



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of briefing	Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee	Date to be published	27 October 2022

List of documents that have been proactively released

Date	Title	Author
July 2022	Cabinet paper: Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee	Office of the Minister for Workplace Relations and Safety
25 July 2022	Cabinet minute: CAB-22-MIN-0270	Cabinet Office

Information redacted

YES

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- Confidential advice to government

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Office of the Minister for Workplace Relations and Safety

Cabinet

Fair Pay Agreements: Approval to refer the “backstop” Slip of Amendments to Select Committee

Proposal

- 1 I propose that the Slip of Amendments (the Slip), which seeks to amend the Fair Pay Agreements Bill (the Bill) by introducing a “backstop” determination process, be referred to the Education and Workplace Committee for consideration alongside the Bill.
- 2 I intend to ask the Select Committee to accept the amendments proposed in the Slip and incorporate the Slip into the version of the Bill that the Committee reports back to the House.

Policy

- 3 The Fair Pay Agreement (FPA) system relies on union and employer representatives to bargain collectively for minimum employment terms. Even if the threshold has been met to initiate bargaining, the absence of willing and suitable representatives on one side will frustrate bargaining. This challenges the intent of the FPA system.
- 4 The proposed new determination process will support the FPA system if one side is not represented in bargaining. This will allow an FPA to be fixed by an independent body, namely the Employment Relations Authority (the Authority), when there is no representative on one bargaining side.

Executive summary

- 5 On 21 March 2022, Cabinet agreed to incorporate a new determination process into the FPA system to cover situations where there is no bargaining party on one side of FPA bargaining and where the default bargaining party does not step in to fill the gap. Cabinet rescinded its earlier decision (from April 2021) that BusinessNZ would automatically be the employer default bargaining party in situations where there was no eligible employer association to represent covered employers, and replaced it with a decision that gives BusinessNZ discretion about whether or not to step in. Cabinet authorised the drafting of a supplementary order paper (SOP) to amend the Bill to incorporate the proposed new determination process [CAB-22-MIN-0080.02 refers]. The Parliamentary Counsel Office (PCO) have drafted the attached Slip (which substantially has the same effect as an SOP, but has a different name and is not a published public document) for referral to Select Committee.

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- 6 Cabinet agreed that the Authority perform the backstop function. The concentration of like functions for the Authority will ensure efficiencies in terms of expertise, resourcing, and cost effectiveness. This function can build on the Authority's existing role fixing terms in the FPA system and other bargaining systems, following protracted bargaining disputes.

Status of the Bill

- 7 On 29 March 2022, I introduced the Bill to Parliament, and it was referred to the Education and Workforce Committee following its first reading on 5 April 2022.
- 8 Public submissions on the Bill closed on 19 May 2022 and oral hearings from submitters concluded at the end of June. The Departmental Report on amendments arising from submissions is due to the Committee on 8 August 2022.
- 9 The Committee is due to report the Bill back to the House by 5 October 2022. The Bill holds a category 2 priority on the 2022 Legislation Programme (to be passed within the year).

Background

- 10 In April 2021, Cabinet agreed to the objective and key design features of the FPA system [CAB-21-MIN-0126].
- 11 On 21 March 2022, Cabinet agreed to amend the FPA system design to:
- 11.1 give the New Zealand Council of Trade Unions (the CTU) and BusinessNZ discretion to be bargaining parties in the absence of willing or suitable union or employer representatives (rather than this role being mandatory in certain situations); and
 - 11.2 incorporate an alternative process (referred to as a "backstop") into the FPA system that will apply if there is no willing or suitable entity on the non-initiating side of bargaining. In this case, the initiating side may apply to the Authority for a determination; and
 - 11.3 incorporate the backstop decisions into the FPA Bill through the following process:
 - 11.3.1 the proposals will be drafted in the form of a SOP, which the Minister will provide to the Select Committee in July 2022; and
 - 11.3.2 the Minister will ask the Select Committee to incorporate the SOP into the version of the Bill the Committee reports back to the House [CAB-22-MIN-0080.02 refers].
- 12 In accordance with Cabinet's prescribed process and to enable the backstop policy proposals to be considered by the Select Committee, I presented a

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Parliamentary paper to the House, prior to the FPA Bill's first reading on 5 April 2022, which was published under the authority of the House. On 6 April 2022, the Committee called for public submissions on the parliamentary paper alongside the Bill.

- 13 This paper seeks Cabinet's agreement to refer the drafted Slip to the Select Committee for consideration. As noted above, the Slip has substantially the same effect as an SOP and comes within the ambit of Cabinet's earlier approval (noted in para 11.3 above), it just has a different name as it is to be considered by the Select Committee, rather than the House, and it is not a published public document.

Key elements of the backstop system

- 14 The proposed backstop determination process enables an initiating bargaining side, in certain situations (as set out below), to apply to the Authority for a determination, whereby the Authority will set the terms of an FPA. The proposed new process aims to strike a balance between providing a reasonable opportunity for parties to bargain without excessive delay in finalising an FPA, with the need to ensure that an FPA is produced once the initiation threshold is met, while still incentivising parties to bargain, rather than seeking a determination. The key features of the proposed backstop process are summarised below:

Trigger for the backstop

- 15 There are three circumstances in which the backstop can be triggered:
- 15.1 Bargaining is initiated for a proposed FPA, but there are no bargaining parties on the non-initiating (ie employer) side¹.
 - 15.2 Bargaining is initiated to replace an existing FPA, but there are no bargaining parties on the non-initiating (ie employee or employer) side.
 - 15.3 Bargaining is underway, and parties on the non-initiating side withdraw from bargaining. These could be the employer side (for a proposed FPA), or the employer or employee side (for a proposed renewal or replacement of, an existing FPA).
- 16 In any of the above circumstances, the relevant default bargaining party (ie CTU or BusinessNZ) may choose to step in. To ensure bargaining parties have a reasonable length of time to organise themselves and form a

¹ There is an exception to the concept of 'no bargaining parties on the initiating side' used throughout this paper. The employer representation rules in the Bill include provisions that take account of different accountabilities faced by the public and private sectors. In summary, state sector employers will generally be able to be represented by the Public Service Commissioner (Commissioner) (or in a few specific cases, able to represent themselves), and they will not have obligations to represent private sector employers. This means that if private and state sector employers are covered by the same FPA, both the Commissioner (and/or other specified State employer bargaining party) and a private sector bargaining party must be part of the employer bargaining side – if there is no representative from the private sector, the employer default bargaining party can step in.

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bargaining side without creating significant delays in the FPA process, default bargaining parties may elect to step in as a bargaining party following a set period:

- 16.1 three months from initiation of bargaining for a proposed FPA;
 - 16.2 two months from initiation of bargaining for renewal or replacement of an existing FPA (as bargaining parties should require less time to coordinate their bargaining); or
 - 16.3 from a withdrawal of non-initiating side during bargaining.
- 17 The relevant default will have one month to decide whether to step in as a bargaining party. After this one-month period, if the default has not stepped in, a bargaining party on the initiating side can trigger the backstop. There will be a three-month period during which the backstop can be triggered. If no application is made for the backstop during this period, the FPA process ends.
- 18 The backstop cannot be triggered if there is no longer representation on the side that has initiated bargaining. This means if the initiating side withdraws from bargaining and the default bargaining party does not step in, bargaining will cease².

Requirements and powers of the Authority when fixing terms

- 19 Cabinet agreed that the Authority perform the backstop function. The concentration of like functions for the Authority will ensure efficiencies in terms of expertise, resourcing, and cost effectiveness.
- 20 The only parties to backstop proceedings will be organisations that have successfully applied to be a bargaining party for that particular FPA. Because the backstop is triggered when there is no representation on the non-initiating side of bargaining, this means one side will not be a party to backstop proceedings. I consider this to be the most workable approach. Allowing individuals or individual entities on the unrepresented side to play a direct role in the backstop proceedings would be unwieldy. It could also end up making the backstop a more attractive option than participating in bargaining which is a key part of the design of the FPA system.
- 21 The Authority will have discretion as to how it seeks input from/about the implications of potential FPA terms on those within coverage on the side that doesn't have representation. Its powers allow it to seek input from anyone it reasonably needs to.

² There is an exception relating to a renewal initiated by bargaining parties representing specified public sector agencies. In this situation, the lack of a bargaining party representing other employers (ie those not represented the specified employer bargaining party) could also trigger the backstop.

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- 22 Cabinet has agreed the same requirements apply to the Authority when setting an FPA through the backstop as when it fixes FPA terms following a bargaining dispute or two failed ratifications.

Appeal rights

- 23 Cabinet agreed that, consistent with the rest of the FPA system, appeal rights under the backstop be limited to questions of law only. Similar to other proceedings in courts and tribunals, only those party to the backstop proceedings can appeal. The Employment Court is the institution that will hear appeals of the Authority's backstop determinations. Cabinet agreed that the Employment Court be required to appoint an amicus curiae to represent the unrepresented side in appeals.

Judicial review

- 24 In the rest of the FPA bargaining system, judicial review of the Authority's determinations is limited to situations where the Authority lacked jurisdiction. However, to safeguard natural justice rights when the backstop is triggered, given the limited appeal rights, Cabinet has agreed not to carry over the existing requirement for the Authority to 'lack jurisdiction' before backstop determination decisions can be judicially reviewed. This means when the Authority sets an FPA through the backstop process, judicial review will be available once any applicable appeal rights have been exhausted.

Feedback on the Parliamentary Paper

- 25 The Education and Workforce Committee received over 20 comments from submitters who expressed a range of reactions from agreement to concern over the backstop process. Some submitters raised concerns regarding the lack of involvement of the unrepresented side in the backstop process. This particular issue is addressed above in paragraph 20. None of the submissions raised concerns that were not already being considered by officials as part of the policy process, and therefore the drafting of the Slip has continued as planned.

Decisions made during the drafting process

- 26 Cabinet authorised the Minister for Workplace Relations and Safety to make decisions during the drafting of the Slip to ensure the backstop system was in line with the overarching objective of the Bill [CAB-22-MIN-0080.02, paragraph 35]. The key decisions made during drafting can be found in Annex One.

Impact analysis

- 27 MBIE's Regulatory Impact Analysis Review Panel reviewed the original Regulatory Impact Statement prepared by MBIE for the backstop policy proposals prior to these being considered by Cabinet in March 2022. The Panel considered that the information and analysis summarised in the Impact Statement met the criteria necessary for Ministers to make informed decisions

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on the backstop proposals. There have been no substantial policy changes since that would require this assessment to be reviewed.

Financial implications

- 28 In Budget 22, \$16.4 million was approved over four years for new FPA functions. Confidential advice to Government [REDACTED]
- 29 The proposals in this paper do not have any additional financial implications.

Compliance

- 30 As the Slip is a component of the FPA Bill, a consideration of the FPA system in relation to Te Tiriti o Waitangi and the New Zealand Bill of Rights has been completed (see paragraphs 31-35 below).

Te Tiriti o Waitangi

- 31 Māori, and especially wāhine Māori, are overrepresented in jobs where liveable pay rates, job security, health and safety and upskilling are lacking. Labour market outcomes for Māori may be improved if FPAs are settled in these sectors with poorer working conditions. The inclusion of a backstop determination process is intended to ensure that the absence of willing and suitable representatives on the non-initiating side does not frustrate the development of an FPA and, deriving from this, potential labour market improvements for Māori.
- 32 The existence of the backstop should incentivise affected parties to attempt to form bargaining sides where possible. The Bill does not mandate Māori representation in bargaining, and traditional bargaining practices may not support inclusive partnership, which risks locking out Māori. The mitigation is the Bill's requirement for each bargaining party to ensure Māori are effectively represented in bargaining, and to consider Māori interests and views.
- 33 When the backstop is triggered for an FPA, the Authority will have discretion as to how it seeks input from those within coverage, and I expect the Authority to consider how it will give effect to te Tiriti in doing so.

Human rights

- 34 The Ministry of Justice will shortly be advising the Attorney-General on the backstop's compliance with the New Zealand Bill of Rights Act 1990. My views on the backstop's human rights implications have not changed since I sought policy approval for the backstop in March 2022 [DEV-22-SUB-0040].
- 35 In addition, the FPA system was recently considered by the International Labour Organisation (ILO's) Committee on the Application of Standards (CAS). This included discussion of the backstop element of the FPA system.

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The CAS did not find the FPA system, or the backstop specifically, to be inconsistent with international labour conventions.

Consultation

- 36 The following agencies were consulted on this paper: the Department for Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Women, Public Service Commission, Department of Corrections, Ministry of Social Development, Ministry of Education, Inland Revenue, Ministry of Transport, New Zealand Police, Oranga Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, New Zealand Defence Force, New Zealand Transport Authority and Ministry of Health.

Climate Implications of Policy Assessment

- 37 The Ministry for the Environment were consulted on the Cabinet paper “Fair Pay Agreements: Backstop where one side is not represented” and confirmed that the Climate Implications of Policy Assessment requirements do not apply to proposals relating to the design of the backstop process in the FPA system as the threshold for significance is not met.

Binding on the Crown

- 38 The FPA Bill (including the amendments proposed by the Slip) will be binding on the Crown.

Commencement of legislation

- 39 The FPA Bill including the Slip of Amendments, if accepted by the Select Committee, will come into force one month after the date of Royal assent. If the Bill passes by the end of October 2022, as I am currently expecting, commencement could occur in December 2022. This date will be kept under review during the legislative period as implementation planning progresses.

Proactive release

- 40 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of decisions being confirmed by Cabinet.

Recommendations

- 1 **note** on 21 March 2022, Cabinet agreed to incorporate a backstop into the FPA system to cover situations where there is no bargaining party on the non-initiating bargaining side, and agreed the Minister of Workplace Relations and Safety to draft proposals in the form of a SOP [CAB-22-MIN-0080.02 refers];
- 2 **note** as part of those decisions Cabinet agreed to two key changes to the FPA system [CAB-22-MIN-0080.02 refers];

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- 2.1 giving the CTU and BusinessNZ discretion to be bargaining parties in the absence of willing or suitable union or employer representatives; and
 - 2.2 introducing an alternative process (referred to as a “backstop”) that will apply if there is no willing or suitable entity on the non-initiating side of bargaining. In this case, the initiating side may apply to the Employment Relations Authority (the Authority) for a determination. That is, the backstop would allow the Authority to set the terms of an FPA in the absence of bargaining parties on the initiating side.
- 3 **note** that Cabinet also agreed to the proposed process to incorporate the backstop decisions into the FPA Bill, that is:
- 3.1 the proposals will be drafted in the form of a SOP (*now called a “Slip”*), which the Minister will provide to the Select Committee in July 2022; and
 - 3.2 the Minister will ask the select committee to incorporate the SOP/*Slip* into the version of the Bill the Committee reports back to the House [CAB-22-MIN-0080.02 refers].
- 4 **note** that on 6 April 2022 the Education and Workforce Select Committee called for submissions on the backstop policy proposals outlined in the Parliamentary Paper entitled *Parliamentary paper: proposed policy change to the Fair Pay Agreements Bill*;
- 5 **agree** to refer the Slip of Amendments to the Education and Workforce Committee for consideration;
- 6 **note** that the Minister of Workplace Relations and Safety will write a letter to the Education and Workforce Committee requesting that the Slip is incorporated into the Fair Pay Agreements Bill so it forms part of the final Bill when reported back to Parliament;
- 7 **note** that the Fair Pay Agreements Bill holds a category 2 priority on the 2022 Legislation Programme (to be passed within the year).

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety

Annex 1: Summary of key decisions made by the Minister for Workplace Relations and Safety during drafting

- 1 On 21 March 2022, Cabinet authorised me to [CAB-22-MIN-0080.02];
 - 1.1 Issue drafting instructions to the Parliamentary Counsel Office to draft a Supplementary Order Paper (SOP) (*now called a “Slip”*); and
 - 1.2 Make decisions, consistent with the objective and overall design of the Fair Pay Agreements (FPA) system, on any issues that arise during drafting of the backstop SOP/*Slip*.
- 2 This annex summarises the key decisions made under that authorisation during the drafting of the Slip.

Encouraging bargaining after the backstop has been triggered

- 3 During the drafting process, officials considered what would happen during the window when the initiating side could apply for a backstop, if the side not represented had a bargaining party step forward. It was decided that if a party stepped forward within this window, then the FPA would return to the bargaining process.
- 4 Similarly, the ability to apply for backstop would cease if, during the window when the initiating side can apply, a subsequent FPA is initiated in the same industry (ie for a different occupation(s) within that industry). Instead, the first FPA would return to the bargaining process and be consolidated with the subsequent FPA. The two consolidated FPAs would then be bargained together (or could return to the backstop process, if a bargaining side for subsequent FPA fails to form). I consider both these decisions in line with the overall purpose of the FPA Bill.

Pay rates for experts and witnesses

- 5 Subsequent to the introduction of the Bill, I realised the ability to pay experts a fair rate to give their guidance was important to particular Employment Relations Authority (the Authority) determinations, including within the backstop process. Therefore, the Slip includes an ability for the Authority to remunerate experts at a rate that will be set by regulations. I also intend to apply this ability to situations where expert opinion is needed for particular determinations within the FPA bargaining process (via the departmental report).