LEGAL ADVICE

LPA 01 01 24

9 March 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Fair Pay Agreements Bill

Please find attached our advice about the consistency of this Bill with the New Zealand Bill of Rights Act 1990. We have concluded that the Bill appears to be consistent with that Act.

Details of the Bill

Minister:	**Hon Michael Wood**	**Bill Type:**	Government Bill
Committee:	Cabinet Economic Development Committee	**Meeting Date:**	16/03/2022

Recommendations

Note the attached advice about the consistency of the Bill with the New Zealand Bill of Rights Act 1990.	**YES / DISCUSS**
Direct the Ministry of Justice to publish the advice on its website.	**YES / NO**
Refer a copy of the advice to the Minister for Workplace Relations and Safety.	**YES / NO**
Refer a copy of the advice to the Minister of Justice.	**YES / NO**

Contacts for telephone discussion (if required)

Name	**Position**	**Telephone**		**1st contact**
		(work)	**(a/h)**	
Jeff Orr	Chief Legal Counsel	04 494 9755	027 221 6859	
Hannah Gray	Lead Bill of Rights Advisor	021 149 6024		✓
Stella Ivory	Policy Advisor	04 471 7418		

Hannah Gray
Lead Bill of Rights Advisor
Policy Group

Hon David Parker
Attorney-General
/ / 2022

MINISTRY OF JUSTICE
Tāhū o te Ture

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Purpose

1. We have considered whether the Fair Pay Agreements Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).

2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21869/26.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 16 (freedom of peaceful assembly), s 17 (freedom of association), s 19 (freedom from discrimination) and s 21 (freedom from unreasonable search and seizure). Our analysis is set out below.

Summary

4. The Bill creates a framework for the collective bargaining of Fair Pay Agreements (FPAs) and sets out the general principles and obligations to guide parties in bargaining FPAs.

5. The Bill's explanatory note states that FPAs will enable employers and employees to collectively bargain minimum employment terms and conditions for covered employees that will be binding on an industry or occupation.

6. The Bill makes provisions for information sharing between bargaining parties, and employers and employees; and restricts strikes and lockouts related to the bargaining of FPAs. These provisions engage the right to freedom of expression, freedom of peaceful assembly, as well as the freedom of association. The membership and coverage of FPAs also engages freedom of association. Access to workplaces for union members and labour inspectors engages freedom from unreasonable search and seizure. Some provisions related to the requirements of Māori representation as part of the FPA framework and processes engage freedom from discrimination.

7. We have concluded that, to the extent that the Bill limits these rights and freedoms, the limits are justified. The Bill therefore appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

8. The purpose of the Bill is to provide a framework for collective bargaining for FPAs, which will specify industry-wide or occupation-wide minimum employment terms.

9. The Bill's explanatory note explains that the main objective is to drive an enduring and system-wide change that improves labour market outcomes, including more equitable distribution of benefits from increased labour productivity. It seeks to achieve this by

enabling employers and typically low bargaining-power employees to collectively bargain minimum employment terms and conditions for covered employees that will be binding on an industry or occupation.

10. The Bill outlines the process that provides for FPAs to be developed, including:

    a. General principles and obligations of FPAs which include that membership is voluntary, that FPAs must not be used to determine preferences or as a lever of influence for either the employer or the employee, and that FPAs must be developed in good faith.

    b. The process and guidelines for:

        i. initiating FPA bargaining, and forming bargaining sides for both the employer and the employee

        ii. FPA meetings and union access to workplaces and bargaining for the proposed FPA

        iii. the content and form of FPAs, and their finalisation, variation and renewal, and

        iv. the penalties and enforcement of FPAs, and the role of relevant institutions such as the Employment Relations Authority (the Authority) and the Labour Inspector.

11. The resulting FPAs will be given force via secondary legislation and will bind a whole industry or occupation.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

12. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.[1]

Sharing of relevant information across bargaining parties

13. There are several provisions throughout the Bill that require bargaining sides to share relevant information to facilitate bargaining of an FPA. For example, cl 30 requires an employer to provide employee information to the employee bargaining side, cl 44 where the chief executive must provide each bargaining party with the name of each other bargaining party for the proposed FPA, and cl 108 where bargaining parties must inform employers and employees about who is or is not covered by the proposed FPA. Clause 110 outlines the requirements for employers to notify employees who may be covered by the proposed FPA, and that the employee can elect not to have their details provided to the bargaining side.

14. These provisions *prima facie* limit the freedom of expression under s 14 of the Bill of Rights Act. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is

[1] See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

demonstrably justified in a free and democratic society, under s 5 of that Act. Justification under s 5 occurs where the limit seeks to achieve, and is rationally connected to, a sufficiently important objective; impairs the right or freedom no more than reasonably necessary to achieve the objective; and is otherwise in proportion to the importance of the objective.[2]

15. The objective of the Bill is to create a framework for bargaining of FPAs and facilitate a process to enable employers and employees to collectively bargain minimum employment terms and conditions for covered employees that will be binding on an industry or occupation. We consider this to be an important objective.

16. The provisions highlighted in paragraph 13 above relate to sharing information (including personal details where necessary) between employers, employees and bargaining parties for the purposes of negotiating, ratifying and maintaining FPAs. The required information is largely factual and relates to communication about, and clarity of who and what, is covered by FPAs across these groups. These processes are integral to enabling the important objective of this Bill to be met.

17. We consider that, to the extent that these provisions engage the right in s 14 (as to whether such information is truly 'expressive' in nature), they do not limit the right any more than is reasonably necessary to allow FPAs to be negotiated, ratified and maintained, and are in proportion to that objective. These provisions are justified in terms of s 5 of the Bill of Rights Act.

Strike or lockouts in relation to an FPA

18. Clause 123B of the Bill makes participation in a strike or lockout unlawful, if the strike or lockout[3] relates to bargaining for a proposed FPA. Lockouts and strikes are forms of expression and any legislative curbs on these activities may be seen as limitations on the freedom of expression rights of workers and employers.

19. As explained above, the limitations on freedom of expression raised by cl 123B may be consistent with the Bill of Rights Act if the limitations are reasonable and are justifiable under s 5 of that Act.

20. The obligation of good faith is a key feature of the FPA system. It provides a basis for the parties, when bargaining, to be active and constructive in establishing and maintaining productive relationships, and aims to minimise the parties resorting to industrial action. The restriction on strikes and lockouts appears to be necessary to facilitate that obligation of good faith. While industrial action, such as strikes and lockouts, may be a part of bargaining, the objective of the FPA system would likely erode if the parties can take industrial action during the bargaining process. We consider the limitations on the right to freedom of expression are rationally connected to the success of the FPA system.

21. We also consider the restriction impairs the right no more than reasonably necessary to achieve that objective and is otherwise in proportion to the importance of the objective. In coming to this conclusion we note that the restrictions on the ability to strike and lockout relates only to bargaining for a proposed FPA and does not extend to strike or lockouts on grounds of safety or health.[4] Further, instead of resorting to industrial action to resolve an impasse, the bargaining parties are encouraged to use the disputes resolution mechanisms

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[2] See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC).

[3] 'Strike' and 'lockout' are defined in ss 81 and 82 of the Employment Relations Act 2000.

[4] Employment Relations Act 2000, s 84.

available to them under the Bill, such as applying to the Authority to fix the terms of a proposed agreement where the parties are unable to agree.[5] We therefore consider the limit to be justified under s 5 of the Bill of Rights Act.

Sections 16 and 17 – Freedom of Association and Freedom of Peaceful Assembly

22. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right to freely associate is directed towards the right to form or participate in an organisation, to act collectively, rather than simply to associate as individuals.[6] The right recognises that everyone should be free to enter a consensual arrangement with others and promote common interests of the group. By protecting the right of individuals to decide freely whether they wish to associate with others, it also includes the right not to associate.

23. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly. The choice of method, place, and time of peaceful assembly is integral to the free exercise of that right.[7]

Universal coverage of FPAs

24. The purpose of the Bill, as expressed in cl 3 is to provide a framework for collective bargaining for FPAs which will specify industry wide or occupation wide minimum employment terms. FPAs will have universal coverage, within the relevant industry or occupation, and aims to improve labour market outcomes for covered employees, in particular those with low bargaining power.

25. As was observed by Gault J in *Eketone v Alliance Textiles (NZ) Ltd* "the right to elect and pursue collective bargaining arises out of, but generally are not regarded as elements of, the freedom of association."[8] As such, we are of the view that the decision to elect and pursue bargaining of an FPA does not amount to an associational activity protected by the right to freedom of association.

26. We also do not consider the universal coverage of the FPA engages s 17, because while two people who enter into a contract might be described as 'associating', they could not be considered to have an 'association' within the meaning of s 17.[9] In any case, we note that there is nothing preventing an employer and a covered employee agreeing a term in an employment agreement that is more favourable to the employee than the corresponding term provided in the FPA, if they wish to do so.[10]

Voluntary membership of a union or an employer association

27. We have also considered whether the Bill engages the right not to join an association, noting that membership of a union or an employer association is voluntary.[11] Where a benefit is so great as to practically compel or induce an individual to become part of an

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[5] Clause 172.
[6] *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142 [30 April 2021] at [113].
[7] *Brooker v Police* [2007] NZSC, 30 at [116] per McGrath J.
[8] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) at 796.
[9] Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [15.7.2]. See also *Turners & Growers Ltd v Zespri Group Ltd (No 2*) (2010) 9 HRNZ 365 (HC) at [73].
[10] Clause 123.
[11] Clause 7.

association, the extent of the inducement may give rise to an issue of inconsistency with the right to freedom of association.[12]

28. However, we have concluded that it does not engage s 17 of the Bill of Rights Act as cl 10 and 11 prohibit conferring on an employee or employer any benefit or opportunity because they are or are not a member of a union or an employer association. While cl 10(2) provides that an FPA can provide that a union member payment may be paid to an employee, who is within coverage and a member of a union, we do not consider it to be sufficient to constitute a breach. This is because the union member payment cannot be more in total than the amount of the employees' union membership fees for the period covered by the FPA.[13]

Industrial action – strikes and lockouts

29. The restriction on industrial action at cl 123B of the Bill engages the right to freedom of association and peaceful assembly. Like freedom of expression, the limitations on these freedoms may be consistent with the Bill of Rights Act if the limitations are reasonable and are justified under s 5 of that Act.

30. The rights to freedom of association, and peaceful assembly, as particular manifestations of expression, are intimately bound together. Justification for the limits imposed on these freedoms by cl 123B are identical to those outlined above in paragraphs 20 and 21 of this advice. We therefore conclude that the limits imposed by cl 123B are justified under s 5 of the Bill of Rights Act.

Section 19 – Freedom from discrimination

31. Section 19(1) of the Bill of Rights Act affirms that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993 (the Human Rights Act).

32. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:[14]

    (a) does the legislation draw a distinction on one of the prohibited grounds of discrimination under s 21 of the Human Rights Act; and, if so

    (b) does the distinction involve disadvantage to one or more classes of individuals?

33. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.[15]

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[12] *Air New Zealand Ltd v Trustees of the New Zealand Airline Pilots Mutual Benefit Fund* [2000] 1 NZLR 418 (HC) at 429. Randerson J considered that while the benefits of a fund created some incentive for pilots or flight engineers to join NZALPA he did not consider that to be sufficient to create a breach of s 17. He noted that "[t]he position may be different where the extent of the inducement is so great as to amount to a practical compulsion to join an employees organisation so as to obtain the relevant benefits." See also Canadian Supreme Court decision *Lavigne v Ontario Public Service Employees Union* [1991] 2 S.C.R 211.

[13] Clause 10(4)(c).

[14] See, for example, *McAlister v Air New Zealand* [2009] NZSC 78, [2010] 1 NZLR 153; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

[15] See, for example *McAlister v Air New Zealand* above n 14 at [40] per Elias CJ, Blanchard and Wilson JJ

34. Clauses throughout the Bill provide for explicit Māori representation. For example, cl 37 provides an obligation to ensure representation of Māori employees, cl 159 (2) (d) and (e) provide for Māori representation in mediation services of Māori employees and employers who are covered by an FPA, and cl 167 outlines that bargaining parties may apply to the Authority about how a sufficient level of Māori representation and input can be ensured. We have considered if this distinction between Māori and non-Māori is in a manner that amounts to discrimination on the basis of race.

35. We have concluded that giving greater emphasis to Māori representation and input in FPA processes and outcomes does not amount to discrimination on the ground of race. This emphasis is necessary to give effect to the Crown's commitment under te Tiriti o Waitangi in a meaningful and practical way.

Section 21 – Freedom from unreasonable search and seizure

36. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.[16]

37. The Bill provides that a representative of a union is entitled to enter the workplace without the employer's consent, if the primary purpose of entering the workplace is to discuss, with a covered employee or an employee who may be affected by bargaining for a proposed FPA, variation, proposed renewal or proposed replacement. A workplace does not include a dwellinghouse.[17]

38. There are a number of conditions on access.[18] A union representative exercising the right to enter a workplace may do so only at reasonable times during any period when a covered employee is employed to work in the workplace, must do so in a reasonable way, having regard to normal business operations, must comply with any existing reasonable procedures and requirements relating to safety, health or security and must at the time of initial entry or if requested, give the purpose of entry and produce evidence of the union representative's identity and authority to represent the union.[19] Access to workplaces may be denied if entry would prejudice the security or defence of New Zealand, or the investigation or detection of offences.[20] Where a certificate of exemption has been issued, access to the workplace may be denied on religious grounds.[21] The Bill provides that every person is liable to a penalty who, without lawful excuse, refuses to permit a union representative to enter a workplace, obstructs entry to the workplace, or wilfully fails to comply with conditions relating to access.[22]

39. The Bill also gives new powers to Labour Inspectors.[23] For the purpose of determining whether an employee is covered by a FPA, a Labour Inspector has the power to enter, at any reasonable hour, any premises where any person is employed or where the Labour Inspector has reasonable cause to believe that any person is employed (including the

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[16] See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.
[17] Clause 56.
[18] Clause 57.
[19] Clause 59.
[20] Clause 59A.
[21] Clause 59B.
[22] Clause 60.
[23] Clauses 185H-185I.

premises of a controlling third party) accompanied, if the Labour Inspector thinks fit, by any other employee of the department qualified to assist or by a constable. A Labour Inspector also has powers to interview and to require production of specified records. An employer or controlling third party must supply the requested information immediately and is liable to a penalty if they, without reasonable excuse, fail to comply. A Labour Inspector is not able to use any information or evidence obtained through the exercise of these powers for any purpose other than to determine whether an employee is covered by a FPA.

40. Ordinarily, a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be reasonably justified and therefore the inquiry does not need to be undertaken.[24] As such, the question with respect to the search and seizure powers under the Bill is whether they are reasonable. The reasonableness of a search can be assessed with reference to the purpose of the search and the degree of intrusion on the values which the right seeks to protect.

41. Powers to search and seize can relate to entering premises in order to conduct regulatory or administrative tasks and to examine records required to be kept by a regulator.[25] We consider that allowing union representatives to enter workplaces without the employer's consent, and the powers given to Labour Inspectors to enter premises, without the employer's consent, and to require production of records, engages section 21.

42. However, we consider that the search and seizure powers in the Bill are reasonable. There are conditions to ensure that entry is done in a reasonable manner, entry is permitted for a limited purpose connected to an administrative or regulatory function, the expectations of privacy for a workplace are lower than for a private dwelling, penalties for non-compliance are low and are civil not criminal, and a Labour Inspector may use any information produced only to determine whether an employee is covered by an FPA.

43. On this basis, we consider that the search and seizure powers contained in the Bill are reasonable and consistent with the Bill of Rights Act.

Conclusion

44. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

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[24] *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R*, above n 16, at [162].
[25] Butler, above n 9, at 18.4.8.