Submission by

The Employers and Manufacturers Association (EMA)

to the

Employment and Workforce Select Committee

on the

Fair Pay Agreements Bill

19 May 2022

Employers and Manufacturers Association (Northern) Inc.
145 Khyber Pass Road, Grafton, Auckland 1023 | Private Bag 92066, Victoria Street West, Auckland 1142, New Zealand
AdviceLine NZ 0800 300 362 AU 1800 300 362 | **Phone** +64 9 367 0900 | **Fax** +64 9 367 0902 | **Web** ema.co.nz

About the EMA

The EMA has a membership of more than 7500 businesses, from Taupo north to Kaitaia, employing around 350,000 New Zealanders.

The EMA provides its members with employment relations advice and legal services from industry specialists, consulting services in HR, ER and Health and Safety, Collective Bargaining negotiation, a People Experience Practice and Advocacy at both Central and Local Government levels for its members to help their businesses and people businesses to grow.

The EMA also advocates on behalf of its members to bring changes in areas that can make a real difference to the day-to-day operations of our members including RMA reform, infrastructure development, employment law, skills and education, health and safety and export growth.

The EMA is also part of the BusinessNZ network.

CONTACT

For further information regarding this submission contact:

Alan McDonald
Head of Advocacy and Strategy
Employers and Manufacturers Association
Private Bag 92-066
Auckland 1142
New Zealand

alan.mcdonald@ema.co.nz

027 809 4398

Please note the EMA wishes to appear before the Select Committee.

Introduction

The Employers and Manufacturers Association (EMA) believes Fair Pay Agreements (FPAs) are a rear vision mirror policy to address an issue that, if it exits at all, exists on a minor scale that does not require a one-size fits all sledgehammer taken to our current industrial relations framework.

Since the 1991 Employment Contracts Act, employees and employers have generally worked well together to design working conditions and flexibility that suit both parties and they have not needed a centralised, bureaucratic, inflexible and compulsory system to do that.

The proposed FPAs are a backward step towards an idealised (rose-tinted, rear view) central wage bargaining regime suitable for the old days of working 9 to 5 – or variations thereof – that is no longer fit-for-purpose in a future of work where employees demand and deserve flexibility, adaptability and the ability for the conditions in the workplace to fit their way of working.

Requiring workers to fit the workplace is an outdated concept made more irrelevant by the recent forced adaptability and flexibility imposed by the Covid 19 pandemic. It is also completely contrary to how a high-performing, highly skilled workforce will want to work now and into the future.

Many of our innovative SMEs – the EMAs membership is about 90% SME – have thrived because employers and employees can adapt quickly to changing demands. Many of our frontier firms and large operators could also not have thrived without that inbuilt flexibility.

Contrary to claims made in support of FPAs our productivity and wage growth have remained relatively closely in step. Productivity was in decline for two decades prior to the 1991 reforms and for a period following those reforms New Zealand was among the leaders in productivity growth among OECD countries.

Our ongoing productivity issues are not related to our labour settings. In fact, many OECD countries, most recently France in 2017, have abandoned compulsory centralised bargaining to introduce systems more like our decentralised system to aid productivity and increase employee/employer engagement and co-operation in the workplace.

No OECD country has introduced compulsory centralised bargaining since the 1970s. Yet, New Zealand is contemplating bringing back an archaic, problematic and highly complex system into labour relations in 2023.

There may be a handful of sectors where setting minimum standards may be applicable but there is no widespread “race-to-the-bottom,” as claimed by the Fair Pay Working Group.

If sectors are identified through market reviews and tests, then the EMA agrees with MBIE’s view that minimum standard could be set in a few sectors. But if the concern is worker exploitation or vulnerability then step up the Labour Force Inspectorate and better use the existing tools and legislation to deal with a few bad apple employers. Both the current Minister of Employment Relations and his predecessor, who also championed this legislation, have stated several times publicly that the “large majority of employers are good employers.”

Why then ignore that fact and develop a piece of legislation that disenfranchises all employers from the current relationships they have with their teams by forcing third parties upon them to negotiate a compulsory outcome for all employers and all employees that they may not want or even agree with?

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Against that background the EMA **Opposes Fair Pay Agreements.**

<u>Why does the EMA Oppose Fair Pay Agreements?</u>

There is no race to the Bottom

The claim is made by those supporting Fair Pay Agreements that there is a race to the bottom when it comes to wages and salaries and that employers are driving wage costs down by competing against each other to provide the lowest prices.

No evidence to support that claim is provided.

Examples such as bus drivers, cleaners, retail staff and aged care workers are often cited.

In several of the cited examples Government is the biggest employer or funder of those sectors and has the power to make changes almost overnight.

Pay and conditions for bus drivers are driven by Government's own procurement policies that insist Local Governments – by far the biggest contractor of bus services – must accept the lowest costs. The fixed costs of running a bus don't alter so the condition and pay rates are the effective margin in negotiations. Government can change that policy overnight, as we've told Ministers supporting FPAs for the past five years, and early in May, Minister Wood moved to make changes.

MBIE also found there was little evidence to support this claim and little demand for Fair Pay Agreements to resolve this type of issue.

That's one of the reasons the EMA supports an evidence-based examination by MBIE to identify potential problem sectors and then work with business community to develop necessary standards to resolve those issues.

In some areas other policy settings are already setting minimum pay and conditions further reducing the need for a blanket FPA approach. Pay Equity claims – about 20 have so far been lodged – will set new pay and conditions in their sectors (most are in Government sector or Government-funded sectors) and the immigration reset also sets the median wage as the minimum in a raft of sectors. Pay Equity claims and the immigration wage settings are arguably already a form of FPAs. We don't need more legislation.

Fair Pay Agreements Will Not Increase Productivity

Simply increasing wages does not lead to increased productivity.

There may be a temporary upward blip in consumer spend as part of GDP from increased wages but there is no demonstrable link between an artificially introduced wage increase and increased productivity.

The EMA shares the Government's goal of a more skilled, higher wage and salary earning workforce.

But that also needs to be accompanied by an associated lift in productivity.

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Recent history tells us that heavily structured, national wage agreements – and that's what Fair Pay Agreements are – have not helped New Zealand's productivity in the past.

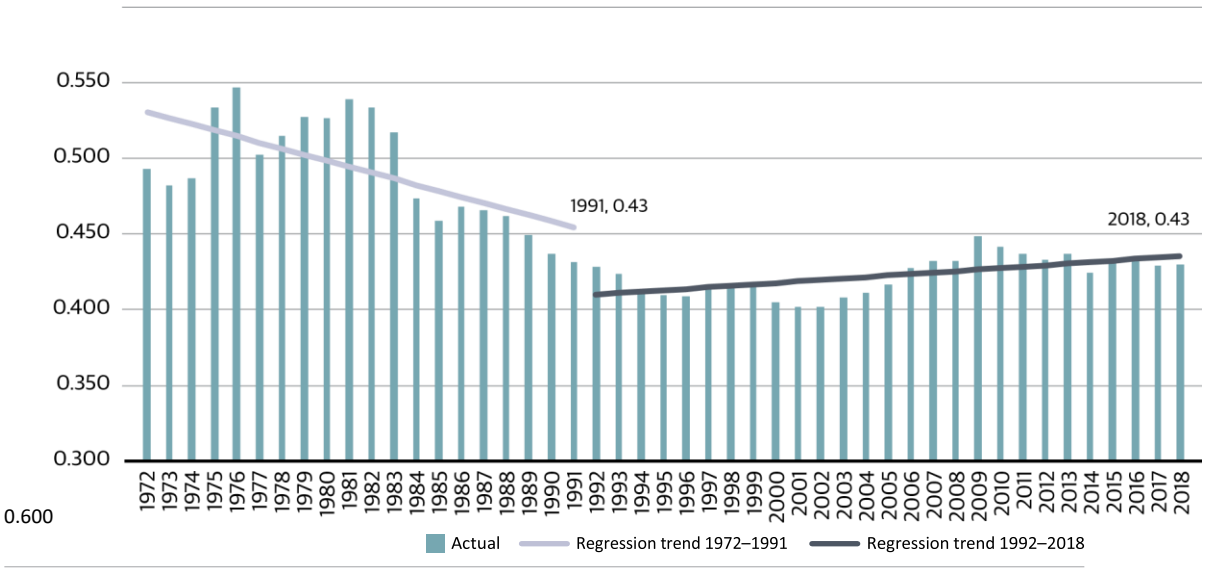
In the two decades leading up to employment reform in 1991 and under a fully centralised wage bargaining system, New Zealand's productivity was in decline. For a period following the introduction of the ECA, New Zealand's productivity growth was among the highest in the OECD before settling into a period of lower growth.

The reasons for that lag are many but appear unrelated to wages and salaries.

The Government says it wants to only have a few FPAs but there is no limit on how many sectors or industries can initiate such a claim and businesses could well see a return of multiple national awards in a single workplace. Several unions outside the sectors identified by Government are already publicly stating their desire to bring in Fair Pay Agreements across sectors such as education and our already under pressure supply chains.

The claim is also made that workers share of GDP growth has declined since 1991. As the figure below from the NZ Initiative's earlier submissions on Fair Agreements show that is not the case.

Compensation of employees/GDP (P)



It has also been claimed that wage growth has not kept pace with productivity growth and again the graph below shows this is not the case.

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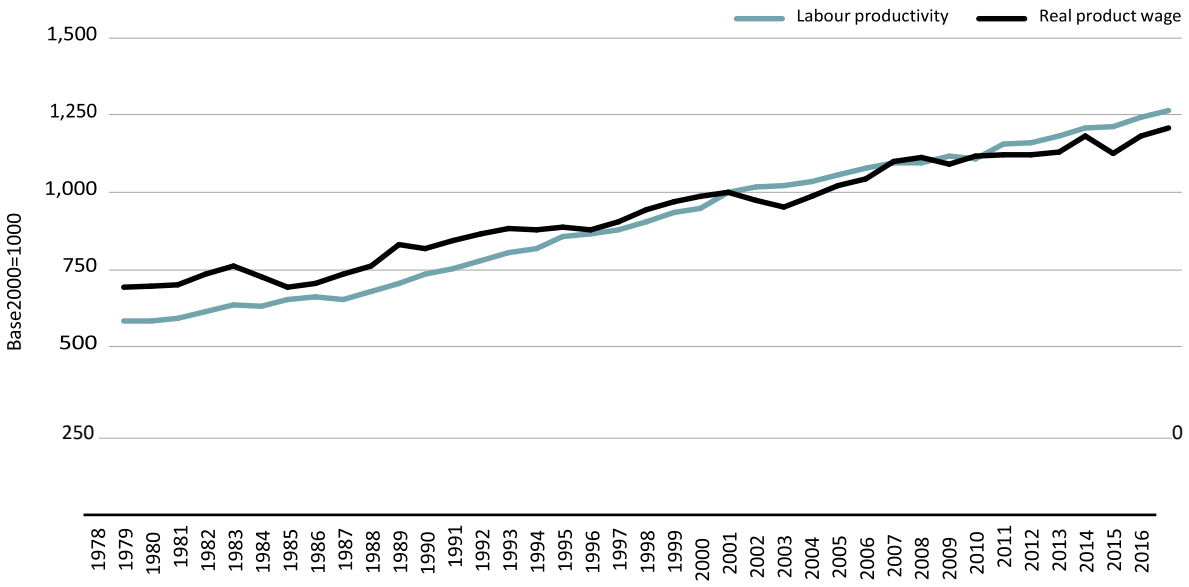
Labour productivity and real product wage base 2000=1000



Fair Pay Agreements will not raise Wages for All

That will of course be the case for those that sit below the any new threshold introduced by a successfully negotiated FPA.

But artificially raising the base imposes a different constraint on the top end of the ranges of wages paid by a business.

For example, in the three years prior to April 2021 the Minimum Wage rose by more than 27% but the top end of wages in other deciles, while also increasing, did not increase by a similar margin.

Instead, employers look at the pool of funds they have for wages and salaries and apportion them appropriately. So, the top end compresses i.e. the pay bands narrow, and conditions and benefits alter. For example, a major Rotorua employer dropped medical insurance benefits for new minimum wage employees and only gave them to employees who'd been with a company for a certain period of time. This maintained the incumbent employee's relativity against the newly hired minimum wage employees.

Pay is just one component of modern remuneration and focusing on just raising wages can and does lead to consequences for other components of the remuneration package. A one size fits all approach will reduce flexibility in additional benefits packages offered by individual employers.

It's an unintended consequence but a real one when you artificially raise the minimum pay rate.

Nationally negotiated awards condemn all workers covered by that award to the minimum acceptable increase for both employers and employees so increases tend towards to lower end of the market. That is especially so if both parties are trying to negotiate three- or five-year terms as set out in the current legislation.

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As the development of various Industry Transformation Plans progresses, it is also clear that Government, Unions, and Industry can work together to improve conditions, skills and productivity. The introduction of blanket FPA legislation sets up a system where Employers and Unions are facing each other across a bargaining table. Even with the best intentions, this sets up a combative environment where each party

seeks to 'win' the negotiations. This works directly against the collaborative tripartite ITPs, which could provide truly transform New Zealand's economy, and may derail the good work done to date.

The Threshold for Initiation is Far too Low and Misrepresentative

A 10% or 1,000 person minimum (whichever is lower) from any one sector or role is far too low to represent anything even close to a fair outcome for either employees or employers.

That means a huge majority of employees are automatically subjected to an agreement they are likely to know nothing or little about and will have had practically zero input into agreeing or negotiating.

At least a majority of employees are likely to know when their enterprise or workplace is in negotiations with their employers on wage bargaining and they can engage with both their representative and directly with their employer to negotiate flexibility for their individual circumstances.

Just as the EMA cannot claim to be representative of the 539,000 plus registered business entities across New Zealand, it is also hard to understand how the Government can possibly regard the CTU as representative of all workers.

Union membership hovers just below 20% of the New Zealand workforce and the CTU is not even a majority representative of the union movement in New Zealand.

Around 25-30% of New Zealand's workforce is employed by EMA members and about 70% of all workers in New Zealand are employed by members of the BusinessNZ network, but we don't claim to be fully representative of either workers or employers.

The default setting to the Employment Relations Authority as a negotiator for employers is also problematic as it both makes or disputes the case and then makes a decision on behalf of employers. That's hardly representative and how could any authority, isolated from the actual practice of business, hope to make a credible decision of behalf of an entire business sector.

The Authority's expertise is ruling on technical breaches of well-established law, not setting the environment for wages and conditions throughout an entire sector of an economy.

The Authority is also already overloaded with even the simplest of cases subject to delays for hearings now reaching into early 2023.

More Red Tape

The legislation obviously requires a myriad of processes for both sides of any negotiation to navigate.

There are assessment criteria for instigating an agreement after the minimum thresholds are set but how do you resolve any issues around questioning the need for or perhaps the veracity of the claims for demand for one of these agreements.

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Employers are currently bound to provide information but how do you realistically reach all the employers in one sector?

How do you check they've carried out their responsibilities under the legislation to inform their employees and give employee representatives access to their staff?

How do those employee representatives legitimately claim to have reached all the employees they are supposedly bargaining for; how do you check that?

There is no mechanism for fairly determining representation for employers when negotiations begin. Well-resourced larger companies may have the required resources and expertise to be part of that negotiation, but they may well also be better placed to manage the impacts of such an agreement than their smaller counterparts or competitors.

It may not be the intent at the negotiation table but the ability of our well-resourced business to absorb any additional costs and conditions could also be detrimental to the ability of the smaller end of town to meet the same conditions while also affecting the overall competitiveness of the larger companies.

The ability of larger businesses to absorb additional costs while their smaller counterparts can't, could potentially lead to anti-competitive behaviour as increased costs for smaller competitors potentially leads to them raising costs and losing business or even failing while their larger competitor carries on as usual.

Similarly, there are no mitigations for those businesses outside the major centres and regions so small provincial or rural business will be subject the same costs and red tape as their large urban counterparts. Even the old, centralised pre-1991 system recognised regional differences.

Businesses and Unions will have to develop their own bargaining teams and associated infrastructure to support ongoing Fair Pay negotiations.

The EMA's counterpart in Australia hires 44 lawyers just to negotiate their Fair Work agreements.

Demarcation Issues

One of the most complex issues will be deciding what constitutes a role across an entire sector and which workers within that sector will be covered by a particular agreement.

Demarcation disputes were at the root of many of the country's more damaging industrial actions pre-1991. The infamous delays to Wellington's BNZ Building and Auckland's Mangere Bridge construction were among the most notable.

Most employees and their employers are used to being fairly flexible on tasks in the workplace and while there are usually defined core roles there are often other tasks associated with that role that could overlap another Fair Pay Agreement if they go ahead.

How do you define a driver's role versus a storeman/packer? Where is the line between stacking shelves or restocking retail displays and being a retail assistant? Who determines that?

Those lines might appear trivial at first, but it has taken the courts in Australia to define which sector a driver who delivers online grocery orders belongs to and which Fair Work agreement covers that task.

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By the way in that case the driver became a retail shop assistant.

This flexibility also helps to prevent worker fatigue from repetitive tasks, thereby increasing engagement and satisfaction. Fair Pay Agreements would likely reduce this flexibility, decreasing an employee's variety of work and therefore engagement. Any decrease in engagement will also lead to a decrease in productivity as these have been shown clearly to correlate to each other in research.

Compulsion

The element of compulsion to conclude and be subject to these agreements is the worst aspect of this unnecessary legislation.

Forcing both employees and employers into an agreement instigated by a tiny fraction of the workforce is simply wrong.

It is contrary to the principles of "Good Faith Bargaining", in our view contravenes current domestic law and almost certainly breaches the International Labour Organisation's views and principles around workplace bargaining which should be voluntary not compulsory.

It is a measure of the seriousness that the ILO takes with this issue, that it is considering a complaint raised by an employer organisation.

Both employers and employees should be able to opt out as per current rules around good faith bargaining.

That current system serves the New Zealand economy well. Other countries around to world, most recently France, continue to move away from fixed, centralised bargaining and moved toward the enterprise, workplace system that New Zealand adopted in 1991.

Jurisdictions with more heavily unionised workforces continue to retain opt out clauses but this legislation takes us back to a system no-one has adopted since the 1970s.

Summary

The EMA believes Fair Pay Agreements are not the future for the New Zealand workforce or our economy as they impose an outdated, archaic view of working life on employees and employers.

They will not achieve the goals that Government believes are the outcomes from FPAs and they are detrimental to our international as well as local competitiveness.

They will impose more costs and red tape on employers at a time when they can least afford it and impose stifling workplace conditions on workforces at the very time, we need flexibility the most.

How could FPAs possibly have responded under the fast-moving, flexible and adaptable workplaces required to meet the difficulties posed by working under a pandemic?

How do FPAs possibly represent the future of work when the future is not a rigidly controlled workplace and workers simply won't accept that in a workplace?

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Imposing this rigid response across all workplaces and employees to a problem, which is at best minor, when there is no demand for a solution is a step backward not forward for New Zealand.

And with a tiny fraction of the workplace forcing such a system on the vast majority FPAs certainly are not fair.

A Recommended Alternative

The EMA supports MBIE's view that a better alternative to the compulsory enforcement of FPAs on all businesses and sectors within those businesses is to take a narrower and much more targeted approach.

Work with the business community and unions to identify sectors where there may be an issue around pay and conditions. Apply a market view and test to provide evidence that supports a factual issue, then work with business and unions to co-design suitable minimum frameworks in those sectors.

We share concerns around vulnerable employees and the small number of bad actors among employers.

We don't want those employers tarnishing the reputation of the business community either. We'd support an enhanced Workplace Inspectorate, better resourced with more staff, seeking out those employers and dealing with them.

As Ministers supportive of the FPAs have acknowledged, the vast majority of businesses are good employers so why then, do we need this sledgehammer to crack what may only be a small nut?

When businesses succeed so too, do the people within those businesses and our wider communities. FPAs are too restrictive for the modern workplace.

We don't need FPAs, but the EMA would accept a more targeted approach.

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