



BRIEFING

Fair Pay Agreements - Timeframes

Date:	11 March 2021	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1897

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Agree to the timeframe recommendations in this briefing.	15 March 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

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

Fair Pay Agreements - Timeframes

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Purpose

To seek decisions on timeframes in the FPA system.

Executive summary

This briefing discusses in chronological order the steps in the FPA process and the timeframes involved in that process. These are summarised in Annex 1. You have already made decisions on some of the timeframes but these are included for completeness or because some element of the timeframe has been reconsidered. The measure used for the timeframes is working days.

The recommended timeframes in this paper seek to balance your desire for a fast FPA development process with your objective for parties to as much as possible reach a bargained outcome. In line with good regulatory practice we have also considered a range of relevant factors including what can be reasonably achieved by parties, the ability to complete an FPA in a reasonable amount of time, interactions between timeframes, certainty and transparency, consequences of non-compliance, and consistency with other relevant legislation.

Many of the choices in this briefing around whether the legislation should set a timeframe involve balancing the need to provide sufficient time for the body or party to undertake a robust process and parties being able to put in place an FPA in a reasonable amount of time. In many cases after balancing these considerations our recommendation has hinged on what can reasonably be achieved by the body or party given its capacity and the nature and complexity of the task, and whether the consequences of non-compliance with a timeframe would be meaningful or appropriate.

It is important to note that the recommended timeframes in this briefing are based on the underlying assumption that the government body and ER Authority are sufficiently resourced to be reasonably able to meet their timeframes.

Our estimated total time for the development of an FPA from initiation to the creation of the legislative instrument is approximately 19 months. This estimate is based on our recommended timeframes plus estimates of the likely time to undertake steps such as verification of initiation, bargaining, and ratification.

We will be providing you with further timeframe advice in upcoming briefings on transitional provisions, duration of agreement, and renewal timeframes.

Recommended action

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

- a **Note** that the FPA Working Group did not specify particular timeframes in its recommendations but noted that clear timelines will be needed to prevent lengthy processes creating excessive uncertainty or cost.

Noted

- b **Note** that the recommended timeframes in this paper seek to balance your desire for a fast FPA development process with your objective for parties to as much as possible reach a bargained outcome.

Noted

- c **Note** that in line with good regulatory practice officials have taken a range of further considerations into account in making recommendations on timeframes for each step in the FPA process.

Noted

- d **Note** that the recommended timeframes in this briefing are based on the underlying assumption that the government body and ER Authority are sufficiently resourced to perform their intended roles in the FPA system.

Noted

Initiation

- e **Agree** that ER Authority should be required to set a period that it considers appropriate for submissions on a public interest test but that it must be at least 20 working days.

Agree / Disagree

- f **Agree** that indications of support collected more than 12 months before the date on which a representation test petition is submitted should be deemed to be invalid.

Agree / Disagree

- g **Agree** to one of the following timeframe options for the completion of verification of initiation tests and checking coverage.

Option 1: no timeframe in legislation (as per the SIWB)	<i>Agree / Disagree</i>
Option 2: as soon as reasonably practicable (MBIE recommendation)	<i>Agree / Disagree</i>
Option 3: as soon as reasonably practicable and no later than within 45 working days of receiving an initiation application, with the power to extend by up to an additional 80 working days (as per the Equal Pay Act) (not recommended)	<i>Agree / Disagree</i>

Notification

- h **Agree** to one of the following timeframe options for the government to publish a notice after a decision has been made on an initiation test.

Option 1: As soon as reasonably practicable	<i>Agree / Disagree</i>
Option 2: within 5 working days of a decision being made on an initiation test (MBIE recommendation)	<i>Agree / Disagree</i>

- i **Note** that we have considered but do not recommend reducing the FPA initiation notification timeframes.

Noted

Bargaining and dispute resolution

- j **Note** that you have agreed the employer bargaining side must identify representatives within 60 working days.

Noted

- k **Agree** that bargaining parties on the same team should be required to develop an agreement about their approach to bargaining within 20 working days of representatives being set.

Agree / Disagree

- l **Note** that you have agreed to a time based element in the threshold for when an FPA can be referred to the ER Authority to set terms and conditions.

Noted

- m **Agree** that the ER Authority should be required to issue a determination to fix the terms and conditions of an FPA within 60 working days/ 3 months of the hearing date or the date final evidence is received.

Agree / Disagree

- n **Agree** that the Chief of the ER Authority should be empowered to extend the time limit to issue a determination to fix the terms and conditions of an FPA if the Chief of the ER Authority considers exceptional circumstances exist.

Agree / Disagree

- o **Agree** that the ER Authority should be required to complete vetting of an FPA as soon as reasonably practicable and no later than 20 working days after receiving the agreed FPA from bargaining teams.

Agree / Disagree

- p **Agree** that the Chief of the ER Authority should be empowered to extend the time limit for the vetting of an FPA if the Chief of the ER Authority considers exceptional circumstances exist.

Agree / Disagree

Ratification

q **Note** that you have agreed timeframes for notifying employers and workers that an FPA is ready for ratification, and that we have reconsidered these timeframes in light of their interactions together and the impact on the total time to undertake ratification.

Noted

r **Agree** that the opt-out period at ratification should be reduced from 20 working days to 10 working days.

Agree / Disagree

s **Agree** that the requirement for 10 working days' notice before ratification is set to take place can occur concurrently with the 10 working day opt-out period for workers.

Agree / Disagree

t **Agree** that bargaining parties should be required to complete ratification of an FPA as soon as reasonably practicable.

Agree / Disagree

u **Agree** that the government body should be required to verify ratification of an FPA no later than 20 working days from the date final information is received from either bargaining party.

Agree / Disagree

v **Agree** that there should be no time limit for the government body to create an FPA legislative instrument.

Agree / Disagree



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

..... / /

Hon Michael Wood
Minister for Workplace Relations & Safety

..... / /

Approach taken in timeframes advice

1. This briefing discusses the steps in the FPA process and the timeframes involved in that process. These are summarised in Annex 1. You have already made decisions on some of the timeframes but these are included for completeness or because some element of the timeframe has been reconsidered.

FPA Working Group recommendations

2. The FPA Working Group did not specify particular timeframes in its recommendations but noted that clear timelines will be needed to prevent lengthy processes creating excessive uncertainty or cost. Where the Working Group commented on timeframes in any specific area we have noted this in our advice.

We have balanced competing considerations

3. The proposed timeframes in this paper seek to balance your desire for a fast FPA development process with your objective for parties to as much as possible reach a bargained outcome.
4. There are no definitive rules governing the form and length of legislated timeframes. In addition to your noted objectives, in line with good regulatory practice we have taken the following considerations into account:
 - a. **What can be reasonably achieved by parties** – the timeframe can reasonably be met by the party given its capability and capacity, and the nature and complexity of the task.
 - b. **The ability to complete an FPA in a reasonable amount of time** – together the timeframes allow parties to complete an FPA in a reasonable amount of time, and prevent excessive delay and cost.
 - c. **Interactions between timeframes** – the timeframes are proportionate to each other and work together well as a whole.
 - d. **Providing certainty and transparency** – the timeframe provides sufficient certainty for parties where necessary and supports transparency and accountability.
 - e. **Consequences of non-compliance** – the timeframe is clear enough to be enforced and there are appropriate and meaningful consequences for failing to meet the timeframe.
 - f. **Consistency or interactions with other relevant legislation** – in this case we have looked at the Employment Relations Act (ER Act), the Screen Industry Workers Bill (SIWB), and the Equal Pay Act.

Underlying assumption of sufficient resourcing

5. The recommended timeframes in this briefing are based on the underlying assumption that the government body and ER Authority are sufficiently resourced to perform their intended roles in the FPA system. We have previously advised that one of the risks of creating an open system with an inability to limit or control demand for FPAs is that, depending on resourcing, the government body and/or ER Authority may be unable to reasonably meet specified timeframes in legislation.

Timeframes specified as working days

6. For consistency and the ability to easily add timeframes, we have specified the timeframes in working days.

Initiation

New: when submissions on the public interest test are called for, we recommend the ER Authority allow at least 20 working days

7. You have agreed that interested parties will be able to make submissions to the ER Authority on an initiation application through the public interest test [briefing 2021-1978 refers].
8. We consider that the timeframe for submissions should recognise that submitters may need time to gather evidence and consult in support of their submission. The SIWB requires the ER Authority to invite submissions on an application to initiate bargaining with a deadline of no earlier than 28 days after the date on which the ER Authority gives the notice.
9. Consistent with the SIWB we recommend the FPA legislation include a timeframe of at least 20 working days for submitters to make a submission to the ER Authority on an application to initiate FPA bargaining through the public interest test. As per the SIWB, we recommend that 20 working days is a minimum timeframe and that the Chief of the ER Authority should be empowered to set a longer period within which submissions must be made if he or she considers it appropriate.

New: to ensure any indications of support for the representation test is current, we recommend they must have occurred within the previous 12 months

10. We consider a timeframe which sets the date before which indications of support will be invalid is necessary to ensure the representation test petition represents current rather than more historical views. The timeframe must allow unions sufficient time to canvas the views of their members around the country, including workforces that may work seasonally.
11. We recommend indications of support collected more than 12 months before the date on which the representation test evidence is submitted should be deemed to be invalid. We consider this timeframe strikes a balance between ensuring the initiation evidence represents current views and allowing reasonable time for unions to canvas views.

New: there are options for a timeframe for verification of initiation tests and checking coverage

12. You have agreed that the ER Authority will assess whether the public interest test has been met and the government will assess whether the representation test has been met [briefing 2021-1978 refers]. You have also agreed coverage would be checked at the same time [briefing 2021-1837 refers]. The successful completion of these checks indicates that FPA bargaining can commence.
13. You have a choice around whether the FPA legislation includes a timeframe for verification and checking coverage. We have considered the following options:
 - a. No timeframe in legislation (in line with the SIWB).
 - b. An obligation in the legislation to issue a decision 'as soon as reasonably practicable'. **[MBIE recommended option]**
 - c. A specific timeframe of as soon as reasonably practicable and no later than 45 working days, with the power to extend a further 80 working days (in line with Equal Pay Act).

No timeframe in legislation

14. Under this option there would be no statutory timeframe within which the verifier must decide whether the initiation test has been met and coverage is clear. This is in line with the approach taken in the SIWB.

15. This option best reflects that initiation is a low hurdle and there are no mechanisms to manage demand for FPAs under current policy settings. There are likely to be periods where demand for verification of initiations exceeds resourcing levels for verification officers, resulting in queuing. With no statutory timeframe the risk of judicial review is reduced, noting however that common law principles of 'procedural fairness' and 'legitimate expectation' that decisions will be made and will not be unreasonably delayed would still apply.
16. The drawback of this option is that it does not provide parties with certainty or transparency around how long the government will take to process an initiation.

As soon as reasonably practicable [MBIE recommended option]

17. Under this option the government body/ ER Authority would be required to decide whether the initiation test has been met and coverage is clear as soon as reasonably practicable.
18. This option establishes a greater imperative for the verifying body to make a decision in a timely manner. It also slightly increases the risk of judicial review if the time taken does not meet the union's expectations of timeliness, although we consider the real risk of judicial review to be low.
19. We consider this option is appropriate in light of the absence of mechanisms to limit demand under current FPA policy settings. Timeframes for a decision will vary according to the level of resourcing and consequent queuing in the system. For example, if six applications to initiate bargaining are received concurrently this will have a flow on effect for the time within which a decision can be made for each one.
20. This option is also appropriate in light of the nature and complexity of the tasks involved. The time required to verify an initiation test and check coverage will vary considerably depending on the quality of the application (there may need to be communication with the applicant to clarify certain points or seek further information), the availability of industry or occupation level data, and any issues raised in submissions on the application.
21. Under this option we consider it would be appropriate to set a government performance target with the expectation that we refine this target as we develop a better understanding of the volume of FPAs coming through the system and the time required to undertake the role.

Specific timeframe

22. Under this option the legislation would stipulate that the government body / ER Authority must verify the initiation test and approve coverage as soon as reasonably practicable and no later than 45 working days of receiving the application, with the power to extend this deadline by an additional 80 working days. This is similar to the approach taken in sections 13Q and 13R of the Equal Pay Act relating to employers' obligations to form a view on whether a pay equity claim is arguable, though there is also the possibility of extending that 80 working day timeframe if the parties agree. This recognises that in multi-employer pay equity claims, the process of identifying the work that the claim applies to and assessing arguability can be a lengthy process. We do not recommend this option.
23. The benefit of this option is it provides the most certainty and transparency to parties on the process for a decision.
24. While it may ensure a more timely process for delivering a decision on an application, there are heightened risks that:
 - a. It incentivises the verifier to work to the final deadline, or
 - b. The verifier fails to meet the deadline due to the government's inability to limit demand under current FPA policy settings. Resourcing would need to cover the full demand for FPAs and be tightly ring-fenced for this option to be achievable.

25. Establishing appropriate consequences for a failure by the verifier to meet this deadline presents issues. Given the mandatory nature of the FPA system, whereby once an FPA is initiated it must reach completion – either through bargaining or determination, it would not be appropriate to allow the application to proceed to bargaining without the verifier being able to confirm it has passed the public interest or representation test. A more likely consequence would be a judicial review or a complaint to the Ombudsman, which would stretch resources further.

Notification

26. The FPA Working Group noted that it will be critical that all affected employers and workers are notified once an FPA process is initiated. It recommended that once an independent body had verified that the initiation tests had been met, it should inform all affected parties (workers and employers) that bargaining will commence. It also recommended that minimum requirements for notifying affected parties should be set in law.

New: there are options for a timeframe for the government body to publish a notice after a decision has been made on an initiation test

27. The previous Minister agreed that employers and unions should have the primary role to notify affected parties that FPA bargaining has been initiated, supported by peak bodies and the government [briefing 2210-1920 refers].
28. In previous advice we suggested that the government could establish an FPA website with information and contact details, as well as using its existing communication channels to raise awareness. We noted that the degree to which the government could publicise the initiation of FPAs would depend on the funding available [briefing 2210-1920 refers].
29. You have a choice around whether and how the FPA legislation includes a timeframe for the government to publish a notice after a decision on an initiation test has been made. The notice would likely be published on the government's website, and would supplement notification and awareness raising by unions, employer groups, and peak bodies. We have considered the following options:
 - a. An obligation in the legislation to issue a notice 'as soon as reasonably practicable' after a decision has been made on an initiation test.
 - b. A specific timeframe of within 5 working days after a decision has been made on an initiation test [**MBIE recommended option**].
30. A requirement to issue the notice as soon as reasonably practicable would best reflect that it is not clear what the consequences would be for the government in not meeting this deadline. On balance, however, while the timeframe for publishing the notice will be dependent on resourcing, we consider the resourcing required to publish the notice would be minimal. We consider a timeframe of within 5 working days would ensure a timely process and could be reasonably achieved in this case.

You have agreed timeframes for notifying workers and employers of initiation and passing on contact details

Decisions on notification timeframes already taken

31. You have agreed timeframes for notifying workers and employers of a successful initiation, passing on contact details, and opt-out periods [briefing 2021-1925 refers]. Specifically, you have agreed that:
 - a. Employers must be required to notify all workers within coverage within 30 working days from the date they become aware of a successful initiation.

- b. Employers must pass on workers' contact details to unions after 20 working days, unless the worker has opted out.
 - c. Employers and unions must inform other relevant employers and unions within 15 working days from the date they become aware of a successful initiation.
32. In addition, you have advised your decision to also require employers to notify unions of workers newly within coverage, and do not opt out of having their contact details passed on, every 90 days.

We have considered, but do not recommend, reducing the FPA initiation notification timeframes

33. We have considered whether any of the initiation notification timeframes could be reduced in order to speed up the FPA development process but do not recommend this. In particular, we note that several participants at the FPA workshop¹ expressed a view that 30 working days for employers to notify workers is longer than necessary. We have considered whether this timeframe could be reduced to 20 working days, or 20 working days with the option to extend an additional 25 working days as per the pay equity bargaining provisions of the Equal Pay Act.
34. On balance we do not recommend reducing the agreed notification timeframes. In our view it will take employers some time to understand what an FPA is, what the process is, and to deduce which of their workers are within coverage, and then notify them.

Bargaining and dispute resolution

You have agreed the employer bargaining team must identify representatives within 60 working days

35. You have agreed that the employer bargaining team must confirm, and seek approval from the relevant government body, at least one bargaining representative within three months (60 working days) of an FPA being initiated. This does not prevent other representatives joining the bargaining team throughout the FPA bargaining process [briefing 2021-1724 refers]. As the FPA would have been initiated by a union, there would already be at least one worker representative identified.
36. We will be providing you with advice on the requirements in relation to the structure/form, and level of government oversight on the selection, of employer bargaining representatives, in order to support your delegated decision on this issue. If it is appropriate a timeframe will be considered as part of this advice.

New: require bargaining parties on the same team to develop an agreement about their approach to bargaining within 20 working days of representatives being set

37. You have agreed to require bargaining parties on the same bargaining team to enter into an agreement on how they will progress and make decisions on FPA bargaining, and to use their best endeavours to enter into this agreement in an effective and efficient manner [briefing 2021-1725 refers].
38. We have reconsidered this advice and now consider the system should include a timeframe (rather than a best endeavours requirement) for agreeing this process agreement. We consider it is important that there is a clear expectation for parties to get organised so that bargaining can commence. A specific timeframe provides certainty and ensures parties cannot purposely draw out this process in an attempt to slow down bargaining.

¹ The FPA Workshop was held on 4 March 2021 to test the FPA development process.

39. We recommend the legislation stipulate that bargaining representatives on the same bargaining side must enter into an agreement about their approach to bargaining within 20 working days of bargaining representatives being set². Several participants at the FPA workshop suggested that developing a bargaining process agreement would not take long.
40. If a bargaining team does not meet this timeframe, the other bargaining team could apply to the ER Authority for a compliance order. A specific timeframe would make it clearer to bargaining teams when they could raise this issue with the ER Authority.
41. Note you have agreed that bargaining teams across the bargaining table use their best endeavours to enter into a process agreement as soon as possible after the initiation of bargaining (as per the approach in the ER Act for collective bargaining) [briefing 2021-1725 refers]. As a process agreement across the bargaining table is not mandatory, there is no associated timeframe required.

You have agreed to a time based element in the threshold for when an FPA can be referred to the ER Authority to set terms

42. You requested that a timeframe be set to avoid prolonged bargaining and subsequently agreed to include a time based element in the threshold for when a bargaining dispute can be referred to the ER Authority to fix the terms and conditions of the FPA. As such, one of the circumstances where the ER Authority can fix the terms and conditions of an FPA is if it is satisfied that a reasonable period has elapsed and bargaining teams have made sufficient efforts to resolve the dispute (including mediation) [1427-2021 refers]. This will be included in the legislation as part of the threshold for when the ER Authority can set the terms of an FPA.
43. In our previous advice on this matter, we recommended against including a set time limit for bargaining as it may incentivise parties to “wait out” the time limit if they consider the fixed terms would be more favourable. The agreed approach gives the ER Authority the discretion to decide what is a “reasonable period” based on the circumstances of each individual instance of FPA bargaining.

New: require the ER Authority to issue determinations to fix FPA terms within 60 working days/3 months of the hearing date or receipt of final evidence, with power to extend

44. As noted above, you have agreed that bargaining parties will be able to apply to the ER Authority to fix the terms and conditions of an FPA after a reasonable period and sufficient efforts for resolving the dispute have occurred.
45. You have choices around whether the legislation sets a timeframe for the ER Authority to issue its determination to fix FPA terms and conditions. A balance needs to be struck between providing sufficient time for the ER Authority to undertake a robust process and parties being able to put in place an FPA in a reasonable amount of time.
46. The ER Act and SWIB (by incorporating the same provisions of the ER Act) include a timeframe for determinations, while the Equal Pay Act does not. The ER Act (and the SIWB through incorporation by reference) stipulates that determinations should be issued within three months of either the hearing date or the date the final evidence is received by the ER Authority. The timeframe can be extended if the Chief of the Authority decides exceptional circumstances exist.

² Note that several participants at the FPA workshop considered calling these ‘bargaining process agreements’ was confusing because that term usually refers to agreements across the table, not within a bargaining team. We consider the policy intent is clear enough for Cabinet decisions but recommend the terminology is addressed through the legislative drafting stage.

47. In the FPA system, the time needed to issue a determination to fix terms and conditions from the hearing date or the date that final evidence is received will vary considerably depending on the size and complexity of the FPA. Factors include the number of terms and conditions needing to be set, the scale of coverage, the nature and complexity of the issues under dispute, and the existence and level of acceptance of any current industry or occupational standards. We expect the fixing of FPA terms and conditions, including the sourcing of expert advice where necessary, is likely to take longer than issuing determinations on disputes under the ER Act in many cases.
48. A further issue is when the clock starts on any timeframe to issue a determination. The time to issue a determination to fix terms from when an application is made will vary significantly depending on the level of queuing in the system. Current service levels for ER Act determinations are approximately 12 months.
49. As noted in previous advice, the ER Act includes limited mechanisms for holding the ER Authority to account in meeting quality standards and timeframes for delivery [briefing 2021-2190 refers]. This means it may be difficult to hold the ER Authority to account for its timeliness or the priority it gives FPA determinations without a more specific timeframe in legislation.
50. On balance, we recommend the FPA legislation require the ER Authority to issue a determination to fix the terms and conditions of an FPA within 60 working days of either the hearing date or the date final evidence is received by the ER Authority. We recommend including a provision allowing the timeframe to be extended if the Chief of the Authority decides exceptional circumstances exist. This approach is consistent with existing ERES legislation, and balances the likely complexity of many determinations with your objective for a fast process.

New: require the ER Authority to complete vetting as soon as reasonably practical and no later than 20 working days after receiving the agreed FPA from bargaining teams, with power to extend if exceptional circumstances exist

51. You have advised your decision that the FPA vetting process should occur prior to ratification, that it should be undertaken by the ER Authority, and that it must be timely [briefing 2021-1615 refers].
52. In subsequent advice we noted that you have choices about whether and how the FPA legislation ensures the vetting process is timely [briefing 2021-2190 refers]. We noted there is a balance to be struck between parties being able to put in place an FPA in a reasonable amount of time and the need to allow sufficient time for the ER Authority to complete an efficacious vet. Our provisional view was that the ER Authority should be required to vet FPAs within a month, with the Chief of the ER Authority having the power to extend this by one month in exceptional circumstances.
53. We have further considered our advice in light of the considerations noted at the start of this briefing. In particular we have further considered what is reasonable for parties in light of the nature and complexity of the task and the consequences of non-compliance.
54. We continue to recommend that the ER Authority should be required to vet FPAs no later than 20 working days after receiving the agreed FPA from bargaining teams, with the Chief of the ER Authority having the power to extend this timeframe.
55. However, we now recommend including a provision allowing the timeframe to be extended (with no limit) if the Chief of the Authority decides exceptional circumstances exist. We consider the power to extend should not be limited to 20 working days because:

- a. The consequences of failing to meet the extend timeframe are not clear. It would not be appropriate to presume the FPA has passed vetting if the ER Authority does not meet its extended timeframe.
- b. The vetting process creates a new role for the ER Authority to identify whether an FPA is inconsistent with either the FPA legislation, minimum employment standards, or is otherwise contrary to law. It is important that the timeframe provides for the exceptional circumstances where ER Authority members may need to work outside their normal areas of expertise to vet an FPA.

Ratification

You have agreed timeframes for notifying employers and workers that an FPA is ready for ratification; we recommend two changes to reduce the overall timeframe

56. You have agreed that bargaining representatives should have an obligation to inform the parties they represent within five working days of becoming aware that the vetting process has been completed and the FPA is ready for ratification, or that the ER Authority has released a determination on the full terms of the FPA [briefing 2021-2405 refers].
57. You have also agreed the following timeframes around ratification:
 - a. On becoming aware that an FPA is ready for ratification, employers must notify employees within coverage within 15 working days [briefing 2021-1925 refers].
 - b. Employers must pass on the contact details of workers who do not opt out after the notification within 20 working days [briefing 2021-1925 refers].
 - c. Each known employee and employer in coverage must be given notice in writing at least 10 working days before the ratification is set to take place of the final date their vote must be cast, among other matters [briefing 2021-2182 refers].
58. We have reconsidered these ratification timeframes in terms of how they work together and the impact on the total time to undertake ratification. We note that current ratification notification decisions result in a total timeframe of at least 50 days before a ratification vote can take place.
59. The two recommendations below reduce the overall ratification notification timeframe from 50 working days to 30 working days.

New: we recommend shortening the opt-out period at ratification from 20 working days to 10 working days

60. We consider it is appropriate to retain the 20 working day opt out period at the notification of initiation, but recommend shortening the opt out period to 10 working days at the ratification notification, as the majority of workers are likely to be have a better understanding of their choices at this later stage in the process and employers should already have a list of the contact details of employees who previously did not opt out. We consider 10 working days still provides a reasonable period for workers to make a decision to opt out and for employers to generate a list of contact details to pass to the bargaining unions.

New: we recommend clarifying that the 10 working days' notice before ratification is set to take place can occur concurrently with the proposed 10 day opt out period

61. We consider it would be reasonable to allow the 10 working days' notice that ratification is about to take place, including minimum requirements such as notification of entitlement to vote and a copy of the draft FPA being made available, to occur concurrently with the proposed 10 working day opt out period. These processes are not mutually exclusive and

allowing them to occur concurrently reduces the overall timeframe by 10 working days. Note that this is consistent with the approach taken in the Equal Pay Act.

New: require bargaining parties to complete ratification as soon as reasonably practicable

62. You have agreed that unions will run the employee ratification process and employer bargaining representatives will run the employer ratification process, in accordance with legislated minimum requirements [briefing 2021-2182 refers].
63. You have choices around whether the legislation should include any timeframe within which parties must complete the ratification process. We have considered options of no timeframe, as soon as reasonably practicable, and a maximum time limit of 20 working days.
64. In our view a balance needs to be struck between the ability to have an effective and fully democratic vote and parties being able to put in place an FPA in a reasonable amount of time. We note that unions and employer bargaining representatives are free to decide their ratification process, and therefore ratification processes may vary from a nationwide road show to all voting taking place remotely. The process is also likely to include a paid meeting.
65. Another consideration is consistency with ERES legislation. The ER Act, SIWB, and Pay Equity Act establish minimum requirements for ratification but do not set a time limit on competing ratification.
66. The consequences of failing to complete ratification in a specified timeframe or taking an 'unreasonable' length of time would be a party could apply to the ER Authority for a compliance order. This disincentive could reduce the likelihood that bargaining representatives use the ratification process to delay the commencement of an FPA.
67. On balance we recommend the legislation require parties to complete ratification as soon as reasonably practicable. This approach provides enough flexibility to undertake a fully democratic vote while creating a positive obligation to complete ratification in a timely manner.

New: require the government body to verify ratification as soon as reasonably practicable and no later than 20 working days from the date final information is received

68. You have agreed to a government body conducting a verification check on the ratification processes and results reported by the bargaining parties, and indicated that you wanted the verification of ratification to be time-bound [briefing 2021-2182 and subsequent email refers].
69. You have also agreed that the government body responsible for verification should have the power to request further information if required during the verification process, and be able to advise bargaining parties if further action is required for a ratification to be approved (briefings 2021-1989 and 2021-2182 refer).
70. In light of your decision that verification of ratification should be time-bound, we recommend the FPA legislation require a timeframe of as soon as reasonably practicable and no later than 20 working days from the date the last piece of supporting information is received by the government body. The extent of further information required to complete a verification is likely to vary, so we consider it crucial that the 20 working days start from the date the last piece of requested information is received.
71. A drawback of creating a time-bound verification process in legislation is, as noted above, if demand for verification exceeds the level of resourcing for verification officers, there is a risk that the government will fail to meet the timeframe.

Commencement

New: we recommend no time limit for the government body to create the legislative instrument

72. You have agreed that an FPA will be finalised by a government body making a legislative instrument. A subset of important terms will be translated into legislative language, with remaining terms attached verbatim from the settled FPA [briefing 2021-1615 refers].
73. It is not standard practice to include a timeframe in legislation for the creation of a legislative instrument but we have considered whether special circumstances exist in this case.
74. The benefit of a requirement to create the legislative instrument as soon as reasonably practicable or within a time limit such as 30 working days is that it would provide more certainty and prevent unreasonable delays in bringing the FPA into force. The timeframe would need to allow for consultation with bargaining teams in order to clarify the FPA content to a level of clarity that is appropriate for a legislative instrument.
75. On balance however our recommendation is not to stipulate a timeframe for the creation of the legislative instrument. We have not yet provided advice on the specific form of the legislative instrument, including whether PCO would have a role in drafting specific aspects, as this will be discussed during the drafting instructions process. If PCO is to have a role in drafting elements of the instrument we consider it would not be appropriate to set a timeframe in the legislation.

Next steps

76. We will be providing you with further timeframe advice in upcoming briefings on transitional provisions, the length of the FPA agreement, and renewal timeframes.

Annex

Annex One: Timeframes diagram

Annex 1: timeframes diagram

