

Departmental Disclosure Statement

Fair Pay Agreements Act Repeal Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

7 December 2023

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Part One: General Policy Statement

The Fair Pay Agreement Act Repeal Bill (FPAA Repeal Bill) will repeal the Fair Pay Agreement (FPA) legislation.

The FPAA Repeal Bill will remove the bargaining framework that enables unions and employer associations to bargain fair pay agreements that specify industry or occupation-wide minimum employment terms, and for the Employment Relations Authority to determine those minimum employment terms (in certain circumstances).

As no FPAs have been finalised, the impact of the FPAA Repeal Bill will be to remove the ability for any FPAs to be finalised.

The objective of the FPAA Bill is to revert to the previous framework where employers and employees (or unions representing their members) have more flexibility to agree their employment terms (as long as these are above the Minimum Entitlement Provisions specified in the Employment Relations Act 2000).

The FPAA Repeal Bill will:

1. Repeal the Fair Pay Agreements Act 2022 and
2. Revoke the Fair Pay Agreements Regulations 2022 and the Employment Relations Authority (Fair Pay Agreements) Amendment Regulations 2023;
3. Reverse the consequential amendments made to the following Acts made under the Fair Pay Agreements Act 2022:
 - a) Defence Act 1990
 - b) Employment Relations Act 2000
 - c) Equal Pay Act 1972
 - d) Holidays Act 2003
 - e) Judicial Review Procedure Act 2016
 - f) Minimum Wage Act 1983
4. Reverse the amendments made to the:
 - a) Employment Court Regulations 2000 by the Employment Court (Fair Pay Agreements) Regulations 2023, with the exception of the technical amendment to express the figures for Employment Court fees in GST-exclusive form
 - b) the Employment Relations Authority Regulations 2000 by the Employment Relations Authority (Fair Pay Agreements) Amendment Regulations 2023.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The Treasury's Regulatory Impact Analysis team determined that the proposal to repeal the Fair Pay Agreements (FPA) System is partially exempt from the requirement to provide a Regulatory Impact Statement (RIS). This exemption was granted on the grounds that the RIS produced when the FPA System was introduced in 2021 mostly duplicates the analysis needed to repeal the system. The exemption was conditional on MBIE producing a coversheet that provides assurance that the analysis is still applicable and provides any additional or updated analysis where relevant. The original RIS and coversheet was provided with the Cabinet paper that sought approval to draft a Bill to repeal the FPA legislation.</p> <p>Subsequently, Cabinet decided to suspend the RIS requirement for decisions relating to 100 Day Plan proposals (taken within the 100 Days) which solely involve the repeal of legislation. As MBIE's RIS Coversheet had already been prepared, the responsible Minister chose to provide the RIS to Cabinet despite this suspension.</p> <p>Documents:</p> <ul style="list-style-type: none">• Coversheet to Fair Pay Agreements Regulatory Impact Statement, 28 November 2023. A copy of the Coversheet will be available here once the FPAA Repeal Bill has been introduced: https://www.mbie.govt.nz/dmsdocument/27868-coversheet-to-fair-pay-agreements-regulatory-impact-statement-2023-pdf• Fair Pay Agreements – Regulatory Impact Statement (RIS), Ministry of Business, Innovation and Employment, Published 8 July 2021. A copy of the RIS is available at: https://www.mbie.govt.nz/dmsdocument/15512-fair-pay-agreements-regulatory-impact-statement-pdf	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>MBIE's Regulatory Impact Analysis Review Panel (which Treasury provided input) reviewed the RIS prepared by MBIE (link in 2.3 above) at the time Cabinet's agreement to draft the Fair Pay Agreement legislation was sought – April 2021. The Panel considered that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to make informed decisions on the proposals.</p> <p>The 2023 Coversheet was reviewed by MBIE's RIS panel for quality assurance.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
The size of the potential costs and benefits are covered in the 2021 RIS (see section 5.1 to 5.3, at pages 42-50) and the 2023 RIS Coversheet (paragraphs 11-14) detailed in 2.3 above.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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The Fair Pay Agreement system engages New Zealand's international obligations related to the right to strike, freedom of association, voluntary collective bargaining and compulsory arbitration.¹

Repealing the FPA legislation will avoid engaging these international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

MBIE considered the implications of the repeal of the FPA legislation on Māori. Māori are more likely than other groups to earn low wages. Given they are disproportionately represented in workforces where there are lower employment terms, they could have disproportionately benefited from any improved terms obtained by an FPA. This would, however, depend on whether these populations were more represented in the industries or occupations where FPAs were developed and whether the minimum terms agreed were better than their current terms. However, they could also have been disproportionately negatively impacted by any disemployment effects (i.e., if employers choose to hire fewer people or reduce hours of work due to higher costs associated with employment).

No consultation with Iwi or Māori representative groups was possible due to timeframe restrictions. In its submission to the Select Committee on the FPA Bill, the NZCTU Rūnanga supported the FPA system, as it considered Māori are particularly affected by a lack of standards and would benefit from a system of better wage fixing.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice has assessed the FPAA Repeal Bill. Its advice has been provided to the Attorney-General, which is expected to be available on the Ministry of Justice's website upon introduction of the Bill: <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

¹ Relevant international human rights obligations are from the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87); the ILO's Convention No. 98; article 22 of the International Covenant on Civil and Political Rights 1966 (ICCPR); and article 8 of ICESCR. New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>Subject to the Legislation Act 2021, clause 5 of the Bill removes all penalties contained in the Fair Pay Agreements Act (as the entire Act is repealed).</p> <p>The Bill repeals the Fair Pay Agreements system, which provided the Employment Relations Authority and Employment Court with jurisdiction in relation to obligations and rights under the Fair Pay Agreements Act (for example, the Employment Relations Authority was empowered to hear disputes and determine the terms of a Fair Pay Agreements in certain circumstances, and the Employment Court could hear certain appeals). Clause 5 of the Bill removes this jurisdiction (by repealing the entire FPA Act). This is subject to the Legislation Act 2021, where if an existing right or legal position exists before the FPA Act is repealed, a party can still exercise their legal rights as though the FPA Act had not been repealed.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted and did not have any comment.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clause 5 of the Bill removes sections 42, 105-108, 152, 185-187, 208, 260-261, and 272-275 of the FPA Act (as it repeals the entire Act) which relate to the collection, storage access, correction of, use or disclosure of personal information.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner was consulted about whether any transitional provisions were needed to deal with the storage of personal information received under the FPA Act. The Office of the Privacy Commissioner considered that it would be important that there is guidance on how the Privacy Act would apply to the personal information collected under the Fair Pay Agreement system and the need for it to be deleted when there was no longer a lawful purpose to hold the information. MBIE intends to work with the Office of the Privacy Commissioner when developing this guidance.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The policy decisions were discussed with social partners New Zealand Council of Trade Unions (NZCTU) and BusinessNZ. NZCTU supports the FPA system and has commented in the media that it opposes the repeal of the FPA legislation. BusinessNZ has consistently publicly opposed the FPA system. No other external consultation has occurred due to timeframe restrictions.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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