

# BusinessNZ comments on the report of the Fair Pay Agreements Working Group

## General Comment

1. The Fair Pay Agreements Working Group report contains elements that concern BusinessNZ.
2. This document sets out reasons for these concerns and suggests alternatives to the recommendations that address them.
3. The suggested alternatives are based on a voluntary approach that combines the concept of codes of practice with the ability to agree a MECA.

## Concerns

4. By definition a system of collective bargaining that imposes outcomes, whether or not those covered were directly involved in the bargaining, involves compulsion. We believe such an outcome to be inconsistent with the provisions of international law, in particular the Right to Organise and Collective Bargaining Convention 1949 (No 98). The draft Working Group report does not take account of this, despite it being an issue that has been raised at the highest levels of government but not yet resolved.
5. The draft report's analysis supports a view that while sector and industry based approaches to collective bargaining may assist in reducing inequality they are less effective in terms of economic productivity, growth and prosperity. However, the suggested recommendations appear to push equality over productivity and growth. This seems counterintuitive and is deserving of further explanation.
6. Employers have previously expressed concerns about the similarity of the FPA concept to pre 1991 award systems. It will be important for this perception to be addressed in any system that is promoted for the future. However, the draft report does not identify how the suggested system will avoid the pitfalls of the past, and indeed contains a number of similarities. For instance:
  - a. Under the award system, two outcomes were possible; "*industrial agreements*" - national occupational agreements agreed in bargaining and, "*awards*" - the result of a decision of the Arbitration Commission when agreement could not be reached in bargaining. The same model would apply under the proposed system albeit that "Fair Pay Agreements" would be the term applied to both agreements reached in bargaining and arbitrated decisions made by a proposed independent third party.
  - b. Under the award system, unions were coordinated by the Federation of Labour and Council of State Unions (later merged into the CTU) while employer associations were coordinated by the NZ Employers Federation (now BusinessNZ). The same basic model will apply under the proposed system under which it is recommended that the "social partners" (BusinessNZ and the CTU) coordinate bargaining representatives.

- c. Under the award system, negotiated settlements and awards were both registered by the independent arbitration body (the Arbitration Commission). The proposed approach is for an independent arbitration body (possibly the Employment Relations Authority) to authenticate both negotiated settlements and decisions made in arbitration.
  - d. Under the award system, strikes were not permitted in pursuance of a settlement, but were lawful in pursuit of non-award bargaining. The proposed model prohibits strikes for FPAs and actively envisages “above FPA” deals being used to supplement FPAs, for which strike action is possible.
7. These are not exhaustive comparisons but serve to illustrate the striking similarity between the two approaches. Given employers’ strong lack of confidence in the systems of the past, it is important that the Working Group’s recommendations for the future identify those aspects of its proposals that will mitigate concerns.

### An alternative approach

8. With these points in mind, the table below addresses the structures and processes suggested in the draft interim report, with a view to better aligning them with our international obligations and with our aspirations for a high performing economy.
9. Overarching principles of the alternative approach are:
- a. Participation is voluntary.
  - b. FPAs are industry/sector/occupational Codes of Practice that become binding on parties that sign it (e.g., like MECAs).

NB the draft recommendations have been simplified and reordered for ease of presentation.

Phase	Draft FPA Working Group Recommendation	A possible alternative approach
<b>Initiation</b>	<p><b>FPA bargaining process initiated <i>only</i> by workers</b></p> <ul style="list-style-type: none"> <li>• Workers to nominate the sector or occupation they seek to cover through a FPA.</li> <li>• Proposed boundaries of the sector or occupation may be narrow or broad.</li> </ul>	<p><b>Workers or employers can initiate.</b></p> <ul style="list-style-type: none"> <li>• Notice of initiation must include the parameters of a proposed FPA, including scope (breadth) and coverage (depth).</li> </ul>
	<p><b>Two grounds for initiation</b></p> <ul style="list-style-type: none"> <li>• <i>Representativeness trigger</i> – 10% or 1,000 (whichever is lower) of all workers (union and non-union) in the sector or occupation as defined by the workers.</li> <li>• <i>Public interest trigger</i> –</li> </ul>	<p><b>Two grounds for initiation</b></p> <ul style="list-style-type: none"> <li>• <i>Representativeness</i> (based on membership)</li> <li>• <i>Issues</i> (verifiable issues with wide employment related connotations) which require systemic responses wider than</li> </ul>

	<p>legislatively specified harmful labour market conditions exist in the nominated sector or occupation.</p> <ul style="list-style-type: none"> <li>• No equivalent employer representation test.</li> </ul>	<p>single enterprises to rectify, but which do not apply outside of the sector or industry in which the issues occur.</p> <ul style="list-style-type: none"> <li>• Wider issues should be matters for national legislation</li> </ul>
	<p><b>Independent body to verify trigger conditions met</b></p> <ul style="list-style-type: none"> <li>• Public interest trigger - verify the claim that the statutory conditions are evidenced.</li> <li>• Representativeness trigger - where the number of workers requesting the process is lower than 1,000, the body would verify the baseline number of workers in the nominated sector or occupation and confirm the threshold of 10% has been met.</li> <li>• Time limits set to complete the verification process.</li> </ul>	<ul style="list-style-type: none"> <li>• No verification of initiation conditions required as participation is voluntary</li> </ul>
<b>Coverage</b>	<p><b>Occupation or sector to be covered to be defined by the parties</b></p> <ul style="list-style-type: none"> <li>• Parties to negotiate the boundaries of coverage, within limits set in the legislation.</li> <li>• Workers initiating the bargaining process must propose intended boundaries of the sector or occupation to be covered by the agreement.</li> <li>• Parties also able to define coverage using additional parameters, including providing for variations in terms for geographic regions.</li> </ul>	<p><b>Occupation or sector to be defined by participating parties</b></p>
	<p><b>FPA cover all employers and all workers (not just employees)</b></p>	<ul style="list-style-type: none"> <li>• FPAs guide those not signatory to it and bind those who are.</li> <li>• Courts can take account of</li> </ul>

	<ul style="list-style-type: none"> <li>• FPAs to cover all workers and employers in the defined sector or occupation, subject to any exemptions.</li> <li>• Coverage to extend to any new employers or workers after the FPA has been signed.</li> <li>• Employers able to apply to the independent body for a declaration of whether their business falls within the coverage and is required to be involved in the FPA process.</li> </ul>	<p>provisions of a relevant FPA in cases of disputes involving matters addressed by FPAs in the same way as they take account of codes of practice .</p>
	<p><b>Limited flexibility for exemptions from FPAs</b></p> <ul style="list-style-type: none"> <li>• Possible temporary exemptions for small employers; new entrants to the workforce or those returning after extended period out of the workforce.</li> <li>• Exemptions limited and temporary in nature (up to 12 months), as the more exemptions provided for will increase complexity and uncertainty.</li> </ul>	<ul style="list-style-type: none"> <li>• No exemptions required</li> </ul>
<p><b>Scope</b></p>	<p><b>Minimum content for FPA set in law</b></p> <ul style="list-style-type: none"> <li>• Must include: <ul style="list-style-type: none"> <li>• The objectives of the FPA</li> <li>• Coverage</li> <li>• Wages and how pay increases will be determined</li> <li>• Terms &amp; conditions, including working hours, overtime and/or penal rates, leave, redundancy, and flexible working</li> </ul> </li> </ul>	<p><b>Minimum content set by agreement but within law</b></p> <ul style="list-style-type: none"> <li>• Can include: <ul style="list-style-type: none"> <li>• The objectives of the FPA</li> <li>• Coverage</li> <li>• Wages and how pay increases will be determined</li> <li>• Terms &amp; conditions, including working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements</li> </ul> </li> </ul>

	<p>arrangements</p> <ul style="list-style-type: none"> <li>• Skills and training</li> <li>• Duration, eg expiry date</li> <li>• Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties, for example, if administrative arrangements are needed for exemptions</li> <li>• Other matters, such as other productivity-related enhancements or actions, even if there is no agreement reached on provisions to insert in the FPA.</li> <li>• FPA's may take account of regional differences within industries or occupations.</li> <li>• Duration of agreements to be agreed, but with a maximum of 5 years.</li> <li>• Additional provisions able to be included by negotiation in the FPA, provided they are compliant with minimum employment standards and other law.</li> </ul>	<ul style="list-style-type: none"> <li>• Skills and training</li> <li>• Duration, eg expiry date</li> <li>• Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties,</li> <li>• Other matters, such as other productivity-related enhancements or actions, even if there is no reach agreement reached on provisions to insert in the FPA.</li> <li>• May take account of regional differences within industries or occupations.</li> <li>• Duration of agreements to be agreed, but should include requirements for regular review.</li> </ul>
	<p><b>Enterprise level agreements</b></p> <ul style="list-style-type: none"> <li>• Enterprise level collective agreements must equal or exceed the terms of the relevant FPA.</li> <li>• Additional provisions not within the scope of the FPA may also be agreed.</li> </ul>	<p><b>Enterprise level agreements</b></p> <ul style="list-style-type: none"> <li>• Continue under existing rules</li> </ul>
<b>Bargaining process rules</b>	<p><b>Good faith rules to apply</b></p> <ul style="list-style-type: none"> <li>• Existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) apply, including the duty of good faith.</li> </ul>	<p><b>Good faith rules to apply (no change)</b></p> <ul style="list-style-type: none"> <li>• Existing bargaining processes as currently defined in the Employment Relations Act (as amended by ERA Bill) apply, including the duty of good faith.</li> </ul>
	<p><b>Time limits for negotiation of</b></p>	<p><b>No time limits for negotiation or</b></p>

	<p><b>FPA's</b></p> <ul style="list-style-type: none"> <li>• Fixed timelines for FPA initiation and bargaining process, including for independent third party to verify whether bargaining may proceed after receiving notification from an initiating party.</li> </ul>	<p><b>renewal of FPA's</b></p> <ul style="list-style-type: none"> <li>• Being voluntary FPA's do not expire, but should contain requirements for regular review</li> </ul>
	<p><b>Notification requirements</b></p> <ul style="list-style-type: none"> <li>• Minimum requirements for all affected employers and workers to be notified of FPA initiation, opportunity to be represented, and informed throughout the bargaining progress.</li> </ul>	<p><b>Notification requirements</b></p> <ul style="list-style-type: none"> <li>• Minimum requirements for all affected employers and workers to be notified of FPA initiation, opportunity to participate and be informed of progress and outcomes.</li> </ul>
<p><b>Bargaining parties</b></p>	<p><b>Parties to nominate a bargaining representative to bargain on their behalf</b></p> <ul style="list-style-type: none"> <li>• Parties to be represented by incorporated entities. <ul style="list-style-type: none"> <li>○ Workers to be represented by unions.</li> <li>○ Employers to be represented by employer organisations.</li> </ul> </li> <li>• Representatives must meet minimum requirements relating to expertise and skills.</li> <li>• Employers and workers to elect a lead advocate.</li> <li>• Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.</li> <li>• Disagreement about who representative should be to be resolved by mediation with arbitration by independent body if no agreement.</li> <li>• If mediation was unsuccessful, parties could then refer to the independent third party to decide who the representative(s) should be.</li> </ul>	<p><b>Parties to nominate a bargaining representative to bargain on their behalf</b></p> <ul style="list-style-type: none"> <li>• Parties can elect to participate themselves or nominate a person or organisation to do so.</li> <li>• Members of organisations are bound by those organisation's rules in this regard</li> </ul>

	<p><b>Representative bodies must represent non-members in good faith</b></p> <ul style="list-style-type: none"> <li>• Non-members of representative bodies to have the right to be represented during the bargaining process.</li> <li>• Representative bodies have a duty to represent non-members, to do so in good faith, and to consult those non-members throughout the process.</li> </ul>	<p><b>Representatives bargaining for an FPA required represent their interests and those of members in good faith</b></p> <ul style="list-style-type: none"> <li>• Non-members or clients of participating representatives can choose whether or not to follow their lead or be bound by negotiated outcomes.</li> </ul>
	<p><b>Workers allowed to attend paid meetings to elect and instruct their representatives</b></p> <ul style="list-style-type: none"> <li>• Workers covered by FPA bargaining able to attend paid meetings to elect their bargaining team and to endorse claims.</li> <li>• Government to determine whether costs met through Government financial support, a levy, or fee.</li> </ul>	<p><b>Workers in enterprises affected by proposed FPA allowed to attend paid enterprise meetings to elect and instruct their representatives</b></p> <ul style="list-style-type: none"> <li>• Rules as for collective bargaining under the ER Act 2000.</li> </ul>
<p><b>Dispute resolution during bargaining</b></p>	<p><b>No recourse to industrial action during bargaining</b></p> <ul style="list-style-type: none"> <li>• Strikes and lockouts related to FPA bargaining prohibited, <b>but not</b> strikes about other matters which coincide with FPA bargaining.</li> </ul>	<p><b>No recourse to industrial action during bargaining for an FPA</b></p> <ul style="list-style-type: none"> <li>• Industrial action permitted under existing rules in Part 8 ER Act 2000.</li> </ul>
	<p><b>Mediation and facilitation should be the starting point for dispute resolution</b></p> <ul style="list-style-type: none"> <li>• Mediation and facilitation are the starting point for resolution of FPA bargaining disputes.</li> <li>• One or both parties may refer bargaining to mediation, in</li> </ul>	<p><b>Mediation should available for dispute resolution</b></p> <ul style="list-style-type: none"> <li>• Mediation available as a non-binding option for resolution of FPA bargaining disputes.</li> <li>• One or both parties may refer bargaining to mediation, in relation to one or more provisions of the proposed</li> </ul>

	relation to one or more provisions of the proposed agreement.	agreement.
	<b>Failed mediation to be referred to final offer arbitration</b>	<b>No recourse to courts if bargaining fails</b> <ul style="list-style-type: none"> <li>Being voluntary, bargaining for FPAs should not be subject to the jurisdiction of the courts.</li> </ul>
<b>Conclusion, variation and renewal</b>	<b>Ratification</b> <ul style="list-style-type: none"> <li>Procedure for ratification to be set in law.</li> <li>Simple majority of both employers and workers before agreement can be signed</li> <li>Workers are entitled to paid meetings for the purposes of ratifying the agreement.</li> </ul>	<b>Ratification</b> <ul style="list-style-type: none"> <li>Signing on as a party will constitute ratification.</li> <li>An employer not to sign unless a majority of employees also agree.</li> </ul>
	<b>No ratification required for arbitrated final agreement</b> <ul style="list-style-type: none"> <li>Appeals mechanism on the grounds of a breach of process or seeking a declaration as to coverage.</li> </ul>	N/A
	<b>Prior to expiry, either party able to initiate a renewal of the agreement, or for variation of some or all terms.</b> <ul style="list-style-type: none"> <li>Variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.</li> </ul>	<b>Any signatory party to an FPA able to initiate a renewal of the agreement, or for variation of some or all terms.</b> <ul style="list-style-type: none"> <li>Variation or renewal of the agreement that is agreed between the bargaining parties must meet the same initiation and ratification thresholds.</li> <li>Participants must meet to review FPAs in accordance with any required review provisions.</li> </ul>
<b>Enforcement</b>	<ul style="list-style-type: none"> <li>Existing collective bargaining dispute resolution and enforcement mechanisms apply to FPA system.</li> </ul>	<ul style="list-style-type: none"> <li>Labour Inspectorate will have their current jurisdiction and rules extended to apply to signatory parties to FPAs and the</li> </ul>

		enforcement provisions of the Employment Relations Act 200 will apply.
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