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Employment Relations Policy
Ministry of Business Innovation and Employment
Wellington

By email: FairPayAgreements@mbie.govt.nz

Designing a Fair Pay Agreements System

Introduction

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the proposals in the discussion paper: *Designing a Fair Pay Agreements System* (**Paper**).

2. The Paper outlines options for a "new system to allow workers and employers to negotiate better minimum terms and conditions of employment for their occupations and sectors. The result of these negotiations will be Fair Pay Agreements (**FPA**); a new type of regulation to combine the adaptability of bargained contracts with the dependability of Government-backed minimum standards."[1]

3. The Law Society's Employment Law Committee has reviewed the Paper and the Law Society's comments on the proposals are set out below.[2]

Initiation

When an FPA can be initiated

Q1. Do you think that either a representation or a public interest test is needed to initiate an FPA? Or do you think that applicants should need to pass both a public test and a representation test to initiate an FPA? If not, what would you recommend instead?

4. There are practical implications and potential unintended consequences of both proposed tests that need to be considered. The public interest test may be easier to administer, as an individual or organisation would be able to make an application which would then be determined. However, without a minimum threshold test the outcome could be an FPA that covers more people than is desirable and may affect individuals and businesses who have not had the opportunity to be involved in determining whether bargaining ought to be initiated. Considering the "primary purpose of the FPA system is to correct the inherent imbalances of power in vulnerable workforces",[3] we query whether the representation test is too high to allow the initiation of bargaining in some sectors. We appreciate, however, that this is sector and occupation specific, and that in other sectors/occupations, the threshold would be very easily met.

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1 Designing a Fair Pay Agreements System, Discussion Paper, at p 4.
2 On some points the Law Society has no comment to make, and the submission therefore does not respond to questions 8, 10-14, 18-19, and 75-85.
3 Above n 1, at p 15.

The representation threshold test

Q2. Is 10% a reasonable threshold to ensure that applicants have some support from their sector or occupation before negotiating an FPA? If not, what do you think a reasonable threshold would be?

5. The setting of a reasonable threshold is a policy matter. However, we note the difficulties with measurement and proof of representation required for initiation. These include how total employee numbers across an occupation or sector are measured, and how representation will be evidenced in practice to ensure the representation being claimed is accurate.

6. We suggest consideration is given to a mixed test which includes both a sector and occupation qualification (for example all cleaners in the manufacturing sector) to assist with clarity of coverage (both from an initiation and coverage perspective).

7. Given the purpose of an FPA, consideration could also be given to including an income threshold to exclude those with a certain level of income (for example, those working at a managerial level within a certain occupation or sector) from the FPA process. This would be fairly straightforward to implement and could be reviewed over time.

Q3. How should an applicant group need to prove that they have reached a representation threshold? (such as through signatures, membership etc)?

8. Requiring individual signatures may be problematic in terms of verification. A similar process to that required for a Multi-Employer Collective Agreement may be useful, although we note that while a secret ballot system may work for unionised workforces, it may not for those that are not unionised. We suggest the government administer this system. There may also be a role for employer participation (in terms of providing verification that particular individuals are working in particular roles).

Q4. Do you think applicants should be able to trigger bargaining by gaining a set number of supporters? If so, what do you think an appropriate number would be?

9. The Law Society notes this option would cause inconsistencies given the uncertainty of sector and occupation sizes and could incentivise organisers to widen the pool of people involved. In turn, this could make the bargaining process more difficult. The wider the pool of participants, the easier it will be to reach a set representation number; however, the harder it is likely to be to reach a concluded agreement.

Q5. Do you think that employers should be able to initiate an FPA bargaining process in their sector?

10. Yes, employers should be able to initiate the FPA bargaining process in their sector.

Q6. How should employers be counted in a representation test – by number or by proportion of the relevant employees that they employ?

11. We suggest the proportion of relevant employees would be a more appropriate test. While this may give larger employers more power in the process (as is acknowledged by the comment in the Paper that a proportionate employer vote may reduce the influence of small businesses), the impact on those employers may well be larger. In addition, other opportunities should be built into the process (both in bargaining, and by way of potential exemptions) to allow the interests of smaller employers to be appropriately recognised).

Q7. If employers are counted by number, what do you think would be the best way to classify and count them?

12. The Law Society suggests employers are counted by representation of employees, as counting them on a legal entity basis may skew the representation.

The public interest test

Q9. What do you think should need to be demonstrated by an applicant group to prove that an FPA will be in the public interest?

13. While this is primarily a policy question, the Law Society makes the following general observations:

- Where possible, the public interest test should be aligned with other legislation that includes a similar test, and it should consider the purposes of other minimum entitlement legislation.[4]
- The public interest test should also reflect the purpose of an FPA (to deal with an imbalance of bargaining power for wages), so a sector that has good bargaining power should not meet the public interest test.
- The public interest test should require the balancing of whether the benefits of an FPA will outweigh the disadvantages of an FPA for the sector, akin to the test required pursuant to the Local Government Act 2002 and the Official Information Act 1982.

14. One option could be a pre-determined list of occupations and/or sectors that qualify as automatically meeting the public interest test. Any occupation and/or sector that falls outside that pre-determined list would then be tested against the public interest test. This would allow a balance of efficiency and flexibility, including the ability to adapt to new or changing occupations/sectors.

Q15. Should the indicators be updated regularly? If so, how regularly, and by whom?

15. Yes, the indicators should be reviewed and updated regularly. We suggest this should be done through the normal governmental process, via regulation, much like Schedule 1A to the Employment Relations Act 2000 (**ERA 2000**).

Q16. Do you think the decision maker should have absolute discretion to decide that the public interest test has been met? If not, why not? What do you think the threshold should be?

16. The Law Society suggests that the decision maker should have discretion to decide that the public interest test has been met, but that these decisions should be open to the usual judicial review/appeal processes (depending on which body is charged with making the initial decision).

Q17. Do you think the public interest test should be available on-demand to anyone, or should a list of allowed sectors or occupations be set in law?

17. See our response to Q9 above.

[4] For example, the Local Government Act 2002 and the Official Information Act 1982.

Notifying affected employers and employees

Q20. Do you think that the government, employers, employer organisations and unions should all play a role in notifying people that FPA bargaining has been initiated?

18. Yes.

Q21. Do you think that employers should have responsibility for informing employees that an FPA has been initiated? Why or why not? If not, who do you think should do this instead?

19. Yes. Consideration should be given to using a standard form notice that employers can use to bring the initiation of an FPA to the attention of their employees. This is a reasonable obligation for employers.

Coverage

Defining and renegotiating coverage

Q22. Do you think that applicants should need to define the coverage of their proposed Fair Pay Agreement (FPA) in terms of the occupations and sectors concerned?

20. The Law Society agrees that applicants ought to define any proposed coverage of a new FPA in terms of occupations and sectors. Existing mechanisms for collective bargaining require an initiating party to define coverage.[5] This ensures an employer can comply with the obligation to notify employees who may be covered by the intended coverage clause.[6]

21. Failing to fully define coverage could undermine the ability of an employer to inform workers who may be affected by an FPA. It could also result in increased applications by employers challenging whether their business falls within an occupation or sector. This in turn would reduce engagement during any bargaining process. More accurately defining the occupation and sector will ensure coverage is relevant to parties, reduce challenges to coverage and assist in later stages of bargaining.

22. Defining coverage of the proposed FPA will also ensure intended parties who could be affected by any subsequent FPA are appropriately informed. It would also be consistent with current employment law.

23. As a general comment, the Law Society agrees with recommendation three of the Working Group[7] which noted extending coverage to include contractors could significantly change employment law in New Zealand.[8] Such a significant change could detract from rather than enhance how the FPA system will function.

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5 In order to be compliant, section 42(2)(b) of the Employment Relations Act 2000 requires a notice initiating bargaining to identify each of the intended parties to and "*intended coverage*" of the Collective Agreement.

6 Section 43 ERA 2000 requires an employer who initiates bargaining or who receives a notice initiating barraging to draw the existence covering of bargaining and intended parties to the attention of "*all employees*."

7 Fair Pay Agreements Working Group (2018). Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits.

8 Including all workers, whether employee or contractor "*would be a significant change to the current employment relations model"* (section 6.2, page 40).

24. The Law Society notes a stated objective of the Working Group and proposed FPA system is to complement and not replace existing employment law.[9] Extending coverage to workers who are not employees risks undermining existing employment law premised on determining the real nature of working relationships.

25. Longstanding case law principles outline a series of tests when determining the "real nature" of the relationship. Section 6 ERA 2000 defines an employee as excluding contractors and specific types of work such as real estate agents and sharemilkers.[10] These principles already protect employees (if an employer attempts to falsely label a relationship as one of contractor when the reality of the relationship is employment) against what the Working Group says would be a "perverse incentive to define work outside employment."[11]

26. Any exceptions to expand coverage beyond employees ought to be well considered and incremental if they are to complement existing employment law rather than replace it.[12]

Q23. Do you have any comments on the use of ANZSCO and ANZSIC to define coverage? Do you think that there are better alternatives?

27. Both ANZSCO and ANZSIC are indicative but not prescriptive definitions of occupations or industries across New Zealand and Australia. There is merit in aligning the system used by Immigration New Zealand with flexibility to take into account reasonable variations including between regions.

Q24. Do you think that parties should be able to bargain different coverage, with any significant changes needing to pass the initiation tests? If so, should there be any restrictions to prevent the test being used to delay the FPA?

28. Yes. We consider it appropriate for parties to bargain different coverage in limited circumstances. This may include a genuine mistake, administrative error, or where all parties agree coverage ought to extend to a group of workers materially connected to the occupation or sector. Significant changes should not be allowed without being required to re-pass the initiation test, as to do so would undermine the purpose of the initiation test and encourage strategic changes in coverage following initiation.

Q25. Should there be restrictions on the permissible grounds for changing coverage during bargaining? If so, what should they be?

29. See our response to Q24 above.

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9 "*This system is intended to complement, not replace, the existing employment relations and standards system. Where possible an FPA system should be designed to build on and adapt existing provisions to minimise cost and complexity*" (Recommendation 3, page 4, *Fair Pay Agreements*, Fair Pay Agreement Working Group, 2018).

10 Section 6(6) ERA 2000.

11 Section 6.2, Page 40.

12 For example, section 6(1)(b)(i) includes a "*homeworker*" even if the form of the contract between the parties is technically that of vendor and purchaser. Parliament has announced changes for contractors working in New Zealand's screen sector which will enable contractors to bargain collectively: https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/workplace-relations-in-the-screen-sector/.

Exemptions

Q26. In what circumstances do you think a temporary exemption from an FPA may be warranted?

30. The Law Society agrees with the Working Group that there is merit in providing for both mandatory and permissible exemptions to FPA coverage.

31. Any mandatory exemption should be clear, objective and consistent with existing exemptions in employment law, such as for small businesses.[13]

32. Any temporary exemption could be agreed by the parties through an exemption clause within the FPA. This could allow a party to apply for a temporary exemption on certain grounds such as financial hardship. We agree there should be a timeframe linked to the exemption. The Working Group suggests 12 months. However, in some cases a longer period could be warranted; for example, where hardship is caused by other commitments such as long-term contracts with distributors or suppliers entered into on the basis of a set cost for labour pre-dating any FPA.

Q27. If included, should exemption clauses be mandatory, or permissible?

Q28. Should the bargaining parties be allowed to negotiate additional, more specific exemptions above those set in law?

Q29. What do you think is a reasonable maximum length of time that an employer should be exempted from the terms of an FPA?

Q30. Should an exemption be able to apply to an entire FPA, or just certain terms?

33. See above at Q26.

Regional alternatives

Q31. Do you think that parties should be allowed to negotiate regional variations in the minimum terms of an FPA?

34. Yes. The Law Society considers it is important to recognise that the cost of living and doing business varies between regions and should be taken into account when setting the terms of an FPA.

Q32. If they are included, what do you think a good level for regional variations could be – regions (regional councils and unitary authorities), territorial authorities (city and district councils) or something else? Should this specificity be set in law or left to the parties to decide?

35. Referring to existing geographical boundaries would be simpler than creating new ones. The parties are in the best position to know what regional variations are required and should be left to agree what appropriate boundaries are. This could include regional or territorial authorities.

Q33. Do you think that the parties should be able to initiate bargaining towards an FPA for specific regions? What, in your view, are the risks of allowing this?

36. Yes. However, a risk of allowing regional bargaining from the outset is the possible exclusion of workers in regions who could benefit from coverage. A way of mitigating this risk would be to allow coverage to go beyond more than one region as agreed during bargaining.

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[13] For example, trial periods only apply to business that have 19 or fewer staff: Sections 67A to 67B ERA 2000.

Alternatively, the settlement of an FPA in one region may encourage workers in another region to initiate bargaining, which could serve as a positive catalyst.

Q34. If regional FPAs are allowed, should parties be able to change the regional coverage during bargaining?

37. Yes, provided all parties agree and are adequately notified. It is possible that once the fact of bargaining becomes known, other regions may wish to join the process, which would confer cost, time and efficiency benefits (as opposed to requiring them to replicate the process). Our previous considerations regarding changes in coverage and reassessing the initiation parameters would apply in this instance.

Q35. Do you think there are particular sectors or occupations which could benefit from, or be harmed by, regional FPAs?

38. Workers in non-unionised sectors and occupations with employment conditions at or close to minimum entitlements would benefit most from FPAs.

39. Small businesses with low margins and limited scope to increase minimum entitlements for staff are at risk of being harmed by FPAs.

The bargaining process

Good faith

Q36. Do you think that a duty of good faith should apply to bargaining parties in their dealings with each other and any government bodies as part of the FPA process?

40. Yes, the duty of good faith should apply to the FPA process. There is fairly well-established case law in this area, including the requirement that a Bargaining Process Agreement (**BPA**) be entered into defining specific obligations.

41. Given the widening of the parties that may be participating in bargaining for an FPA (and given that some of these parties may have limited recent experience of collective bargaining), consideration could be given to providing more explicit guidance in section 4 ERA 2000 regarding the principles of good faith applicable to collective bargaining situations.

Q37. Should a duty of good faith for FPA bargaining involve the same responsibilities as under the current Employment Relations Act? What new responsibilities, if any, will be needed?

42. The Law Society considers that consistency with the provisions of the ERA 2000 and existing bargaining case law is appropriate, noting that the current provisions are already equipped to apply to multi–employer and multi-union agreements. It may also be appropriate to consider expanding these provisions to include explicit penalties for breaches of BPAs to reinforce constraints around bargaining behaviour.

Scope

Q38. What do you think of having mandatory and excluded categories?

43. The Law Society is cautious about excluding particular categories in the FPA, as it is important to retain flexibility to cater for changing work patterns/environments and to allow parties to reach agreement on terms that may be specific to their industry or sector.

44. However, to ensure that the concept of FPAs meets base-line standards and to meet the intent of the legislation, the specification of core mandatory provisions is likely to be required.

Q39. What do you think of the mandatory topics?

45. In selecting mandatory topics, consideration should be given to the purpose of the proposed legislation, which is to "set binding **minimum terms** at sector or occupation level (emphasis added)."[14] For this reason, mandatory topics should be focussed on core minimum employment terms that are likely to be easily and widely applicable, such as minimum wage rates, overtime rates, leave entitlements, redundancy, coverage, duration, variation etc. Terms that are more employer-specific, such as working hours, skills and training and superannuation (as well as the other terms listed in the permissible category) may be better placed in the permissible category.

Q40. What terms, if any, should be in the excluded category?

46. See above at Q38.

Q41. What do you think of the alternative option to have only mandatory and permissible categories?

47. The Law Society considers that this accords the parties the greatest flexibility. The current provisions in the ERA 2000 regarding unenforceable terms (for example, regarding trial periods and availability provisions in section 67B(4) and section 67D(4) ERA 2000 respectively) should however also apply to FPAs.

Q42. Should any of the items in the permissible and mandatory lists be in a different category?

48. See above at Q39.

Q43. Do you think that in the event of a bargaining stalemate, the determining body should only be able to set the mandatory terms of the FPA?

49. The Law Society views this as sensible to avoid unnecessary tension over provisions that involve a greater degree of subjectivity. It also accords with the purpose of the proposed legislation referenced above in our response to Q39 to the setting of "minimum" sector and industry specific terms (rather than a full set of employment terms and conditions).

Representation

Q44. Do you think that unions and employer organisations should be the major bargaining representatives as is normal?

50. This is likely to be the most practical enabler of bargaining at this level. However, consideration should be given to ways in which the participation of other interested parties can be facilitated to ensure the interests of the affected sector/occupation as a whole are adequately represented.

[14] Message from the Minister, Designing a Fair Pay Agreements System Discussion Paper, October 2019.

Q45. Should there be a limit on the number of representatives at the bargaining table?

51. For reasons of efficiency and timeliness of settlement, representative numbers should be limited. The relevant number will likely depend on the sector and occupation involved and the way in which employers and employees in that group are organised. The BPA could be an appropriate place for the parties to determine limits on the numbers of bargaining representatives.

Q46. Should other interests be represented? E.g. non-unionised workers, funders or future entrants to the market. Should this be by agreement of the major bargaining parties?

52. As set out in our response to Q44 above, there is merit in other interested parties being represented, particularly given the levels of union penetration in some sectors and the need to have affected parties adequately represented at bargaining. Depending on the sector, there may be other educational or regulatory bodies that could be easily involved. It is recognised, however, that some government involvement may be necessary to administer this in practice in some sectors and industries.

Q47. How should bargaining representatives be selected? Is there a role for Government in ensuring the right mix of parties is at the table?

53. Given that an FPA will bind all employees within the particular occupation and/or sector, it is essential that the bargaining representatives are able to fairly and effectively represent the interests of workers and employers right across the covered occupation and/or sector. In some sectors, the relevant representatives may fairly easily identify themselves, but in others, government involvement will be necessary.

Bargaining costs

Q48. Which of the three options for bargaining costs do you agree with, and why? Is there another option which you consider is best?

54. The Paper sets out three options for how costs could be shared in the process of making an FPA.[15] Consideration should be given to a bargaining costs distribution model that combines aspects of options 1 (bargaining fees) and 2 (costs as they fall, except government contributes to tangible costs). Tangible costs could be funded centrally, with additional costs being funded by a bargaining fee that would be factored into the wage rates agreed. This would be consistent with the objectives set out in section 3 ERA 2000 (recognising the inherent inequality in bargaining power), by reducing to a reasonable level the direct impact of bargaining costs on affected workers and on those who have borne the costs of preparing for and attending bargaining.

Q49. If a bargaining fee or levy is introduced, how should non-members be identified?

55. Employers are likely to be best placed to provide information regarding covered employees, with timing of the notification appropriately controlled and a penalty regime in place for non-compliance.

Q50. If a bargaining fee or levy is introduced, should the charge be made for all employees/employers as of a certain date? Would there need to be exceptions for certain circumstances? If so, which circumstances?

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[15] Above n 1, at pp 30-31.

56. Consideration should be given to building some flexibility into the bargaining costs process, with parties able to agree as part of the BPA details of bargaining cost to be allocated as an agreed term of the FPA. These processes could consider whether exceptions are appropriate by reference to the specific occupation or sector; they could also consider whether the triggering of fees should be date based, or whether new employees (who commence employment after the commencement of the FPA) will also be required to make a contribution.

Q51. Could there be good reasons for departing from the current situation where bargaining parties cover the costs of bargaining?

57. Consideration should be given to departure from the current model, given the wider worker and employer groups that will be involved in bargaining and the likelihood the agreement will also bind and benefit parties that have not participated in (and have not incurred any costs in respect of) bargaining.

Support

Q52. Do you think that a 'navigator' should be provided to support the bargaining parties?

58. Given the complexities of the negotiation and agreement process between parties that may not be frequently involved in bargaining, the Law Society supports the concept of a navigator to support the bargaining parties during the initial process.

Q53. What skills do you think would be most useful for a navigator to have?

59. Essential skills for a navigator would be a background and experience in New Zealand employment law and collective bargaining. Additional helpful skills could include facilitation, alternative dispute resolution, negotiation and process knowledge.

Q54. Do you think the navigator should have any additional functions than those described?

60. The functions described in the Paper are broad and cover most of the required functions of a navigator.[16] However, we consider it desirable to retain a degree of flexibility in the navigator's function to allow the parties to seek assistance from the navigator on additional issues as and when they arise during the course of bargaining. The functions of the navigator could also be reviewed and honed overtime, as the FPA bargaining processes develop and become more familiar.

Q55. Should the navigator role be performed and resourced by the government?

61. For reasons of efficiency, consistency of service, cost management and integrity of the system, it is likely to be necessary that the navigator role is performed and resourced by government.

Q56. Should the parties be allowed to provide their own navigator, or refuse to have one altogether, if they agree to it?

62. There is likely to be some flexibility in respect of the manner and degree to which the parties use and rely on the assistance of the navigator. However, providing a private navigator

[16] Above n 1, at p 32.

(when the parties will already be able to seek their own advice) or being allowed to refuse to use a navigator may lead to unnecessary pre-negotiation disputes.

Q57. Do you agree that the bargaining representatives should have the primary responsibility for communicating with the parties they represent?

63. The Law Society envisages that in nearly all cases this will be covered in the BPA.

Q58. At which stages of the FPA process should there be a requirement to communicate with the employers and employees under coverage of the agreement? (e.g. initiation, application for determination etc.)

64. The Law Society recommends that communication milestones should be covered in the BPA, but as a minimum (and given the number of stakeholders and public interest in the FPAs), there should be a number of compulsory communication milestones (for example, on initiation, agreement of the BPA, ratification, referral to facilitation, determination), with the ability to also provide bargaining progress communications while bargaining is on foot.

Q59. How much oversight should the government have over the communication process?

65. The Law Society envisages that communications would primarily be factual and agreed between the parties (with the assistance of the navigator if required).

Q60. Do you think that the principal nationwide employer and worker organisations (Business NZ and the New Zealand Council of Trade Unions) should support the bargaining parties to communicate with members?

66. Yes. These organisations are likely to want to be involved and communications with the assistance and support of these channels is likely to be more effective.

Dispute Resolution

Q61. Do you think that we should make use of the existing employment relations dispute resolution mechanisms?

67. Where possible, existing employment relations dispute mechanisms should be used, with provision for extra resourcing of those mechanisms as required to accommodate the additional workload. Employer organisations and other main bargaining parties already have a good understanding of the current mechanisms for resolving bargaining related disputes, so a continued use of these mechanisms will promote efficiency and cost-effectiveness in dispute resolution. It will also simplify the dispute resolution system (by not adding additional layers) and allow the system to be more easily explained to vulnerable workers who will ultimately benefit from FPAs.

Mediation

Q62. In the event of a bargaining stalemate, should it be mandatory for parties to enter into a formal mediation process before they can seek a determination?

68. Yes. This mediation could either be provided through the existing MBIE Mediation Service or by the bargaining navigator, if this forms part of their role. The Law Society suggests the use of a facilitation service (as is currently provided by the Employment Relations Authority (**Authority**)) should be considered in addition to mediation.

69. Mandatory mediation will give the parties an idea of the potential outcomes and may encourage settlement prior to any determination by the Authority.

Q63. Should mediators be able to provide non-binding recommendations to the bargaining parties? Are there any other functions which a mediator, but not a navigator, should have?

70. Non-binding recommendations should be able to be made by mediators in the same way as they currently are when the MBIE Mediation Service assists parties to resolve other bargaining related disputes (i.e. privately and in the context of the mediation). Mediators should have their normal powers under the ERA 2000 in respect of bargaining mediation (unless a decision is made to confer similar powers on navigators).

71. Separately, in respect of facilitation, the current provisions of section 50H ERA 2000 should apply to recommendations made during the course of bargaining facilitation.

Determination

Q64. What should count as a bargaining stalemate?

72. We suggest similar criteria to those set out in section 50C(1)(b) ERA 2000 should apply. The provisions relating to lockouts and strikes will not be applicable, but the good faith provisions set out in section 50C(1)(a) (provided there is to be a good faith bargaining requirement, as supported at [40] – [42] above), and the protracted bargaining provisions set out in section 50C(1)(b) would provide a good basis for determining that a stalemate has been reached.

73. Given the wide-ranging impact of sector-wide bargaining the Law Society also considers that a referral to facilitation/mediation would be appropriate where the parties agree that a bargaining stalemate has been reached.

Q65. Should circumstances be set in law, or should parties need to agree that they have reached a stalemate?

74. As set out above, the Law Society considers that a combination of these factors should be applied (i.e. legal criteria, but the option for parties to self-refer if they consider a stalemate has been reached).

Q66. Do you think that there should be a determination process in the event of a bargaining stalemate? If not, would there be sufficient incentives for parties to reach an agreement?

75. If an agreement cannot be reached during mediation or facilitation, the matter should be referred to the Authority (using a different Member to the Member conducting facilitation, as provided in section 50D ERA 2000) for a determination.

76. The Law Society agrees that this will provide an additional incentive to the parties to reach an agreement. The ability for the Authority to make non-binding recommendations public (under section 50H(2) ERA 2000) as part of the facilitation process, would provide a further incentive to reach an agreement.

Q67. Do you think that the Employment Relations Authority is the most appropriate organisation to carry out the determination function?

77. Yes. The Authority has the power to make determinations in respect of enterprise bargaining and we consider there are benefits (in terms of simplicity, efficiency and cost-effectiveness) in using the same mechanism for FPA bargaining. Alternatively, given the potentially wide-

ranging impact of sector-wide bargaining, these matters could be heard directly in the Employment Court (effectively an automatic removal under section 178 ERA 2000) on the grounds that the nature of the matter creates a public interest in having a determination made by the Employment Court.

Q68. Do you think that the determining body should only be able to set terms of the mandatory topic of an FPA?

78. Consideration should first be given to the purpose of the FPA system (setting binding minimum terms at the sector or occupational level in order to provide "better employment and equality outcomes", and "reward workers fairly for their work and protect employers from competitors who gain market share by driving down workers' terms and conditions"),[17] before deciding the extent to which the determining body should be able to set terms of an FPA .

79. In this purpose, there is a reference to *minimum terms* designed to provide needed protection, as opposed to a complete set of terms and conditions governing all aspects of the employment relationship. For this reason, the Law Society considers that, while it may be open to the parties to agree additional terms and further tailor agreements to their particular sector/worker population, additional protection (by way of Authority determination) ought only be conferred on a core set of mandatory terms to be included in all agreements. Restricting the Authority's jurisdiction in this way will also confer speed, efficiency and cost benefits.

Q69. What role do you think the determining body should have in relation to bargaining stalemates for permissible FPA terms, if any? Should the determining body be able to set terms for permissible matters with the consent of the bargaining parties? Should it be able to make recommendations?

80. See our response to Q38 above. In addition, our comments in respect of the role of mediation/facilitation are relevant here at [68] – [71]. These mechanisms would provide an avenue by which the Authority (or MBIE Mediation Service) would be able to assist the parties in settling permissible terms through the mediation/facilitation process and make non-binding recommendations.

Q70. Do you think that the determining body should be able to ask for advice from experts to assist it in making its determinations?

81. Maintaining simplicity in the system, cost and timely provision of determinations should all be considered in responding to this question. Having a determining body seek its own advice will raise questions regarding:

- the composition of that body, its independence and the relevant terms of reference;
- the weight then given to expert opinion provided by bargaining parties; and
- where the determining body's costs in obtaining expert advice should lie.

82. Main parties to an FPA bargaining process are likely to be significant representative organisations which, by the time an FPA bargaining process has reached a stalemate, will likely have obtained their own expert advice in respect of the provisions at issue. We consider the most efficient way to determine these issues would be to allow the determining

[17] Message from the Minister, Designing a Fair Pay Agreements System Discussion Paper, October 2019

body to assess and weigh up the advice obtained by the relevant parties (and provided to the determining body as part of the determination process) in making its determinations. This methodology would also be simpler from a cost allocation perspective, with each party bearing the cost in respect of its own evidence (subject to any overall cost allocation decisions made).

Q71. Should the panel of experts need to be demonstrably independent from the bargaining parties?

83. See Q70 above. If a panel of experts is to be used, we suggest such a panel should be demonstrably independent from the bargaining parties. We note that given New Zealand's small size and the small size of the relevant expert populations, this may at times pose some practical difficulties.

Q72. If a panel of experts is consulted, should their advice be public or strictly confidential?? Should experts be protected from liability for their advice?

84. See above at Q70. Given the wide-ranging public interest in FPAs, the Law Society considers that the advice or evidence of an expert panel should be made available in the same way that the bargaining parties' evidence would be available (i.e. as part of the overall papers and evidence before the determining body and as referred to in any determination of that body).

85. We would expect that experts would have their usual contractual protections and insurance in place in respect of the advice provided and that, given their advice was being provided to (and relied on by) the determining body in making its determination, any cause of action in respect of that advice being incorrect would be by way of an appeal against the determining body, rather than a claim against the relevant expert.

Appeal rights

Q73. Should appeal rights be limited in any way? If so, what sort of limitations would be appropriate?

Q74. Do you think that appeal rights should be limited to matters of law only?

86. Appeal rights in respect of FPAs should be limited in the same way that appeal rights in respect of collective agreements are currently limited under the ERA 2000 (i.e. restricted to matters of law in respect of an FPA regarding which the Authority has fixed terms, but allowing for appeals as usual on issues of interpretation and enforcement).

Anti-competitive behaviour

87. We have not commented specifically on the market impact test section (Q75 – Q85), save to say that there would be significant risks (in terms of wasted bargaining, wasted resources and a potential risk to the integrity of the FPA system) if agreements that had been reached between the parties (and potentially determined by a determining body) were amended through a market impact test.

88. Consideration should be given to whether current anti-competition mechanisms (with some minor amendment if required), as well as other mechanisms proposed as part of the FPA system (such as the ability to grant exemptions from an FPA for small businesses or new entrants, potentially on a mandatory basis) would be sufficient to address any risks regarding anti-competitive behaviour.

Conclusion

Ratification

Q86. Do you think that FPAs should need to be ratified by a majority of employers and workers who will be affected?

89. Yes. The Law Society considers it important that those who will be covered by FPAs ought to ratify the conditions they will be covered by or will be required to comply with. Requiring ratification by a majority of parties will also better ensure compliance with the FPA.

Q87. Do you think that a majority of voters is a more workable requirement than a majority of all affected parties?

90. Yes, however it could create a perverse outcome: there would be less incentive for parties to accurately scope a coverage clause in an FPA and encourage engagement of all parties. In the event of low voter turnout, a minority could then ratify an FPA for the majority. Consequently, we consider that a majority of all affected parties is a reasonable ratification threshold and would enhance the credibility of the process. It would also create an incentive for parties to accurately scope the coverage clause in an FPA.

Q88. How should employer votes be counted: one vote per business, or votes as a proportion of workers employed in the covered sector?

91. The Law Society considers a proportionate vote is a more accurate representation of all parties, as opposed to one vote per business. This does risk smaller businesses being more easily outvoted by businesses with a larger number of workers. However, larger businesses are potentially more affected by the impact of an FPA. Exemptions for smaller businesses may go some way to address this.

Q89. How do you think the Government should support a ratification process?

92. The government should support ratification through making funding and resourcing available for the whole FPA process.

Q90. What should happen if an agreement does not pass ratification? Should parties return to bargaining?

93. Yes, parties should return to the bargaining table if they are unable to ratify the FPA. There ought to be a process for dealing with disputes caused by being unable to ratify, similar to existing mechanisms (described in detail in our answers to Q61 – Q74).

Q91. What should happen if some terms and conditions are determined by the determining body and others are agreed by the parties? Should the whole agreement need to be ratified, or just the terms agreed by the parties?

94. Where a determining body is involved, the terms determined by the body need not be ratified. Those terms agreed by the parties ought to follow the normal ratification process.

Enactment

Q92. Should the Government be allowed to change any terms of an FPA in the process of enacting it through regulations? If so, on what grounds?

95. Changes by government ought only to be made for genuine mistake or administrative error. No significant or substantive changes should be made.

Q93. What do you think is the best way to ensure that people are able to easily find information about FPAs?

96. People will be best able to easily find information if legislation requires compulsory registration of FPAs on a public database. This should be freely available to the public.

97. The Law Society would favour a flexible format tailored to whatever is required to ensure everyone can easily access information and the FPA database. This should include online access, resources provided by MBIE, and sending information to representatives, and worker, community, business and industry groups.

Enforcement

Q94. What should happen if a person or group thinks that the minimum terms set by an FPA are not being met?

Q95. Do you think the Labour Inspectorate should have the ability to enforce minimum terms set by an FPA?

98. Any FPA must set terms at or above minimum entitlements set out in legislation such as the Minimum Wage Act 1983 and Holidays Act 2003. If terms set by an FPA are not being met, parties ought to be able to personally progress matters or seek assistance through a union or representative to do so. Parties could use existing mechanisms for claims relating to breaches of a collective agreement or individual employment agreement including for wage arrears.

99. There is merit in enabling Labour Inspectors to enforce an FPA because some parties will be unable to afford to progress matters themselves. This would require better resourcing of the Inspectorate than currently.

100. Whether or not an FPA has been breached ought to be subject to a test similar to that used in Australia. This requires an assessment of all the terms and conditions as to whether the worker is "better off over all."[18] This recognises that benefits in one area can compensate for lesser terms in another (assuming all terms are at or above minimum entitlements set out in legislation).

Cost recovery

Q96. Do you think that the costs of dispute resolution in the FPA process should be consistent with the current system?

101. Yes.

Q97. Aside from dispute resolution, do you think there are any functions or services in the FPA process for which it would be inappropriate to charge a fee?

102. No. It will be important to adequately resource all aspects of the FPA process including ensuring equitable access to representation. This will require further resourcing of Mediation Services, the Labour Inspectorate, the Authority and the Employment Court, as well as the cost of engaging representation. This may also include payment of a bargaining fee to a union or sector group, or expansion of existing funding for legal aid providers and community groups giving advice on employment.

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[18] As described by the Working Group in Section 3.7 of their Recommendations, at page 25.

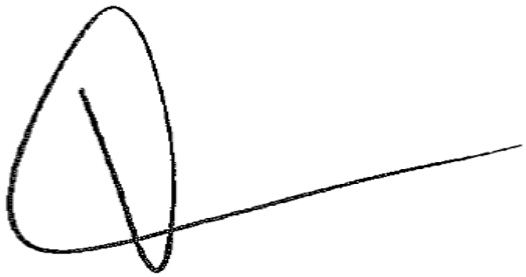
Q98. What would be an appropriate share of costs between the government and bargaining parties for the other functions (excluding dispute resolution)?

103. Ideally, the FPA process would be cost-free, in the same way the current minimum employment terms system is. Alternatively, any cost for assessing the initial and market impact tests ought to be minimal to ensure it does not create a barrier to entry. While the applicant could bear this cost in the first instance, limits on these costs could be set, either on a fixed basis or by the Authority.

Conclusion

104. We hope these comments are helpful to the Ministry and the Law Society's Employment Law Committee would be happy to discuss further if needed. If so, contact can be made in the first instance through the Law Society's Law Reform Manager, Vicky Stanbridge (Vicky.stanbridge@lawsociety.org.nz).

Yours faithfully



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