MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Advice on Coverage

Date:	21 January 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1837

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations & Safety**	**Approve** the proposed approach to coverage in the FPA system.	5 February 2021

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
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The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Purpose

This briefing provides advice on decisions about coverage in the Fair Pay Agreement (FPA) system.

Executive summary

The FPA Working Group (FPAWG) recommended that workers and their representatives who initiate bargaining should propose the intended boundaries of the sector or occupation to be covered by the agreement, within limits set by legislation.

This briefing advises on what, if any limits, should be put on bargaining parties in order to ensure the system:

a. creates a system of industry or occupation-wide bargaining to facilitate greater and more mature sector-or occupation-wide dialogue (allowing parties to capitalise on sector-or occupation-wide opportunities and address sector-or occupation-wide issues); and

b. improves labour outcomes, particularly for workers in industries or occupations where competition is based on decreasing labour costs.

There is a need to ensure that the boundaries of an FPA are logical, clear and do not create undue complexity and uncertainty for employers and workers, including by preventing the risks from overlapping FPAs. We think managing these complexities and risks are critical to your objective of creating an enduring system.

We recommend that the coverage of an FPA be defined by the initiator as either an:

- Occupational FPA, where the initiator would be required to describe what single occupation the FPA is to apply to and each industry that is proposed to be covered (for example, cleaners whose job includes dusting, mopping, sweeping, vacuuming and emptying rubbish bins in all sectors); or

- Industry FPA, where the initiator would be required to describe what single industry is proposed to be covered and each occupation that is proposed to be in coverage (for example, checkout operators, shelf-stackers, deli-workers in the Supermarket and Grocer sector).

The initiator would be able to define the occupations and industries inside the legislative limits of either the Industry or Occupational FPA, but could not mix multiple industries AND multiple occupations. We recommend that there is an independent body that would work with the initiator to ensure that the described boundaries of the FPA are sufficiently clear that interested parties can identify that they are in coverage.

We recommend addressing the possibility of overlapping FPAs by legislating that the first FPA must apply to that group of workers that are subject to an overlap unless the second FPA bargains

terms and conditions that are not less favourable. We recommend the 'not less favourable' test is assessed during the vetting process.

If an FPA is subsequently initiated for different parts of the same occupation or industry, we recommend bargaining should be consolidated into one FPA up until a specified point in time, and afterward by agreement. We recommend that any subsequent initiation for different parts of the same occupation or industry be added after an FPA is agreed, must constitute an addition to the original FPA and the whole FPA will expire at the same time.

Recommended action

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

a **Note** the FPAWG recommended that workers and their representatives who initiate bargaining should propose the intended boundaries of the sector or occupation to be covered by the agreement, within limits set by legislation.

Noted

b **Note** we consider that it is important to design the FPA system to:

a. create a system of industry or occupation-wide bargaining to facilitate greater and more mature sector wide dialogue (allowing parties to capitalise on sector-or occupation-wide opportunities and address sector-or occupation-wide issues); and

b. improve labour outcomes, particularly for workers in industries or occupations where competition is based on decreasing labour costs.

Noted

c **Note** these design principles have led us to apply principles that attempt to incentivise the bargaining parties towards wider FPAs that apply to most of an industry or occupation, however, with potential trade-offs with the manageability of bargaining.

Noted

d **Note** it will be important to ensure that the boundaries of an FPA are logical, clear and do not create undue complexity and uncertainty for employers and workers, including by preventing the risks from overlapping FPAs. We think managing these complexities and risks are critical to your objective of creating an enduring system.

Noted

e **Agree** coverage of an FPA must be defined by the initiator as either an:

a. Occupational FPA, where the initiator would be required to describe the occupation, including a description of the work that the FPA is to apply to and each industry that is proposed to be covered; or

b. Industry FPA, where the initiator would be required to describe what industry is proposed to be covered and each occupation, including a description of the work which is proposed to be in coverage.

Agree / Disagree

f **Agree** the representation tests and the public interest test should apply to the group in coverage as defined by the initiator.

Agree / Disagree

g **Agree** that if coverage is substantially expanded during bargaining to include another occupation or industry the initiation tests must be retested with the newly defined coverage

grouping, unless in the instance of 1000 workers, the test has already been met for that defined group, even if expanded.

Agree / Disagree

h **Agree** to address overlapping FPAs by either:

a. A legislative principle that the Occupational FPA trumps the Industry FPA or vice versa.	*Agree / Disagree*
OR	
b. Requiring bargaining parties to address overlaps in the FPA, with a legislative backstop where overlaps are not foreseen by the bargaining parties.	*Agree / Disagree*
OR	
MBIE preferred c. Legislate that the first FPA to be bargained will apply to that group of workers that are subject to an overlap unless the second FPA bargains terms and conditions that are not less favourable to that group of workers overall.	*Agree / Disagree*
OR	
d. Allow each worker to choose which of the two FPAs will apply to them.	*Agree / Disagree*

i **Agree** that bargaining parties to an FPA should be able to bargain coverage at any point in the process (*change from previous advice*).

Agree / Disagree

j **Agree** that if bargaining is initiated for the same occupation or industry FPA that is already being bargained, then the subsequent bargaining must be either:

a. Consolidated. Any subsequent initiation proposed to cover an industry or occupation that already has bargaining underway must merge.	*Agree / Disagree*
OR	
b. Consolidated unless parties have reached a specific point in bargaining. For example, a draft FPA has been prepared and ratification date set.	*Agree / Disagree*
OR	
c. Consolidated by the request of any one party, but all parties must agree before bargaining is consolidated.	*Agree / Disagree*
OR	
MBIE preferred d. Bargaining must be consolidated up until a specific timeframe ie 6 months after initiation, after which point consolidation can only occur with the agreement of the existing bargaining parties.	*Agree / Disagree*

k **Agree** that after an FPA is agreed, and there are subsequent initiations for other parts of the same industry or occupation that either:

MBIE preferred a. Any subsequent initiation for an additional occupation to be added to an Industry FPA or industry to be added to an Occupational FPA must be done as an addition to the original FPA. Only the parties to the variation would be required to ratify the change, however, and no substantive changes could be made to the other terms of the FPA.	*Agree / Disagree*
	OR
b. There can only be one FPA per occupation and per industry: if further occupations or industries are to be added, they need to wait until the FPA is up for renegotiation.	*Agree / Disagree*

l **Agree** that MBIE should undertake the new functions required for the purposes of approving coverage which require:

a. Ensuring the description of occupations and industries proposed by the initiator, or bargaining parties (when coverage is substantially expanded) are sufficiently clear so impacted parties can identify that they are in coverage, and

b. Informing the relevant body of the new proposed coverage so that notification processes can take place; and

c. Informing the initiator that they consider the proposed coverage to impact on bargaining that is already underway and of the requirement to merge (if within the specified time limit) or the requirement to bargain the terms and conditions as an addition to the FPA (where the time limit has passed or where there is already an agreed FPA); and

d. Informing the bargaining parties when it becomes aware that there are other FPAs or bargaining underway for an FPA that they think may overlap with the new proposed FPA. This could be done at the outset (when the FPA is initiated by the union) or throughout bargaining if the body becomes aware of an FPA that is likely to overlap.

Agree / Disagree

m **Agree** that the Employment Relations Authority should determine disputes from an initiator about whether a subsequent initiation for an FPA is proposing coverage that is substantively the same as an Industry or Occupational FPA that already has bargaining underway or has already been agreed and, if the same, notifies the parties of the requirement to consolidate or that the parties will be bargaining an addition to an FPA (where an FPA for that industry or occupation already exists).

Agree / Disagree

n **Agree** that, where there are proposed overlapping FPAs, the Employment Relations Authority as part of the vetting process establish whether the terms of the second FPA are not less favourable than the original terms and conditions of the first FPA and declare which FPA applies to the people in overlapping coverage.

Agree / Disagree

Tracy Mears
Manager, Employment Relations Policy
Workplace Relations & Safety Policy, MBIE

21 / 01 / 2021

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

1. Alongside specific areas of the FPA system that you requested particular advice on, we agreed to provide you further advice on the remaining areas of the FPA system that we have not yet got decisions on.

2. In the meeting on 17 November 2020, you indicated that the initiation tests for the FPA system should reflect what was proposed by the FPAWG that a FPA collective bargaining process may be initiated by workers and their union representatives if:

    a. They can meet a minimum threshold of 1000 or 10% of workers in the nominated sector or occupation, whatever is lower (the representation test); or

    b. Where the representativeness threshold cannot be met, a FPA may still be initiated where there are harmful labour market conditions in the nominated sector or occupation (the public interest test).

3. These choices impact on advice that we had previously provided to the former Minister around coverage of an FPA. This briefing provides you with advice on whether (and if so how) to limit parties choice about coverage of an FPA and how to mitigate some of the possible risks arising from coverage.

4. For the purposes of this briefing, "coverage" is the proposed boundaries of which occupations and industries (and therefore workers and employers) are to be covered by any given FPA.

5. We use 'sector' and 'industry' as interchangeable terms throughout the briefing.

The FPAWG recommended it should be left up to parties to define coverage within legislative limits

6. The FPAWG recommended that workers and their representatives who initiate bargaining should propose the intended boundaries of the sector or occupation to be covered by the agreement, within limits set by legislation. Once the proposed boundaries are set through initiation, the parties would be able to bargain the boundaries of coverage. While the FPAWG contemplated legislated limits on coverage, no specific limits were recommended.

The FPA discussion document sought submissions on the proposal that bargaining parties should have freedom to define coverage within the boundaries of ANZSCO and ANZSIC

7. We previously recommended requiring coverage to be set by specifying named occupation(s) within named industry(ies) using the Australian New Zealand Standard Classification of Occupations (ANZCO) and Australia New Zealand Standard Industrial Classification (ANZIC) occupation and industry codes – a method of classifying occupations and industries in New Zealand and Australia.[1]

8. We suggested the advantages of this limitation are that it would be workable, consistent and limit the risk of overlap. We thought the requirement to specify both occupation and industry, combined with the representativeness test requirement, should drive initiators to only include relevant occupations who could benefit from an FPA. However, we noted this option would still have full flexibility as in theory all occupations within an industry could be listed. Likewise, all industries for one occupation could also be listed. We expected the likely narrower scope may contribute to better bargaining as parties may have more in common.

[1] This would mean, for example, an initiator might name the coverage as Kitchenhands, Waiters, Bar Attendants and Baristas (occupations) in Cafes and Restaurants (industry). Kitchenhands who work in the Aged Residential Care Services industry would be excluded from coverage.

9. We noted that the disadvantage of a combined occupation/sector approach is that it would not create minimum terms that apply across an *entire* occupation by default (although it could well have flow on effects to the parts of an occupation not covered).

10. On balance we thought this was the best form of limitation to consider.

After considering submissions, we recommended that the Minister specify the eligible workforces that met the public interest test in regulations

11. Most submitters opposed being required to use the ANZSCO and ANZSIC codes to define coverage. Many employers provided examples from their own industries to illustrate why the codes were inappropriate and should not be used.

12. The former Minister had agreed that the public interest test should be proactively assessed, with eligible workforces specified in regulations by the Minister. This had meant that parties who initiate bargaining – if they meet the representation test – would be doing so within the constraints of the specified workforces set out in regulation.

13. We recommended that the bargaining parties must specify a combination of occupations and industries within the constraints set by the specified workforces in regulations. For example, the Minister may have specified an industry (supermarkets and grocery stores) and an occupation (sales workers) in regulations. The initiator and bargaining parties agree to refine coverage to a subset of the industry (supermarkets only) and a subset of the occupation (checkout operators).

This briefing reconsiders our advice in light of broadening the initiation triggers

14. We have reconsidered our advice in light of broadening the initiation triggers to include either the representation test *or* the public interest test and your strong preference to ensure the system does not include ministerial decision-making.

15. This briefing considers options against the criteria for assessing FPA design features and the high-level objectives of the FPA system, which are two-fold:

    a. to improve labour outcomes, particularly for workers in industries or occupations where competition is based on decreasing labour costs; and

    b. to create a system of industry or occupation-wide bargaining to facilitate greater and more mature sector wide dialogue (allowing parties to capitalise on sector-or occupation-wide opportunities and address sector-or occupation-wide issues).

16. The list of criteria we used to assess the different options are:

    - Incentivising industry-wide or occupation-wide FPAs, over many FPAs per industry or per occupation: to achieve the system objectives of creating sector-wide social dialogue, and to capitalise on sector-or occupation-wide opportunities and address sector-or occupation-wide issues.
    - Certainty: ensuring that only one FPA applies to a worker at any given time in order to provide certainty to employers and workers about the terms and conditions that apply to a worker.
    - Effectiveness: whether the option supports improved outcomes for workers
    - Workability: whether the option supports the smooth operation of the FPA system
    - Cost effectiveness / efficiency: whether the option achieves the objective in a way that represents good value for money.

Social partners' views

17. We spoke with the New Zealand Council of Trade Unions (NZCTU) about some of the high-level proposals in this briefing. Due to tight-time constraints they were not able to put forward a formal view on the options. However, they did say that they think the options should:

    a. Follow the FPAWG's recommendations where they covered the issue in question; and

    b. As a principle, allow the bargaining parties flexibility to address coverage issues in the FPA.

18. We also spoke to BusinessNZ who favoured reducing complexity in the system where possible and at a minimum, avoid overlapping FPAs.

Public sector representatives

19. We spoke to the public sector representatives from the Ministry of Education and the Ministry of Health. They both shared the view that overlaps should be avoided where possible and strongly shared the view that bargaining should be consolidated where subsequent unions initiated for the same occupation or industry.

20. Education noted that it would be very important for coverage to describe the work (ie including describing the core duties that are actually done by that job) that is within coverage, and not just list job titles. They said this was a particular concern with the pay equity claims that they had received.

21. Both Ministries were also supportive that any subsequent bargaining for another part of the same occupation or industry FPA should be agreed as an addition to the FPA, with the entire agreement expiring at the same time.

Whether (and if so how) to put limits on parties choice about coverage

One of the key challenges with coverage is ensuring that the system is workable and complexities are minimised

22. The representation trigger of 1000 workers or 10% of the workforce (whatever is lower) means that, without legislative limitations, a union could initiate for an FPA that is either construed:

    a. extremely broadly, for example, it would be possible for a union who has support from 1000 butchers to propose an FPA that covers all workers in the meat industry, supermarkets and grocers and restaurants and cafes; or

    b. very narrowly, described in very specific detail (for example, shoe makers that specialise in making oxford shoes).

23. Either of these scenarios could pose significant risks for the workability and complexity of the system. For example, a broad FPA could include a vast number of industries where there are few common interests and a low chance of being able to get agreement between both bargaining parties and from either the employer or union representative bodies. On the other hand, extremely narrow FPAs could result in hundreds of FPAs in any given industry. This is likely to be costly and inefficient and lead to a complex landscape of terms and conditions with overlaps and perpetual bargaining. It would also not achieve one of the objectives of creating a system that encourages sector-wide or occupation-wide social dialogue.

24. There are incentives on unions to initiate for a logical grouping in order to maximise the chance of the FPA being ratified. However, we also consider that there is a need to ensure

that the boundaries of an FPA are logical, clear and do not create undue complexity and uncertainty for employers and workers, including by avoiding, or mitigating the risks from, overlaps. We think managing these complexities and risks are critical to your objective of creating an enduring system.

25. When developing options we considered the need for the coverage of the FPA to be as clear as possible to minimise demarcation disputes and to aid in the accurate notification to affected employers and workers that an FPA has been initiated.

We now recommend that the initiator must describe the boundaries of an FPA as either an Occupational FPA or an Industry FPA

26. We recommend that the coverage of an FPA must be defined by the initiator as either an:

    a. Occupational FPA, where the initiator would be required to describe the single occupation, including a description of the work the FPA is to apply to and each industry that is proposed to be covered (for example cleaners whose job includes dusting, mopping, sweeping, vacuuming and emptying rubbish bins in all sectors); or

    b. Industry FPA, where the initiator would be required to describe what single industry is proposed to be covered and each occupation, including a description of the work, that is proposed to be in coverage (for example, checkout operators, shelf-stackers, deli-workers in the Supermarket and Grocer sector).

27. All bargaining parties would therefore have a common bargaining interest, having either the occupation proposed to be covered in common (Occupational FPA), or both the occupation and the industry in common (Industry FPA). This structure would also enable one of the key objectives of FPAs to encourage occupation-wide or sector-wide social dialogue to address sector or occupation specific issues and opportunities.

28. Having clear boundaries of an FPA across occupational and industry lines should prevent unnecessary complexity that could arise from tens or hundreds of FPAs across an industry or occupation. It should also limit the number of overlaps and make it easier to address overlaps when they occur (see options for overlapping FPAs below).

The initiator is free to describe the occupations and industries proposed, but to be checked by a body to ensure description is sufficiently clear

29. The initiator would be able to define the occupations and industries inside the legislative limits of either the Industry or Occupational FPA. A critical aspect of the system is ensuring that employers and workers know that they are within the proposed coverage of an FPA, so they can choose how to be involved in the process. For this reason, it is proposed that the description of who is covered is checked by an independent body, for clarity.

30. The body would work with the initiator to ensure that the described boundaries of the FPA are sufficiently clear so that interested parties can identify that they are in coverage. Once the body is satisfied that the boundaries are sufficiently clear then the notification process could start. The initiator, the government and other relevant parties such as the peak bodies would all have a role in notifying affected parties (we will provide advice on notification and communication issues in a forthcoming briefing).

While there are some risks with this approach, we consider it strikes the right balance between certainty, flexibility and workability of the system

31. There is a risk of ‘first-mover advantage’ with this approach. The unions that initiate first can determine how to describe the industry or occupational FPA and this may have knock-on effects for subsequent FPAs. For example, the first mover could choose to describe an industry as the Fast Food and Restaurant Industry or the Restaurant and Café Industry. However, this risk is partially mitigated by the bargaining parties being able to redefine

coverage through the bargaining process. A party that is not initially covered, however, will not be able to directly influence the boundaries unless subsequent bargaining brought them within coverage or through the consolidation process (described in detail from paragraph 61).

32. We consider this approach strikes the right balance between certainty for all parties involved in the system to understand when they are impacted by a proposed FPA and flexibility for the initiator and subsequent bargaining parties to choose how to best describe the occupations and industries in coverage.

We considered but do not recommend other options

33. We considered but do not recommend the option that the initiator could define coverage without any limitations. This option creates too many risks and is unlikely to be workable. For example, there would be no ability to limit the risks of overlapping FPAs, as initiating parties would be free to determine the boundaries of the FPA. There also would not be checks and balances on whether the proposed coverage is set out sufficiently clearly so there could be ambiguity which may create uncertainty among employers and workers about whether the FPA impacts their workers or work, or once bargained, that it covers their particular work or workers.

34. We also considered taking a principle based approach to limiting coverage, where the coverage would be limited by a 'principle of commonality' when determining proposed coverage. Under this option, either the occupation would need to be common across industries or the industries would have to have shared traits. However, we discarded this option as we considered it would be overly complex because it would require an independent body to be able to draw a line and make a judgement call about what constitutes shared traits and would likely require an appeal process where disputes arose.

The representation tests and the public interest test should apply to the group of workers as defined by the initiator

35. We propose that the initiation tests are to apply to the group of workers as defined by the initiator, within the bounds of the legislative limitations.

36. We considered but do not recommend possible alternative options including requiring the representation tests to be applied proportionately across those occupations that are proposed to be in coverage. We considered that this might mean that a union could only initiate where they received at least some worker support, which while being representative, would mean the system is limited to only those occupations who support having an FPA, which may mean the intervention is both not broad (industry or occupation wide) and may not target those workers with the worst labour market outcomes. We dismissed the option of requiring 1000 or 10% of workers per occupation in proposed coverage for the same reason.

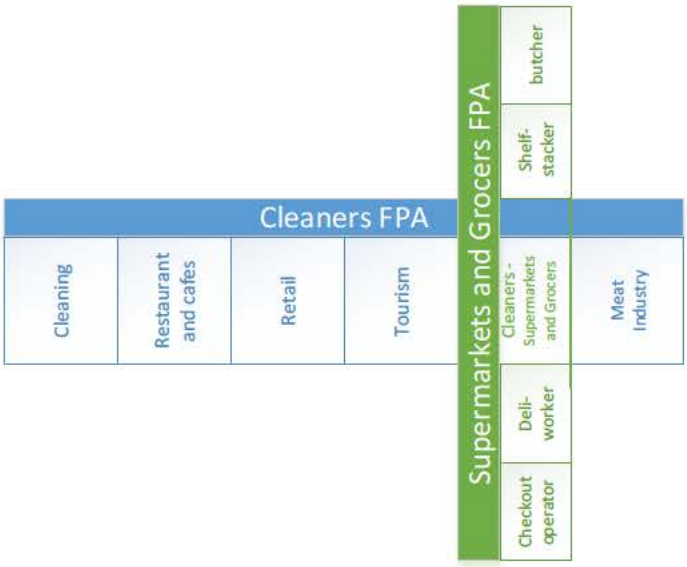
37. We also recommend that any subsequent expansion of coverage through bargaining to include either a new occupation or industry will be required to re-meet the initiation tests unless, in the instance of 1000 workers, the test has already been met for that defined group, even if coverage is expanded.

38. We considered and do not recommend the ability to expand coverage without having to retest the representation test or the public interest test. This could mean that the existing bargaining parties have the ability to pull in other occupations or industries without the need to prove the triggers, reducing the legitimacy of the triggers as a gateway to the FPA system.

We recommend that where overlaps occur, the Employment Relations Authority (the Authority) determines which FPA is more advantageous and applies that FPA to the entire group of workers within the overlap

39. There will be the potential for overlapping FPAs where there is an occupational FPA that crosses over with an Industry FPA. A hypothetical example is illustrated in figure 1 below.

Figure 1 - Overlapping Industry and Occupational FPAs



40. To address the concern of two possible FPAs applying to one group of workers, we considered four options:

    a. **Overlaps are addressed through a legislative principle that the Occupational FPA trumps the Industry FPA**, or vice versa.

    b. **Bargaining parties are required to address overlaps, with a legislative backstop where overlaps are not foreseen by the bargaining parties.** Bargaining parties are required to discuss and agree how overlaps are to apply. Where a FPA has not foreseen a potential overlap, a default principle set in legislation will apply that either the Occupational FPA trumps the Industry FPA, or vice versa.

    c. **Legislate that the first FPA to be bargained must apply to that group of workers that are subject to an overlap (ie a Cleaners Occupational FPA) unless the second FPA bargains terms and conditions that are not less favourable (ie the Supermarket and Grocers Industry FPA, if it covered cleaners).** So in the example above, if there is an existing Cleaners Occupational FPA and a Supermarket and Grocers FPA is initiated we would expect that either cleaners would not be included in the Industry FPA or if they were, they would only be included where the terms and conditions were more favourable than the Occupational FPA. For the avoidance of doubt, an existing FPA for one sub part of a group would not constrain what could be bargained for the broader group. In the above example, if the Supermarket and Grocers FPA was completed first and covered cleaners, any subsequent Occupational FPA for cleaners could agree terms and conditions that were either higher or lower than those for cleaners in the Supermarket and Grocers FPA. If the terms were higher in the Occupational FPA, the cleaners in the Supermarket and Grocers FPA could make a case for that to apply. If the terms in the Occupational FPA were lower, they would seek to be excluded from the Occupational FPA or retain the existing coverage of the Industry FPA.

Whether or not the bargained terms are not less favourable than the first FPA can be checked during the vetting process. For example, the vetting process would involve assessing the terms and conditions for cleaners covered by the Occupational FPA, and cleaners proposed to be covered by the Industry FPA and make a judgement call if cleaners on the Industry FPA would, overall, have not less favourable terms. Where the terms are judged to be not less favourable overall than the first FPA then coverage will be amended in the first FPA (Cleaners FPA) to carve out those cleaners that will now be covered by the industry FPA (Supermarket and Grocers FPA). The 'not less favourable' decision would apply to all workers falling under the overlap – it would not assess which FPA was better for each person.

d. **If overlaps occur, allow each worker to choose which of the two FPAs will apply to them.** This would require the employer to provide both sets of terms and conditions to the worker and allow the worker to choose which FPA they wish to apply.

41. When assessing the options we considered that the most important criteria were:

    a. Certainty: ensuring that only one FPA applies to a worker at any given time in order to provide certainty to employers and workers about the terms and conditions that apply to a worker.

    b. Effectiveness: whether the option supports improved outcomes for workers

    c. Workability of the system: whether the option supports the smooth operation of the FPA system.

42. While under Option A - a legislative principle that either an Occupational FPA would trump an Industry FPA (or vice versa) - would provide certainty to employers about which FPA applies, it is also a blunt tool that does not allow for a nuanced approach to overlaps. It could mean that workers are worse off, even where parties wanted to bargain better terms and conditions for those workers. Therefore, we do not recommend this approach.

43. On the other hand, we consider that Option D is too nuanced: it would not give any certainty to employers, and would not be very workable. An employer could have employees doing the same role but choosing to be subject to different minimum terms in different FPAs, or switching regularly between the two FPAs. It could also lead to a more litigious approach, especially if there are disagreements about whether an employee had been provided the opportunity to choose between the two FPAs.

Permitting the bargaining parties to decide how overlaps would be dealt with is consistent with bargaining principles, however, does not guarantee certainty, and could mean worse outcomes for workers

44. Option B has the benefit of allowing the bargaining parties to decide how overlaps are to apply, which the NZCTU suggested should be a preferred approach where relevant. However, this approach means that parties could either prevent a future FPA being bargained for a group of workers (where the first FPA has an exclusivity clause) or override earlier bargaining (where subsequent parties decide that their FPA is to take precedence). There may also be situations where both of the overlapping FPAs could purport to provide exclusivity for the same group of workers or provide a competing approach to how overlaps were to be applied (ie a better off overall approach vs a exclusivity approach). In these cases, certainty of which FPA applies would not be guaranteed and would likely be litigated. This would impact on the smooth operation of the FPA system.

45. Under this option having a default backstop to address situations where parties failed to identify the overlaps would be critical. However, a default would also be a blunt tool that guarantees certainty but does not guarantee that workers receive the better negotiated terms and conditions. Having a default is also likely to influence how the overlap is bargained, i.e. if

the default benefited one side they may be less likely to bargain how the overlap is to work. Given these risks, we also do not recommend this approach.

On balance, we recommend legislating that the first FPA apply to the subgroup that is the subject of an overlap, unless a second FPA proposes terms and conditions that are not less favourable than the first FPA

46. This option ensures that only one FPA can apply to any specified group of workers, providing certainty to parties about which terms and conditions are to apply. It is proposed that a vetting body would check the bargained terms in the second FPA and establish whether it is not less favourable than the original terms and conditions.

47. The "not less favourable" test is applied in the Employment Relations Act 2000 in relation to how the 30-day rule is to be applied. Under section 62, the employee and employer can agree to additional terms and conditions above the terms and conditions of the collective agreement if they are 'no less favourable' to the employee than the terms and conditions of the collective. This principle was also applied by the Courts under the previous Awards system.

48. If the vetting body determines that the second FPA should apply to the group of workers subject to the overlap, then, if that agreement is ratified and made into a legislative instrument there will be a subsequent amendment to the first FPA to remove those workers from coverage.

49. Changing the terms and conditions of workers a second time creates inefficiencies and costs in the system. Employers who have already had to update the terms and conditions of workers to reflect the first FPA, will then need to update the same workers' terms and conditions to reflect the second FPA. However we consider the additional costs would be justified in this instance because it means that employees would receive more favourable terms and conditions.

50. One possible outcome is that unions will seek to set Occupational FPAs, as they could set base rates for that occupation in all industries. We consider this creates positive incentives for industry specific FPAs that are bargained after the Occupational FPA to provide more favourable terms and conditions for workers, especially where it is important for that industry to have terms and conditions that are tailored to that industries particular characteristics. This should incentivise better labour market outcomes for workers.

51. On balance, we consider that this option strikes the right balance between providing parties certainty about which FPA applies, but also allows parties to bargain better terms and conditions for workers that are already covered by an FPA.

Not addressing overlaps is not feasible

52. We considered and do not recommend the option not to prevent any overlaps and instead provide direction to the dispute resolution body that the FPA that provides the most favourable terms should apply. We do not consider that this provides sufficient clarity to the parties to understand which FPA should apply, which is likely to result in inconsistent application, litigation and liability where the wrong FPA is mistakenly applied.

The independent body should have a role in notifying bargaining parties of any potential overlaps

53. It is proposed that the independent body will also have a role in notifying the relevant bargaining parties when it becomes aware that there are other FPAs that they think may overlap with the new proposed FPA. The body will notify the parties of the consequences of any overlap (ie that for a particular occupational group within that industry, terms and conditions must be not less favourable in order to apply). This could be done at the outset (when the FPA is initiated by the union) or throughout bargaining if the body becomes aware of an FPA that is likely to overlap.

54. It is possible that the overlaps will involve comparing occupations across certain regions, as bargaining parties can agree to regional terms and conditions (ie this may form a Schedule) as part of the FPA (which applies nationally). The independent body would apply the 'not less favourable test' to all workers impacted by the proposed overlap and make a judgement call about whether or not the majority of workers will receive terms that are not less favourable.

55. There may be some uncertainty where there is overlapping bargaining occurring at the same time for an occupational group (ie cleaners) and for a subset of those workers in an Industry FPA (cleaners in the Supermarket and Grocers Industry). It is proposed that once the first FPA is ratified it will set the terms and conditions for the overlapping group of workers for the subsequent FPA. The independent body will have a role in notifying the bargaining parties of the subsequent FPA that the terms and conditions for that subgroup of workers has been bargained and that that sub-group should be excluded from coverage or in order for coverage to apply to them they must bargain terms and conditions that are not less favourable. This could result in some inefficiencies in bargaining.

Parties can bargain the scope of coverage without limitation

We had previously recommended that parties should be able to bargain coverage in the initial stages of bargaining, after which point coverage would be set

56. Previously we had recommended that parties can renegotiate coverage in the initial stages of bargaining, so long as the initiation tests are met where there are substantive changes to coverage [briefing 2210 19-20 refers]. We had not yet defined the 'initial stages of bargaining'. Our initial reasoning for limiting bargaining coverage to the initial stages of bargaining was because if coverage was expanded it would be necessary to notify the newly affected employers and workers, and frequent changes to coverage could increase compliance costs and the risk that notifications are ignored.

We now consider that parties should be able to bargain coverage without limitation, however, any substantive broadening of coverage must go through the notification processes

57. We have reconsidered our advice in light of the broadening of the initiation triggers, the workability of the system and the goals to improve mature sector-wide and occupation-wide dialogue and to both capitalise on sector-wide opportunities and address sector-wide issues. Given this, we consider that if parties wish to bargain to broaden coverage to include more occupations within an industry, or further industries for an Occupational FPA, they should be able to do so. We think this measure, alongside our proposed approach to consolidation of bargaining and additions to existing FPAs (discussed below), will mean fewer, but more substantive FPAs. We no longer recommend it is necessary to limit bargaining of coverage to the initial stages of bargaining.

58. Any substantive broadening of coverage that includes additional occupations or industries than proposed at initiation will require informing the independent body so that the notification processes to newly affected employers and employees can occur. The existing bargaining parties will be obliged through good faith to consider the views of any further employers and workers and may need to add new bargaining representatives.

59. This recommendation has implications for previous decisions regarding what happens when an agreement does not pass ratification [briefing 2210 19-20 refers]. The previous Minister agreed that following a failed attempt to ratify an agreement, the FPA would return to bargaining. Following a second failed attempt to ratify an agreement, the FPA would be referred to the determining body for a binding determination that sets the terms and conditions of the FPA.

60. If the system permits parties to bargain increases in coverage after ratification (for example, parties agree to expand coverage to include new occupations or industries) the new ratification would include workers and employers that were not involved in the first ratification. This may increase the risk that it fails ratification, which would trigger a

determination. We will provide you with further advice on the options for addressing this in relation to expanded coverage in the briefing advising on ratification in February.

If an FPA is subsequently initiated for the same occupation or industry, we recommend bargaining should be consolidated up until a specific timeframe

61. It will be possible for another union to initiate for an FPA that is already being bargained. For example, a union may have initiated for checkout operators and shelf-stackers in the Supermarket and Grocers Industry FPA and subsequently, another union may initiate for deli-workers and butchers in the same industry.

62. We have considered whether in this situation there should be a requirement for consolidation of bargaining which could reduce the likelihood of multiple FPAs covering the same industry and fragmented bargaining. It would also support one of the objectives of the system to improve social dialogue across a sector or occupation, and not parts thereof. It also reduces the risks of demarcation and encourages bargaining based on relativities across occupations within the same industry.

63. There are four possible options for consolidating bargaining across the same Industry FPA, or across the same Occupational FPA:

    a. **Bargaining must be consolidated.** Regardless of where the initial FPA is in the process, any subsequent initiation proposed to cover an industry or occupation that already has bargaining underway must merge.

    b. **Bargaining must be consolidated unless parties have reached a specific point in bargaining.** For example, a draft FPA has been prepared and ratification date set.

    c. **Bargaining can be consolidated by the request of any one party, but all parties must agree before bargaining is consolidated.**

    d. **Bargaining must be consolidated up until a specific timeframe ie 6 months after initiation, after which point consolidation can occur with the agreement of the existing bargaining parties.** The union who initiates first could be obliged to notify any other unions that are within coverage of that occupation or industry to advise them of the cut-off timeline and the consequences if they choose not to initiate within that timeline.

64. Requiring bargaining to be consolidated at all times risks delaying and potentially defeating months or years of bargaining. For example, an FPA could be already drafted and put to members when another initiation for an FPA in that sector occurs, requiring parties to restart bargaining with new employers and workers. We do not recommend this option.

65. We considered but do not recommend the option that a party could apply, but all parties must agree, before bargaining is consolidated. This option risks multiple FPAs per industry or occupation, which would add to the complexity and risk the workability of the system. It would create fragmented bargaining and increase the risks of relativity issues across occupations within an industry.

66. We considered requiring bargaining to be consolidated unless bargaining representatives have notified employers and employees of a draft agreement and have set a ratification date. However, it is likely that bargaining is very advanced and adding in a further occupation or industry just prior to ratification may delay and derail existing negotiations.

We recommend consolidation up until a specified point after initiation, and thereafter by agreement of the existing bargaining parties only

67. On balance, we consider that specifying a specific timeframe in legislation provides parties clarity about when bargaining will be required to be merged. It also provides any other unions

in that industry or occupation time to gather the support needed to initiate if they wanted to join the existing bargaining for that industry or occupation.

68. If a subsequent initiation occurs after the time period has expired, we propose allowing the existing bargaining parties to agree to consolidate bargaining if one of the bargaining parties from the subsequent initiation applies. Where the parties disagree to consolidate after the specified timeframe, it is proposed that the second initiation for an FPA in that industry or occupation (ie deli-workers and butchers in our example above) would be required to bargain their terms and conditions separately, and they would form an additional Schedule to the initial proposed industry or occupational FPA (this is covered in more detail below).

Independent body to check whether coverage proposed is substantially the same as an existing Industry or Occupational FPA

69. There are risks that an initiator may describe the work or industry in a way to avoid having to be consolidated with existing bargaining. This could occur, for example, if a union had a poor relationship with the other union who is leading the existing bargaining. We consider that the independent body will have a role in determining whether the coverage proposed is substantively the same as an Industry or Occupational FPA that already has bargaining underway and to notify the parties of the requirement to consolidate.

After an FPA is agreed, and there are subsequent initiations for the same industry or occupation, we recommend that bargaining should agree an addition to the FPA

70. Once an FPA is agreed (for example, Supermarkets and Grocers Industry FPA), it will be possible for further bargaining to be initiated for the same industry or occupation (ie butchers and deli-workers in the Supermarkets and Grocers Industry FPA).

71. We consider that there are two viable options:

    a. **Any subsequent initiation for an additional occupation or industry to be added to the FPA must be done as an additional Schedule.** Parties could build on existing terms and conditions of the agreed FPA where appropriate and any matters on which they agreed a different term could be added as a Schedule to the FPA. Only the parties to the variation would be required to ratify the Schedule. However, no changes would be able to be made to the primary terms and conditions.

    b. **There can only be one FPA per occupation and per industry, if further occupations or industries are to be added, they need to wait until the agreement is up for renegotiation.**

72. While there are advantages to requiring only one FPA per occupation or industry in terms of simplicity, ensuring an industry or occupation isn't in perpetual bargaining and removing the risks of relativities, we do not think restricting collective bargaining until the agreement expires will support the objective of improving labour market outcomes for workers. These workers may not get improved outcomes for years until the FPA has expired. This may also impinge on international law obligations to allow people to freely collectively bargain.

73. As such, we recommend that where there is an existing FPA covering a subset of an industry or occupation and there is a subsequent initiation for one or more occupations within an industry or for other industries for an occupation that already has an FPA any agreement reached would be added as an additional schedule to the primary agreement. This provides an opportunity for parties to use the agreed terms in the FPA as a reference, but depart from them if they wish, and to list those different terms for the occupation or industry in question via a Schedule to the FPA. We recommend that only the additional parties to the variation should be required to ratify the Schedule. The agreement, and its Schedules, would expire at the same time, so that when it is renegotiated all the occupations/industries will be negotiated at once.

74. We considered and do not recommend the option that there could be a new FPA each time. This would be very complex, lead to inefficiencies and would mean employers have to abide by, and bargain, multiple FPAs. It would also increase the risks of relativity issues either between occupations in the same industry, or between sectors with the same occupation.

Who should perform the role of the body who verifies coverage and notifies of overlaps

A body is needed to undertake certain functions

75. We consider the following functions will need to be undertaken to approve coverage:

    a. Ensuring the description of occupations and industries proposed by the initiator, or bargaining parties (when coverage is substantially expanded to include additional occupations or industries) are sufficiently clear so impacted parties can identify that they are in coverage, and

    b. Informing the relevant body of the new proposed coverage so that notification processes can take place; and

    c. Informing an initiator that they consider the proposed coverage to impact on bargaining that is already underway and of the requirement to merge (if within the specified time limit) or the requirement to bargain the terms and conditions as an addition to the FPA (where the time limit has passed or where there is already an agreed FPA).

    d. Informing the bargaining parties when it becomes aware that there are other FPAs or bargaining is underway for an FPA that they think may overlap with the new proposed FPA. This could be done at the outset (when the FPA is initiated by the union) or throughout bargaining if the body becomes aware of an FPA that is likely to overlap.

76. There is also a new role for a body to determine disputes from the initiator:

    a. Determines disputes from an initiator about whether a subsequent initiation for an FPA is proposing coverage that is substantively the same as an Industry or Occupational FPA that already has bargaining underway or has already been agreed and, if the same, notifies the parties of the requirement to consolidate or that the parties will be bargaining an addition to an FPA (where an FPA for that industry or occupation already exists).

77. Coverage is likely to be one of the key challenges in the system. It will be vital for the workability of the system that coverage is clear enough that parties can understand if they are in or out of the proposed bounds of the FPA. We have heard anecdotally that coverage has been a key challenge in the pay equity process with insufficient detail being provided in the initiation notices what the intended occupation is. For example, we understand it has taken about a year to agree the “coverage” of the Public Sector Admin/Clerical claim.

We recommend that most of these functions can be undertaken by MBIE

78. It will be important that the body can work with the union(s) to enable coverage to be described clearly. It will also be important for the body to have a good knowledge of the bargaining underway and the FPAs that have already been agreed. We consider that the functions to approve coverage (paragraph 75, a-d above) should be undertaken by MBIE (as the regulator and the employment dispute resolution service) as they would be best suited because they will require largely administrative or facilitative skillsets to support the initiation process and are not determinative or judicial in nature.

79. MBIE (through the dispute resolution functions) has the existing skillset to work with the union(s) to ensure that coverage is set clearly and will have a good understanding of the

FPAs that have been negotiated to date to advise on potential overlaps. The notification processes could then take place.

However, where there are complex decisions that impact on how the FPA can be bargained, we consider this decision should be done by the Authority

80. The final function (at paragraph 76 (a) above) will require the ability to make complex decisions to determine whether a newly proposed initiation is within the bounds of any existing FPA bargaining or an existing FPA. There may be strategic reasons for trying to word the occupations or industries so they fall outside the ambit of existing bargaining or an existing agreement, as well as considerable scope for unnecessary misunderstanding and disputes from lack of clarity.

81. When a proposed initiation falls within the bounds of existing bargaining, it is proposed that MBIE will initially discuss the implications of this with the initiator to facilitate the FPA process (with options for the initiator to: reframe the proposed coverage, merge the bargaining processes, or bargain a variation to an existing FPA). However, if the initiator disputes that the proposed coverage falls within the bounds of existing FPA bargaining or an agreed FPA, this is a quasi-judicial matter and it is proposed that the initiator must take the dispute to the Authority for final determination (before the FPA can be initiated formally). The decision would be appealable.

82. These functions have been budgeted for as part of the dispute resolution functions and verification functions in the FPA system budget-bid.

Additional functions proposed for the Authority as the vetting body

83. It is proposed that the Authority would establish whether the bargained terms in the second FPA are not less favourable than the original terms and conditions of the first FPA and declare which FPA applies to the workers in overlapping coverage.

84. These additional functions may mean that the vetting process will take longer than initially anticipated, but only where there are overlapping FPAs that need to be assessed.

Next steps

85. We are providing advice on the remaining aspects of the design of the FPA system required to seek Cabinet approval to draft the Bill and to inform the drafting instructions. The schedule for the project is set out in the table below:

Milestone	Date
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
DEV Cabinet Committee	14 April 2021