Hospitality New Zealand

TO EDUCATION AND WORKFORCE SELECT COMMITTEE

SUBMISSION ON
FAIR PAY AGREEMENTS BILL

19 MAY 2022

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About Hospitality New Zealand

1. Hospitality New Zealand Incorporated ("Hospitality NZ") is a member-led, not-for-profit organisation representing over 2,500 businesses, including cafés, restaurants, bars, nightclubs, commercial accommodation, country hotels and off-licences.

2. Hospitality NZ has a 120-year history of advocating on behalf of the hospitality and tourism sector. The term "hospitality" is used by us to include food and beverage businesses as well as accommodation providers. We work tirelessly on behalf of our members to promote the industry, partner with government to prevent restrictive legislation, protect commercial interests and to spearhead innovation for a sustainable future.

3. As the trusted body, we seek to unlock the hospitality industry's potential as an engine for growth in the New Zealand economy and to ensure that our industry's needs are represented by engaging with the Government and other industries.

4. Hospitality NZ also runs the Accommodation Association NZ. The purpose of the Accommodation Association is to ensure that the accommodation sector is well understood by central, local government and the regulators.

5. This submission relates to the Fair Pay Agreements Bill, and Hospitality NZ welcomes the opportunity to comment on the proposed Bill

6. Enquiries relating to this submission should be referred to Tim Blake, General Counsel, at tim@hospitality.org.nz or 04 381 9935, or Sam MacKinnon, Senior Policy Advisor, at sam@hospitality.org.nz or 021 026 72441.

7. The so-called 'fair pay' system will see us to return to the national awards system abolished by the introduction of the Employment Contracts Act in 1991. Our view that this is a serious backwards step for employment relations in New Zealand. Our reasons are set out below.

Misleading Name – A Bad Starting Point

8. We believe that the name "Fair Pay Agreements" is misleading. It is coloured language, because no one wants to say they disagree with "fair agreements". However:
   a. We do not believe it is "fair" to impose an arrangement on employers and employees that they did not agree to.
   b. The "one size fits all" solutions to be imposed by this proposed regime will be unaffordable for many small businesses. This is not "fair" to those businesses.
   c. There are many workers who will lose jobs they value, because the "one size fits all" solutions to be imposed by this proposed regime will force the closure of the businesses they work for. This is not "fair" to those workers.
   d. We don't believe it is accurate to describe this an "agreement", when it will impose outcomes. In particular:
      i. The employers and employee don't get to bargain directly.
      ii. A fair pay agreement could be "ratified" even if 49% of employees and 49% of employers didn't want it.

iii. A fair pay agreement could be imposed by the Employment Relations Authority ("ERA"), even if the majority of employers and the majority of employees didn't want it.

Compulsion – Freedom of Association

9. The so-called Fair Pay Agreements regime would technically not amount to compulsory unionism, but in real terms would make New Zealand workers beholden to trade unions, and force workers to be represented by unions. It would seriously erode New Zealand workers' right to freedom of association.

Compulsion – Breach of New Zealand international obligations

10. Compelling employees and employers to be party to a bargaining process is also a breach of New Zealand's obligation under the International Labour Organisation, convention of 1949, to which New Zealand became a signatory in 2003. Article 4 of that convention say that countries are to:

> "*…encourage and promote the full development and utilisation of machinery for* ***voluntary*** *negotiation between employers or employers' organisations and workers' organisations…*" [bolding added]

11. The proposed FPA regime's excessive use of the ERA, as a compulsory arbitrator, is also a breach on New Zealanders right to voluntarily negotiate.

12. Such a blatant breach of our treaty obligations is an international embarrassment.

An unaffordable system for New Zealanders

13. The new system would have a considerable impact on the bottom line of businesses, in terms of both increased compliance and direct employee costs. Many businesses will close, and the direct and indirect value they provide to the economy and to the community will be lost. We believe that the Fair Pay Agreements Act would have a hugely detrimental effect on New Zealand's productivity, peoples' prosperity and the growth of the economy.

14. In addition to costs, we are also concerned that a fair pay agreements regime will erode productivity. Productivity is already a significant issue for the New Zealand economy. In real world terms, under a FPA system, rewarding individual excellence in the workplace will be less common.

15. The last two years have been very hard for many small to medium sized businesses, especially because we have been battling through the direct and indirect impact of the Covid-19 pandemic. They have had to deal with:
    a. Supply chain disruption and uncertainty.
    b. Labour market shortages.

c. Changes to immigration rules, resulting in increased compliance costs, increased fees and increased wages payable to certain migrant workers.
d. Two minimum wage increases.
e. Covid-19 related compliance costs.
f. Lock-downs.
g. Increased sick leave obligations.
h. Increased statutory holiday obligations (Matariki).
i. Basic costs of businesses significantly increasing, including fuel, electricity, freight, and local government rates.
j. Accelerating general inflation, now running at 30-year record levels.

16. Not only will FPAs lead to wage costs etc, but they will be expensive of themselves. The costs of organising and conducting bargaining in many cases amount to many thousands of dollars (for employers and employers' organisations, the costs will well exceed Government support). Further, there will be significant loss of productivity, for managers and workers, from the participation in such a complex process. Further again, unions commonly expect the employer to pay to the costs of transporting, accommodating and feeding workers representatives. Small businesses may find even these procedural/compliance costs unsustainable, let alone the cost of any settlements.

17. Many small businesses have only battled through because their owners have worked for less than minimum wage and/or poured in their own private savings (or re-mortgaged their homes). This is not the right time to add significant further cost onto businesses by to introducing this new legislation.

If it's not broken, don't try to fix it (and, if it does need fixing, don't use a sledge hammer to crack a nut)

18. As a country, we can (and mostly already do) deal with unfair employment practices and outcomes through minimum wage, minimum statutory conditions and a generally robust employment law system. If it's not broken, don't try to fix it. We don't need the Fair Pay Agreements Act 2022.

19. Arguably the hospitality industry does need to pay more. However, sustainable healthy change takes time. Market conditions, resulting from labour shortages caused by immigration disputation, have already driven hospitability industry wages up beyond what many businesses can afford. Many small hospitality businesses have already closed, or are operating reduced days/hours only, and they simply can't pay more. The Fair Pay Agreements Act would represent further change that would go too far too fast, with damaging consequences.

One size does not fit all

20. A regime like this will not adequately recognise the need for important and major differences between regions (although we acknowledge that proposed regime says that there can be differences between employees located in different regions).

21. Two of the elements that must be included in FPAs are remuneration, including overtime and penal rates, and hours of work. By definition, these will be common to all workplaces covered by the FPA. However, as we know, not all workplaces work the same way. Many now have flexible working arrangements that take account of employee preferences as well as accommodating changes in circumstances.

22. Events such as the Covid 19 pandemic have driven the need for flexibility. Fair Pay Agreements will take much more "one size fits all" approach to the employer / employee relationships. It will ignore unique benefits that some businesses provide some workers. It will ignore the unique circumstances of many workers and businesses that play an important role in the businesses and the workers reaching an arrangement that works for them.

23. Many small employers display a social conscience by offering a chance for work to disadvantaged members of the community. A "one size fits all" so-called fair pay agreements regime will make these special employment relationships unaffordable for most small employers. The Fair Pay Agreements Act will hurt our community's most vulnerable workers.

24. The introduction of the Employment Contracts Act in 1991 recognised that "one size fits all" documents were unworkable. Local and regional differences, as well as the unique features of some jobs within the generic description could not be dealt with by generic documents. This fundamental reality appears to have been either unappreciated or ignored in the Government's consideration of FPAs as a future approach to managing conditions of employment.

Workers will not get the full benefit of increases (and more holistic approach from Government is needed)

25. The Government claims that FPAs are necessary to improve the wages. However, in our view, wages increases are a hollow victory it they are outweighed by inflation, increased tax liability and loss of Government support (e.g. working for families).

26. What workers actually need is a better standard of living, and greater prosperity in real terms. For that to be sustainable, we need a business environment where productivity grows.

27. Widespread and sustainable worker prosperity will not be achieved by simply imposing higher wage costs onto employers. A more holistic and co-ordinated approach by Government is needed.

28. The current minimum wage of $21.20 per hour ($44,223 per annum) is now close to the tax threshold of 30% (payable on income above $48,000). The current "Living Wage" is $22.75 per hour ($47,457 per annum). Increases in the minimum wage in 2023 will close the gap with the 30% tax bracket before any FPA settlements are applied.

29. Tax brackets need to be inflation adjusted. Otherwise, the effect of a tax bracket of (for example $48,000 per annum) will change quickly (in real terms) over time. Failing to increase the tax bracket with inflation will, over time, result in a tax grab for the Government.

30. Further, without a better a more coordinated approach to worker prosperity, wage increases for the lower paid are likely to be diminished by abatement criteria for Government subsidies such as Working for Families.

31. Increasing wages, without corresponding increases in productivity, is inflationary. The rapidly increasing financial and compliance costs of doing business (as discussed elsewhere in this submission) are stifling productivity, not enhancing it.

32. In addition to causing inflation, and absent wider holistic changes (including to tax brackets), forcing up wages will not result in a sustained overall improvement in New Zealand worker prosperity.

Concepts that will be difficult to implement in the real world

33. Examples of how impractical this regime would be, when applied in real world terms, include:
    a. Confusion between "industry-based agreements" or "occupation-based agreements". An occupation-based agreement covers everyone in a specified occupation irrespective of the industry or sector in which they work. An industry-based agreement will cover all employees in specified occupations in a given industry. That said, no recognition has been given to the fact that no occupation is completely confined to one industry or sector. Hospitality workers can be found across a range of industries.
    b. The proposed requirement that settlements be subject to a ratification vote by employers. It is virtually impossible for an employer organisation (representing, say, retail workers), to know in time for a ratification vote how many employers in the country have employees that will be covered by a proposed FPA and how many employees each of those employers has on that day.
    c. Deciding who will represent employers under the Bill's provisions is fraught with practical difficulty. Both a lack of sufficiently representative organisations for given occupations and a lack of expertise in national level collective bargaining will create enormous challenges for employers. Examples of this difficulties include:
        i. how to identify affected employers; and
        ii. how to choose a representative bargaining team who will bargain on behalf of affected employers.

Undue and damaging complexity

34. The Bill proposes a system of enormous complexity.

35. First, it is complex because of the myriad of new concepts it introduces. The list below is a non-exhaustive list of issues and concepts that participants will need to grapple with:
    a. Initiation criteria
    b. Threshold criteria
    c. Evidence of threshold criteria
    d. Notification requirements
    e. Coverage (sector, industry, occupation or sub occupation; regional or national)

f. Exemptions
g. Good faith criteria
h. Scope of FPAs (i.e., what they can cover)
i. Representation, including of those people and organisations not members of representative bodies
j. Māori interests
k. Bargaining costs and cost recovery
l. Support and resource requirements
m. Anticompetitive behaviour
n. Disputes
o. Arbitration
p. Appeals and judicial review
q. Ratification (e.g. how, in real world terms, to allocate votes to employers)
r. Evidence of ratification
s. Enactment
t. Enforcement

36. It will take the ERA and the Employment Court years to clarify these concepts. High levels of uncertainly will prevail in the interim. Excessive litigation is likely.

37. For example, coverage also will create many issues as evidenced by the demarcation disputes that occurred under the pre-1991 award system. For instance, is an employee employed by a supermarket to drop off goods ordered online a driver or a retail worker? Issues such as this have taken years to resolve in Australia, which has an award-based system (though different from that proposed for New Zealand).

38. Even once all of the above new concepts are understood by lawyers, unions and the businesses community, the FPA regime remains inherently complex. It is a system with many steps and stages, many of which are complex and time consuming. It is a slow, complicated, bureaucratic and labour-intensive process.

39. Asking businesses and employees to engage in a system with so many "moving parts" is unlikely to produce efficient and fair outcomes, certainly in the short term and probably not at all. In addition and separate to inflation, unemployment and business closure from artificially driving up wages through a "one size fits all" process, this FPA regime will lead to:
    a. Business uncertainty and confusion
    b. Major delays in achieving agreements for work and pay
    c. High compliance costs
    d. Litigation

Inability to "stack" roles

40. A vital tool for small businesses, especially in the hospitality industry, is the ability to "stack" roles (a.k.a. "hurdle" roles).

41. Often small businesses will not be able to afford to employ someone full-time into a particular role. At the same time, the person looking for a job needs guaranteed hours. Small businesses and employees often deal with this by agreeing that the worker will "stack" or "hurdle" roles.

42. An example might be an employee agreeing to work as a trainee chef in the morning, but a kitchen hand in the afternoon; or an employee agreeing to work as bar manager two days a week and a waiter/waitress for the balance; or as a hotel worker in the evenings and a receptionist in the afternoons. There are countless variations of how this works.

43. The ability to stack means many employees gets guaranteed hours when they otherwise wouldn't; and get on-the-job exposure to a more senior role when often they otherwise wouldn't. It also provides employers affordable coverage and a means of developing staff into more senior roles (e.g. putting them into the more senior role only at times that are not too busy and/or when there is appropriate supervision and support).

44. In real-world terms, stacking will often be too hard and/or too expensive under a FPA regime. As a result, employee career progression opportunities will be stifled, and both workers and employers will miss out financially and otherwise.

Loss of ability to quickly pivot

45. New Zealanders have spent the last two and half years dealing with multiple incarnations of the Covid-19 pandemic. Hospitality businesses (and businesses in other sectors) have had to deal with compulsory closures, workers being unavailable through isolation, loss of access to migrant workers, loss of custom (local and tourist), supply-chain disruption, new and important health and safety considerations, and other new, complex and important compliance issues.

46. To survive the pandemic, business had to pivot quickly and repeatedly, and to do so in a way that was the taught fit for that particular business and its workers. The pandemic taught New Zealander how important it was to be able to pivot quickly.

47. The FPA regime would mean that, in the labour market context, New Zealand businesses would lose their ability to quickly pivot.

Industrial unrest and polarising of communities

48. When national award bargaining was last in force in New Zealand, industrial unrest and disruption was much higher than in it is now (especially from the 1950s to the 1980s). This caused huge economic damage and polarised communities.

49. New Zealand has already been polarised by Covid-19 vaccination issues. Most New Zealanders do not enjoy seeing families, friends, neighbours and workmates set off against each other. Modern history clearly shows that compulsory collective bargaining is polarising.

50. We also believe that the Fair Pay Agreements Act would increase industrial unrest in New Zealand. We acknowledge that the Bill provides that most strike action during bargaining is to be illegal. However, we are concerned that parties to an actual or anticipated bargaining process will take some sort of industrial action to pressure the other party (e.g. strikes outside the bargaining process, sympathy strikes by non-bargaining unions, excessive use of stop work meetings, strikes "dressed up" to be about health and safety, work to rule, supply-chain disruption, picketing etc).

Need for compromise to achieve sustainable industrial relations laws

51. New Zealand needs sustainable and enduring industrial relations systems and laws, not a political football.

52. The Government plans to pass the FPA Bill later this year. However, even with an optimistic timeline, it is unclear whether any fair pay agreements will be in place before the next election.

53. The National and Act parties are committed to repealing the proposed FPA regime when they are next elected to Government.

54. The national cost of flicking between a system of individual bargaining and a system of collective bargaining is huge (especially with the difference between the current individual bargaining system and the proposed FPA system). New Zealand can't afford to flick between systems as Governments change. We need a system that both sides of the political fence can live with, and that both unions and employer groups can live with.

55. The present Bill is ideologically uncompromising. This is disappointing.

56. Compromise could have resulted in a regime that we could all live with, and that would have been much more likely to be enduring.

57. The most obvious compromise would be a regime that set FPAs as industry benchmarks, but that employers and employee could opt out of. Our work in the industry leads us (at Hospitality NZ) to believe that this is a sensible compromise, that both unions and employers groups could live with. Removing compulsion would also resolve the fundamental moral objection that many New Zealanders have to the Bill.

Let the electorate decide?

58. It is true that this Government has not made a secret of its wish to implement a mandatory FPA regime (either before or after the election). However, given that this is widely

acknowledged as the biggest change to labour laws and industrial relation at least since the Employment Contracts Act 1991, the proposed FPA regime has largely flown under the radar (at least until very recently). We believe that the reason it has largely flown under the radar is because the business community, and the public generally, have justifiably been so pre-occupied with the Covid-19 pandemic. The Select Committee will possibly receive many submissions. We believe it would have received many more, but for the way in which this most serious issue has been somewhat eclipsed by the pandemic.

59. A high number of businesses and workers still do no realise (or, at least have not realised until very recently) the level of compulsion in the FPA Bill. For an issue of this magnitude, there should be been greater public debate and scrutiny.

60. In these circumstances, the "right thing to do" would be to put off introduction of a FPA regime, and to make this a front-and-centre 2023 election issue. Further, if we are going to transition to a FPA regime, it would be far better to do so early in an election cycle.

Conclusion

61. Hospitality NZ's position is that the Bill should not proceed. The FPA regime will not lead to sustained worker prosperity. This misnamed legislation would lead to:
    a. Loss of individual freedoms.
    b. Business closures.
    c. Unemployment.
    d. Inflation.
    e. Business uncertainty and confusion.
    f. Loss of flexibility for businesses.
    g. Loss of career progression opportunities for workers.
    h. Reduction in guaranteed hours that employers can offer.
    i. Major delays in achieving agreements for work and pay.
    j. High compliance costs.
    k. Litigation.
    l. Polarisation between employers and employees (with consequential industrial unrest)
    m. An inability to quickly pivot as business conditions change.
    n. International reputational damage a blatant breach of our international treaty obligations.

62. In the alternative, FPAs could be replaced by a system of voluntary collective bargaining built on present provisions for codes of practice and multi-employer collective agreements.

63. We wish to appear and be heard before the Select Committee.