

Coversheet to Fair Pay Agreements Regulatory Impact Statement

Purpose of Document

Decision sought:	Analysis produced for the purpose of informing final Cabinet decisions to repeal the Fair Pay Agreement Legislation
Advising agencies:	Ministry of Business, Innovation and Employment (MBIE)
Proposing Minister:	Minister for Workplace Relations and Safety (Hon Brooke van Velden)
Date finalised:	28 November 2023

Limitations and Constraints on Analysis

The National and ACT Coalition Agreement proposes to repeal the Fair Pay Agreements (FPA) legislation by Christmas 2023. The impacts were assessed in the 2021 Regulatory Impact Statement (RIS). The limitations and constraints on analysis were covered at **section 1, pages 10-11** of the RIS.

As this policy is a 100-day commitment, no consultation on the repeal of the FPA system has occurred with social partners (New Zealand Council of Trade Unions (NZCTU) and BusinessNZ), iwi or Māori representative groups due to timeframe restrictions. NZCTU supports the FPA system and has commented in the media that it opposes the repeal of the FPA legislation. BusinessNZ has publicly opposed the FPA system.

Responsible Manager (signature and date):



Beth Goodwin

Employment Relations Policy Team
Workplace Relations and Safety Policy Branch / Labour, Science and Enterprise Group
Ministry of Business, Innovation and Employment
28 November 2023

Context for this coversheet

1. The National and ACT Parties' coalition agreement commits to repeal the Fair Pay Agreements (FPA) legislation by Christmas 2023. Such a decision would ordinarily require a Regulatory Impact Statement be completed by the relevant agency.

2. The Treasury's Regulatory Impact Analysis team has determined that the proposal to repeal the Fair Pay Agreements (FPA) system is partially exempt from the requirement to provide a Regulatory Impact Statement. This exemption is granted on the grounds that the Regulatory Impact Statement produced when the FPA System was introduced in 2021 mostly duplicates the analysis needed to repeal the system. This exemption is conditional on MBIE producing a coversheet that provides assurance that the analysis is still applicable and provides any additional or updated analysis where relevant.
3. This Coversheet has been quality assured by an internal MBIE panel.

A note on terminology:

The proposed repeal of the FPA system is effectively returning to the 'status quo' in the 2021 RIS. Therefore, to enable an easy comparison between this coversheet and the 2021 RIS we sometimes refer to repealing the FPA system as a return to the status quo.

Diagnosing the policy problem

4. The problem definition, including what stakeholders think of the problem, is described at **section 2, pages 12-26** of the 2021 RIS. There have been no significant changes to the regulatory settings that would lead us to consider that the status quo has changed since 2021.
5. In 2021, there was evidence that wages had not kept up with productivity improvements. While there are many potential factors, it is likely that is partially driven by an imbalance of bargaining power. In addition, in some labour-intensive sectors of the economy, employers may be able to compete by holding down or reducing terms and conditions offered to workers, often described as a 'race to the bottom.'
6. Prior to implementing the FPA system, New Zealand lacked the sector-level coordination mechanisms in our employment regulation framework to establish industry or sector-level minimum standards. While this aspect of the problem is limited to sectors or occupations with a 'race to the bottom', bargaining power and coordination problems can occur across a wider part of the labour market.
7. Repealing the FPA system will mean these issues will not be addressed.
8. We have not been able to consult on the repeal of the FPA system. However, further consultation (subsequent to the 2021 RIS) occurred during the Select Committee process, with public submissions sought between 6 April and 19 May 2022. The majority of submitters supported the Bill (predominantly employees and employee associations/unions) and saw the case for change. Reasons for support included, but were not limited to, the need for improved working conditions, addressing long standing inequality, the need for better recognition for work and improved communication, and the need for minimum standards. Those who did not support the Bill (predominantly employers and employer associations) raised a number of concerns. These included, but were not limited to, the compulsory nature of Fair Pay Agreements, the complexity of the processes set out in the Bill, perceived litigation risk, lack of representation of employers and potential impacts on business costs, productivity and inflation. Many of these submitters also did not see the need for change.

Policy options and impacts

9. The impact analysis on policy options is set out at **section 4 of the RIS, pages 38-39**.

10. While it may be possible to update some of the data in the RIS to reflect changes in the labour market since 2021, MBIE's view is that these changes are not material to the impact analysis so these updates have not been made.
11. The summary of the costs and benefits of introducing an FPA system is set out at **section 5.2, pages 42-50**.
12. The main beneficiaries of repealing the FPA system would be employers who would retain the flexibility to set worker terms and conditions in line with current bargaining structures. Some employers would face lower wage costs after repealing the FPA system compared to any of the intervention options, though the extent will vary depending on the potential differences in terms and conditions that may have occurred under an FPA.
13. The main costs of repealing the FPA system would likely fall on employees who would otherwise be in scope of proposed bargaining or coordination arrangements. They may have benefited from increased wages and improved terms and conditions of work. Depending on the sectors/occupations where FPAs are concluded, they could disproportionately benefit some population groups covered (including women, young people, Māori and Pacific peoples).
14. The capacity created by the FPA funding for the employment relations dispute resolution system is providing a benefit to employers and employees because the system has higher capacity than it would otherwise have for dealing with disputes.
15. Based on the criteria in the RIS, MBIE's view is that relative to the change options, the status quo would be:

Criteria	Repealing the FPA system (equivalent to returning to the status quo in the 2021 RIS) relative to the other options
<p style="text-align: center;">Effectiveness in improving outcomes for workers</p> <p>The extent to which the option achieves the objective of improving workers' labour market outcomes by addressing the imbalance of bargaining power between employees and employers.</p>	Less effective at improving worker outcomes
<p style="text-align: center;">Effectiveness in preserving adaptability of employers in labour market</p> <p>The extent to which firms can adapt flexibly to shocks in the market and innovative practices are not restricted</p>	More effective in preserving adaptability of employers in labour market
<p style="text-align: center;">Efficiency of the system</p> <p>This includes the compliance and regulatory costs of the intervention. This also assesses the extent to which the intervention is appropriately targeted and proportionate to the scale of the problem.</p>	Repealing the FPA system has lower compliance costs for employers but there would still be negative effects for employees if targeting of interventions is not used for occupations that require additional support (ie MBIE's preferred option, as set out at pages 31-33 of the RIS). Overall, our assessment, based on information available, is that the economic costs of repealing the FPA system are slightly higher than MBIE's preferred

	change options but lower than those of the FPA system.
<p>Consistency with the existing ERES system and domestic/ international obligations</p> <p>An assessment of whether the approach is consistent with the principles of the existing ERES system.</p>	<p>Repealing the FPA system would be more consistent with the existing ERES system and domestic/ international obligations but the same as the other change options. The FPA system may have engaged some of New Zealand's international labour obligations. Repealing the FPA system would mean those international obligations are not engaged for the FPA system. The FPA system was vetted against the New Zealand Bill of Rights, which found that any limitation on rights were justified.</p>

16. The overall conclusion of the 2021 RIS is that the case for intervention is weakly positive. That is, there are economic costs repealing the FPA system and there are some options for change that could help address those costs (by introducing limited sector-based minimum standards where there is evidence of a labour market problem and strengthening existing collective bargaining mechanisms), but these options would require further investigation. However, the scope and the costs of the FPA system were high and it was not recommended.

Implementation

17. **Section 6** of the RIS addresses the implementation and operation of the FPA system, at **pages 51-54**.

18. MBIE and the Employment Relations Authority were resourced to operationalise the FPA system. This has created additional capacity in the broader employment relations system, while the FPA process gears up. This has provided a benefit to employers and employees because there has been greater capacity for core employment relations services than otherwise. Decisions around funding related to the repeal of the FPA system are yet to be determined.

19. The legislation came into force on 1 December 2022. Since then, six FPAs have been initiated but all are only in the early stages of bargaining; and one further application is being assessed by the MBIE. There are no significant transitional provisions required because there will be no FPA's completed by the time the repeal takes place. Development of FPAs will cease at that point, as there would be no framework for finalising the agreements. There is other legislation that will cover necessary rights and obligations of people within the system after the repeal:

- a. Section 33 of the Legislation Act 2019 deals with the effects of repeals on existing rights and proceedings. It sets out that a repeal does not affect the commencing of a proceeding that relates to an existing legal position, the completion of a proceeding commenced or in process under the legislation or the completion of a matter or thing that relates to an existing right or interest. This means that any action for breach of the FPA Act may be brought, or concluded if brought before the repeal of the Act, to the Authority or Court in the manner described in the Act.
- b. In relation to the private information that was provided to unions under the FPA Act, the Privacy Act would apply. The Privacy Act states that an agency that holds personal information must not keep that information for longer than is required for the purposes for which the information may lawfully be held. That information was provided for the lawful purpose under the FPA Act, therefore the information would

need to be deleted once the FPA Act is repealed, for compliance with the Privacy Act requirements.

20. It is intended that MBIE will use its existing channels for disseminating FPA information for the purposes of communicating about the repeal of the FPA system, including communicating directly with parties currently involved in initiating or bargaining an FPA.

Monitoring and review

21. **Section 7 of the RIS** covered the monitoring, evaluation and review of the FPA system, at **pages 55-56**.
22. As part of operational expenditure in outyears, the FPA system was due to be reviewed once it had been operational for several years. Given the system is now to be repealed, the evaluation will be scaled down to only cover the implementation of the FPA system, rather than the system as a whole.
23. Repealing the FPA system essentially reverts the system to the status quo. MBIE undertakes periodic regulatory stewardship reviews of the Employment Relations and Employment Standards system. The system was last evaluated in 2017, this is discussed in the RIS at **page 18**. There is no review planned.