



BRIEFING

FPAs: Advice on Enforcement

Date:	25 February 2021	Priority:	High
Security classification:	In Confidence	Tracking number:	2021-2155

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Agree to the enforcement approach to Fair Pay Agreements recommended in this briefing.	4 March 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
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The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

FPAs: Advice on Enforcement

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Purpose

This briefing provides advice on the Labour Inspectorate's role in the enforcement and of compliance with Fair Pay Agreements (FPAs).

Executive summary

You have indicated that FPAs should be treated as minimum standards for the purposes of enforcement and that the Labour Inspectorate should be able to take enforcement action where an employer breaches clear and measurable terms and conditions of an FPA.

We have recommended that the Labour Inspectorate have a role in enforcing:

- The FPA base wage(s),
- Incremental adjustments to the FPA base wage(s),
- Minimum leave entitlements that build on existing leave entitlements under the Holidays Act 2003, and
- Overtime and penalty rates.

These terms and conditions are specific and measurable and, with adequate safeguards, can be drafted clearly to ensure that they can be enforced by the Labour Inspectorate.

We recommend that there is a legislative template that specifies the parameters of the base wage (and adjustments), leave entitlements, overtime and penalty rates. The proposed agreed wording in a draft FPA could be checked by the vetting body to ensure it fits within the specified parameters of the template in law. The parties would be required to agree wording that complies with the template before the FPA could proceed to the ratification stage.

The Labour Inspectorate would require additional information and powers to be able to enforce these provisions. This includes requiring that employers keep a record, where an FPA applies, of the days of the week and times that employees work in order for the Labour Inspectorate to enforce overtime and penalty rates.

The Labour Inspectorate has a general role in enforcing compliance with the obligations specified in legislation within its jurisdiction. We recommend that the Labour Inspectorate is able to use their compliance tools in relation to obligations specified in the FPA legislation, but not those terms and conditions agreed by the parties that fall outside of the base wage (and adjustments), minimum leave entitlements, overtime and penalty rates. The other terms and conditions of the FPA would be able to be personally enforced by employees and employers and their representatives who are within coverage of the FPA.

Recommended action

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

- a **Note** your previously stated preference that an FPA be treated as a minimum employment standard with a limited role for enforcement by the Labour Inspectorate.

Noted

- b **Note** the parties within coverage of an FPA will be able to enforce their own rights in relation to the FPA (through the dispute resolution and compliance processes set out in the Employment Relations Act 2000).

Noted

- c **Agree** that the following terms of an FPA will form new minimum employment entitlements that the Labour Inspectorate can enforce in accordance with the Employment Relations Act 2000:

- i. the hourly base wage(s);
- ii. adjustments to the hourly base wage across the lifetime of the Fair Pay Agreement;
- iii. increases to minimum leave entitlements (as specified under the Holidays Act);
- iv. the hourly overtime rate;
- v. the hourly penalty rate.

Agree / Disagree

- d **Note** by making the terms listed in recommendation (c) above 'minimum entitlement provisions' the Labour Inspectorate would be able to apply to the Employment Court where there are serious breaches of these terms that could attract severe consequences including a:

- i. pecuniary penalty of up to \$50,000 for an individual or \$100,000 for a body corporate;
- ii. compensation order to recompense impacted employees;
- iii. banning order that bans an employer from the labour market for up to 10 years.

Noted

- e **Agree** that a legislative template be drafted that can be used by the bargaining parties to an FPA that specifies the parameters of the base wage (and adjustments), leave entitlements, overtime rates and penalty rates, in order to ensure that the terms are specified in a way that is enforceable.

Agree / Disagree

- f **Agree** that the proposed wording specified in the FPA is checked by the vetting body to ensure that it meets the requirements of the template.

Agree / Disagree

- g **Agree** that the bargaining parties would be required to agree wording that meets the requirements of the template (if they choose to include that term in the FPA) that is considered enforceable by the vetting body before the FPA could proceed to the ratification stage.

Agree / Disagree

- h **Note** the Labour Inspectorate requires additional information and powers to be able to enforce the provisions listed in recommendation (c).

Noted

- i **Agree** to require employers to keep wage and time records that include, where an FPA applies, the days of the week and times of the day that employees worked in order for the Labour Inspectorate to enforce overtime and penalty rates.

Agree / Disagree

- j **Note** we are considering whether the Labour Inspectorate needs to be empowered to decide if the employee is in coverage of the FPA:
- i. Empowering the Labour Inspectorate to decide an employee's coverage comes with certain legal risks and liability.
 - ii. We are still working through the extent of these and what possible safeguards could be provided in order to give the Labour Inspectorate this power.
 - iii. If we cannot provide sufficient safeguards it may be that the Labour Inspectorate would need to apply to the Employment Relations Authority to get a determination about a workers status.

Noted

- k **Agree** to seek in your Cabinet paper a Ministerial delegation to decide whether, and how, the Labour Inspectorate could decide whether a worker is in coverage of an FPA.

Agree / Disagree

- l **Note** that the Labour Inspectorate has a general role in ensuring compliance with obligations set out in the laws within their jurisdiction. To do this the Labour Inspectorate has their lower-level enforcement tools available: improvement notices, enforceable undertakings and infringement fines.

Noted

- m **Note** in order for the Labour Inspectorate to have a role in enforcing the terms of the FPA itself, the FPA legislation will need to be added to the laws that fit within the Labour Inspectorate's jurisdiction. This means:

- that the powers, functions and compliance tools in the Employment Relations Act 2000 that apply to the Labour Inspectorate would apply in relation to the FPA legislation.
- that the Labour Inspectorate's compliance role applies to secondary legislation that is made under those laws, and would, unless there is an express exclusion, apply to the specific terms of the bargained FPA.

Noted

- n **Agree** that the FPA legislation should be added to the laws that fit within the Labour Inspectorate's jurisdiction.

Agree / Disagree

- o **Agree** that the Labour Inspectorate should not have a role for those terms and conditions that fall outside of those listed in recommendation (c).

Agree / Disagree

- p **Note** the Labour Inspectorate has a role in relation to flexible work arrangements under the Employment Relations Act 2000. The short-term flexible work provisions enable a worker to raise their concerns with mediation, the Labour Inspectorate or to apply to the Employment Relations Authority for a determination.

Noted

- q **Agree** that the Labour Inspectorate should have a role where a *process* has been agreed to determine flexible work arrangements or short-term flexible work arrangements under the FPA and this role should be consistent with the existing approach to short-term flexible work in the Employment Relations Act.

Agree / Disagree

- r **Agree** that unions should not have standing to take claims 'in and of themselves' unless they have their members or non-union members consent (consistent with the existing processes under the ER Act).

Agree / Disagree

- s Confidential advice to Government

Noted

Penalty for misclassifying workers

- t **Agree** that the onus of proving that the employer misclassified the worker to avoid coverage of the FPA should sit with the employer who would have a defence if they can prove, on the balance of probabilities, that they took the action for reasons other than to avoid the FPA.

Agree / Disagree



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

25 / 02 / 2021

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

1. There are a number of policy decisions still needed on design features of the proposed FPA system, including some key design features, in order to obtain sufficient decisions for PCO to begin drafting a Bill (briefing 2021-0627 refers).
2. You have requested advice on these remaining design features be provided to you so that Cabinet agreement to the FPA system and approval to draft can be sought in April 2021.
3. The Fair Pay Agreement Working Group (FPAWG) considered that the existing dispute resolution and enforcement mechanisms under the ER Act should be used to enforce FPAs. They recommended that the Government consider whether additional resources for bodies involved in enforcement would be needed.
4. We provided you an Aide Memoire on the different approaches that could be taken to enforce an FPA that differ depending on how you view their status (Aide Memoire 2021-2448 refers). These were:
 - a. **No Labour Inspectorate Enforcement.** Use the existing approach to enforcing an agreement under the Employment Relations Act 2000 (the ER Act). The parties to the agreement (or in the case of FPAs those who are within coverage) can enforce the agreed terms and conditions through the dispute resolution process (including by way of compliance orders through the ER Authority).
 - b. **Treat the FPA as a minimum standard.** If the FPA is conceptually equivalent to a minimum standard, there is an argument that the Labour Inspectorate could or should have a role in enforcing some or all of the terms of the FPA.
 - i. **With limited enforcement.** The Labour Inspectorate would be able to take enforcement action where an employer breaches their obligation to pay the FPA base wage (and any subsequent adjustments) or agreed minimum leave entitlements. We consider that this would be an extension of the Labour Inspectorate's existing role in enforcing minimum entitlement provisions.
 - ii. **With full enforcement.** This option would be a considerable extension of the Labour Inspectorate's existing function by enabling the labour inspector to have a role in enforcing matters agreed by parties and not set by Parliament (these matters, under the ERES system currently, are left to the parties to the agreement to enforce through dispute resolution).
5. You indicated your preference that the FPA be treated as a minimum standard and accepted that not all the terms and conditions of the FPA would be appropriate to be enforced by the Labour Inspectorate. In addition to the base wage and minimum leave entitlements, you indicated that your preference was to include overtime and penal rates. There was an indication that if the term related to pay and it was clearly enforceable that the Labour Inspectorate should have a role in enforcing it.
6. This briefing provides more detailed advice on the proposed role of the Labour Inspectorate in enforcement of the specific terms of the FPA and their wider compliance role in the FPA system.

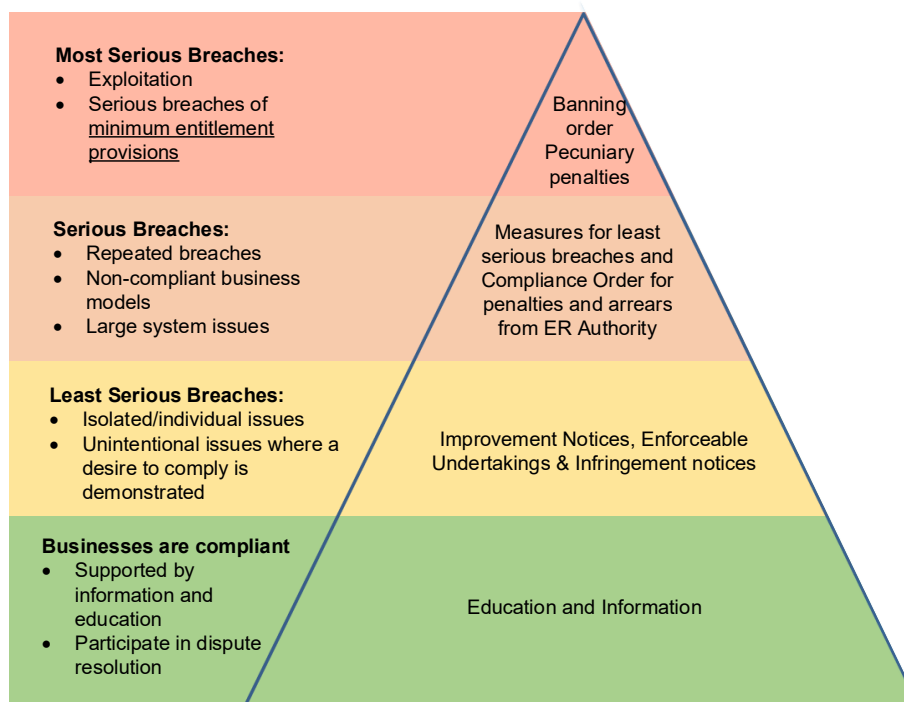
The Labour Inspectorate's enforcement and compliance role in the ERES system

7. The Labour Inspectorate's jurisdiction and powers are set out in the Employment Relations Act 2000 (the ER Act). The Labour Inspectorate is the ERES system regulator that monitors whether provisions of ERES Acts have been complied with and takes all reasonable steps to

ensure compliance. As well as having a general role in ensuring compliance with ERES Acts in its jurisdiction, a key role of the Labour Inspectorate is to:

- a. enforce 'minimum employment provisions', such as the minimum wage and leave entitlements; and
 - b. ensure that employers meet their statutory obligations to record certain information that allows the Labour Inspectorate to determine whether the employment standards have been breached. These include the employee's individual employment agreement, the employee's wage and time records and the holiday and leave records.
8. The Labour Inspectorate does not have a role in enforcing contractual matters that have been agreed between the parties.
 9. A key objective of the Labour Inspectorate is fair workplaces. This is achieved through lifting compliance and capability in workplace relationships to ensure workers receive their minimum entitlements and employers are not undercut by competitors breaching minimum employment standards.
 10. There are two channels for the obligations and rights set out in ERES Acts to be enforced:
 - a. **By the employee themselves (or through a representative):** the individual employee may choose to raise concerns through the dispute resolution process, this may involve early problem resolution and mediation in the first instance, or the Employment Relations Authority (the Authority) and the Courts where the problem was unable to be resolved. Where an employer has breached their obligations or minimum standards the employee or their representative may choose to apply to the Authority for a compliance order to rectify the breach or seek a penalty; or
 - b. **The Labour Inspectorate:** Figure 1 below sets out the general enforcement approach based on the level of compliance.

Figure 1 Enforcement and Compliance



11. A key focus of the regulator (including employment services) is on supporting employers to be compliant through education and information. The Labour Inspectorate takes a risk-based compliance approach.

The Labour Inspectorate has a number of lower-level compliance tools

12. Part of the Labour Inspectorate's role is to determine whether the provisions in the Acts within their jurisdiction are being complied with and taking reasonable steps to ensure compliance. In most instances where there is an isolated instance of a breach of a provision in an Act a lower level enforcement tool will be used:
- a. **Improvement notices:** if the Labour Inspectorate believe on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts they may issue an improvement notice that requires the employer to comply with the provision. This notice must have the steps the employer could take to comply and a timeframe for compliance.
 - b. **Enforceable undertakings:** a labour inspector and the employer agree in writing that the employer will undertake, by specified date, to rectify a breach of any provision of the relevant Acts, or pay money owed to an employee under a provision of the relevant Act or take any action that the labour inspector determines is appropriate. The undertaking can be withdrawn or varied with the consent of the labour inspector.
 - c. **Infringement notices:** A labour inspector may issue an infringement notice where there are reasonable grounds for believing that the person committed an infringement offence. These are where an employer has failed to either:
 - i. retain a copy of the employee's employment agreement or the current terms and conditions of employment, or failed to retain a copy of the intended employment agreement;
 - ii. keep a wages and time record;
 - iii. keep a holiday and leave record.

The notice contains an infringement fee of \$1000 per offence (up to a maximum of \$20,000 in a three month period).

If an employer fails to act on the improvement notice or enforceable undertaking the labour inspector may seek a compliance order to seek arrears or/and a penalty

13. If an employer fails to improve or take an action from an enforceable undertaking within the specified timeframe the labour inspector may apply to the ER Authority to seek a compliance order. If a party continues to fail to comply an application can be made to the Court who has significant powers including awarding a fine not exceeding \$40,000.
14. A labour inspector may only seek a direct penalty (without first needing to go through the process of issuing a lower-level enforcement tool and compliance order process) against an employer for a breach of a provision in limited circumstances. These include where an employer has failed to retain a copy of the individual employment agreement or failed to retain wage and time records or holiday and leave records.

The Labour Inspectorate is empowered to take action on behalf of an employee in a limited number of circumstances

15. While a labour inspector is able to issue improvement notices and enforceable undertakings in relation to any provision within its jurisdiction, it may only act on behalf of an employee in a limited number of circumstances. These include:
- a. to recover wages or holiday pay, or money payable to the employee, under the Minimum Wage Act or the Holidays Act;

- b. where there is a serious breach of the minimum entitlement provisions they may, as well as recovering arrears, seek compensation orders for employees who have suffered loss or damage as a result of the serious breach;
- c. to determine whether a contractor should be classified as an employee.

The Labour Inspectorate cannot recover money on behalf of workers where it does not relate to a minimum entitlement breach

16. If, for example, an employee had only received part of their wages but this totalled to more than the minimum wage for each hour worked, the Labour Inspectorate is not empowered to recover the remaining money that has not been paid on behalf of the worker. Rather, the worker would apply to the ER Authority for a compliance order to enforce the employer to pay that employee their remaining wages and salary or seek arrears themselves through the dispute resolution process.

'Minimum entitlement provisions' attract stronger enforcement consequences

17. There are more stringent enforcement consequences where 'minimum entitlement provisions' are breached. These are defined in the ER Act as:
- a. the minimum entitlements, and payment for those, under the Holidays Act,
 - b. the minimum entitlements under the Minimum Wage Act, and
 - c. the provisions for the Wages Protection Act (which includes when lawful deductions can be made).
18. Only the Labour Inspectorate can apply to the court for a declaration that there has been a serious breach of a minimum entitlement provision. The consequences of a serious breach may be a pecuniary penalty of up to \$50,000 for an individual or \$100,000 for a body corporate, a compensation order and, in some instances, a banning order that prevents employers from operating in the labour market for up to ten years.

You have indicated that the FPA should be treated as a minimum standard with a limited enforcement role for the Labour Inspectorate

19. As with the ER Act, the parties within coverage of an FPA will be able to personally enforce their rights and obligations agreed in the FPA through the dispute resolution process (briefing 1920-2210) and compliance processes (briefing 2021-1989 refers).
20. You have indicated that you agreed with our recommendation that the Labour Inspectorate should be able to enforce some limited terms of the FPA where the Labour Inspectorate has an existing enforcement role. The terms we recommended include the:
- a. FPA base wage(s),
 - b. incremental adjustments to the FPA base wage(s), and
 - c. minimum leave entitlements that build on existing leave entitlements under the Holidays Act 2003.
21. You also indicated you wanted to include overtime and penalty rates. These are discussed in the next section.
22. The base wage (and any incremental adjustments) in the FPA, in effect, will be setting a new 'minimum wage' for that industry or occupation that would be able to be enforced by the Labour Inspectorate. Likewise, if leave entitlements are agreed that are above the minimum

entitlements provided for in the Holidays Act, these will be enforceable by the Labour Inspectorate.

23. As mentioned above, one of the Labour Inspectorate's key objectives is to ensure employers are providing employees with their minimum employment entitlements. We consider that these terms would fit within the Labour Inspectorate's existing role of enforcing minimum employment entitlements.
24. Under this approach the Labour Inspectorate would be able to seek wage arrears for a failure to pay the FPA base wage (or adjusted FPA base wage) or failure to pay minimum leave entitlements. This would create a strong signalling effect that the FPA must be abided by or else risk enforcement measures. This mitigates some of the risk around possible non-compliance due to not having a union presence in a workplace and having workers with low bargaining power. We consider this should strongly incentivise employers to ensure the base wages of an FPA are provided to those workers in coverage.

We recommend a legislative template specifies the parameters of the terms that are intended to be enforced by the Labour Inspectorate

25. In order to do this, we recommend that there is a legislative template that specifies the parameters of the base wage, adjustments and leave entitlements. This template could provide sufficient flexibility for parties to specify a process to get the base wage (and adjustments) so long as it is possible to work out that base wage by reading the FPA itself, or the figure specifying the base wage, adjustments or minimum leave entitlements.
26. The proposed agreed wording could be checked by the vetting body to ensure it fits within the template (and is therefore enforceable by the Labour Inspectorate). The parties would be required to agree wording that fits within the templates parameters before the FPA could proceed to the ratification stage.

You indicated a preference for overtime and penalty rates to be enforceable by the Labour Inspectorate

27. We considered whether overtime and penalty rates should be enforceable as though they were minimum entitlement provisions (and for the Labour Inspectorate to seek arrears where breach is found). In order to be enforceable we consider that they would need to be:
 - a. drafted clearly,
 - b. be measurable and quantifiable in the FPA itself (and not subsequently through the employment agreement),
 - c. enable the Labour Inspectorate to apply a consistent enforcement approach to all workers and employers within coverage of the FPA, and
 - d. be workable and not unduly complex so the Labour Inspectorate can enforce it efficiently.

The Labour Inspectorate does not have an existing role in enforcing overtime and penalty rates

28. The Labour Inspectorate does not have an existing role in enforcing overtime and penal rates (unless they impact on payment for Holidays Act minimum entitlements). This is currently a contractual matter and where issues arise these are dealt with through the dispute resolution process (including, on application by an employee or their representative, through a compliance order issued by the Authority or Court where an employee's employment agreement has been breached).

29. In order to work through the complexities of enforcing the base wage and overtime and penalty rates we have created the following hypothetical examples:
- a. **Tim's employer fails to pay him the contracted amount.** Tim is a cleaner who is covered by an FPA. The FPA sets a base wage of \$23 per hour. Tim's employment agreement says his wage is \$26 per hour. His employer, Just Cleaning, pays Tim \$24 per hour. The Labour Inspectorate cannot enforce this breach of Tim's contract as the base wage for the FPA has been paid.
 - b. **Tim's employer fails to pay Tim the overtime rate based on his contracted rate.** Building on the scenario in (a) above, the FPA sets an overtime rate of 1.5 times Tim's contracted wage to be paid after 40 hours in a week have been worked. While the Labour Inspectorate cannot recover arrears for breaches to Tim's contracted rate, they would be able to recover arrears for failing to pay Tim's contracted rate where it relates to overtime. This would create inconsistencies in what the Labour Inspectorate could seek arrears for (ie it allows the Labour Inspectorate to enforce the *contracted rate* in relation to overtime). This would also mean the Labour Inspectorate could recover different amounts per worker, based on their contracted amount. This would be inconsistent with enforcing a minimum standard equally across all workers.
 - c. **Tim's employer fails to pay Tim the minimum overtime rate established in the FPA.** In this scenario the overtime rate is specified in the FPA as \$35 per hour once Tim has worked a 40 hour week. Tim is only paid the base FPA wage of \$23 per hour, even though he worked a 45 hour week. The Labour Inspectorate would be able to seek arrears for Tim for the five hours where the employer failed to pay Tim his overtime rate. The overtime rate that the Labour Inspectorate can enforce is the same for any worker covered by the FPA because the FPA sets a minimum rate for which overtime must be paid (i.e. it does not change based on the contracted rate).

On balance we consider that overtime or penalty rates could be enforceable by the Labour Inspectorate as minimum entitlements if there are sufficient safeguards in place

30. On balance, we consider it is viable for overtime and penalty rates to be enforced by the Labour Inspectorate if sufficient safeguards are in place to ensure workability, minimise complexity of enforcement and to ensure a consistent enforcement approach within the FPAs.
31. While, operationally, overtime rates and penalty rates will raise a number of complexities, for example, there are likely to be questions about whether the employer authorised the worker to work the overtime hours. These concerns exist now when enforcing other minimum leave requirements (was the worker actually asked to work on Easter, or did the worker chose to work that day without authorisation). Adding in additional terms for the Labour Inspectorate to enforce will increase this complexity, however, we consider it is consistent with the view that FPAs are setting new minimum entitlements that, where specific and measurable, should be enforced.
32. We recommend that the rates need to be clearly determinable by reading the FPA itself. For example, the FPA could specify an hourly wage that is to apply for overtime or penal rates (like a Sunday rate), or it could specify a formula determinable by reading the FPA (for example, 1.5 times the FPA base rate). As mentioned above, we recommend that a template is drafted that specifies how the overtime and penalty rates can be specified so that they are able to be enforced by the Labour Inspectorate.
33. We recommend that the proposed agreed wording inputted into the template would then be checked by the vetting body to ensure it is able to be enforceable by the Labour Inspectorate. The parties would be required to agree wording that is considered enforceable before the FPA could proceed to the ratification stage.

34. This will ensure that the minimum entitlement for overtime and penalty rates is drafted clearly, is measureable and quantifiable, and is therefore consistently applied across FPAs. Like the base wage, parties will be able to agree to overtime rates or penalty rates that are higher than the FPA, however, the Labour Inspectorate would only be able to seek arrears where the FPA overtime or penalty rate has been breached. This is consistent with how Modern Awards specify overtime and penalty rates in Australia.
35. While there is a risk of unintended consequences such as limiting innovation and locking in business models, we consider that this approach still leaves room for bargaining parties who do not agree penalty rates or overtime rates to work within these parameters. For example, the parties could agree that the base FPA rate is the penalty rate for the purposes of meeting the requirements of the mandatory terms of the FPA.

Specificity of hours worked

36. Currently, section 130 of the ER Act specifies what wage and time information the employer must record. In relation to hours worked, the employer is only required to record the number of hours worked each day in a pay period and the pay for those hours. This can be recorded either in a wage and time record, the employment agreement or a roster (or any other document or record) used in the normal course of the employee's employment.
37. The Labour Inspectorate would need access to the employee's record of worked hours in order to assess whether overtime or penalty rates have been paid. Depending on the type of penalty or overtime rates agreed in the FPA, the record may need to include:
 - a. The time of day the hours were worked (for example, night time hours may include a higher rate of pay)
 - b. The day of the week that the employee worked (for example, working on a Sunday may include a higher rate of pay).
38. We recommend that where there is an FPA there be a requirement on employers to keep a record of the days of the week and times that the employee worked in order for the Labour Inspectorate to enforce overtime and penalty rates. Note, this may have an impact on existing pay roll systems and should be signalled well in advance so that employers can update their systems to reflect the new requirements.
39. The FPA would be required to specify what the total number of ordinary working hours are for a day or week before the overtime rate applies.

We are considering whether the Labour Inspectorate needs to be empowered to decide if the employee is in coverage of the FPA

40. We think it could be viable that the Labour Inspectorate is empowered to make a decision about whether the employee is in or out of coverage for the purpose of enforcement. Then, if an employer disagreed that the employee was in coverage they would be able to dispute this by taking a case to the ER Authority. We consider, due to the cost and resources involved in going to the ER Authority, that only those cases that are on the margins are likely to be disputed.
41. However, empowering the Labour Inspectorate to decide an employee's coverage comes with certain legal risks and liability. We are still working through the extent of these and what possible safeguards could be provided in order to give the Labour Inspectorate this power. If we cannot provide sufficient safeguards it may be that the Labour Inspectorate would need to apply to the Employment Relations Authority to get a determination about whether the employee is within coverage. We advise that in the Cabinet paper you seek delegated authority to make ministerial decisions on this point.

Role of the Labour Inspectorate in other terms and conditions of the Agreement and requirements of the FPA legislation

42. The Labour Inspectorate has a general role in ensuring compliance with obligations set out in the laws within their jurisdiction, to do this they have their lower-level enforcement tools available: improvement notices, enforceable undertakings and infringement fines. In order for the Labour Inspectorate to have a role in enforcing the Agreement, the FPA legislation will be added to the laws that fit within the Labour Inspectorate's jurisdiction. The Labour Inspectorate's compliance role applies to secondary legislation that is made under those laws, and would, unless there is an express exclusion, apply to the specific terms of the bargained FPA.

The Labour Inspectorate does not have an existing role in ensuring compliance with agreed contractual terms and conditions

43. The Labour Inspectorate does not have a role in ensuring compliance with contractual terms and conditions above minimum entitlements or in relation to requirements specified in legislation. While you have indicated that the FPA is to be treated as a minimum standard, we have put in place safeguards to ensure these matters are able to be enforced by the regulator, including that PCO drafts a template of the terms and conditions that need to be sufficiently clear and specific for enforcement purposes.

The remaining terms and conditions are unlikely to be appropriate for the Labour Inspectorate to use their compliance tools

44. We do not consider it appropriate for the Labour Inspectorate to have a role in ensuring compliance with the remaining terms and conditions of the FPA because:
- a. There is a strong risk that the terms agreed will **not drafted sufficiently clearly** for the Labour Inspectorate to be able to seek compliance.
 - b. The terms and conditions agreed are **unlikely to be appropriate for the Labour Inspectorate** to have a role in ensuring compliance as they may be subjective and not objectively measurable. In these instances, the parties themselves are best placed to resolve any issues through dispute resolution or personal compliance mechanisms.
 - c. Providing the Labour Inspectorate a role in ensuring compliance with the other terms and conditions of the FPA may **provide an expectation of enforcement**, even when this is not feasible. This is likely to increase complaints to the Labour Inspectorate that in reality they are unable to address. It would be an inefficient use of the Labour Inspectorate's time to triage and redirect these complaints to mediation.
 - d. It could result in different and inconsistent enforcement approaches depending on the level of clarity of the terms of the FPA. It could lead to some employers' actions being able to be enforced and others not. This could create **inconsistent outcomes** that are likely to be viewed as unfair by employers who receive harsher consequences (ie being penalised for failing to abide by an improvement notice).
45. For these reasons we recommend being very clear in the legislation about where the Labour Inspectorate does and does not have a role in the FPA system. We recommend that the Labour Inspectorate is able to use their compliance tools in relation to obligations set out in the FPA legislation and the terms and conditions that will constitute minimum entitlement provisions in the FPA (the FPA base wage (and any adjustments), minimum entitlement provisions, overtime and penalty rates). We recommend being explicit that the Labour Inspectorate will not have jurisdiction to enforce those terms and conditions of the FPA that are not minimum entitlement provisions.

However, we consider that the Labour Inspectorate's role in relation to flexible work should be consistent with their existing role under the ER Act

46. There are two slightly inconsistent approaches under the ER Act around flexible work. Under the ER Act if an employee believes that an employer has not complied with their requirements under the Act in relation to a flexible work application they can refer the matter to a labour inspector. At that time, the labour inspector must, to the extent practicable in the circumstances, assist the employee and employer to resolve the matter. If this does not resolve the matter the employee may refer the matter to mediation.
47. However, there is a slightly different process in the most recent provisions around short-term flexible work. In this instance, where workers apply for a short-term variation to their usual work in response to domestic violence and the employer fails to follow the statutory process, the employee may instead choose either to apply to a labour inspector to assist in resolving the matter, mediation or to apply to the Authority for a determination.
48. The Labour Inspectorate is a limited resource with strong competing priorities that often means it is not practicable to respond to these concerns on an individual basis, and as such these matters are typically handled by mediation.
49. We recommend a consistent approach with the short-term flexible work provisions where it is up to the employee to choose the vehicle that they wish to have their concerns heard. This would mean the Labour Inspectorate would have a role in assisting parties to resolve their concerns around flexible work if the employee chooses to use the Labour Inspectorate to do so.

Should unions have standing in and of itself as a party to the FPA

50. We have recommended that anyone that is in coverage of an FPA is able to personally enforce the rights and obligations set out in the FPA legislation and the FPA itself. There is a question about whether the unions with workers in coverage of an FPA should be given *standing* to take a claim as a party to the agreement without the need to first get a workers consent to take the claim.
51. Under the ER Act, a union is required to get individual consent both from their own union members and from non-union members if they wish to take action on behalf of the worker. We do not recommend a change to this approach. Under the Equal Pay Amendment Act, the union can take a claim on behalf of workers and union members, however, workers have the right to opt out of the process. If the union wished to enforce the Pay Equity Settlement after it was agreed they would need to get both their own union members and the non-union members consent to do so.
52. Legally, even if we were to provide the union standing, it would not be able recover arrears or compensation from a breach without a claimant. However, the union could seek to take a case to have a penalty imposed on the employer where they can prove that the employer has breached an obligation set out in the Act or in the FPA itself.
53. We consider this would be a significant shift away from the existing processes under the ERES system and raises complex freedom of association concerns that we have not been able to work through in the timeframes. We do not recommend giving unions standing to take claims in and of themselves unless they have their members or non-union members consent (consistent with the existing processes under the ER Act).

Misclassifying a worker as a contractor to avoid the FPA

54. You agreed to include in the FPA system an ability to penalise an employer who misclassified an employment relationship as a contractor arrangement to avoid the FPA. At the FPA meeting on 17 February we discussed whether:
- a. The penalty should be strict liability and apply to any misclassification,
 - b. the claimant should have to prove that the employer misclassified them in order to avoid the FPA, or
 - c. that the employer has a defence by providing evidence that they did not misclassify in order to avoid the FPA. This would be shifting the burden of proof from the worker who sought to have their employment status clarified, to the employer.
55. We do not recommend that the penalty is strict liability as this would mean any misclassification of an employee, regardless of intent, could attract a penalty. This would apply more broadly to any workers who are misclassified. We consider that this would be pre-empting the work underway on dependent contractors (but currently paused until resources are freed up from other work programmes) that is considering this as one of many options.
56. We recommend that the onus of proof be reversed because the employer is best placed to provide the defence that the misclassification was not done with the intention of avoiding coverage of the FPA. It would be difficult for the worker to prove what the employer's intention was, other than by objective measures, for example, if the whole workforce was changed to one of contracting or if the timing of the change coincided with the introducing of the new FPA terms.
57. We consulted the Ministry of Justice about reversing the onus of proof. They considered we had a strong policy rationale for reversing the onus of proof. They noted it will be important to articulate in the Cabinet paper why the normal principles of natural justice are unable to be followed, and why reversing the onus of proof is justified in the circumstances.

Budget implications

Confidential advice to Government



Next steps

62. We will be 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.