

Fair Pay Agreements Regulatory Impact Assessment update on limiting judicial review of bargaining parties' decisions

Section 1: Executive Summary

1. This document provides updated analysis to the previous Regulatory Impact Analysis (RIA) that was done by the Ministry of Business, Innovation and Employment (MBIE) on Fair Pay Agreements (FPAs) in April 2021.
2. The problem that this analysis is addressing is the potential for delays and disincentives for entities to participate in FPA bargaining arising from judicial review of bargaining parties' exercise of statutory powers (including statutory powers of decisions).¹ Judicial review is a legal process where any person can challenge the lawfulness of administrative decisions that are made under a legal power.
3. MBIE considered several options for limiting the grounds for judicial review of bargaining parties' decisions. The analysis considered the extent to which each option is likely to be a justified limitation under the Bill of Rights Act, and their effectiveness in correcting errors where there is a genuine breach of rights.
4. The option chosen by the Minister is the option that MBIE recommended, which is to limit the grounds for judicial review until after alternative avenues have been exhausted and where the complaint is that the bargaining party making the decision was not authorised under the FPA legislation to make the decision in question or did not act in good faith. The Minister is seeking Cabinet approval for these changes and this analysis supports that consideration.

Responsible Manager (signature and date):



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To be completed by quality assurers:

Quality Assurance Reviewing Agency:

The Ministry of Business, Innovation and Employment

Quality Assurance Assessment:

MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact Statement **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

¹ Referred to as "bargaining parties' decisions" in this RIS.

Section 2: Background

5. On 19 April 2021, Cabinet agreed to the key policy features of a new Fair Pay Agreements (FPA) system and to begin drafting legislation to implement the system [CAB-21-MIN-0126 refers].
6. The Fair Pay Agreement Working Group (FPAWG) did not address how judicial review would work in the FPA system. However, the FPAWG recommended that the FPA system should maintain, as far as possible, the existing processes under the Employment Relations Act 2000 (the ER Act). Cabinet agreed that, apart from limiting appeals to questions of law when the Employment Relations Authority (ER Authority) fixes the terms of an FPA, the usual challenge and appeal rights under the ER Act would apply [CAB-21-MIN-0126].
7. Several submissions to the Select Committee on the FPA Bill have commented on the potential for judicial review and litigation in the FPA system.
8. The Minister agreed to limit judicial review of bargaining parties' decisions. This limitation applies only to situations where all alternative avenues have firstly been exhausted and where the complaint is that the bargaining party making the decision was not authorised under the FPA legislation to make the decision in question or did not act in good faith.
9. The Regulatory Impact Analysis that accompanied the April 2021 Cabinet decisions, compared system-level interventions for addressing the labour market issues identified. This update to the Regulatory Impact Analysis covers the Minister's decision to limit judicial review of bargaining parties' exercise of statutory powers of decision.

Section 3: Problem definition and Objectives

Rationale and objectives of FPA system

10. The current Employment Regulatory and Employment Standards (ERES) system recognises that there is an inherent imbalance of bargaining power in the employment landscape. There is a broad view that additional interventions within or alongside the ERES system could be introduced to improve labour market outcomes for workers, which includes introducing sector-wide minimum standards for workers, especially for sectors which heavily compete on cost to secure contracts.
11. The two primary issues that the FPA system intends to address are:
 - the imbalance of bargaining power between employers and employees, and
 - industry competition based on reducing terms and conditions for employees (ie a 'race to the bottom' for workers amongst businesses within a sector heavily competing on costs).
12. The key aims of the FPA system, in addressing the above issues, are to enable minimum standards to be reflective of the needs of the relevant sector, improve labour market outcomes for workers through addressing competition based on labour costs,

and to improve workers' ability to collectively improve their working conditions.

Problem definition

There are two policy problems that the proposed policy change seeks to address:

Judicial review may be used tactically to delay or frustrate the bargaining process

13. Judicial review could be used as a delaying tactic to frustrate bargaining for a proposed FPA. The range and complexity of bargaining party decisions increases the likelihood of judicial review. This may stall the process for improving employees' terms and conditions, introduces uncertainty for covered employees and employers, and impacts on the finality of the proposed FPA. For example, attempts to halt and delay Auckland Council from implementing its own provisional local alcohol policy has resulted in costly and time-consuming legal challenges.²

Judicial review may dampen parties' willingness to bargain

14. Any bargaining party or side in the FPA system who exercises a statutory power of decision becomes a party to any resulting judicial review proceedings. Entities may therefore be disincentivised or otherwise unwilling to become a bargaining party due to the perception that it might expose them to the associated costs, legal liabilities, time, and resourcing implications.
15. If actors are unwilling to participate in bargaining, this could undermine the policy intention that an initiated FPA should result in a bargained outcome where possible, arrived at through an efficient process. If this risk is realised, it may result in many or most FPAs being referred to the Authority to fix the terms. This risk may compound if the number of judicial review proceedings on bargaining party decisions increase over time. This is an (untested) risk/assumption that underpins the rationale for limiting judicial review in the FPA system.

Objectives for limiting judicial review of bargaining parties' decisions

16. The objectives for limiting judicial review are to:
 - Mitigate the risk of judicial review being used as a tactic to delay and undermine the FPA bargaining process (referred to as "risk of delays"); and
 - Reduce the risk that entities may be disincentivised or unwilling to participate in bargaining which may result in FPAs being referred to the Authority to fix the terms (referred to as "disincentives to participate"); while
 - Ensuring the process continues to provide a mechanism to correct errors in the bargaining process where there is a genuine breach of a person's rights.

Section 4: Options Identification

17. The table below sets out three options for limiting judicial review of bargaining parties' decisions. The option set ranges from least to most restrictive in terms of limiting rights of judicial review. All options (other than status quo) require an applicant to use existing mechanisms for resolving a dispute before applying for judicial review.

Status quo	This option enables a person to bring an application to the Employment Court for judicial review of a bargaining party decision without limiting the grounds for review.
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² <https://www.stuff.co.nz/auckland/128164191/legal-challenges-against-auckland-councils-local-alcohol-policy-cost-ratepayers-over-1m>

<p>1. Limits the grounds for judicial review</p>	<p>This option limits bargaining parties' exercise of statutory powers (which include bargaining parties' decisions) from being judicially reviewed, to only situations where:</p> <ul style="list-style-type: none"> a) all alternative avenues have firstly been 'exhausted', namely, dispute resolution and a compliance order, if available, to resolve a breach of obligation; and b) the complaint is that the bargaining party exercising the statutory power was not authorised under the FPA legislation to exercise the power in question or did not act in good faith.³ <p>This option is similar to the limitation on judicial review in section 184 of the Employment Relations Act, which limits judicial review of the Authority's determinations, except on the grounds of lack of jurisdiction (includes where the Authority acts in bad faith). The rationale for the limitation on Authority determinations under section 184 was to minimise delays and improve efficiency of decision-making.</p>
<p>2. Limits which decisions are judicially reviewable</p>	<p>This option makes only the following bargaining parties' decisions (and the exercise of statutory powers leading to the decisions) judicially reviewable (after exhausting alternative avenues to resolve the dispute):</p> <ul style="list-style-type: none"> a) determining what other interests should be recognised or reflected; b) determining the feedback mechanism; c) conduct of the ratification vote.
<p>3. Limits grounds and decisions (combines options 1 and 2)</p>	<p>This option makes only the decisions (and exercise of statutory powers leading to the decisions) in option 3 judicially reviewable, after:</p> <ul style="list-style-type: none"> a) alternative avenues have firstly been exhausted; and b) only on the grounds that bargaining party exercising the statutory power was not authorised under the FPA legislation to exercise the power or did not act in good faith.

Who is impacted by this change?

18. We expect that the policy change will mainly affect employees and employers who are within coverage; of a proposed FPA,⁴ An FPA is expected to benefit workers whose

³ Good faith requires parties to deal with each other honestly, constructively and without misleading or deceiving each other.

⁴ In relation to a proposed FPA, coverage means the employees who perform work to which the terms of the proposed FPA apply; and their employers. An example of coverage for an occupation-based agreement is a proposed FPA that would cover all commercial cleaners.

terms and conditions are below that agreed in the FPA and will create an equivalent cost for their employers.

19. There could be moderate impacts for some employees and employers within coverage who are affected from not being able to take judicial review proceedings on the grounds that are excluded from judicial review. For example, they will not be able to bring a judicial review claim on some common law grounds, e.g. where the complaint is that the decision is 'unreasonable' in the circumstances, or where their natural justice rights have been breached.
20. This will impact those employees or employers in coverage who have a legitimate claim arising from an error in the bargaining process. If an error in the bargaining process occurs that is outside the limited grounds for review, the affected employee or employer would need to seek alternative means to address their concerns, such as through dispute resolution or a compliance order (where available). These alternative mechanisms are intended to provide an efficient and accessible avenue for parties to resolve any dispute or compliance issue that may arise during FPA bargaining. This includes issues that may otherwise fall outside of scope of the limited grounds of judicial review, e.g. decisions that are procedurally unfair or unreasonable. Mediation in particular is a powerful mechanism for parties to promptly and effectively resolve any problem in relation to bargaining for the terms of a fair pay agreement. However, the mechanisms are only beneficial if the process deficiency is identified before the FPA is finalised.
21. There could be positive impacts on the living standards of population groups who may benefit from not experiencing delays in FPA bargaining caused by judicial review proceedings. These population groups include those that have a significant prevalence of jobs with inadequate working conditions, low wages, and low labour productivity, e.g., Māori, Pacific peoples, young people, and people with disabilities.

What stakeholders think

22. The Ministry of Justice (MOJ) considers that some limitation on judicial review of bargaining parties' decisions may be justified. From a high-level review, MOJ noted that the objective of ensuring certainty of the FPA system (such as to offset the risk of employers using judicial review to undermine or delay FPAs) may be sufficiently important to justify some limitation on judicial review. However, it is not clear cut.
23. The NZCTU think that any action taken in the process of creating an FPA should only be subject to judicial review on the ground that an action taken was ultra vires and outside the lawful exercise of power. It also submits that the ability to judicially review the actions of bargaining sides should not be permitted. This is because the freedom and robustness in which bargaining parties engage with each other in FPA bargaining will be hampered if union and employer sides face the risk that their actions will be subject to judicial review.
24. The Authority noted the Bill assumes bargaining parties' decisions are subject to judicial review. Authority members thought this would have a chilling effect on an entity's willingness to participate.

Section 5: Impact analysis

Assessment of options for limiting judicial review of bargaining parties' decisions

25. The below criteria are linked to the objectives in para 16, which have been developed to assess three options against the status quo for limiting judicial review of bargaining parties' decisions:
- **Consistency:** the extent to which the option is consistent with BORA (i.e. is least restrictive compared to other options, is proportionate to the risks and has adequate safeguards) and parallel interventions in the ERES regulatory system;
 - **Effectiveness:** the extent to which the option supports improved outcomes for employees in coverage;
 - **Workability:** the extent to which the option supports the smooth and efficient operation of the FPA system;
 - **Integrity:** the extent to which this option enhances the integrity of the bargaining process, including the correction of errors that affect a person's rights.

Impact Analysis table

26. We have conducted a qualitative impact assessment as we have limited cost data to compare options in comparable units. This table sets out the marginal impacts - how each of the options identified above compares with the status quo against the criteria.

	Status Quo (position in the Bill)	1. Limit the grounds for judicial review (JR)	2. Limits which decisions are judicially reviewable	3. Limits grounds and decisions (combines options 1 and 2)
Consistency	0 overall rating Consistent with BORA, ie no limitations on the right of review. Consistent with Screen Industry Workers Bill (SIWB) and JR approach for non-bargaining parties in backstop process. Inconsistent with the limitation on Authority determinations in the ER Act.	- overall rating This would be a more proportionate response to the objectives in para 16, although it is restrictive (compared to the status quo). It has a similar effect to the limitation on JR in the ER Act.	- overall rating This would be partially consistent with BORA, enabling major decisions to be judicially reviewable, while other less significant decisions would not be reviewable. This is a novel approach for which there are no precedents or parallels in the ERES system.	-- overall rating This would further reduce consistency with BORA by increasing the limitations on JR. Like option 2, this approach is novel and untested, and we are unsure how it would operate in practice. Inconsistent with the limitation in the ER Act.
Effectiveness	0 overall rating Leaves the door open for any person to seek JR. This is likely to result in delays in improved terms and conditions for employees in coverage while JR is there is a stay on proceedings.	+ overall rating This would reduce the number of doors open for a person to seek JR, therefore reduces the risks of delays. Also encourages parties to exhaust alternative dispute resolution mechanisms to resolve disputes.	0 overall rating Similar to status quo in terms of the number of doors open on judicially reviewable decisions on any ground. Persons could channel their JR claims through those doors, resulting in delays.	0 overall rating Courts generally interpret ouster clauses narrowly and if that occurs, the benefits of having a limitation would be negated (resulting in a similar effectiveness to the status quo).

	Status Quo (position in the Bill)	1. Limit the grounds for judicial review (JR)	2. Limits which decisions are judicially reviewable	3. Limits grounds and decisions (combines options 1 and 2)
Workability	0 overall rating Likely to disincentivise entities to participate in bargaining due to perceived risks of legal liability/costs from judicial review claims (stakeholders have commented on this).	+ overall rating Entities would be more incentivised to participate because the perceived risks of being a party to JR proceedings would be less.	0 overall rating Disincentives to participate would be greater because the decisions which are judicially reviewable would be set out in statute.	0 overall rating Similar to option 2 in terms of disincentivising effect on entities by specifying decisions (and grounds) for JR in statute.
Integrity	0 overall rating Safeguards the integrity of the FPA system by providing a mechanism to correct errors where there has been a genuine breach of a person's rights.	- overall rating Provides an avenue for a person to seek judicial review to correct genuine errors in the bargaining process, but is not a full safeguard on the integrity of the process followed in bargaining the FPA.	- overall rating This would remove some decisions from being judicially reviewable.	-- overall rating This would place further limitations on judicial review, which increases the risk that some errors may not be corrected.
Overall assessment	This is not the preferred option.	This is the preferred option.	This is not the preferred option	This is not the preferred option

Key: ++ much better than doing nothing/the status quo, + better than doing nothing/the status quo, 0 about the same as doing nothing/the status quo, - worse than doing nothing/the status quo, -- much worse than doing nothing/the status quo

27. Option 1 is the preferred option, which is likely to be most effective in reducing the risks of delays and disincentives to participate in the FPA system, while enabling errors to be corrected where rights have been breached. It will not correct all errors that occur in decision-making processes, but the dispute resolution mechanisms and compliance orders (which must be exhausted first) provide an efficient and accessible alternative pathway to resolve a broad range of disputes or compliance issues. Although no option eliminates all risks of judicial review proceedings, option 1 provides a proportionate response to the risks and is the least restrictive of the option set.
28. Although options 2 and 3 are potentially workable, and have some benefits, we consider that they are novel approaches for which there are no precedents. This means that we cannot be sure how they will operate in practice or how a court would interpret the limitations. There is a possibility that both options may have unintended consequences by specifying the decisions that are judicially reviewable. Option 3 is also considered to be relatively complex (containing several limitations) which some people may not find easy to follow or apply.

Section 6: Costs and benefits

29. It is normal practice in preparing a RIS to identify and estimate the various categories of cost and benefit associated with the options for change.
30. In this case, we consider that estimating the costs and benefits of the limitation on judicial review is too difficult to quantify because of the complexity and multitude of factors in judicial review proceedings. There is also insufficient evidence on the likely number of judicial review claims, how a court is likely to deal with claims, and the

monetised costs and benefits on affected parties. We consider that it is preferable to describe the cost and benefit impacts in non-monetised terms to avoid the possibility of making incorrect assumptions in the analysis.

Matrix of Impacts (benefits and costs)

31. We have structured the analysis as a matrix of impacts on affected parties based on whether the judicial review claim is a genuine attempt to correct errors that affect a person's rights, or whether judicial review is used as a tactic to delay or frustrate the bargaining process. This approach enables an assessment of the non-monetised costs and benefits on affected parties under the status quo (no limitation) versus the proposed option (limitation of judicial review).
32. The limitation of judicial review under the proposed option has been designed to reduce the risk of situations where judicial review could be used as a delaying tactic to undermine or frustrate the FPA bargaining process. This means that there are likely to be some situations where a person (e.g. a covered employer or employee) has a genuine claim that cannot be corrected by judicial review because it is outside the proposed limitation.

	Status Quo (no limitation on judicial review (JR))	Proposed option (limited grounds for JR)
JR is used tactically to delay or frustrate FPA bargaining	<ul style="list-style-type: none"> • Wide scope to use JR to delay FPA process • Could delay legitimate outcome <p>Benefits:</p> <ul style="list-style-type: none"> • Benefit to party taking JR is costs avoided from delay <p>Costs:</p> <ul style="list-style-type: none"> • Costs to party that benefits from legitimate outcome • Costs to government (system support costs) • Costs to system if entities are disincentivised to participate 	<ul style="list-style-type: none"> • Reduces likelihood that JR could delay legitimate outcome <p>Benefits:</p> <ul style="list-style-type: none"> • Lower benefit to party taking JR from costs avoided through delay <p>Costs:</p> <ul style="list-style-type: none"> • Lower costs to party that benefits from legitimate outcome • Lower costs to government • Lower system costs from entities being disincentivised to participate
Legitimate JR claim to correct an error in the decision-making process	<p>Benefits:</p> <ul style="list-style-type: none"> • Benefit to party with legitimate claim <p>Costs:</p> <ul style="list-style-type: none"> • Costs to party (not bringing a claim) that benefits from legitimate outcome • Other costs as above 	<p>Benefits:</p> <ul style="list-style-type: none"> • Lower benefit to party with legitimate claim <p>Costs:</p> <ul style="list-style-type: none"> • Lower cost to party that benefits from legitimate outcome • Other lower costs as above

33. The analysis above shows the trade-offs between the costs and benefits for affected parties, i.e. a benefit for one party is likely to result in costs for another. The top row generally shows the proposed option has lower overall costs relative to the status quo,

particularly for a party that benefits from a legitimate outcome. This is because the judicial review limitation reduces the likelihood of delays and disincentives to participate.

34. The bottom row shows that the main cost of the proposal is that some legitimate claims are not being heard by a court because they are outside the scope of the limited grounds for judicial review. This will be a material impact for some people whose rights are affected by an error. This cost was considered as part of the design of the proposed limitation, which is offset by the lower cost to a party that benefits from a legitimate FPA outcome.
35. In our judgement, the above analysis indicates that, on balance, the reduced costs on parties that benefit from a legitimate outcome are greater overall than the lower benefits on parties that have a legitimate claim to judicial review. This is because the proposed limitation is a proportionate response to the risks of delays from judicial review (which is expected in most, but not necessarily all, cases to impact a larger number of affected employees relative to the number of people impacted by a breach of rights). Also, legitimate claims can still be brought to correct some errors under the proposed limitation, and there are other mechanisms in the FPA system that are designed to resolve disputes between the parties, i.e. mediation or compliance order to remedy non-observance or non-compliance with any provision in the FPA Bill. There are many examples in the employment relations system where compliance orders have been used to address compliance problems.

Section 7: Implementation and evaluation

Implementation

36. The limitation on judicial review of bargaining parties' exercise of powers will be given effect through the Fair Pay Agreements Bill. The Employment Court will have exclusive jurisdiction to hear judicial review cases under the Judicial Review Procedures Act. There will be a right of appeal of a judicial review decision to the Court of Appeal, with the leave to the Court of Appeal.

Monitoring and Evaluation

37. A full set of performance and success measures, and a monitoring plan, will be developed as part of detailed monitoring and evaluation design based on a detailed programme logic. The intervention logic and evaluation plan, together with identification of key performance indicators, will be developed over the course of 2022. MBIE is currently developing a framework for evaluating the overall effectiveness of the Employment Relations/Employment Standards Regulatory Framework. It is intended that the evaluation of the impact of FPAs will be nested within this wider programme of work.