

## **Quick Summary of the New Zealand Model** **Prof. David Doorey**

Here is my quick and dirty overview of the New Zealand model introduced in May 2021, based on my quick reading of the materials. I do not guarantee that I have everything completely accurate and this is certainly not a complete story, but hopefully it is sufficient to provide a high-level overview for non-NZ readers.

### **Accessing the Fair Pay Bargaining Process**

- **Identifying the Bargaining Unit:** In order to trigger the FPA bargaining process, unions must decide whether they want to represent an "occupation" or an "industry". The government provides an example of an application to represent "cleaners" (Occupation) or an application to represent "supermarkets" (Industry).
- There could be overlapping applications or FTAs that apply to the same workers. For example, there may be "cleaners" who work in "supermarkets". To deal with this possibility, the law would assign the worker to the "first FPA" unless the second FPA provides terms that make the worker "better off overall". Presumably this would require an assessment similar to what happens under employment standards legislation in Canada when tribunals are asked to decide if a contract provides a "greater benefit" than the labour standards legislation.
- A lot of complicated scenarios could arise involving overlapping and competing applications that cover the same workers under the NZ model. The law deals with these issues in a variety of ways, including allowing the tribunal to consolidate applications of FPAs if that makes industrial relations sense. I won't go into the weeds any more than to note that any sectoral bargaining model needs to contemplate all possible scenarios and provide solutions for them. A solution might be as simple as permitting the expert tribunal discretion to craft solutions that make sense given some basic parameters, but flexibility and some common sense needs to be built into the model.
- **Threshold for Right to Bargain an FPA:** Once the target group is identified, the unions would need to prove that at least 10% of the workforce in the group or 1000 workers support an FTA. This model is similar to that proposed in the Harvard Law School *Clean Slate* report that I was involved with last year. The final [Clean Slate report](#) recommended a system of sectoral bargaining be triggered once a worker organization has membership of at least 5000 workers or 10 percent of workers in a sector, whichever number is lower.
- **The Alternative Public Interest Test Option:** The NZ model includes a secondary access point into the FPA known as the "public interest test". This applies if unions can demonstrate that there are "harmful enough conditions in the group to justify an FPA." In [a widely discussed Canadian proposal from the 1980s](#), sectoral agreements would be available in "historically underrepresented sectors", which gets a similar idea that it is extremely difficult to gain a foothold in some of the sectors with the worst working conditions.

## The Sectoral Bargaining Process

- **Representation at the Bargaining Table:** Once the required threshold has been satisfied, the process of bargaining a FPA begins.
  - Employees are represented by either the single union that initiated the FPA process, or an association of unions all of which represent some employees in the unit may be formed. Once an FPA has been ratified, it applies to all employees in the unit. Another union representing some employees in that unit can decide whether to become a party to the FPA, although I'm not clear on how that process will work.
  - Employers will need to create a bargaining representative, with the assistance of the main national business organization (BusinessNZ), which will receive funding from the government for this role.
  - An interesting element of the NZ model is the possibility built into the system for representations of other stakeholder groups to be included at the bargaining table, including but not limited to Indigenous peoples.
- **The Duty to Bargain:** The law requires the two parties to meet and bargain towards reaching an FPA, so there is a form of compulsory duty to bargain in good faith that is familiar in Canada but not throughout much of the rest of the world. There is also a duty on unions to represent both non-union and union members in good faith, a concept that is also well-established in Canadian labour law.
- **Dispute Resolution:** If no FPA is reached through bargaining, there is no strike or lockout option. Rather the dispute goes through mandatory mediation (with non-binding recommendations) and then compulsory arbitration, which the employer lobby absolutely hates and argues is a violation of international labour law, which supports "voluntary" not compulsory bargaining.
- **Notice and Information Requirements:** There are a variety of notice obligations, mostly imposed on employers, to ensure that employees are informed of the FPA process and the opportunity to participate in ratification votes. Employers are also required to provide the unions involved in negotiating an FPA with contact information for each affected employee, although the law permits an employee to opt out of this information being sent (although employees who opt out will still be provided with information about ratification votes). There is a requirement that the employer permit 2 two-hour paid meetings at the workplace conducted by the union representatives to discuss the FPA process and bargaining and to provide union representations with access to the workplace to discuss the FPA with employees.
- **Ratification:** Any proposed FPA must be ratified by a majority of affected employees and employers. The model provides for each employee vote to count as a single vote. Employers receive at least one vote per affected employee, with an additional system of

weighted votes for employers with 20 or fewer employees. An FPA is ratified when a simple majority of both employers and employees who cast ballots vote to accept the FPA. If a proposed FPA is voted down twice, it goes to the government authority to fix the terms. Therefore, once the FPA process commences, it must conclude with an FPA.

- **Government funding and support:** To help kickstart the process, the NZ government has committed to pay \$50,000 to each bargaining team for each new FPA, among other funding commitments, including payments of \$250,000 to the lead umbrella labour and employer organizations to build FPA bargaining capacity. The government will also provide a bargaining support person for each round of bargaining, who sounds like a conciliator in Canadian language, and other bargaining supports and training.

### Scope of Fair Pay Agreements

- **Scope of FPA:** FPAs must cover minimum basic wage rates, hours of work, overtime, and penalty rates. Other topics must be discussed, but are not required to be in the FPA, including layoffs (redundancies), leaves, and health and safety. Beyond that, other topics can be raised and included if both parties agree.
- **Exemptions:** FPAs can include different rates for different regions based on cost of living and other exemptions are permitted, such as special rules for businesses facing financial hardship, but all of the rules must comply with human rights and other statutory rules.
- **FPA does not apply to contractors:** I noticed that the task force recommended that the FPAs apply to both employees and contractors, but the final model appears to apply only to employees, a problematic loophole in some industries. I'm not knowledgeable enough to know if NZ law includes an expanded definition of "employee" that includes what in Canada we would call a "dependent contractor". The government has indicated that the model will eventually be extended to contractors.
- **Special rules for union members:** An interesting inclusion permits a FPA to provide for higher wages for union members, but only up to the cost of their union dues.

### Enforcement

- Violations of the FPA bargaining process can be brought to a tribunal like a bad faith bargaining complaint in Canada.
- Interestingly, the terms of a concluded FPA will be brought into force through legislation and regulation. Essentially, as I understand it, the FPA will become a Regulation and enforced as such by government inspectors and employment tribunal. Available penalties include financial penalties of up to \$50,000 for individuals or \$100,000 for corporations for serious breaches, make whole orders, and the interesting "ban order" that bans an employer from the labour market for up to 10 years!