidation is only required if an application has not been made for FPA1 to be fixed by the backstop process</u> - this provides certainty to parties about what process will be undertaken and provides a clear and easy rule for parties to understand. Once the backstop process is engaged, then that process must be undertaken. It is possible that employer bargaining parties subsequently come forward for FPA2, however, we do not consider it to be practical or workable to require the FPA to revert from the backstop process back into bargaining for FPA1. Noting, if the employee bargaining side thought there was an opportunity to bargain the FPA, they could withdraw their application for the FPA to be set by the backstop process and re-initiate the FPA[16].

    c. <u>When two FPAs initiated in the same industry have both gone to the backstop process, the ER Authority should have discretion to merge the two</u> - joining the determination processes may result in resourcing, time and cost efficiencies, particularly for the ER Authority panel and Authority advisor appointed, but also for the unions and employers that have members or employees covered by both processes. However, joining the

[16] In this scenario the employee bargaining side would need to re-initiate the FPA as the process for forming bargaining sides, notification etc would need to re-occur.

processes is unlikely to always be appropriate, particularly where significant progress had been made in the process and to join would significantly delay the determination and the resulting outcome for the workers affected by the determination.

d. If there are multiple FPAs for the same industry, regardless of whether they are determined by bargaining, the backstop process, or two (or more) separate backstop processes, the subsequent FPA(s) should be attached as a Schedule(s) to the existing industry FPA and expire at the same time – This is consistent with the previous decision where if two FPAs in the industry are bargained separately, FPA2 is attached to FPA1 as a Schedule and expires at the same time as FPA1 (or visa versa if FPA2 is concluded first). We consider that an FPA that results via the backstop process should not be treated any differently.

92. The table below outlines how the consolidation requirements recommended above would apply in different scenarios.

	FPA 2 Bargained (ie there are bargaining parties on both sides)	**FPA 2 no bargaining party**
FPA 1 bargained (ie there are bargaining parties on both sides)	Standard rules: • <6 months: must consolidate • >6 months: can choose, so either bargained together or separately (and the subsequent FPA attached as a Schedule)	Standard rules: • <6 months: must consolidate (meaning the parties for FPA 1 must also bargain terms for those covered by FPA 2) • >6 months: can choose, so either bargained together or FPA 1 bargained and FPA 2 fixed via backstop process (and the subsequent FPA attached as a Schedule)
FPA 1 no bargaining party	Consolidation can only occur if the backstop process has not started for FPA 1: • If backstop process has started: FPA 1 fixed via backstop process and FPA2 bargained (and the subsequent FPA attached as a Schedule) • If backstop process has not started: Must consolidate (meaning the parties for FPA 2 must also bargain terms for those covered by FPA 1)	ERA decides whether to: • consolidate and fix the FPA during the same process or • continue to run two separate processes (and the subsequent FPA attached as a Schedule) *[note, this assumes the bargaining sides for FPA1 and FPA2 both decide to apply for the FPA to be fixed by the backstop process]*

Notification – requirements that apply following initiation continue to apply, plus the initiating side would have obligations to notify the other side of their chosen action

93. The notification requirements that apply at initiation would still apply, as part of preparation for bargaining (eg, initiator to notify employers and other unions and employers to notify employees within coverage).

94. The requirements for when MBIE notifies a default that they must or may become a bargaining party to an FPA would need to be amended to reflect the voluntary nature of the role and timeframes outlined above for when a default may step in.

95. As outlined above, if there are no bargaining parties approved to be a bargaining party within the specified timeframes, then the initiating side would be able to apply for the backstop process to occur and if they do not apply within the required timeframe, development of the FPA would cease. In order to ensure that employers are aware of what is happening with the FPA, the employee bargaining side should be required to notify employers (that they are aware of), the employees which they have received the contact details for, and MBIE of their chosen course of action (ie, whether they have applied for the backstop process or chosen not to). In the situation, where a renewal of an FPA was applied for by the employer side, then the employer bargaining side would be required to notify employers within coverage and MBIE of their chosen course of action. Notified employers would then be required to pass this information to any employees within coverage.

96. The requirement for employers to notify employees at critical stages of bargaining would not apply as these critical stages would not occur. Instead, it will be up to the union bargaining parties to communicate with employees during the backstop process.

Duty of good faith and bargaining obligations – these should apply where relevant

97. Where employer relationships exist that already have a duty of good faith, the duty of good faith should also apply in the backstop process. This would apply for the following employment relationships:

    a. An employer and employee – so that employers are not able to do anything with the intention of undermining employees' involvement with the union bargaining party representing them in the backstop process.

    b. A representative organisation and its members (ie unions) – as they will be representing them in the backstop process.

    c. The bargaining parties on the same side – as they will need to work together to provide their input into the backstop process.

98. The ER Authority should, therefore, be able to apply penalties of up to$20,000 for an individual and $40,000 for a company or other corporation for breaches of good faith that could occur during the backstop process. In particular where:

    a. an employer breaches its duty of good faith duty by doing anything with the intention of inducing an employee not to be involved in the backstop process

    b. any party that is subject to a duty of good faith has engaged in behaviour that is deliberate, serious, and sustained; or intended to undermine the backstop process.

99. There would be no duty of good faith between bargaining sides, due to the lack of two bargaining sides.

100. Where a bargaining party has a role in the backstop system, their bargaining obligations would still apply. Therefore:

    a. on the initiating side, the organisations that had been approved to be a bargaining party for the FPA would represent their side in the process – they would, therefore, have a duty of good faith to any other bargaining parties (meaning they would need to coordinate their input to the ER Authority) and obligations to those they are representing (including the obligation to ensure Māori are effectively represented).

    b. 'specified employer' bargaining parties would represent 'specified employers' – they would have a duty of good faith to any other 'specified employer' bargaining parties and obligations to those they represent (as per the current decisions, they have would no obligation to represent 'other employers').

101. In the bargaining process, bargaining sides can agree for particular interests or populations to be represented during bargaining where they consider it would be appropriate. This would not apply in this process due to the lack of two sides to agree and lack of bargaining. However, the determining body has discretion to seek expert input so could choose to seek input from a particular perspective if it considered it was appropriate.

Contact details – employers will still be required to provide contact details to union bargaining parties at initiation and during the backstop process

102. The requirement to pass contact details of employees at initiation would apply in preparation of bargaining. The requirement to pass on the contact details of new employees within coverage during bargaining will need to be amended to also apply during the backstop process. This is justified as the union bargaining parties will still be representing them as part of this process.

103. This requirement would not apply where there are no union bargaining parties in the process (ie, for a renewal initiated by the employee side). We do not consider it would be appropriate for employee contact details to be provided to the Authority advisor, as they are not intended to represent employees. In the situation where the Authority advisor is providing information to fill the gap created by a lack of employee bargaining side, it would be up to them to determine how best to achieve this (eg by engaging with relevant unions or a sample of employees).

104. The requirement to pass on employee contact details again prior to ratification would not, however, apply due to the lack of a ratification process.

105. Once employee contact details have been passed to the union bargaining party(ies) they will be able to retain them while the FPA is in force (as per the bargaining system).

Paid meetings – employers should provide paid time for each employee within coverage of a proposed FPA to attend two, two-hour paid meetings organised by the unions during the determination process

Previous decisions

Cabinet agreed that employers must provide paid time for each employee within coverage of a proposed FPA during bargaining (applying to both union and non-union employees) to attend up to two, two-hour paid meetings organised by the union(s). If an FPA is voted down at the first ratification process, employers must provide an additional two paid hours to attend any additional meeting organised by the union(s).

106. As there is no bargaining under the backstop process, we have revisited whether the requirement on employers to provide paid time for up to two meetings should still apply.

107. We have considered the following options:[17]

    a. Option One (recommended): Maintain the requirement agreed by Cabinet for employers to provide paid time to attend up to two, two-hour paid meetings for employees within coverage –This option is consistent with your decision that in the backstop process employees will still be represented by the unions that applied to be a bargaining party. It supports improved outcomes for workers by providing two paid opportunities by which union representatives can communicate with affected employees in the manner they see fit. This option has a significant impact on employers through the cost of workers' wages and the potential disruptive effects on

[17] None of the three options includes a requirement for an additional two hours if the FPA is voted down at the first ratification process because the backstop determination process has been triggered and consequently, there is no ratification process.

business operations, which may be less justified given the absence of a bargaining and ratification process. The CTU considers two paid meetings should be provided in this process as the union bargaining parties would use one to form a view on the terms they will propose and the other to obtain employees' views in the final stages of the determination process (eg on any draft terms).

b. Option Two: Employers provide paid time for one two-hour meeting for employees within coverage of a proposed FPA – Requiring paid time for only one meeting reduces the direct and indirect costs on employers compared with option 1, while ensuring that unions have a means to communicate with employees within coverage. This option is not aligned with the equivalent provision under the bargained system, but the difference may be justified as the second paid meeting during bargaining may be used to support ratification. A risk of this option is that it increases the appeal of the backstop process to employers.

c. Option Three: Do not require employers to provide any paid time for meetings for employees within coverage – This avoids the potentially significant costs and impacts on employers to pay for employees' time while they attend the meetings and the potential disruption to businesses. The risk with this option is that it limits the ability of unions to inform affected employees about the FPA process, seek their feedback on the proposed terms, and for employees to hear the views of others. There is also a risk that this option would create an incentive for employers to trigger the determination backstop process, as they would avoid the cost of paid time for meetings under this process.

108. We consider paid time for at least one meeting should be required during this process. The value of the second paid meeting may depend on how long the backstop process takes and whether there is an opportunity to comment on draft terms.

109. On balance, we recommend Option 1, requiring paid time for two meetings when an FPA is being determined by the ER Authority via the backstop process. This option is consistent with the requirements and the intended purpose for the paid time for meetings in the bargaining system (ie for employees to provide input into the bargaining mandate and for information dissemination about proposed terms). However, this requirement would be reduced to account for any paid meetings had already been held during bargaining before the backstop process was triggered (ie there cannot be two paid meeting during bargaining and another two meetings during the backstop process if this is then triggered due to all the bargaining parties on one side withdrawing). This requirement would not apply where there are no union bargaining parties in the process.

Workplace access – rights for unions should apply after an FPA has been initiated (during the determination process) and when an FPA is in force

Previous decisions

Cabinet agreed that the union workplace access during collective bargaining in the ERA would be applied to FPA bargaining (ie that union(s) may access a workplace with workers within coverage without the employer's consent when an FPA is being bargained if the primary reason for their visit relates to the FPA).

Cabinet also agreed that once an FPA is in force and there are workplaces with employees in coverage of the agreement (even if they are not union members) relevant unions will be entitled to access workplaces without the employer's consent if the primary purpose of the visit is related to the FPA.

110. We have considered the following options for workplace access rights without the employer's consent under the backstop process:

a. Option One (recommended): Employee representatives may access a workplace with workers within coverage without consent after an FPA has been initiated and when an FPA is in force – this would require a variation of Cabinet's agreement because part of it applied to when an FPA is *being bargained* (as distinct from after an FPA has been initiated). This option enables unions to maintain effective ongoing communications with employees in coverage and is consistent with existing rights of access under the FPA system when the FPA is being bargained. As unions that have been approved to be a bargaining party will continue to represent employees in the backstop process, we consider they have an ongoing role in communicating with employees (including non-union members). It supports the obligation on the employee bargaining side to consult and get feedback from affected parties. The CTU has indicated that it considers workplace access should be the same under both the backstop process and the bargaining process. Consistent with previous decisions, workplace access would also be available once the FPA is in force.

b. Option Two: Remove workplace access rights that apply while the FPA is being fixed by determination but retain workplace access rights when an FPA is in force – the rationale for this option is based on the differing purpose for workplace access rights before and after the FPA is fixed. Removing access rights (without consent) during the backstop process is based on the conceptualisation that no bargaining is occurring. Retaining workplace access rights after an FPA has been determined via the backstop process is based on the intention to not disadvantage employees (in terms of the support they can receive from unions) if their FPA was fixed by determination rather than a bargained process. We consider that removing the workplace access rights (without consent) during the backstop process would be inconsistent with the intention for the unions that were approved to be bargaining parties to continue to represent employees in this process.

c. Option Three: Remove workplace access rights that apply before and after the FPA is in force – this option is based on the conceptualisation that if bargaining is not occurring, then there are no bargaining parties. It is not consistent with your decision that the unions that are approved to be bargaining parties would continue to represent employees in the backstop process.

111. We recommend Option one, whereby employee representatives may access a workplace with workers within coverage without the consent of employers after an FPA has been initiated (regardless of whether the FPA is being bargained or going through the backstop process) and once an FPA is in force. This option is consistent with the workplace access rights that apply to the FPA bargaining process and ensures that affected employees are not disadvantaged under the backstop process. This requirement would not apply where there are no union bargaining parties in the process.

Vetting and the better off overall test (BOOT) – the ER Authority would need to perform these (where required) for FPAs it is fixing under this process

112. Like in the bargained system, it is implicit when the ER Authority is fixing the terms of an FPA that it cannot set terms that are otherwise unlawful (therefore a separate 'vet' of the FPA is not required).

113. If the coverage of the FPA overlaps with an existing FPA, then the ER Authority would need to complete the BOOT to determine which FPA applies to the employees within overlapping coverage.

Variations – variations should be allowed with the same requirements as when an FPA has been concluded via bargaining

Previous decisions

a. Bargaining sides must agree a process for varying an FPA as part of its governance arrangements and that the process for varying an FPA must require:

   i. Agreement of both bargaining sides to initiate bargaining of a variation

   ii. Ratification (refer briefing 2021-3120).

b. A default bargaining party can agree on behalf of its side to bargain a variation if there are no bargaining parties left on that side (refer briefing 2122-0514).

When an FPA is fixed by the ER Authority in the backstop determination process, the FPA will need to include a process for varying the FPA that includes those minimum requirements.

114. Due to the absence of an existing employer bargaining side, the requirement that both sides[18] agree to initiate bargaining of a variation means bargaining of a variation could only be initiated if the default bargaining party agreed to bargain on behalf of employers. This is consistent with your previous decision that the default bargaining party should be able to step in and agree to bargaining a variation if there are no bargaining parties left on one side.

115. The risk of this approach is that it is too complicated and costly for the default to ever agree to bargain a variation as it would also have to run the ratification process (which would have never happened before). However, to ensure the certainty of FPA terms it is important that variations are only initiated when there is a clear need that is recognised by both sides (to avoid variations being used as a tool to re-litigate an FPA). Therefore, we consider the requirements under this process should be consistent, with a small exception covered below.

116. The intention is that once the FPA is in force there is no difference between one that is developed through bargaining or via the backstop process. Therefore, the requirement for employers to provide one two hour paid meeting for a proposed variation during the duration of an FPA would still apply.

117. Once bargaining of a variation has been initiated, it has shifted to the bargained system, so the obligations and requirements are the same (eg duty of good faith between bargaining sides, bargaining obligations to those they are representing).

Next Steps

118. On 14 December you decided on the following process and timeline for incorporating the backstop process into the FPA Bill:

Process step	Date
Seek Cabinet approval for policy decisions for the backstop at DEV (acting as LEG) (at the same time as seeking approval to introduce the FPA Bill)	16 March 2022

[18] The organisations that can agree to vary an FPA is limited to those organisations that were, and remain, bargaining parties to that FPA. The only exemption is the default bargaining party, as they can step in as a bargaining party when there is no bargaining party on one side. This means they could choose to step into being a bargaining party to an FPA and agree to initiate bargaining of a variation, even if they were not a bargaining party when the FPA was bargained.

Seek Cabinet approval for policy decisions for the backstop	28 March 2022
Draft the backstop SOP	April - July
Refer the backstop SOP to Select Committee	25 July

Annex A: Aspects of the FPA system that would either apply or not apply (with only minor changes or no changes in decisions required)

Initiation – the same requirements would apply with a minor amendment

119. The inclusion of a backstop process does not impact initiation of an FPA.

Financial support – decisions relating to the provision of a financial contribution to the employee bargaining side will be considered as part of upcoming advice

120. Cabinet agreed that once an FPA has been initiated, each bargaining side (on the employee and employer side) is offered a one-off contribution of $50,000 and an additional contribution of up to $25,000 to each bargaining side if less than 20% of those in coverage on their side is a member of a union or industry group (as relevant). As the financial contributions provided for FPA bargaining purposes is fixed to a number of FPAs being initiated each year it may need to be rationed if more FPAs are initiated that budgeted for. We intend to provide advice to you in 2022 on how this funding can be prioritised and rationed if the number of FPAs exceeds the budgeted number.

121. If no employer associations have been approved to be a bargaining party, then they would not be eligible for the financial support available to bargaining sides. However, as the initiating union, and potentially additional unions, have been approved to be bargaining parties they may be eligible for the financial support available to bargaining sides, if it was offered before it became apparent that bargaining wasn't going to occur.

122. Unions representing employees in the backstop determination system will still incur costs associated with engaging with employees to get their views. The costs of inputting into the backstop process may, however, be less that what a union would incur during bargaining.

123. In the upcoming briefing on a possible rationale for this funding, we will consider whether the funding should not be offered until it is known that bargaining will occur and/or whether there should be any prioritisation of provision of financial support to unions involved in bargaining an FPA compared to inputting into the backstop process.

Dispute resolution – dispute resolution services will be available where relevant

124. Dispute resolution services would be available for those that have an FPA relationship (eg disputes between employee bargaining parties) and employers and employees will be able to enforce their rights and obligations once the FPA is in force.

Ratification – would not occur

125. There is no ratification process when terms are fixed by the ER Authority

Finalisation – would occur

126. The CE of MBIE would still need to put the FPA into secondary legislation so that it applies to all employers and employees within coverage.

Compliance and enforcement – the same responses would be available

127. The ER Authority will be able to apply penalties for breaches that could occur during the backstop process or once the FPA is in place (refer paragraph 98). Penalties would not be available for breaches that could only occur during bargaining or ratification.

128. The intention is that once the FPA is in force there is no difference between one that is developed through bargaining or via the backstop process. Otherwise, employees could be negatively affected by the employer side's decision not to bargain. Therefore, once the FPA

is in force, employers and employees within coverage will be able to enforce their rights and obligations through the dispute resolution processes. In addition, the Labour Inspectorate would be able to enforce the terms as minimum entitlements.

Renewal – the same requirements will apply

129. The standard requirements for initiating a renewal will apply and once a renewal has been initiated the same process of notification and forming of bargaining sides will occur, where possible.

130. If one bargaining side does not form, the side that initiated the renewal could apply for the backstop process. The main difference for renewals is that they can be initiated by the employer side. Therefore, there is a possibility that the backstop process could be triggered by a lack of any bargaining party on the employee side. In this situation, the backstop process would include an employer bargaining party(ies) and the Authority advisor would be providing independent information on the likely impacts of potential terms on employees.