MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Vetting and giving effect to Fair Pay Agreements

Date:	16 December 2020	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-1615

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** to an approach for vetting FPAs. **Agree** how FPAs should be finalised and brought into legal effect.	29 January 2021

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
Harry Chapman	Senior Policy Advisor, Employment Relations Policy	04 916 6091		

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- ☐ Withdrawn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

To provide advice on giving effect to Fair Pay Agreements (FPAs), including whether FPAs should be vetted before being enacted and how they should be finalised and given legal effect.

Executive summary

The FPA Working Group did not make specific recommendations on how FPAs should be finalised and brought into effect, but we assume that it intended for FPAs to apply in a similar way to normal collective agreements concluded under the Employment Relations Act 2000 (ER Act).

We consider features of the FPA system mean that the approach taken in other systems to vetting and finalising the outcomes of collective bargaining may not be appropriate. There are risks that, in the absence of a vetting process, agreed FPAs may not be clear, may not comply with the law, and could have unintended consequences. Our recommendations below are dependent on the design of the rest of the system, and therefore if other features of the system are later redesigned we may need to reconsider this advice.

We previously recommended that agreed or determined FPAs should be vetted. Our recommendation is for vetting of whether the agreed FPA meets the minimum legal requirements in the FPA legislation and other key legal requirements (e.g. competition law). We consider this option is compliant with our international labour obligations. However, a risk remains that FPAs could be agreed which are inconsistent with the objectives of the system and create reputational risks for the system (e.g. significant price increases for consumers or fiscal costs). It may be possible to undertake an assessment of these risks to inform the bargaining representatives and still be consistent with our international obligations. We have not yet formed a view about whether this would add value to the system or not. We can provide further advice on this once the design of the system is closer to final.

In terms of the legal mechanism for finalising FPAs, we previously advised that the Minister should bring FPAs into force through an Order in Council regulatory process. Given your desire to create an FPA system which is durable and free from political influence, we have ruled out this option (although it is still our preferred option). We recommend that MBIE should finalise and give effect to FPAs through a legislative instrument, with a small subset of important terms drafted by Parliamentary Counsel Office and the remaining terms incorporated verbatim. We do not recommend a contractual approach similar to normal collective bargaining under the ER Act.

Recommended action

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

a **Note** that the FPA system is substantially different to normal collective bargaining, pay equity, and screen bargaining because it will bind all employers and employees within coverage, regardless of whether they are contractually linked to the bargaining representatives or want to be covered in the system.

Noted

Vetting of FPAs

b **Note** we consider the FPA system creates risks that need to be managed, and vetting should be incorporated into the system before agreements are finalised.

Noted

c **Note** you have choices about the extent to which FPAs are vetted, ranging from a substantive economic impact analysis to no vetting process.

Noted

d **Note** any vetting process for FPAs which goes beyond a check of whether the FPA meets minimum legal requirements could be inconsistent with our international labour obligations.

Noted

e **Agree** that FPAs should be vetted to check that they are compliant with minimum requirements under the FPA legislation as well as with wider key legal requirements before they are finalised.

Agree / Disagree

f **Note** that while a vetting process against minimum FPA requirements and other key legal requirements will mitigate some risks and should be compliant with our international obligations, there is a risk that agreed FPAs will be inconsistent with the objectives of the system and could create reputational risks (e.g. if there are significant price increases as a result of agreed FPAs).

Noted

g **Note** that there is a potential supplementary option where the regulator could also check FPAs against the objectives of the system, with any issues it identifies referred to the bargaining representatives in an advisory-only way (i.e. the bargaining representatives can choose to disagree and the FPA can still be finalised). Once the design of the FPA system is finalised, we could assess whether this is a useful addition.

Noted

h **Note** we will provide further advice on who should perform the regulatory vetting function when you confirm what the function should be.

Noted

i **Agree** that the vetting process should occur prior to the ratification of agreements

Agree / Disagree

j **Agree** if vetting identifies issues – in relation to minimum requirements for FPAs or wider key legal requirements – they should be referred back to the bargaining representatives to resolve.

Agree / Disagree

k **Agree** that no vetting should be required if the entirety of an FPA is set by determination.

Agree / Disagree

Finalising an FPA and bringing it into effect

l **Note** there are a number of viable approaches for how FPAs could be finalised after the vetting process (if any), including the Minister making regulations or a government body making a legislative instrument.

Noted

m **Agree** that FPAs should be finalised by a government body making a legislative instrument.

Agree / Disagree

n **Agree** that only a subset of important terms should be translated into legislative language, with remaining terms attached verbatim from the settled FPA.

Agree / Disagree

Tracy Mears
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

16 / 12 / 2020

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / ..... / .....

Background

1. On 17 November 2020 you met with officials to discuss the development of a Fair Pay Agreement (FPA) system. At this meeting you requested further advice on a number of design features of the system.

2. Two topics you requested advice on were:

   - the legal mechanism for finalising an FPA and bringing them into legal force,
   - and whether they should be vetted prior to finalisation (i.e. checked to see if they will have unintended consequences or will create legal issues).

3. You indicated you want to create an enduring FPA system which is insulated from politics as much as possible, and embedded in the employment relations system. You indicated that where decisions need to be made within the system, they should be made independently from the Government.

Features of the FPA system mean that the approach taken in other systems to vetting and finalising agreements may not be appropriate

4. Under the ER Act, collective agreements are not vetted prior to finalisation. Rather, once the agreements have been ratified (or in rare cases, determined) they come into force and bind the union(s) and employer(s) who are signatories to the agreement and the union-member employees who are within the coverage clause. This is an example of a contractual basis for giving effect to agreements.

5. Similarly under the Equal Pay Act 1972, the process for settling pay equity claims is based on a contractual model. A pay equity claim is settled where the statutory requirements are met (e.g. parties agree there is no longer differentiation of pay between male and female employees, there is a process for review, etc) and there is a written agreement recording the requirements. Once finalised, the settlement automatically varies an employment agreement's terms and conditions

6. Occupation-level contracts bargained under the Screen Industry Workers Bill (SIWB) will be subjected to a technical check by the Employment Relations Authority (ERA) to make sure they contain mandatory terms and do not include prohibited items. Once this check is complete they can then be ratified. This ensures there are no wasted ratification votes because an occupation-level contract is deficient. Once a contract is checked by the ERA and ratified, it comes into force after a delay. Although the ERA checks the agreements, this is an example of a contractual basis for giving effect to agreements.

The FPA system is distinct from these other models

7. The main distinction between collective bargaining under the ER Act and the FPA system is that in the FPA system there is no contractual relationship between the bargaining representatives and the affected parties. Under the ER Act, parties to the collective agreement on the employee side have chosen to be a member of the union and therefore for them to represent their collective interest (and can choose to resign membership at any time). In contrast, the FPA process will create an association between employers and their representative organisation, and employees and the unions who are the bargaining representatives, but without a contractual link.

8. The broader application of an FPA is inconsistent with the legal principle of privity of contract, a doctrine of contract law that says contracts are only binding on the parties to a contract and that no third party can enforce the contract or be sued under it. In multi-employer collective agreement bargaining, privity of contract exists because the employers are directly

represented at the table and each is a signatory to the agreement for it to bind them; and the employees covered are members of the union signatory.

9. FPAs are more similar to occupation-level contract negotiations under the SIWB. However, the circumstances associated with the SIWB are quite different to the FPAWG where employer and union representatives differed over the compulsory nature of the FPA system. The SIWB process included a working group with consensus among engagers and workers, which led officials to consider that there was a low risk of any negative consequences from agreements. In addition, only named occupations can apply to begin occupation-level negotiations. Therefore officials considered a limited, technical check by the ERA would be sufficient.

The FPAWG did not provide specific recommendations on these issues

10. The FPAWG did not explicitly comment on how FPAs should be brought into force, although we assume the group intended that they should operate consistently with collective bargaining (i.e. they will apply once agreed). It did recommend that parties must register FPAs, and that they should be publicly available.

11. The FPAWG also recommended that the government consider how to assess and mitigate potential negative effects of FPAs. It noted:

> *"We acknowledge some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects."*

The vetting of agreements before finalisation

We previously recommended that agreed or determined FPAs should be vetted

12. To address the risks identified by the FPAWG, we originally recommended subjecting final FPAs to a 'market impact test' to balance the likely risks, and with the ability to reject any FPAs likely to inflict undue negative outcomes. Examples included an FPA leading to a concentration of market power among employers by setting terms that small employers struggled to comply with, or an FPA which leads to substantial increases in prices for consumer products.

13. During the consultation process in 2019, most submitters who answered the relevant question in the discussion document did not support the government being able to alter an FPA in the course of putting it into force. Where submitters did approve, it was only in certain cases, such as illegality (particularly terms below minimum standards) or a genuine mistake or administrative error. One submitter suggested moving any vetting processes before ratification, to provide certainty that any ratified agreement will be finalised in the form presented.

14. Nonetheless submissions from businesses did describe market risks within their own industry, and the wider economic risks, which reinforced our view that these risks remain a concern. For example, some small to medium sized businesses were concerned that larger employers could agree terms which would only be possible for large employers to comply with, given large employers' economies of scale and ability to 'average out' profitability across a number of locations.

15. In a later iteration of our advice, we recommended considering potential market impacts at the initiation stage, with parties informed on any risks and left to address them in bargaining. We suggested that market impacts would still need to be considered in the usual process of making regulations, but that this would be one part of a wider check against the objectives of

the FPA system, and that the threshold for refusing to finalise an FPA based on market risks could be set very high.

16. The Minister agreed with our recommendation that there should be a light-touch assessment of FPAs to ensure they are consistent with the objectives of the system, with a high threshold for refusal.

17. In June 2019, LDAC supported the concept of "an independent check for higher level policy outcomes" but noted it would be unfortunate if this occurred only at the end, and should be incorporated throughout the bargaining process. Then in December 2019 it provided advice on how to approach deciding which body would be best to perform the function, noting it would be "likely to include some degree of policy assessment that may be difficult, and potentially counterproductive, to draft as purely technical or administrative decisions." It said the market impact test "would be risky to leave entirely to the regulator".

The FPA system creates risks that we consider need to be managed

18. The design elements of the FPA system will result in a highly permissive system with a high impact. These include:

    - A relatively low threshold for initiation (1,000 or 10% of workers, or meeting a public interest test), and no proactive setting of which sectors or occupations are eligible to use the system.
    - A relatively wide list of mandatory to agree topics, and no prohibition on the inclusion of any topics.
    - No limit on the breadth of FPA coverage. (We will be providing advice on coverage in early 2021.)
    - Uncertainty about how representative the bargaining representatives will be of all employers and employees potentially affected by the FPA.
    - The possibility of terms being set in a determination by the ERA.

19. As we have identified in recent advice (2021-1424 refers), opening up the initiation threshold could lead to a substantial increase in the number of FPAs with flow on implications. Opening up the entry into the system, combined with few limits on what can be agreed within the system will likely result in a large number of FPAs, each of which sets standards in a number of areas. The overall effect of these choices and outcomes will be a fundamental reshaping of the employment landscape in New Zealand.

20. We recognise that FPAs will lead to benefits for employees. However, we consider these design elements of the system also create risks for the suitability of the bargained outcomes and the potential for unintended consequences. These include:

    a) A risk to accessibility: affected parties may struggle to work out whether any FPA(s) are relevant to them if there are a large number of FPAs which have been agreed.

    b) Creation of legal ambiguity: terms could be agreed which create ambiguity and make it difficult for affected parties to comply with the terms (e.g. loose definitions of covered occupations, or overlapping FPAs where it is unclear which one takes precedence)

    c) Compliance with statutory requirements for FPAs: Terms could be agreed which were not compliant with statutory requirements for FPAs, which would result in terms which are unenforceable (e.g. terms below the level of minimum standards). We expect this risk to not be significant in most bargaining situations as the bargaining representatives should be familiar with minimum standards and the requirements of the FPA legislation.

d) Compliance with wider legal requirements: For example, agreed terms in FPAs could be in contravention of the Commerce Act, [1] or could interact with our international obligations.[2] The bargaining representatives may be less familiar with these aspects of the law.

e) Economic impacts: The FPA could create risks to competition, or lead to significant price increases for purchasers or consumers. We are not referring to a reduction in competition among workers (by setting the minimum level of wages) but competition risks for businesses and consumers which, for example, could be created as a consequence of increasing barriers to entry in a sector.

21. We consider the framework of the system should be focussed on supporting positive outcomes while mitigating or minimising negative risks. The design features already decided (such as mandatory to agree terms) should result in positive outcomes, but the risks should be actively managed.

22. Our analysis and recommendations below are dependent on the design of the rest of the system and the resulting risks, and therefore if other features of the system are later redesigned we may need to reconsider this advice.

You have a choice about the extent to which agreements are vetted

23. To address the risks identified above, there are a spectrum of possible vetting procedures which could be introduced as part of the FPA system. There is a trade-off between cost, speed, and efficacy: the more significant the vetting was, the slower and more costly the process would be, but the higher the chance it would identify significant risks ahead of the agreement being finalised. The options include:

- Option 1: No vetting process – the agreed FPA would automatically be finalised without any check or changes. This would not mitigate any of the risks listed above, although parties could be encouraged to consider this risk when drafting and the system could include a process for finalised FPAs to be challenged if they do not meet legal requirements (these are discussed further below).
- Option 2: A check of whether the FPA meets minimum requirements. For example, whether all terms were at least at the level of minimum employment standards, and all the 'mandatory to agree' topics were included. This could also check whether the terms are legally clear. This would mitigate the risk of unclear and non-compliant terms (risk a – c above).
- Option 3: A check of whether the FPA meets minimum requirements as well as other key legal requirements. This is similar to the option above, but would also involve a check of the FPA against other key legal requirement such as competition law or international agreements. This would mitigate risks a – d above.
- Option 4: A light-touch vetting of the agreement against the objectives of the system. If the vetting identified issues the body could refer it back to the bargaining

[1] The Commerce Act 1986's prohibition on restrictive trade practices contains an exception for "the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains provisions that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees" (s44(1)(f)). We are doing further work to explore whether FPAs would fall within this exception. If FPAs would fall within this exception, the prohibitions in the Commerce Act could still apply to any terms, which form part of an FPA, that do not directly relate to employment terms.

[2] NZ's trade obligations, under both the World Trade Organisation and free trade agreements, constrain the government's ability to discriminate against non-New Zealand service suppliers compared to NZ service suppliers. If FPAs contained differential minimum terms on the basis of companies' country of origin (or other proxies for this, such as size), this could create de facto discrimination between domestic and international companies operating in NZ. If any such differential minimum terms were solely set through industry negotiation, and remained outside government control, this may not create trade law issues. However, if the government controlled or set those terms itself, this could be problematic from a trade law perspective.

representatives (see below sections). This would mitigate the risk of ambiguity and a breach of legal requirements (risks a – d above), and it may be able to identify the most significant economic issues (risk e).

- Option 5: A substantive economic impact analysis, which could assess whether there is a likelihood of significant negative impacts on labour and product markets. This could be similar to the Commerce Commission's clearance process under the Commerce Act, where it analyses what impact a transaction would have on competition. This would mitigate all of the risks listed above (risks a – e), but would require significant economic expertise to be developed.

We note this interacts with our international labour obligations

24. We note that the International Labour Organisation's (ILO) principle of free and voluntary collective bargaining normally does not allow for "any restriction, annulment or interruption of collective agreements" or any altering of the content of collective agreements.[3]

25. The Committee on Freedom of Association, a Governing Body committee of the ILO, has noted: "Making the validity of collective agreements signed by the parties subject to the approval of these agreements by the authorities is contrary to the principles of collective bargaining and of Convention No. 98." It has also said governments must ensure any process of registration or publication of collective agreements "only involves checks on compliance with the legal minima and questions of form" (e.g. who it applies to and the duration of the agreement). Finally it notes: "In cases where certain collective agreements contain terms which appear to conflict with considerations of general interest, it might be possible to envisage a procedure whereby the attention of the parties could be drawn to these considerations to enable them to examine the matter further, it being understood that the final decision thereon should rest with the parties."

26. The views of the Committee of Freedom of Association lead us to consider that only the first three options would be acceptable to the Committee. However, the FPA model, given it will apply beyond the bargaining representatives, has some characteristics which are different to the usual collective bargaining situation.

27. We nonetheless consider that a vetting process involving a test against the objectives of the system could be somewhat justifiable from an ILO perspective:

    - Firstly, this option would not involve *political* influence on the outcome of FPA negotiations.
    - Secondly, as we will explore below, we consider if any issues are identified under this option it would be most appropriate if the FPA was referred back to the bargaining parties rather than the government modifying terms directly. We note that if the vetting body refers some parts of an FPA back to the bargaining representatives for reconsideration, and the bargaining representatives disagree with the objection from the vetting body, this could lead to deadlock. You have choices about whether the bargaining representatives or the vetting body would have final say in this situation.
    - Finally, we consider it could be appropriate for the government to establish a legal framework within which FPA bargaining can occur and the objectives for the system, and then to check whether the legal framework and objectives have been complied with.

28. We note Business NZ has already written to the ILO to object to recent changes to the ER Act in 2018 relating to voluntary collective bargaining. Given its fundamental objections to the introduction of the FPA system we anticipate that Business NZ will likely object to the ILO about various aspects of the proposed FPA system too.

29. Our fuller rights analysis will explore this issue in more depth.

[3] International Labour Office, "Collective Bargaining: A Policy Guide", 2015

We recommend option 3 as it would likely be compliant with our international labour obligations and mitigate some risks

30. Option 2 would involve a body checking whether the FPA complied with the minimum statutory requirements. In most cases the bargaining parties should be aware of what these are and negotiate within the requirements – particularly as they will be aided by a navigator – but we still consider a check could identify isolated instances of non-compliant FPAs. This check would help to avoid a situation where FPAs were finalised but contained unenforceable terms, which could confuse affected parties and create legal uncertainty. Finally, we think a check to make sure that the agreement is clear and understandable to a reader not involved in bargaining would be a helpful safeguard, to avoid subsequent legal challenges.

31. Option 3 would build on this to also assess the FPA against other key legal requirements, such as competition law and New Zealand's international obligations. These key legal requirements are likely to be less well known than statutory requirements for FPAs assessed in option 2.

32. We consider option 3 is the best option for how agreements should be vetted and the minimum required for the system to adequately manage some of the risks we have identified. This option would be more compliant with our international labour obligations compared to option 4.

33. This is similar to the approach taken in the SIWB.

34. Finally, we note there could be a possible supplementary option which could be combined with option 3: the regulator could do a light touch assessment of the agreed FPAs against the objectives of the system, but only refer any issues identified in an *advisory* way to the bargaining representatives. After receiving the advisory assessment, the bargaining representatives could then choose to proceed with ratification regardless. The advisory information could be publicly released and could aid affected parties in understanding the implications of the agreed FPA prior to the ratification process. Before making a recommendation on this supplementary option further work would be required and we would need to assess your decisions on other parts of the system.

Option 4 could be non-compliant with our international labour obligations so we do not recommend it

35. Under this option, a body would check whether the FPA is inconsistent with the objectives of the system, and the legislation could set expectations that FPAs will be put into effect unless a high threshold is met.[4] The vetting would occur by weighing the FPA objectives as a whole, not a narrow decision based on market risks only.

36. We are preparing further advice on what the objectives of the FPA system should be. Our provisional advice was that the primary objective of the FPA system could be:

    - to enable bargaining to set fair and suitable minimum terms and conditions for workers with low bargaining power, in sectors where more collectivisation could be beneficial.

37. This will need to be revised given your decisions on other aspects of the system.

38. There could also be complementary or secondary factors to take into account. These could be similar to three of the Modern Award objectives, which are taken into consideration any time the Fair Work Commission alters, creates or reviews a Modern Award:

    - the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden,

[4] There would be options in policy design for how to define the 'high threshold' (e.g. set in law or as non-legislative guidance).

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards, and
- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

39. We recognise that compared to the substantive economic analysis in option 5, option 4 is less likely to recognise all competition issues in advance and therefore would not be able to fully address competition risks. This necessarily flows from the fact that it is a light touch assessment which would not include a substantive competition analysis. Nonetheless we consider a more thorough assessment would add substantial costs to the FPA system and would create significant delays in finalising FPAs. In addition, the consultation responses show that most forms of government intervention did not have a social licence, so we recommended options which involve less intervention.

40. As we have identified above, this option creates the risk of non-compliance with New Zealand's international labour obligations, although we think this vetting process could be potentially justifiable. We note that in 'extension' bargaining systems overseas there is sometimes a 'public interest' test before an existing collective agreement is extended to cover a wider group of employers and employees, which is a somewhat similar situation to a vet against objectives before an FPA can bind a wide group of affected parties.

41. Overall, this option would be better than option 3 at minimising the risk of unintended consequences which could arise from FPAs, at least to the extent they were somewhat obvious and significant. We also think it strikes a good balance between effectiveness and efficiency. However, given the potential inconsistency with our international labour obligations we do not recommend this option.

We no longer recommend a substantive economic analysis process (option 5) due to the costs and impact on bargained FPAs

42. Option 5 would be the most effective at identifying risks and unintended consequences which could arise from an FPA.

43. However, this option would be very costly and time consuming. The slow process for considering the market impacts and implications of the FPA could frustrate the bargaining representatives and be seen as undermining the bargaining process. Conducting the economic analysis could also be highly complex and costly, likely adding millions of dollars per year to the cost of the FPA system.

44. Given the other design features of the system which have now been established, such as a permissive initiation process, we do not consider this option is viable.

We do not recommend option 1 (no vetting) as it could result in FPAs that are difficult to comply or should not be complied with

45. To address the risks we have identified above we still consider that a vetting safeguard is required to protect against potential negative outcomes.

46. In theory, the system could be set up so that an FPA that had not been vetted and which did not meet statutory requirements could be challenged on the basis that its terms (or the whole agreement) were outside the law. However, we do not consider such a model would be effective and it could generate uncertainty. Therefore we do not recommend the option of including no vetting process.

47. Under option 1, bargaining parties could be encouraged to consider and address competition and market impacts during the bargaining process. We do not consider this would be sufficient. First, because there are not sufficient incentives for bargaining parties to represent the wide range of other interests that may conflict with their own. There are also no repercussions if parties failed to consider the relevant market and economic impacts.

Second, bargaining parties might not have sufficient access to all relevant information as information is likely to be silo-ed.

48. We acknowledge that any vetting process might undermine the social licence of FPAs, particularly from a worker perspective, as demonstrated by the responses to the discussion document. However, this needs to be balanced against a wider public/economic interest. We consider deviating from a normal bargaining process is justified given FPAs' wider coverage.

Which body does the vetting will depend on how substantive the vetting process is

49. Which body should perform the vetting function is linked to the question of how substantive the vetting process is. Therefore our advice on who should conduct the vetting process is dependent on your decision in relation to the substance of the vetting.

50. You have indicated you are interested in creating a new employment institution in the future, and the vetting function would be a natural fit for this new body. In the absence of this body we consider these functions could be done within MBIE, the ERA, or the Commerce Commission in the short term. If you wanted to proceed with MBIE performing the functions, there are choices about where the function would be located, but this issue does not need to be resolved in the legislation (it could simply name the Chief Executive of MBIE as being responsible for the function, who could then delegate).

51. We can provide further advice on the appropriate body when you decide which function you want to proceed with. In preparing this advice we would need to consult the Public Services Commission and the potential bodies who could incorporate the function.

You also have choices about when the vetting occurs

52. Another question is when the vetting should occur: before or after the ratification process. We previously advised that the vetting should occur after the ratification process as part of a final review by the Minister. We now consider that it would be more efficient for the light-touch vetting process to occur before the ratification process. This is to avoid a situation where the bargaining representatives conclude negotiations, and the FPA is ratified, but then the vetting process identifies issues. Given the potential for FPAs with wide coverage and a large number of affected parties, the ratification process is likely to be more costly and complex to operate than the vetting process, so we think it makes sense to prioritise a 'wasted' vet (where the FPA then failed the ratification process) rather than a 'wasted' ratification process. The downside of vetting agreements prior to ratification is that the FPA may be voted down after a vet had been completed, although this would have less impact under the 'lighter' vetting options. However, in this scenario it is likely that the FPA would later return to another ratification (or a determination) so the vetting process would still be beneficial (as it would inform subsequent vetting if issues were identified that the parties needed to resolve).

53. Finally, the framework will need to specify whether an agreement determined by the ERA needs to also be vetted. In the case of a partially determined FPA, we think there is still merit in the whole agreement being vetted. However, where the whole FPA is determined by the FPA the case is less clear cut. There could be a limited benefit from still vetting an ERA determined agreement, particularly given there is no opportunity to appeal the substance of an ERA determination. However, on balance we think vetting an ERA-determined FPA is not needed. The ERA will have access to clear statutory requirements for what must be included in FPAs, and they will be able to consider wider impacts as part of their determination process.[5]

[5] It would also be possible to constrain the ERA's decision making powers so it – for example – must comply with the objectives of the FPA system. We will be providing further advice on what the objectives of the system should be and how decision makers will take them into account.

What happens if vetting identifies issues

54. If the vetting identifies issues, we think the body doing the vetting could either return the FPA to the bargaining representatives to get them to resolve the issue, or it could potentially be empowered to modify the FPA itself.

55. We recommend if issues are identified that the FPA is referred back to the bargaining representatives to resolve it, and once the issue had been resolved the representatives could resubmit the FPA. If the resubmitted FPA is still not able to pass the vetting process, the bargaining representatives may choose to continue to bargain until it passes the vetting process, or to enter into the dispute resolution system to resolve the deadlock. The vetting body's decision could be judicially reviewed on the process but would not be appealable on the substance of the decision.

56. Empowering the body to directly modify the terms of the FPA to resolve issues could seriously undermine the bargaining nature and reduce the social licence for the system. Although this role would be best performed by an independent body, it could nonetheless create a perception of political interference in the terms of an FPA.

The legal mechanism for finalising FPAs

The FPA Working Group did not specify the legal mechanism for finalising FPAs

57. The FPA Working Group (FPAWG) report did not specify how exactly an FPA would be made binding after bargaining had concluded, but the language used in other recommendations implies it considered that FPAs would be treated like collective agreements (which are automatically applied after ratification).

58. As noted above, such an approach would appear to be inconsistent with the legal principle of privity of contract, a doctrine of contract law that says contracts are only binding on the parties to a contract and that no third party can enforce the contract or be sued under it. In the FPA system the bargaining parties will not necessarily have any contractual relationship with those they represent, and cannot bind them. Therefore the law needs to establish some mechanism for binding parties not in a contractual relationship.

In our initial advice we recommended using regulations as the legal mechanism for putting an FPA into force

59. In our initial advice to the former Minister, we highlighted that applying FPA terms to all employers and employees in a named occupation and industry as if it were a standard collective agreement would present legal risks concerning freedom of association and the delegation of law-making powers.

60. In light of this the risks associated with a contractual approach, we recommended a regulatory approach with the Minister bringing FPAs into force. We noted that the biggest advantage and disadvantage of the Minister finalising and bringing FPAs into force is that it would involve political influence on the outcome of FPAs and whether they can be translated into law. We agreed with LDAC that decisions involving policy content (such as finalising an FPA) are often made closer to Government, which preserves the ability to take higher level policy choices and take a broader view. The advantage of a Minister being involved is that they are able to assess whether the FPA is in the public interest and is subject to democratic accountability. The disadvantage is that in the absence of any statutory requirements, a Minister would be able to simply decline to finalise a sound FPA if they were opposed to the system on principle.

61. We advised that finalising FPAs in regulations would reduce the risk of FPA legislation being read narrowly by the courts. We noted that in Ireland, a similar mechanism where agreements automatically took effect was considered by the Irish Supreme Court to be an

inappropriate delegation of Parliamentary control.[6] We recommended that the terms agreed by bargaining parties should be subjected to appropriate checks and balances before being applied to non-parties.

62. We proposed the mechanism for finalisation should be to create an Order in Council attaching the FPA as a schedule to the primary FPA legislation, and did not consult on any alternatives. Many submitters nonetheless described FPAs as if they were to be directly enforceable contractual instruments after ratification.

LDAC noted that regulations are the best, but not the exclusive, option for finalising FPAs

63. After providing our initial advice to the former Minister, we sought LDAC advice on the best way to give FPAs legal effect.

64. LDAC noted that there are four options for putting an FPA into force:

- **Contractual**: the law would authorise the final agreed document as a legally binding contract between parties, which would also apply to those named in coverage. Legitimacy of the FPA would only be considered when challenged in court.
- **Administrative**: empowering an administrative body or Minister to approve (under certain criteria) an FPA, which then applies as ratified. Approval would be subject to appeal or judicial review.
- **Judicial**: the bargaining parties submit the final FPA to the ERA or a court, which then makes a determination that the FPA is binding on its terms, after hearing parties and other interested parties. The decision would be subject to appeal.
- **Regulatory**: Matters on which legal certainty is desirable (such as coverage, scope, application, transition) of the FPA translated into an Order in Council with remaining terms and conditions incorporated by reference or attached as a schedule to the Order.

65. LDAC agreed that putting FPAs into force through an Order in Council on the recommendation of a Minister would be the most appropriate option. It recommended that the policy content, balancing judgement, and potential limits on freedoms involved in finalising an FPA make the decision more appropriate for being made by the Executive branch of the Government.

66. LDAC noted that the final agreement is unlikely to be directly suitable as a legislative instrument that can apply across an industry and into the future on its own (this is addressed in the next section). It noted that the FPA will need to provide certainty as to what parts must be complied with, who is covered, transitional requirements, and future application.

67. To guarantee this legal certainty, LDAC recommended that Parliamentary Counsel Office (PCO) draft key terms in the Order on which legal certainty is required (such as coverage, transitional requirements, and future application), with remaining substantive terms incorporated by reference or included in a schedule to the Order with minimal amendment.

Other systems differ in how they give effect to bargained agreements

68. Using LDAC's categorisation, similar systems to FPAs are described in the following table:

[6] In 2013 the Irish system for setting binding minimum terms across occupations was struck down by the Supreme Court for granting irrevocable power to fix rules, punishable by conviction and fine, without parliamentary or ministerial control. The system was successfully reintroduced with an added public interest test and Ministerial veto step in 2015. In New Zealand, courts cannot strike down legislation, but where there is ambiguity they can assume Parliament did not intend a wide delegation of power and can read the provision narrowly.

System	Finalisation process
ER Act collective bargaining	**Contractual** – agreements are automatically binding, but only on signatory parties (and those within coverage i.e. union members)
Pay equity bargaining under the Equal Pay Act	**Contractual** – final settlement automatically binding to signatory employers and covered employees (who are not pursuing separate claims)
Screen industry bargaining under SIWB	**Legislated contractual** – legislation specifies that agreements apply beyond signatory parties once finalised (having received technical approval by ERA)
Ireland: Sectoral Employment Orders / Employment Regulation Orders	**Judicial / regulatory** – Labour Court makes recommendations for approval by the Minister to create a statutory instrument that applies to a sector
Sharemilking Agreements Act 1937	**Regulatory** – terms and conditions for sharemilking agreement contracts are set out in a schedule to the Act, which can be varied by Order in Council by the Governor General if statutory criteria are met
Australia: Modern Awards	**Regulatory** – the independent Fair Work Commission makes determinations varying, creating, or revoking Modern Awards

69. Occupation-level agreements in the SIWB framework will be brought into legal effect in a similar way to collective agreements under the current ER Act (setting aside the vetting of agreements in SIWB). It is important to note that the representativeness of bargaining parties in that system is ensured at the outset due to the specific registration requirements in the SIWB. This extent of representativeness will not be guaranteed in FPA bargaining and is a key reason for our concern with legal risks (freedom of association, delegation of law-making powers).

70. The Equal Pay Act pay equity bargaining framework (as recently amended) largely aligns with the existing ER Act, and pay equity settlements will have the legal status of collective or individual agreements. This is unproblematic as their coverage is limited to the bargaining parties themselves, with involved employers obliged to bargain (if they have decided a claim is arguable) but able to dispute the pay equity claim itself on clear grounds. In addition, employees can choose whether they want to be represented by a union: they have the option of opting out at any time and therefore retain the right to pursue their own claim and terms of settlement.

71. Irish Employment Regulation Orders and Sectoral Employment Orders are both given statutory effect by a Minister on advice of the Labour Court in reference to certain considerations. In this sense, they most closely resemble LDAC's regulatory option.

72. The Australian Modern Awards finalisation process most closely resembles the LDAC's regulatory option. An important difference between Modern Awards and FPAs in this case is that Modern Awards are drafted in entirety by the Fair Work Commission. There is little risk of any content failing to reflect the objectives of the Fair Work Act or failing to have legal clarity and consistency.

73. The Fair Work Commission has faced well-known issues with staying up to date with its workload to review Modern Awards every four years. The first review, commenced in 2014, was still not completed by the time the second review was due to begin in 2018. The obligation to conduct this review was repealed in 2019. Whilst the circumstances are certainly different to the ER Act and FPAs, this is an example of the workload associated with managing the finalisation and review of occupational and sectoral minimum standards.

We consider a number of the options are feasible

Although it is our preferred option, we have ruled out the Minister being responsible for finalising FPAs

74. You have indicated that you want to reduce any steps in the process where there could be political influence on outcomes in the FPA system. Therefore we have ruled out the option of the Minister being responsible for finalising FPAs, such as through an Order in Council process. We think this option is viable and is still our preferred option. We also consider political influence risks could be mitigated, as briefly described in the next paragraph.

75. We note that well-designed statutory criteria for when the Minister could approve or decline to finalise an FPA would reduce the risk of arbitrary or purely political decision making. For example, in the process for adding workforces to Schedule 1A of the ER Act you must be satisfied that certain criteria are met. It is also possible to design a statutory process which has a negative test – i.e. an action must be taken unless certain conditions are met. For example, the Minister could be required to approve an agreed FPA unless the Minister considered it would be inconsistent with the objectives of the FPA system. If a party disagreed with the decision (e.g. the Minister made a decision based on irrelevant factors) then they could seek a judicial review in the courts.

A regulatory model with an independent regulator could work well

76. Under this option, a regulator would be delegated the ability to finalise FPAs after they were vetted. Once an FPA was concluded – either after ratification or after a determination – it would be referred to the regulator for approval. The regulator would then vet the FPA and could approve or decline to give the FPA legal effect. This would be simpler than the Minister having to approve each FPA and finalise it through regulations.

77. There are a number of sub-options as to how the regulator could give the FPA legal effect once it was satisfied that it should be finalised:

    - A legislative instrument finalising the FPA (with a number of sub-options):
        - all the terms of the FPA could be translated into legislative language
        - a subset of the terms of the could be translated into legislative language (such as coverage, term of the FPA, etc) with any terms not translated incorporated verbatim from the FPA
        - no terms could be translated into legislative language (i.e. it would be finalised verbatim from the bargaining process)
    - It could make an administrative instrument (e.g. a declaration) that the FPA meets statutory requirements, and so the FPA is required to be followed.
    - A process where once an FPA is completed it is submitted to the government for publication, and it automatically applies according to its terms and scope (this sub-option would be incompatible with any vetting of FPAs).

78. We think using professional drafters and legislative language could minimise the risks of ambiguous terms in FPAs. We note that unlike in normal collective bargaining, the bargaining representatives are drafting language which will be imposed on others, so even if bargaining representatives can accept ambiguity in agreements, it could create problems for others. However, we recognise that wording will have been carefully bargained, and the bargaining representatives are likely to view any translation of agreed terms as an inappropriate interference in agreed outcomes. In addition, redrafting potentially large and complex FPAs into legislative language is likely to be a lengthy task. There is a risk that if redrafting occurs of substantive provisions then the resulting legal language will not reflect what the bargaining representatives thought they had agreed to.

79. Overall, we continue to recommend that only a small subset of terms are drafted in legislative language (as either secondary or tertiary legislation), while the rest of the terms of the FPA would be incorporated verbatim. This would ensure there would be legal clarity about who the FPA would apply to and other important 'metadata' for the agreement, while avoiding a complex and time consuming process of redrafting the entire FPA.

80. The particular body which performs the role of regulator (who would finalise FPAs), is linked to the question of vetting agreements explored above. We think this role could be performed by an independent function within MBIE with PCO doing the drafting, or it could be well suited to a new FPA body (potentially with the support of PCO).

81. We consider this is the best option if the vetting is more than a simple legal check.

We do not recommend the contractual option

82. A contractual option would be similar to the current system for collective agreements under the SIWB. The law would authorise the final agreed document as a legally binding contract between parties, which would also apply to those who fall within coverage.

83. A contractual approach could result in unclear FPAs which do not provide clarity to affected employers and employees. LDAC noted: "The contractual nature of the language of an FPA is unlikely to provide the necessary legal certainty as to what parts of the FPA must be complied with, who is covered, transitional requirements, and future application." This uncertainty could lead to legal disputes about the meaning of terms agreed in FPAs and who the FPA applied to.

84. As we have explored above, without a clear statutory basis for extending FPAs to cover a whole industry or occupation, a contractual approach would be inconsistent with the legal principle of privity of contract. Therefore the legislation would need to explicitly authorise the extension of FPAs to cover all employers and employees within coverage, regardless of whether they participated in the process or had a contractual relationship with the bargaining representatives. In the SIWB system, which does use a legislated contractual approach, other factors (including occupations named in law, bargaining representative registration requirements, and sector buy-in for the system) mean the risks of unintended consequences for those covered, who are not signatory parties, are limited. The potential wide coverage of FPAs create significant risks for such parties, so we do not recommend a contractual option.

Next steps

85. This is the last briefing on the FPA system we will be provide you this year. We will provide another set of briefings early next year.

86. 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
Ministerial consultation completed (2 weeks)	29 March 2021 –

	13 April 2021
Cabinet Committee	April 2021