



## BRIEFING

### Advice on legislative structure of Fair Pay Agreements

<b>Date:</b>	7 December 2020	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-1592

Action sought		
	Action sought	Deadline
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>	<b>Decide</b> whether the Fair Pay Agreement system is contained within the Employment Relations Act 2000 or in a standalone law.	14 December 2020

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Acting Manager, Employment Standards Policy	04 901 8438		✓
Tayla Sumner	Policy Advisor, Employment Relations Policy	04 896 5343		

The following departments/agencies have been consulted

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



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### Purpose

To provide advice on the legislative structure of the Fair Pay Agreement system.

### Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Decide** whether the Fair Pay Agreement system should be contained within:

	<i>Tick one</i>
Employment Relations Act 2000	
Standalone law (MBIE recommends)	

Tracy Mears  
**Acting Manager, Employment Standards  
Policy**  
Labour, Science and Enterprise, MBIE

7 /12 /20

Hon Michael Wood  
**Minister for Workplace Relations and  
Safety**

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## Background

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1. On 17 November 2020 you met with officials to discuss the development of the Fair Pay Agreement (FPA) system. At this meeting you expressed the need to create a robust and enduring FPA system that could include contractors at a later date. You asked for further advice on whether the FPA system should be legislated as a standalone FPA law or as an amendment to the Employment Relations Act 2000 (ER Act).
2. The Fair Pay Agreement Working Group did not comment or recommend a legislative structure for the FPA system in its report.

## Legislative design principles

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3. The Legislation Design and Advisory Committee's (LDAC) good legislative design principles focus on three fundamental objectives of high quality legislation:
  - a. fitness for purpose
  - b. constitutional soundness<sup>1</sup>, and
  - c. accessibility for users.
4. We therefore consider a range of factors to be important when weighing up the two options for legislative structure:
  - a. durability of FPA system
  - b. ability to support inclusion of contractors
  - c. fitness for purpose, and
  - d. accessibility.

## A standalone law would best support your goals

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5. You have advised MBIE that the FPA system needs to be durable and allow for contractors to be included in the future.

### Durability of the FPA system

6. We have been unable to identify any material difference in durability between the two options. We consider the durability of the system to be determined more by whether FPAs have taken effect, rather than the legislative structure of FPAs. A number of provisions in the ER Act are frequently amended or repealed after a change of government. We do not consider where the FPA system is contained in law will affect a future government's decisions on whether or not to repeal or retain the FPA system or particular elements of it.

### Ability to support inclusion of contractors in the future

7. The ER Act regulates relationships between employers and employees and is reflective of the broader Employment Relations/Employment Standards (ERES) regulatory system which predominately focuses on employment relationships. In contrast, contractors are regulated by commercial and competition law that generally respects parties' freedom of contract and

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<sup>1</sup> LDAC considers legislation to be constitutionally sound when legislation reflects the fundamental values and principles of a democratic society. We consider the content of the FPA system to be the determining factor of this principle, rather than the structure.

prevents collective bargaining as ‘anti-competitive’ behaviour.<sup>2</sup> Contractors are not legally entitled to minimum standards or the same rights and obligations that employees are. Pay and how work is done are subject to negotiation between the parties to contracts.

8. Any amendment to the ER Act to include a bargaining system that applied to contractors would significantly change the scope of the Act, and would blur the boundary between what it means to be an employee versus a contractor. It would likely result in consequential changes throughout the ER Act, and would be a complex undertaking to ensure that the ‘contractor’ provisions applied only to contractors in practice. There is a possibility that provisions could be missed which would result in unintended consequences. Further considerations would be needed to address how contract law applies to contractors for FPA processes only. We have provided advice about the inclusion of contractors in the FPA system (briefing 2021-1541 refers).
9. Parliamentary Counsel Office (PCO) has indicated that if instructed to amend the ER Act to incorporate FPA provisions, its preferred drafting approach would likely be to add a new and self-contained Part to the ER Act, rather than amend pre-existing provisions.
10. Given the ER Act has been heavily amended in an ad hoc nature over its 20 years, further amendments would contribute to the complexity of the ER Act and broader ERES system. A standalone law would better support the inclusion of contractors in FPAs while preserving the scope and integrity of the ER Act.

## **A standalone law would best align with good legislative design principles**

### **Fitness for purpose**

#### *ER Act architecture necessary for FPAs*

11. The FPA system will form part of the wider ERES regulatory system and is likely to borrow or rely on some architecture from the ER Act. Further policy work is needed to determine the architecture required. Depending on future design decisions, a range of provisions may be needed, including: dispute resolution, good faith in collective bargaining, workplace access, union rights and recognition and institutions<sup>3</sup>.
12. While the FPA system may have some similarities to collective bargaining in the ER Act, it will differ greatly in design and processes. For example, the bargaining parties and their obligations to one another are different, as are initiation tests and how agreements are enforceable. Housing the two processes under the same act may cause confusion about the rights and obligations between employees, employers, employer organisations, unions and contractors in the different circumstances. There is a high risk that this would further complicate the ER Act.
13. Until decisions are made about what ER Act architecture is required for the FPA system, we are unable to draw a conclusion on which option contributes more to fitness for purpose.

#### *Similar bills in the ERES system have used bespoke legislative solutions*

14. The Screen Industry Workers Bill (SIWB) creates a workplace relations framework that:
  - a. provides clarity about the employment status of people doing screen production work

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<sup>2</sup> Two exceptions are the health and safety regulatory system, which governs both employment and contracting relationships, and paid parental leave.

<sup>3</sup> Existing employment institutions are created by the ER Act. You have expressed that you want a new institution to perform some roles in the FPA system. Its exact roles and functions are yet to be determined. We do not consider that a new FPA institution will affect whether the FPA system is contained in the ER Act or in a standalone law.



- b. introduces a duty of good faith
  - c. introduces mandatory terms for contracting relationships in the industry
  - d. allows collective bargaining at the occupation and enterprise levels, and
  - e. creates processes for resolving dispute arising from contracting relationships or collective bargaining under the SIWB.
15. A standalone law was the preferred structure for SIWB given the intersection between employment, contract and competition law. Concepts in the SIWB such as the collective bargaining process and the definition of good faith in contractual relationships are not the same as in the ER Act. Amending the ER Act would not have met the policy objective as the SIWB workplace relations framework was specifically created for contractors in the screen industry.

**Accessibility**

16. LDAC considers that well-designed legislation should be accessible and easy to understand. If FPAs were to apply only to work done by employees, there would be stronger rationale to keep collective bargaining and FPA bargaining provisions in the same act. As you have made an in-principle decision to include contractors in the future, a standalone law would be easier for all end users to navigate and understand. Currently contractors do not refer to the ER Act for law relating to their work. Therefore this raises the question about how accessible FPA law would be to contractors if the FPA system was contained within the ER Act (but the rest of the ER Act would continue to not apply to contractors).

**Recommendations**

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17. If your main objectives with the structure of the Bill are to create an enduring FPA system that has the ability to support the inclusion of contractors, MBIE recommends a standalone FPA law.

Criteria	ER Amendment Bill	Standalone FPA law
Durability	-	-
Ease and suitability of including contractors	x	✓
Fitness for purpose	-	✓
Accessibility	?	✓

18. On balance, a standalone FPA law best aligns with your goals for the FPA system and LDAC’s principles for good legislative design principles. It better facilitates the future inclusion of contractors and allows greater accessibility for end users, while preserving the current scope and integrity of the ER Act.

**Next steps**

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19. We are preparing a number of other briefings on aspects of the FPA system for you, with the first set of briefings due to you by 11 December 2020.
20. The schedule for the project is set out in the table below:

Milestone	Date
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Advice on design features requested by Minister	All provided by 11 December 2020
Advice on consequential changes to other design aspects Advice on remaining advice on system issues	All provided by 19 February 2021
Cabinet paper drafted RIA prepared	12 March 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	26 March 2021
Ministerial consultation completed (2 weeks)	29 March to 13 April 2021
Cabinet Committee	April 2021