

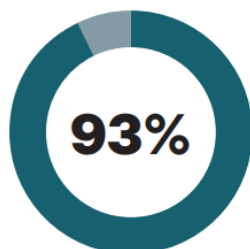


**Submission to the Education and Workforce Committee on the
Fair Pay Agreements Bill**

19 May 2022

About the New Zealand Aged Care Association

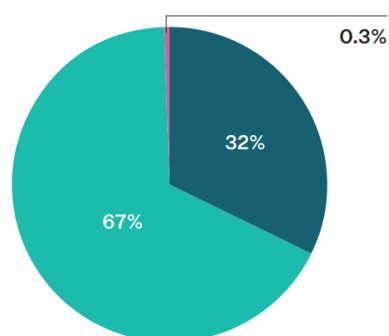
1. This submission is from the New Zealand Aged Care Association (NZACA/the Association), the peak industry body for the aged residential care (ARC) industry in New Zealand. We represent over 37,000 beds of the country's rest home industry, or about 93% of the total supply. Our members' services include four categories of care, rest home, hospital, dementia and psychogeriatric, as well as short-term care, such as respite.



NZACA member care facilities provide 93% of the total 40,729 ARC beds.

Source: TAS Quarterly Report September 2021/NZACA member database

2. Our members range from the very small stand-alone care homes with as few as six beds in more remote areas of the country right through to the larger care centres with more than 100 beds, some of which are co-located with retirement villages.



Bed supply distribution by ownership model:

(September 2020)



Source: NZACA Annual Report 2020/21

3. Advocating and lobbying to government to shape policies and create an environment that helps our members provide outstanding quality care for older New Zealanders is at the heart of what we do. We provide leadership on issues that impact on the success of our members, for example, the annual contract negotiation with District Health Boards (DHBs), the pay equity settlement and workforce recruitment and retention.
4. We produce valuable research, professional development opportunities, information and publications to help our members make informed business decisions, improve capability and keep them up to date with industry developments. We also run the annual industry conference, which is the showcase event for New Zealand's aged care sector.
5. Any enquiries relating to this submission should be referred to Kathryn Maloney, Principal Policy Analyst, kathryn@nzaca.org.nz or by phone on 04 473 3159.

Overall comment

6. This submission is in response to the Education and Workforce Committee on the Fair Pay Agreements Bill.
7. The NZACA supports the purpose of the Bill to improve labour market outcomes in New Zealand. We believe in the right for every worker in New Zealand to be treated fairly and to be paid fairly. However, we do not agree that the measures proposed in the Fair Pay Agreements (FPA) Bill are the best way to achieve this.
8. The Association has never actively opposed reforms resulting in elevation of ARC sector workers' pay rates, but rather has made the point that such reforms will need to be accompanied by an increase in sector funding, as we are government funded. Any FPA agreement that affects ARC sector workers would similarly need to be accompanied by an increase in sector funding.
9. The Bill aims to set minimum employment terms and conditions for an occupation or industry as a whole. It prevents individual employers from being at the bargaining table, and smaller employers may be unable to meet the minimum standards agreed to between the larger employees and unions. While there is a weighted voting system that favours smaller employers, this does not go far enough to mitigate this risk in our view.
10. The Bill sets out a relatively complex process for the creation of fair pay agreements that employers and employer organisations will need to be fully across immediately an FPA is initiated. Each fair pay agreement must specify: when it comes into force and when it expires, its coverage (with sufficient clarity), the normal hours of work, minimum base wage rates (including when and how they are adjusted), overtime, penalty rates, any superannuation, the governance arrangements that will apply to the bargaining sides, and the process for each bargaining side to engage with the other bargaining side, if they are bargaining to vary the agreement.
11. The fact only representatives and not individual employers are allowed to participate in the bargaining process may mean individual employers' concerns will not be, or will not adequately be, taken into account. Employers may be bound by something they had no say in.
12. A further concern of the NZACA and its members is the likely ability of unions covering ARC workers to initiate bargaining in a sector which is not substantially unionised but where the (low) 10% threshold is likely to be met.

Difficulties for employer organisations to be a bargaining party and the use of the backstop

13. The Bill proposes that the bargaining parties should ideally be unions and employer organisations. While this would indeed be the ideal, practically it will be very difficult for most employer organisations to carry out this role. Most employer organisations including us, the NZACA, do not have the money, resource or time to do this; we are mostly small advocacy bodies, not practiced in employment negotiations.
14. Saying that, the NZACA would likely be the best representative for any FPA that covers an occupation found in the ARC sector, and we would certainly want what is best for our members. However, should we not be able to represent our members, the proposed backstop – the Employment Relations Authority (ERA) – may be used. This would certainly not be the preferred option for our members as the ERA would not understand the ARC sector as we do and would not likely fully represent their interests.
15. As Hon Michael Wood, Minister for Workplace Relations and Safety, noted in his Parliamentary paper: Proposed policy change to the Fair Pay Agreements Bill, "The side without a bargaining

representative will not be directly represented in the Authority proceedings”¹. Ironically, as an amendment to the *Fair Pay Agreements Bill*, this backstop is inherently unfair for our members, the employers. As noted in paragraph 14, as an employment organisation, we would not want to step back from the bargaining table, but unless we could be funded to be at the bargaining table, we would have no choice.

16. Should the backstop be triggered, the ERA would set terms without bargaining occurring beforehand. This means there is the potential for the bargaining terms to be weighted in the employee’s favour before bargaining even commences.
17. Where bargaining parties reach an agreement, their proposed FPA will need support from a simple majority of both employee and employer voters to be ratified. However, should a vote fail twice, the FPA then goes to the ERA for determination. Therefore, even where the employer association is one of the bargaining party, employers may still end up with an FPA that they never agreed to, which utterly destroys the whole negotiation and bargaining process.

The practicalities of managing an FPA

18. The logistics of managing an FPA will be incredibly onerous for the employer organisation and the employer:
 - 18.1. How would parties affected be notified under the system, including notification that bargaining has been initiated and notification of progress and outcomes?
 - 18.2. How would parties covered by the proposed FPA vote on its ratification?
 - 18.3. How would employees who fall under multiple coverages (because they perform a mix of roles, and these roles overlap) be treated under the system? Given that a broad range of groups would fall within proposed coverages, how would this be managed to give effect to each group’s best interests?
 - 18.4. What about those employers who are not a member of the employer organisation? If the NZACA is one of the bargaining parties, those employers who are not our members may not wish us to represent them. However, they would have no choice in the matter.
19. Should any employer association hope to be one of the bargaining parties, support and guidance would need to be made available for free to ensure the process is understood and managed correctly. As BusinessNZ puts it, “a lack of expertise in national level collective bargaining with battle-hardened unions will create enormous challenges for employers confronted with a claim for an FPA”.

Costs

20. Where an FPA agreed for ARC sector employees includes an increase in wages, who would fund this increase? Under the fixed funding model of the annual ARRC Agreement, employers have no capacity to be able to fund wage increases that have resulted from a collective agreement and would need to seek extra funding from government. However, the agreement will be legally binding, and should extra government funding not be forthcoming, any increased wages may need to be funded at the expense of the ARC residents, i.e., to fund this increase, facilities may have to reduce staffing numbers which in turn could compromise the care of the residents.
21. In the First Reading of the FPA Bill, where Minister Woods introduced the Bill, he asked the House “why aged care should not be a sector that attracts skilled and caring Kiwis through

¹ https://www.parliament.nz/resource/en-NZ/PAP_121464/a141b142e6532b7aa40dedfb2c024177e9292a47/

decent, sustainable pay and conditions”. He continued, “The answer is that for 30 years, our employment relations system has embedded low pay and conditions in a race to the bottom in many of these sectors”². The NZACA fundamentally disagrees with the Minister on this point: the reason the sector cannot “attract skilled and caring Kiwis through decent, sustainable pay” is not because of the employment relations system, it is because they are not funded adequately enough by government to pay anything higher. Whether or not the Minister for Workplace Relations and Safety is aware that the funder of the ARC sector is in fact the Government remains to be seen.

22. Under the legislation, *all* employees (not just those that belong to a union) will be legally entitled to attend up to two 2-hour meetings. There would be no funding available to our members to cover this cost, and so the employer would have to find the money to pay for all the affected staff to attend the meetings. Referring to paragraph 20, under the fixed funding model, from where would the employer find the money? For example, an average-sized facility employs six cleaners, of which three are part-time. They are all paid \$21.50 per hour. So based on two 2-hour meetings that all attend, the cost to the facility would be \$516.
23. Returning to the issue of union meetings, should all affected staff attend the union meetings, and particularly if the meetings were held offsite, there is a danger that the ARC facility could be in contravention of the ARRC Agreement (a legally binding contract). For example, if the FPA was for nurses, this could result in no nurses being available for work during these two hours. The ARRC Agreement specifies that there is 24-hour Registered Nursing coverage in an ARC facility as below:

D17.4 Hospitals	
a.	In every Hospital:
i.	at least one Registered Nurse shall be On Duty at all times;
ii.	the distribution of Care Staff over a 24 hour period shall be in accordance with the needs of the Residents as determined by a Registered Nurse. A minimum of 2 Care Staff are required to be On Duty at all times;
iii.	the layout of the Facility must also be taken into consideration when determining the number and the distribution of Care Staff required to meet the needs of the Residents under clause D17.4(a)(ii).

Table 1: Age-Related Residential Care Services Agreement (source: NZACA)

24. Under the current proposed legislation, it would be possible for an FPA to “provide that a union member payment may be paid to an employee [who is covered by the agreement]”³ by their employer. Again, the question must be asked, how can an ARC employer afford to pay this, under the current ARC funding model?
25. If an FPA is successfully negotiated on behalf of any workforce in the ARC sector, this will likely result in relativity issues. Looking across the occupations (see Table 2 below), if an FPA successfully negotiated for kitchen hands to receive increased wages that matched the current wages of chefs and was higher than those of cooks, an FPA would surely then be initiated for chefs and cooks. Considerable time might elapse between the implementation of the FPA for kitchen hands and the FPA for chefs. The question is, what would happen to the cooks and chefs in the interim?

² https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20220405_20220405_20/

³ Fair Pay Agreements Bill, Section 13

25.1. Our members employ staff in the following occupations:

Care Staff	Non-Care Staff
Clinical Managers	Facility Managers
Registered Nurses	Office Administration Staff
Enrolled Nurses	Chefs
Caregivers	Cooks
Activities Coordinators	Kitchen Hands
Occupational Therapists	Gardening/Maintenance Staff
Physiotherapists	Cleaning Staff
Assistant Physiotherapists	Laundry Staff
	Home Assistants

Table 2: Occupations found in the aged residential care sector (source: NZACA)

26. The costs for an industry association have yet to be quantified, but are likely to be considerable given the administrative burdens imposed on employer representatives by the Bill.

Negative effects on the worker

- 27. While the purpose of the Fair Pay Agreements Bill is to ensure fairer pay to all workers, the reality of this Bill is that should it be enacted, it would be catering to the lowest common denominator. Workers would not have the opportunity to negotiate individually with their employer but would be party to a collective agreement that they may not necessarily agree with.
- 28. Once an FPA is in force, it will last a minimum of three years and a maximum of five years. Technically, workers covered by FPAs will have no right to changes to their conditions for employment for at least three years. Where a phased increase is built in, it is likely to be conservative, to ensure against unsustainable costs. It is highly likely that as a result of inflation over a three-year period, the value of workers’ incomes falls behind in real terms.
- 29. Once a union triggers an FPA, neither employer nor employee will have any power to stop it. In a recent poll carried out by Retail New Zealand, only 29% thought their employment agreement should be negotiated by the unions. Most wanted the ability to negotiate for themselves.
- 30. The threshold for an FPA to be initiated is either 10% of workers or 1,000 employees in the identified group. The ARC workforce totals more than 20,000 workers, and out of that, just 4,000 belong to a union. Therefore, more than 16,000 ARC employees could be forced into an agreement that they never asked for nor ever wanted.
- 31. There is little evidence that FPAs will improve productivity. It can be argued that they may reduce it. The NZ Initiative found that the “race to the bottom is somewhat mythical given that average wages have risen faster than inflation across all income deciles”⁴.

Lack of clarity in the proposed legislation

- 32. The proposed legislation is unclear on whether an employer who currently contracts rather than directly employs someone covered in the agreement would have to ratify the agreement (in case they hire a direct employee in that role in the future).

⁴ <https://www.nzinitiative.org.nz/reports-and-media/reports/work-in-progress-why-fair-pay-agreements-would-be-bad-for-labour/>

33. It is not clear whether there is the possibility of allowing additional terms in an individual's employment agreement after an FPA agreement has been finalised, for example, flexibility in work hours to benefit both employee and employer.

Alternative solutions

34. The NZACA supports the BusinessNZ proposal that if FPAs must go ahead, make them voluntary and not compulsory. Individual employers and employees should have the opportunity to opt-out of them. Voluntary FPAs would at least be more consistent with New Zealand's obligations under international law.
35. Current enforcement should be strengthened with an increase in both the number and power of labour inspectors to better detect inappropriate activity and enforce minimum labour standards.
36. The Multi-Employer Collective Agreement (MECA) is a tool already in existence that can be used to produce an occupational collective agreement. (The fact that there are very few of these speaks volumes for the lack of desire for collective agreements.)

Conclusion

37. The NZACA thanks the Education and Workforce Committee for the opportunity to make a submission on the Fair Pay Agreements Bill.
38. While we support the purpose of the Bill, we do not agree that the measures proposed in the Fair Pay Agreements Bill are the best way to achieve this and therefore do not support the enactment of the FPA Bill.
39. The NZACA believes that the measures proposed in the FPA Bill would be costly to both employers and employer associations.
40. We are gravely concerned that should the FPA Bill be enacted, ARC employers would not be fairly represented at the bargaining table as currently, the NZACA would struggle to be that representative, potentially resulting in the ERA stepping in.
41. The NZACA supports the submission made by BusinessNZ and in particular agrees that the Bill should be amended to make the FPA a voluntary one.
42. Any enquiries relating to this submission should be referred to Kathryn Maloney, Principal Policy Analyst, kathryn@nzaca.org.nz or by phone on 04 473 3159.

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