Andrew Butler
Barrister

andrew.butler@chambers.co.nz
+64 4 460 0741

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Kirk Hope
Chief Executive
Business New Zealand
Wellington

Email: khope@businessnz.org.nz

FAIR PAY AGREEMENTS BILL 2022 : CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990 ("BORA")

1 You have sought my opinion as to the consistency of aspects of the Fair Pay Agreements Bill ("**FPAB**") with the provisions of BORA. In particular, you have asked me to assess the advice given by the Ministry of Justice to the Attorney-General on the consistency of the FPAB with the New Zealand Bill of Rights Act 1990 (dated 9 March 2022, LPA 01 01 24, available on the Ministry of Justice website).

2 I note that since the FPAB was introduced into Parliament, the Government has signalled by way of Parliamentary Paper (*Parliamentary paper: Proposed policy change to the Fair Pay Agreements Bill*, G46C, 31 March 2022) that it will introduce a Supplementary Order Paper (**"SOP"**) to amend the FPAB so as to provide a backstop where the default Fair Pay Agreement (**"FPA"**) bargaining regime in the current version of the FPAB cannot operate, because either of the default bargaining representatives (CTU for the unions and Business NZ for the employers) does not engage (**"proposed backstop"** in the **"proposed SOP"**). The proposed SOP was not part of the FPAB reviewed by the Ministry of Justice and so could not, and did not, feature in its advice to the Attorney-General. However, because the effect of the proposed backstop is to ensure that an FPA will result, even where a party is not represented, it raises significant concerns as to whether the FPAB is consistent with the principles of voluntariness and autonomy of the parties. My analysis of BORA-consistency proceeds on the basis that the proposed backstop will become part of the FPAB and needs to be assessed as part of the overall analysis of the FPAB's BORA-consistency.

3 My conclusions are set out in the final two pages of this opinion. As you will see, in my opinion, certain provisions of the FPAB are inconsistent with freedom of association as guaranteed by s 17 BORA and are not justified limits on that right under s 5 BORA.

Overview of the FPAB

4 Broadly speaking, the principal features of the FPAB are as follows:

4.1 The object of the FPAB is to enable minimum employment terms and conditions to be set for covered employees in a covered industry that will be binding for those covered employees on an industry or occupation-wide basis.

4.2 It creates a framework for the negotiation and settlement of FPAs through collective bargaining. I return to how the collective bargaining is to occur below. It is this particular feature of the FPAB that raises the most acute BORA concerns.

4.3 It sets out the broad principles and obligations that are to guide parties to FPA bargaining. Among these are prohibitions on strikes and lockouts during the negotiation of FPAs where the purpose of those types of industrial activities is to bring pressure on the other bargaining party.

4.4 It provides for information sharing to occur between the parties and between employers and employees and places limits on the availability of strikes and lockouts during the bargaining of FPAs.

4.5 A number of provisions are aimed at ensuring that there is adequate representation of Māori as part of the FPA framework and processes.

5 As you will be aware the Employment Relations Act 2000 (**"ERA"**) supports collective bargaining at enterprise level by enabling collective bargaining between unions and employers (either on an individual or multi-employer basis). The effect of the FPAB is to introduce the possibility of sectoral collective bargaining, ie collective bargaining beyond individual enterprises, whereby workers and employers within certain industries or occupations are obliged to conform with the terms and conditions of employment set out in an applicable FPA.

6 The most acute BORA consistency concerns arising out of the FPAB relate to the breadth of its scope; the strong element of compulsion created by the FPAB (including (1) the ability for Government, through MBIE, to insert itself into the FPA bargaining process; and (2) the provision for the Employment Relations Authority (**"Authority"**) to arbitrate and fix the terms of an FPA); and the one-sided nature of the power to initiate FPA bargaining. I also note that the FPAB prohibits strikes or lockouts during

FPA bargaining where the aim is to influence that bargaining. This total prohibition may be inconsistent with the right to strike / lockout.

7 In brief:

Breadth of scope

7.1 there are no restrictions on which industries or occupations can be the subject of an FPA;

7.2 as a result, industry- or occupation-wide collective bargaining can occur in respect of any industry or occupation. The industry or occupation does not, therefore, need to be one where historically there have been low wages or poor working conditions (e.g. zero hour contracts, long hours, piece work, etc). An FPA could therefore apply to workers engaged in vocational or professional employment such as electricians, lawyers, doctors, accountants, etc.

Inconsistency with voluntary nature of collective bargaining

7.3 the bargaining framework created by the FPA has several elements which undermine the principle of voluntary collective bargaining and the autonomy of the parties in particular:

7.3.1 The Government, through the Chief Executive of MBIE is inserted into the process in a key role: it is for MBIE to determine whether one of the two pathways for initiating FPA bargaining is available and one of those pathways (the public interest test pathway) is significantly dependent upon the exercise of judgement by the Chief Executive.

7.3.2 The Authority is given the power to arbitrate and fix the terms of an FPA where bargaining has not resulted in an FPA agreed by the bargaining parties, or where one of the social partners is not represented by a bargaining team.

7.3.3 The Government, through the Chief Executive of MBIE, will approve the terms of a settlement (or the determination of the Authority) and convert this into legislative form for enactment.

One-sided nature of bargaining initiation

7.4 Only unions can initiate bargaining for an initial FPA; employers cannot.

Strikes / lockouts

7.5 The FPAB prohibits strikes or lockouts during FPA bargaining where the aim is to influence that bargaining. This total prohibition may be inconsistent with the right to strike / lockout.

Collective bargaining: is BORA relevant to whether and how it occurs?

8 Section 17 BORA guarantees the right to freedom of association. That right, like most other BORA rights, can be subject to such reasonable limits as are demonstrably justified in a free and democratic country: s 5 BORA.

9 The first question that arises for consideration is whether collective bargaining engages s 17 BORA. The Ministry of Justice takes the view that it does not.

10 The Ministry of Justice advice states that "the decision to elect and pursue bargaining of an FPA does not amount to an associational activity protected by the right to freedom of association [guaranteed by s 17 BORA]" (paragraph 25). This conclusion is said to be based on an observation made by Gault J in *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) at p 796 (***"Eketone"***). There, Gault J stated: "The right to elect and pursue collective bargaining arises out of, but generally are not regarded as elements of, the freedom of association."

11 On its face, this observation of Gault J in *Eketone* might support the approach adopted in the Ministry of Justice advice. However, reliance on it to this effect is problematic because the Ministry of Justice advice does not consider several points that I consider to be relevant to the continuing authority of Gault J's comments in *Eketone*:

11.1 First, the statement was expressly stated to be an obiter dictum; it did not form part of the ratio decidendi of the case. In short, a Court today would not regard the observation as being binding precedent that it must follow.

11.2 Second, *Eketone* is an old case. It was decided in the very early years of BORA, when the Courts had little experience in BORA adjudication and were relatively conservative in defining its scope and application outside the field of criminal justice. It is not consistent with the more generous approach to the definition of the scope of BORA rights (including the right to free association) that is undertaken by the Courts today.

11.3 Third and critically, Gault J relied on decisions of the Canadian Supreme Court when making his observations. However, since the early 2000s those cases have been overturned by that Court and no longer represent good law in Canada. Bearing in mind the significant weight that New Zealand courts typically place on decisions of the Canadian Supreme Court (and the weight that Gault J clearly put on the decisions of that Court in *Eketone*), the change in direction by the Canadian Supreme Court is likely to affect the approach that our Courts would now adopt. (I discuss the more recent Canadian case law in some detail below.) The 180-degree change in the Canadian case law since 1993 materially affects the status of Gault J's observations in *Eketone*.

11.4 Fourth, in *Eketone*, Gault J having made the observation he did about BORA, then went on to uphold an expansive view of the importance of, and necessary union protections flowing out of, the recognition of collective bargaining in the then applicable labour law (the Employment Contracts Act 1991 or "**ECA"**). In short, the narrow view he took of s 17 BORA had no material effect on the outcome of *Eketone*.

11.5 Fifth, Gault J also expressly stated that, since the right to collectively bargain was recognised in the ECA, it "should be fully accorded bearing in mind ILO Convention 98 concerning the right to organise and bargain collectively." In short, international labour law is relevant to the proper understanding and application of collective bargaining rights and obligations in New Zealand. If, as the Canadian courts have now done, the New Zealand courts were to consider that collective bargaining is a 'purposive' element of the right to free association, then it is highly likely that our Courts would, like the Canadian courts have done, draw on ILO Convention materials when elucidating the scope of that element of the freedom to associate.

12 In my opinion, the failure of the Ministry of Justice to reflect the above points in its advice to the Attorney-General means that the conclusions in the Ministry of Justice advice as to the relevance of freedom of association to the BORA-consistency of the FPAB should not be relied upon as authoritative.

13 Accordingly, I consider the relevance of freedom of association to the BORA-consistency of the FPAB afresh.

Overseas caselaw on freedom of association and collective bargaining

14 In considering the proper scope and application of rights and freedoms guaranteed by BORA, the New Zealand courts typically draw on the jurisprudence of several overseas

jurisdictions, including, in particular, decisions of the Supreme Court of Canada in respect of the Canadian Charter of Rights and Freedoms 1982 (on which BORA was substantially based) and the European Court of Human Rights. In addition, our Supreme Court has emphasised on several occasions that legislation, including human rights legislation, is to be interpreted consistently with relevant international instruments unless Parliament can be said to have deliberately departed from those instruments.

Canada

15 The Canadian Supreme Court had decided in the well-known "labour trilogy" in 1987 that freedom of association was not relevant to labour relations in Canada, and, in particular, was not relevant to whether the right to strike / lock out was protected by the Canadian Charter nor whether collective bargaining was protected by the Canadian Charter.

16 This jurisprudence (which was considered by many commentators and judges to be in error) was progressively reversed by the Canadian Supreme Court starting in 2002.

17 Of note:

17.1 The Supreme Court has clarified that freedom of association protects association in three dimensions:

(i) a constitutive right to join with others and form associations;

(ii) a derivative right to join with others in the pursuit of other constitutional rights; and

(iii) a purposive right to join with others to meet on more equal terms, the power and strength of other groups or entities.

17.2 Broadly, the constitutive right means that the state is prohibited from interfering with individuals meeting or forming associations, but can interfere with the activities pursued by an association; the derivative right protects the activities of an association that specifically relate to other constitutional freedoms (for example, freedom of expression, or freedom of religion) but does not protect other non-constitutional freedom activities of the association. The purposive right protects associations' activities, particularly in the field of labour relations. The Court has found that the purposive right is relevant to collective bargaining, strikes, lock-outs, and the like. The object of the purposive right is to enable

individuals who are vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact or conflict. Importantly, the Court has affirmed that freedom of association is not merely a bundle of individual rights, but also comprises of collective rights which in here in associations (*Mounted Police Association of Ontario v Canada* 2015 SCC 1 ("**MPAO**")).

17.3 Much of the subsequent case law has focussed on the freedom of individuals to form and organise employee associations in pursuit of collective workplace goals, including a right to collective bargaining. The Court has held that the subsidiary right to collective bargaining, as part of the purposive element of the right to free association, means that, in the context of collective bargaining with a single employer, employees have a right to a process of collective bargaining that enables them to unite, to present demands to the employer collectively and to engage in discussions in an attempt to achieve workplace-related goals. The process provided must be meaningful, but the state can choose from a range of possible models in constructing legislation to regulate collective bargaining. Restrictions that disrupt meaningful collective bargaining can amount to measures which substantially interfere with meaningful collective bargaining. Examples include a restriction on the subjects that may be discussed; the imposition of arbitrary outcomes; banning recourse to collective action without countervailing protection; making employee workplace goals impossible to achieve or establishing a process which employees cannot effectively control or influence. The key to determining whether or not the legislative model substantially interferes with meaningful collective bargaining is to assess whether collective efforts are rendered pointless thereby encouraging the view that future associational activity would be similarly futile. In determining whether legislation substantially interferes with meaningful collective bargaining, the analysis must always be contextual and will vary with the industry culture and workplace in question: *MPAO* at [71]-[72], [93]; *Health Services and Support - Facilities Subsector Bargaining Association et al. v. British Columbia* [2007] 2 SCR 391 ***("Health Services")*** at [90], [92], *British Columbia Teachers Federation v British Columbia* 2016 SCC 49, upholding the dissent in 2015 BCCA 185 at [284]-[285], [311] and [385].

17.4 As noted, the Canadian case law is clear that the Charter does not guarantee access to a particular labour relations model. Nonetheless it does emphasise that there needs to be access to a mechanism to resolve bargaining impasses; in the case of employees this would mean either the right to strike or a meaningful substitute such as arbitration: *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 at [93] (***"SFL"***).

17.5 Importantly, nothing in the Canadian case law suggests that freedom of association in its purposive sense is available only to employees and not to employers.

European Court of Human Rights

18 The European Court of Human Rights has held that Article 11 of the European Convention on Human Rights confers on employees the right to bargain collectively with an employer, with a broad margin of appreciation given to each individual member state as to how they organise their labour relations law to facilitate that form of bargaining: *Demir v Turkey* (2009) 48 EHRR 54 (Grand Chamber) at [154].

19 The breadth of the margin of appreciation given to individual member states was emphasised in *Unite the Union v United Kingdom*, 26 May 2016, where the Court held that the abolition of the Agricultural Wages Board for England and Wales (a statutory body, which for many years had set minimum wages and conditions in the agriculture sector) did not breach Article 11 of the Convention. The Court rejected the proposition that the UK Parliament lacked relevant and sufficient reasons for abolishing the Board or that the abolition of it had failed to strike a fair balance between competing interests at stake. More particularly, the Court held that, even if it accepted the Union's submission that voluntary collective bargaining in the agricultural sector was virtually non-existent and impractical, that proposition was insufficient to compel a conclusion that a mandatory mechanism should be recognised as a positive obligation on the UK Government. The Court noted that the Union remained free to take steps to protect the operational interests of its members by collective action, including collective bargaining, and by engaging in negotiations to seek to persuade employers and employees to reach collective agreements.

20 The European Court of Human Rights case law also establishes that the right to strike is "clearly protected by Article 11": *RMT v United Kingdom*, App no. 31045/10, 27 August 2012 at [84]. The Court has characterised the right to engage in collective bargaining as "essential": *RMT v United Kingdom* at [85]. And the Court has recognised that in deciding whether the right to strike can be limited by legislation, the impact of a strike on an employer can be taken into account: *UNISON v United Kingdom*, app no. 53574/99.

ILO materials

21 As you will be aware, one of the most important features of the Treaty of Versailles, which was settled at the end of the First World War, was the enunciation of a number of labour rights, obligations and standards that were made legally binding and that

ultimately informed the work of the International Labour Organisation (**"ILO"**). The ILO has over the decades of its existence articulated a number of core freedom of association principles, including principles relevant to collective bargaining.

22 Freedom of association and collective bargaining, including the use of strikes and lockouts as part of collective bargaining, have all been given significant focus by the ILO. Of note:

22.1 Article 3(e) of the Philadelphia Declaration (1944) "recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: … (e) the effective recognition of the right of collective bargaining."

22.2 The ILO Right to Organise and Collective Bargaining Convention (**"ILO Convention 98"**) (1949) is a fundamental instrument. Article 4 provides that "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements." Critical to art 4, therefore, is the concept of "voluntary negotiation" towards collective agreements.

22.3 Article 2 of ILO Convention 154 (1981) defines collective bargaining as being:

> "all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for
>
> (a) determining working conditions and terms of employment; and/or
>
> (b) regulating relations between employers and workers; and/or
>
> (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."

Article 5 of that Convention provides that:

> "1. Measures adapted to national conditions shall be taken to promote collective bargaining.
>
> 2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:
>
> (a) collective bargaining should be made possible **for all employers** and all groups of workers in the branches of activity covered by this Convention; (emphasis added)"

22.4 Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work(1998) declares that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely… (a) freedom of association and the effective recognition of the right to collective bargaining."

22.5 You will also be very familiar with the Compilation of Decisions of the Committee on Freedom of Association. The latest Compilation provides extensive reference to decisions of the Committee, which:[1]

22.5.1 Establish the central importance of the right to strike and the strict scrutiny which will be given to any national measures which seek to inhibit that right outside of the public sector, even where there is a system of labour arbitration in place (chapter 10).

22.5.2 Establish that there are strict limits on the extent to which states can (1) dictate the content of collective agreements; (2) determine what matters the parties to collective bargaining can negotiate over; (3) determine the level at which collective bargaining is to occur (ie whether it is to occur at enterprise level, sectoral level, national level or a mix of these). In respect of the last of these three, Committee decisions are particularly critical of state interference (chapter 15).

22.6 The Committee on Freedom of Association accepts that provision may be made for recourse to conciliation, mediation and (voluntary) arbitration procedures in

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[1] See Https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3947747,1.

> industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage. In addition, however, arbitration is not a substitute for strike action. The Committee has repeatedly emphasised that legislation cannot impose compulsory binding arbitration as a replacement for strike action, either at the outset or during the course of an industrial dispute, except in the case of an essential service, or when a non-essential service is interrupted for so long that it endangers the life, safety or health of the whole or part of the population (and that the non-essential service thereby becomes essential), or — as recently pointed out by the Committee, invoking the view of the Committee of Experts — when, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities. In that regard, arbitration imposed by the authorities at the request of one party, the Committee considers that it is generally contrary to the principle of the voluntary negotiation of collective agreements established in ILO Convention 98, and thus the autonomy of bargaining partners. I do note, however, that the Committee might consider that an exception could be made in the case of provisions which, for instance, allow workers' organizations to initiate such a procedure on their own, for the conclusion of a first collective agreement. That is because the Committee may accept that experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, and so these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.[2]

Conclusions

23 In light of the above materials, in my opinion a New Zealand Court that was asked today to decide whether collective bargaining (and the concomitant right to strike / lock-out) is protected by s 17 BORA would be highly likely to determine that it is. In order to decide to the contrary, a New Zealand Court would have to explain away the Canadian, European and ILO materials[3] and find some basis in the language or purpose of s 17 BORA that justifies the contrary conclusion. The language of s 17 BORA does not lend itself to such a narrow approach and I am not aware of anything in the purpose of s 17 BORA which would justify a narrow approach either. I therefore conclude that the Ministry of Justice advice was incorrect in saying that s 17 BORA is not relevant to collective bargaining.

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[2] This paragraph is based on my review of the Compilation of Decisions and of the excellent analysis set out in B Gernigon et al, *ILO Principles Concerning The Right To Strike* (Geneva, ILO, 1998).

[3] I also note that art 8.1(d) of the International Covenant on Economic Social and Cultural Rights (1966) protects the right to strike, providing that it is exercised in conformity with the laws of the country concerned.

24 In my opinion, it is likely that a New Zealand Court would explain the relevance of s 17 BORA to collective bargaining by (1) adopting the same three elements of freedom of association adopted by the Supreme Court of Canada, and (2) using the Canadian case law and the ILO materials to "flesh out" the application of particular aspects of freedom of association to particular features of collective bargaining in New Zealand statutes. In my opinion, the same approach should have been adopted by the Ministry of Justice in its advice to the Attorney-General.

Particular issues within the FPAB

Characterisation of aims of FPAs: are they about improving labour market outcomes for covered employees, particularly for those with low bargaining power?

25 The Ministry of Justice's characterisation of the aims of the FPAB is important to its BORA analysis. The advice, drawing on the explanatory note to the FPAB states that FPAs aim "to improve labour market outcomes for covered employees, in particular those with low bargaining power" (see eg paragraph 24). That assertion needs to be carefully parsed and analysed.

26 First, to the extent that the quotation emphasises benefits to workers who have low bargaining power, care needs to be taken. As I demonstrate shortly, it is true that one pathway to initiating FPA bargaining requires an initiating union to demonstrate that the covered workers are in effect low paid. But, the FPAB allows another pathway to initiating FPA bargaining the only criteria for which are related to how many workers wish to have the initiating union collectively bargain for an FPA. That pathway, in other words, does not require workers to have low bargaining power. Nor do they have to be low paid.

27 Second, while I accept that FPAs may well improve labour market outcomes for historically low paid workers (and that this is a good thing), I do not accept that this is or will be necessarily true of workers operating outside low paid industries or occupations.

28 Turning to the first point, the FPAB provides two tests to be applied by the Chief Executive of MBIE to determine whether a union's application to initiate an FPA bargaining process can proceed:

28.1 a representation test (that requires at least 1,000 covered employees' support initiating bargaining, or 10% of all covered employees' support initiating bargaining): clause 29(1) FPAB; or

28.2 a public interest test, under which the initiating union needs to demonstrate that employees to be covered meet a number of criteria including, for example, receiving low pay, having little bargaining powers, inadequate pay, etc: clause 29(4) FPAB.

29 As will be apparent, the public interest test certainly focusses on low paid workers. Permitting industry/occupation-wide collective bargaining for low paid worker sectors could well meet the test imposed by s 5 BORA that any measure that limits a right must address an important social problem.

30 In contrast, however, the representation test has no public interest element to it at all. Put simply, it is "a numbers game". It would be available in any number of industries or occupations that do not meet the public interest test. No reason has been given as to why industry / occupation-wide collective bargaining should be compulsory outside of low-paid sectors, simply because a certain number or certain percentage of covered employees support the initiation of bargaining for a proposed FPA. I note that at the recent hearing before the Commission on the Application of Standards, the New Zealand Government representative acknowledged that the numbers required to meet the representation test were lower than in other countries' systems.[4]

31 As to the second point, the explanatory note to the FPAB refers to "systemic weaknesses" in New Zealand's labour market (p 1) and then notes "a significant prevalence of jobs with inadequate working conditions, low wages, and low labour productivity" (p 1). It further notes that Māori, Pasifika, young people and persons with disabilities are over-represented in low paid, insecure, unsafe jobs (p 1). It expresses the view that the FPAB will help address these issues (p 1). None of that, however, establishes that PFPAs that operate *outside* low paid, insecure, unsafe job sectors will improve labour market outcomes for employees in those sectors.

Characterisation of an FPA: does an FPA involve an association between employers and workers?

32 The Ministry of Justice advice states that "we also do not consider the universal coverage of the FPA engages [the freedom of association], because while two people who enter into a contract might be described as 'associating', they would not be considered to have an 'association' within the meaning of s 17 [BORA]" (paragraph 26). Reference is made to the decision of White J in *Turners & Growers Ltd v Zespri Group Ltd (No. 2)* (2010) 9 HRNZ 365 (HC) at [73].

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[4] Commission on the Application of Standards, CAN/PV.20 (8 June 2022), 110th session, 17th sitting, Geneva, at p 7.

33 I do not agree with the Ministry's conclusion:

33.1 Where collective bargaining occurs under the FPAB the outcome is not that the parties enter voluntarily into an individual collective agreement between an employee union and a single employer. Rather, under the FPAB an FPA will be given legal effect by means of secondary legislation. In short, the FPA will be a legislative instrument that binds together unions, workers and employers that are covered by it, whether they want to be so bound or not; it is not a voluntary contract. Therefore, the premise on which the Ministry of Justice advice is based is incorrect.

33.2 Reliance on *Turners & Growers Ltd* is inapt. First, that case dealt with a regulated export industry (kiwifruit). That context is very different to a scenario under which employees and employers of all shapes and sizes, operating in any industry or occupation can be compelled by the FPAB to associate with each other on particular terms. Second, the case concerned the very different context of a monopsony (ie an industry where there are multiple suppliers and only one buyer). Both contextual factors mean that nothing said in *Turners & Growers* can be taken as being relevant to the quite different context of industrial relations, where, as noted earlier, human rights norms have — at least since the Treaty of Versailles 1919 — been considered highly relevant.

34 This issue is not simply one of terminology; there are several matters of substance which arise. Most importantly, clauses 117-121 of the FPAB have the effect of rendering certain features of an FPA to be "minimum entitlement provisions" and / or "minimum wage rates" for the purposes of the ERA and / or the Minimum Wage Act 1983. These provisions are enforceable by the Labour Inspectorate at MBIE and can be the subject of penalties in the case of non-compliance. Ordinary contracts do not result is such consequences, except to the extent they breach existing minimum statutory provisions.

Freedom of association and sectoral bargaining

35 Where the context is collective bargaining between workers (through a union) and a single employer (ie enterprise bargaining) it is inevitable that the focus of freedom of association will usually be on that right assisting the interests of the workers.

36 The context of the FPAB is wholly different: it is not a single workplace collective bargaining environment such as is largely dealt in the current ERA (and the Canadian case law). Rather, the collective bargaining envisaged by the FPAB is industry- or occupation-wide collective bargaining.

37 The effect of an FPA bargaining process once initiated is to force an employer to have to associate with (1) other employers and (2) unions representing workers who do not work within the employer's enterprise (and who themselves may not be members of the union concerned). This forced association is of a quite different nature and order to that involved in enterprise collective bargaining where employer and worker have chosen each other and so, when engaged in collective bargaining, are in effect conducting negotiations in an environment where they already have an existing relationship. Bargaining for an FPA is neither voluntary nor limited.

38 Furthermore, it is obvious that in many industries or occupations there will be a substantial spectrum of employers within the employer class: there are likely to be many employers that are small operators lacking substantial bargaining power at the sectoral level as against other, larger employers and as against a union representing workers at a sectoral level. In principle, therefore, where legislation seeks to impose collective bargaining on an industry- or occupation-wide basis, it will be important that measures are put in place to protect the interests of employers, so as to ensure that their ability to bargain and not have their interests sacrificed by larger employers and large unions is respected. Indeed, it is for this reason that the Committee on Freedom of Association has consistently emphasised that core principles of collective bargaining within the ILO Convention system are voluntariness and respect for the autonomy of the worker *and* employer parties. In my opinion, a New Zealand Court would draw on these ILO materials in order to conclude that any system of collective bargaining in New Zealand must meet reasonable standards of voluntariness and respect for the autonomy of the worker *and* employer parties in order to be considered a reasonable limit on s 17 BORA.

39 In my opinion, the FPAB does not do so:

39.1 Significantly, whereas s 3(b) of the ERA explicitly states that one of its objects is to "promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively", no similar statement of purpose is to be found in the FPAB. There is a risk that a Court might regard this omission from the FPAB as deliberate, and hence interpret the FPAB (once enacted) as overriding the freedom of association as it applies to sectoral level collective bargaining.

39.2 FPA bargaining is not voluntary. First, where no FPA is in existence, bargaining for an FPA can only be initiated by one of the social partners: unions. Once the Chief Executive of MBIE is satisfied that the threshold for one of the two pathways is met by a union, then the FPA bargaining process commences. Second, the

initiating union decides whether a proposed FPA will be an industry or occupation-wide one. Third, under the proposed SOP, if no suitably representative employer bargaining party is appointed, a union can seek a determination from the Authority fixing the terms of an FPA. Employers are not required to be represented and there is no right of appeal against such a determination. In contrast, under the ERA the Authority has very limited power to determine a collective agreement (section 50J) and when it does so, there is an ability to elect a de novo hearing before the Employment Court on certain grounds: section 179A(2) ERA.

39.3 FPA bargaining does not respect the autonomy of the parties: Government has important roles to perform in respect of FPA bargaining. First, it is the Chief Executive of MBIE who determines whether FPA bargaining can be initiated. Second, an FPA must be assessed and approved by the Authority (Part 7, subpart 1). Third, an FPA must be verified by MBIE (Part 7, subpart 3). Fourth, an FPA is given legal effect through secondary legislation (Part 7, subpart 5). Fifth, an FPA overrides a pre-existing collective agreement in place between covered employees and employers to the extent that the terms of the FPA are more favourable to the covered employees than the collective agreement: clause 163(3). The effect of this clause is to override agreements that have been voluntarily reached by workers and an employer. Sixth, the matters to be discussed at FPA bargaining are not decided by the parties, but rather by the FPAB: clause 115 provides for a list of topics that FPA bargaining sides must discuss whether to include in a proposed FPA, a proposed renewal, or a proposed replacement. (For completeness, clause 115 does not prevent the parties from discussing other issues: clause 116(1)).

39.4 As noted, the effect of initiating FPA bargaining is to require that employers associate with each other in order to bargain towards or in the context of a proposed FPA, once the Chief Executive of MBIE is satisfied that either the representation test or the public interest test has been met. As noted above, I do not consider that a Court would regard it as unreasonable for legislation to enable a union to initiate sectoral-level collective bargaining for low paid workers. The same is not true where the basis for initiating FPA bargaining is the representation test. The FPAB does not provide any safety-valve or sense-check to avoid the imposition of compulsory collective bargaining once the representation test is met. No discretion is given to the Chief Executive of MBIE to decline an application to initiate bargaining for a proposed FPA on the grounds that the particular industry or occupation is such that collective bargaining is not required to protect the interests of employees in that industry or occupation. The

absence of any such assessment or "off ramping" mechanism is, in my view, unreasonable.

Initiation of bargaining for an initial FPA only available to unions, not employers

40 One matter not addressed by the Ministry of Justice advice is the fact that the FPAB only permits a union to initiate FPA bargaining; an employer representative group cannot do so (clauses 27-28).

41 This is a departure from the collective bargaining model currently found in the ERA: section 40(1) of the ERA permits collective bargaining to be initiated by either an employer or by workers (through a union).

42 As noted earlier, article 5 of ILO Convention 154 (1981) is clear that the aim of that Convention (which expressly enacts no new substantive commitments) is to ensure that collective bargaining "should be made possible *for all employers* and all groups of workers" (emphasis added). The inability for an employer group to initiate an FPA bargaining process is a clear breach of this obligation.

43 While I would be prepared to accept that it might be reasonable to restrict who can initiate an FPA bargaining process in low-paid sectors (eg it might be reasonable to restrict the initiation of FPA bargaining to unions in those sectors because typically those sectors are low paid because of the absence of union representation / natural bargaining advantages available to employers in those sectors and to permit an employer representative group to initiate FPA bargaining might result in poor conditions being locked in because of organisational challenges facing low-paid workers), I can see no similar justification for preventing an employer representative group from initiating FPA bargaining in other sectors. (For completeness, once the first FPA has been adopted, subsequent FPA bargaining can be initiated by either workers or employers.)

44 In my opinion, a New Zealand Court that was asked to decide whether the complete prohibition on employers initiating bargaining for an initial FPA is consistent with s 17 BORA would conclude that it is not. That said, for the reasons given earlier, in my opinion a compelling case might be able to be made that prohibiting employers from initiating FPA bargaining in low-paid sectors (where workers may need more time / resources to collectively organise themselves through unions) could be a reasonable limit (within the meaning of s 5 BORA) on freedom of association.

Strikes and lockouts

45 Clause 123B makes participation in a strike or lock-our unlawful, if the strike or lock-out relates to bargaining for a proposed FPA. The Ministry of Justice advice states that clause 123B of the FPAB is a justified limit on free expression and free association rights of workers and employers. The Ministry of Justice advice explains:

45.1 Clause 123B is a prima facie interference with freedom of expression and freedom of association / peaceful assembly (paragraphs 19 and 29). I agree with this assessment.

45.2 Limitations on freedom of expression may be considered justified limits on that freedom, if they mean the requirements of s 5 BORA, namely that the limits are reasonable and justifiable in a free and democratic society (paragraphs 20 and 30). Again, I agree.

45.3 The obligation of good faith is a key feature of the FPA system (paragraph 20). I agree. Indeed, the requirement for good faith (1) is already a feature of the ERA (section 4(4)(a) ERA); (2) has been accepted by the Canadian Supreme Court in its Canadian Charter jurisprudence as being a key requirement of effective labour relations; and (3) is a feature of relevant ILO obligations.

45.4 The restriction on strikes and lock-outs "appears to be necessary to facilitate that obligation of good faith" (paragraph 20). I disagree. Overseas case law is clear that where a bargaining impasse is reached it is important that employees (and, for the reasons I have expressed earlier in the context of industry/occupation-wide collective bargaining, employers) have access to an effective mechanism to resolve that impasse. The overseas case law emphasises that strikes cannot be outlawed, unless there is a meaningful substitute: *SFL* at [93]. While the FPAB does make available a number of dispute resolution mechanisms where the parties are unable to agree (Part 10) the process around that is very much tilted in favour of the bargaining union.

45.5 While the FPAB provides for either bargaining side to apply to the Authority for a determination in respect of an FPA, in my opinion the reality will be that (at least in the case of bargaining for an initial FPA) it will be highly unlikely to be the employer bargaining side that does so, given that the employers did not, indeed could not, initiate bargaining. Common sense suggests that a union that initiates bargaining for an FPA is unlikely to be the party holding up proceedings to the extent recourse to the Authority becomes necessary to break the impasse. Ultimately, the structure of the FPAB is such as to give unions the "whip hand"

when it comes to disputes over bargaining for an initial FPA. This accords with my earlier observations.

Conclusion

46 Canadian, European and ILO materials suggest that freedom of association is implicated by legislation that supports (or does not support) or that regulates collective bargaining. While freedom of association does not dictate one particular model of acceptable collective bargaining, it does establish some governing principles. Legislation needs to respect those principles or, where they are departed from, genuine justification that meets the requirements of s 5 BORA must be demonstrated. The question will typically be whether the system of collective bargaining is voluntary, respects the autonomy of the parties and facilitates their bargaining by ensuring that any imbalance of power is able to be corrected in a fair manner through fair processes and the availability of proportionate industrial action.

47 Because the Ministry of Justice advice took the view that collective bargaining does not fall within the protection of s 17 BORA, it has not fully analysed this important aspect of the FPAB for BORA-consistency. I have, therefore, reviewed the FPAB for consistency with s 17 BORA afresh.

48 In my opinion:

48.1 The FPAB overshoots in its coverage criteria. The regime is not confined to workers in low paid, insecure or unsafe job sectors. The representation pathway to initiating FPA bargaining means that FPAs can apply to sectors that are not low paid, insecure or unsafe. I note that fulfilling the representation criteria is simply a "numbers game"; the Chief Executive of MBIE cannot decline to permit an initiating union to propose an FPA even if they were satisfied that sectoral collective bargaining was not needed in order to protect employee interests.

48.2 The scheme of the FPAB does not accord with the twin principles of voluntariness and respect for the autonomy of the parties.

48.2.1 There is no obvious rationale for why employees and employers should be forced to collectively bargain outside of low paid, insecure, or unsafe job sectors; that being so, this form of interference with freedom of association cannot be justified.

48.2.2 The FPAB gives Government (through the Chief Executive of MBIE and the Authority) substantial influence over the form of, the content of and the process of bargaining for FPAs.

48.3 The complete prohibition on employers initiating bargaining for an initial FPA is inconsistent with s 17 BORA.[5]

48.4 The prohibition on strikes and lockouts during, and in support of, FPA bargaining does not appear to be reasonable. Strikes and lockouts are tools used by workers and employers respectively to assist in breaking bargaining impasses and are protected as such in overseas case law.

49 There are, therefore, several features of the FPAB which, in my opinion, are not consistent with, or are unlikely to be consistent with, s 17 BORA. Chief among these are its universal coverage; its departure from the principle of voluntariness; its interference in multiple ways with party autonomy; and the complete prohibition on employers initiating bargaining for an initial FPA. At the same time, there are some features of the FPAB that I consider would be likely to be consistent with s 17 BORA, particularly those features of it that are focussed on enhancing the bargaining power of those in low paid, insecure or unsafe jobs. If the FPAB had confined itself to workers in those sorts of jobs alone, the limits the FPAB imposes on freedom of association would have been more likely to be reasonable and justified in a free and democratic society.

Yours sincerely

Andrew Butler

[5] That said, in my opinion, a compelling case might be able to be made that prohibiting employers from initiating FPA bargaining in low paid sectors (where workers may need more time / resources to collectively organise themselves through unions) could be a reasonable limit (within the meaning of s 5 BORA) on freedom of association.