Centre for Labour, Employment and Work

Fair Pay Agreement Design – Prescriptive or Permissive?

A comment from John Ryall, member of the Fair Pay Agreements Working Group

The Ministry of Business, Innovation and Employment (MBIE) has released a consultation document, *Designing a Fair Pay Agreements* System that follows on from a report delivered in December 2018 by the Jim Bolger-chaired working group. The consultation process is open until 27 November 2019.

The 'Bolger' Report outlined the case for Fair Pay Agreements (FPAs) and recommendations on how they should work. It noted that the New Zealand collective bargaining system was very weak and in terms of OECD countries '*sits at the far end of the decentralised spectrum*'.

The report detailed New Zealand's levels of economic inequality, the historical fall in New Zealand workers' share of the national income, low productivity growth, low collective bargaining coverage and the impossibility of workers on small worksites ever being able to practically exercise their democratic right to collectively negotiate their employment conditions.

The Bolger Report followed the OECD in recommending New Zealand adopt sector level bargaining while maintaining the already existing flexibility to undertake firm-level bargaining to tailor sector-level agreements to each workplace's particular circumstances.

As there would be no right to strike for an FPA the report set out a process of independent determination of the FPA, through either the Employment Relations Authority or Employment Court, if a dispute arose between the parties that could not be resolved through mediation.

The consultation document includes 98 questions about the details of a proposed system that would allow employer and worker representatives to set minimum employment standards across their industry or occupation. While the volume of questions posed in *Designing a Fair Pay Agreements System* will keep practitioners busy it the document does not make clear that many of the questions are asking for comment on options that the Bolger Report directly or indirectly rejected.

For instance, the Bolger Report proposed that there should not be an automatic right to initiate bargaining for a fair pay agreement, but that the triggers should be reasonable given that the industries that would likely to be the focus, such as cleaning or security, currently had weak levels of unionisation. The report set two separate triggers for initiation. A representation trigger would occur if a union presented a request from 1000 workers in that industry or 10% of the industry workforce. Because this trigger would probably never be achieved in industries such as forestry or agriculture the report left open a 'public interest' trigger, which would need to be determined by an independent authority based on evidence of worker vulnerability or exploitation.

The MBIE consultation document surprisingly and with no reference to the Working Group's considerations, raises a new question - should there be two triggers to initiate bargaining – both representation and public interest. The discussion document also uses the word 'test' rather than trigger and implies that there may be further criteria that would be required before bargaining is triggered by proposing the question as to whether the industries or occupations that are allowed fair pay agreements should be restricted by legislation.

The document also asks whether ANZSCO or ANZSIC codes should be required to define coverage; whether temporary exemptions should be mandatory or permissive; whether regional variations should be defined by territorial authority areas; whether some bargaining topics should be excluded from FPAs; whether the Government should have a role in choosing the bargaining teams; and whether all FPAs should have to go through a 'market impact test' by a government-appointed body before it commences.

Many of these questions were not covered in the Bolger Report because they were considered too detailed and were best left to the employer and worker parties.

In my 40-year experience of collective bargaining workers and employers, guided by experienced union and employer advocates, deal with bargaining issues fairly well, especially if both sides know that if they don't reach agreement an adjudication body will do it for them.

My experience of collective bargaining is that industry pay trends, the viability of the business, the market the business operates in and the financial and other impacts on the workers or employers by each party's claims are at the centre of the discussion. None of these have required a government-driven market test (included in 9 consultation questions) before agreement is reached and neither should FPA bargaining.

While current collective bargaining also involves differences between the parties on coverage of collective agreements these matters are also normally sorted during the bargaining process and don't require prescriptive legislative rules around them.

The Bolger Report was released just over a year after the Care and Support Workers Pay Equity Settlement, in which pay rates, skill and qualification progression were negotiated for a five-year term for 55,000 workers and hundreds of employers.

It was passed into legislation because the Government, employer and union parties wanted it to apply not just to current employers but also to new employers setting up business during the term of the settlement. At the time there was no means, such as Fair Pay Agreements, within our collective bargaining system for this to occur.

Hopefully, by the time it expires in 2022 the employer and worker parties will be able to use the Fair Pay Agreement system to renew it rather than having to go back to parliament to pass another law.