MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: commencement periods and how changes are translated into employment agreements

Date:	13 May 2021	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-3277

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	Agree to our recommendations in relation to commencement periods and how changes are translated into employment agreements.	21 May 2021

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

The following departments/agencies have been consulted
N/A

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- ☐ Withdrawn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 commencement periods for the Fair Pay Agreements (FPA) legislation and finalised FPAs themselves, as well as how FPAs will be translated into employment agreements.

Executive summary

This briefing address four questions.

A: How quickly should the FPA legislation come into force?

New legislation is normally subject to a commencement period in order for affected parties to understand and prepare for the new rules, for government to establish new functions, and for associated regulations to be prepared (if required).

We recommend a six-month commencement period for the FPA legislation. Our view is that the minimum lead-in period is three months.

B: Once an FPA is finalised, how quickly should the terms of an FPA apply to affected parties?

We have considered whether there is any reason to depart from the established practice of the bargaining parties having flexibility to determine when an agreement should commence.

We recommend that there should be a minimum period of three months before FPAs come into force. We consider a departure from full flexibility is necessary, partly because the bargaining representatives in the FPA system may not have full information about the impact the FPA will have on all affected parties.

C: Once the FPA is in effect, how should employment agreements change to reflect the new standard?

FPAs will be a new minimum standard across a sector or occupation. They will inevitably interact with existing employment agreements that pre-date the FPA.

We recommend that FPAs should directly deem changes to employment agreements where the agreements contain terms less favourable than the FPA. This should be done to a granular level rather than comparing each category of terms in the FPA versus the employment agreement.

D: What should happen to employment agreements with terms from an FPA in the event that an FPA expires?

We have explored whether the FPA legislation needs to specify what happens in cases where employment agreements incorporate terms from an FPA (including by reference) and then the FPA expires.

We recommend that where an FPA expires any terms in the employment agreement from the FPA should continue in force, but could be subject to renegotiation.

Recommended action

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

a **Agree** that the FPA legislation should commence either:

three months after Royal assent	OR	*Agree / Disagree*
six months after Royal assent (**recommended**)		*Agree / Disagree*

b **Agree** that where an FPA is agreed for the first time or renewed, the bargaining parties should be able to negotiate a commencement period of no less than three months from the time the FPA is made into secondary legislation.

Agree / Disagree

c **Agree** that where an FPA is varied the bargaining parties should have full flexibility to agree how quickly it should come into force.

Agree / Disagree

d **Agree** that once an FPA is in force it should automatically deem changes to relevant individual employment agreements or collective agreements so that each individual term in an existing agreement which is less favourable to employees than the FPA is replaced by the term of the FPA (according to the principle of favourability).

Agree / Disagree

e **Note** there is an alternative option where each category of terms in employment agreements would be compared against the FPA, which would lead to significant trade-offs when comparing categories of terms. We do not recommend this approach as it would be more subjective and it would be more difficult to enforce.

Noted

f **Note** it is likely to be difficult in some cases for affected parties to determine whether the terms of the FPA are superior to existing employment terms, particularly in relation to non-wage terms and conditions, but that issues should be resolvable through discussions at the workplace level, Labour Inspectorate enforcement (as applicable), or the dispute resolution system.

Noted

g **Agree** that where employment agreements include terms of an FPA (including by reference), even if the FPA expires the incorporated terms should continue to apply (although they could be renegotiated).

Agree / Disagree

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

13 / 05 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. You have received policy approvals from Cabinet to start drafting the FPA legislation. We are providing you with a series of briefings on remaining issues which need to be addressed in order to draft the legislation.

2. This briefing addresses a number of issues and we have divided it into a section for each:

    - Section A: How quickly should the FPA legislation come into force? New legislation is normally subject to a short lead in period in order for affected parties to understand and prepare for the new rules, as well as provide time to prepare associated regulations. We explore whether there should be a lead in period for the FPA legislation.
    - Section B: Once an FPA is finalised, how quickly should the FPA's terms apply to affected parties? In this section we consider whether there is any reason to depart from the established practice of the bargaining parties having flexibility to determine when an agreement should commence.
    - Section C: Once the FPA is in effect, how should employment agreements change to reflect the new standard? FPAs will be a new minimum standard across a sector or occupation. Consideration needs to be given to how the new standard will apply to existing employees, and what happens to terms which are below the new standard. It is likely to be a complex undertaking for employers to comply with the new FPA, depending to some extent on what is contained in employment agreements and the level of employees' wages and conditions relative to the new standard.
    - Section D: What should happen to employment agreements with terms from an FPA in the event that an FPA expires? In this section, we explore whether the FPA legislation needs to specify what happens in cases where employment agreements incorporate terms from an FPA by reference and then the FPA expires.

3. Neither the FPA Working Group nor the discussion document explored these specific issues.

Criteria

4. We have used a consistent set of criteria in the process of providing advice on the FPA system and assessing options. For the purposes of this briefing we have narrowed the criteria slightly to the following:

    - Effectiveness: whether the option supports improved outcomes for workers
    - Consistency: whether the option is consistent with parallel interventions in the ERES regulatory system, unless there is a good reason for divergence
    - Workability: whether the option supports the smooth operation of the FPA system
    - Balance: whether the option strikes a suitable balance between certainty and flexibility for participants
    - Simplicity: the process is clear to all parties and avoids unnecessary complexity

Section A: How quickly should the FPA legislation come into force?

Issue

5. New legislation is normally subject to a short lead in period in order for affected parties to understand and prepare for the new rules, as well as provide time to prepare associated regulations.

6. At the time of the FPA legislation bid, we had not yet determined whether a delay would be required to commencement of the legislation and whether regulations would be required to support the FPA legislation.

Analysis

7. The Legislation Design and Advisory Committee suggests that the general principles in designing commencement clauses are that they must provide:

   - certainty about when legislation is in force; and
   - adequate public notice of the commencement of legislation (so that people can undertake any preparatory action).[1]

8. It also notes another important factor is "the practical context of the particular legislation or those most affected by it", and that if this is not adequately considered there can be a substantial burden on affected parties (e.g. if a number of pieces of regulation take effect at the same time).

9. Taking this guidance into account, we consider there are three main reasons why there should be some delay to the commencement of the FPA legislation.

(1) Stakeholders will need time to understand the new FPA framework

10. The FPA legislation will be a fundamental shift in New Zealand's employment relations/employment standards system. We consider a delay of some sort would be appropriate to give time for employers and employees to understand the FPA legislation and organise themselves in order to participate in bargaining or meet their procedural obligations.

11. Although the details of the FPA system will be available as soon as the legislation is introduced to Parliament, the legislation could change significantly during the parliamentary process (e.g. during Select Committee examination and Committee of the Whole stage). Therefore stakeholders will not be able to ascertain the final design of the system and their obligations until the legislation has been passed in Parliament.

12. One aspect employers will need to understand promptly once the legislation comes into force will be the process requirements, such as the need to notify staff once an FPA has been initiated. As soon as the legislation comes into force there could be a large number of initiations and employers will need to be able to respond appropriately.

13. If industries or occupations are caught unaware by initiation for FPA bargaining, it could lead to slow, unproductive bargaining. Bargaining may also fail to truly represent all affected parties in the sector. While the government would attempt to support such bargaining, the funding for the FPA system is limited and the shorter the commencement period we consider the greater the risk of unmet need.

(2) Guidance will need to be prepared and government functions will need to be established

14. A commencement period of at least three months would be preferable to ensure the smooth implementation of the FPA legislation. Various new functions will need to be established within MBIE (e.g. to assess initiation applications) and existing functions will need to be augmented to reflect new responsibilities (e.g. the MBIE employment call centre, Labour Inspectorate, mediation services, ER Authority).

15. Preparing guidance for employers and employees will also be time consuming and can only start in earnest when the legislation is passed and the details are finalised.

[1] Legislation Design and Advisory Committee, "Guidance on commencement clauses", http://www.ldac.org.nz/guidelines/supplementary-materials/guidance-on-commencement-clauses/

16. The FPA Budget Bid requested money from the 2021/2022 financial year, so once the contingency has been drawn down, the government will have financial resources available to establish these functions.

(3) Supporting secondary legislation will be required

17. Regulations will be needed to support the implementation of the FPA system. For example, Cabinet has agreed that when minimum entitlement provisions are included in agreed FPAs they must be specified in a prescribed format and include details as set out in secondary legislation (recommendation 75). This secondary legislation setting this out should be available from the time the FPA legislation comes into force.

18. There may also be a need for other technical regulations, such as to set the format of forms or required information when applying to the ER Authority for a determination on an FPA.

19. Regulations normally take a few months to implement once policy advice, Ministerial decisions, Cabinet decisions, drafting, and Cabinet approval are taken into account. Preparing the regulations will require policy resource and it is likely to be difficult to prepare the regulations concurrently with supporting the final stages of the FPA legislation through Parliament.

We recommend a six-month commencement period

20. We consider there are two viable options for commencement: either a six-month or three-month lead in period. We do not consider a commencement period less than three months would be feasible, as it would put the implementation of the system, and compliance with it, at risk.

21. We note that unions and employers could prepare for FPA initiations in the time between Royal assent and commencement. In this period, unions could work to define their intended coverage, gather necessary support from employees, and identify relevant employers. Likewise, employers could use this time to organise themselves and determine which organisation will represent them in preparation for bargaining.

22. We consider the minimum commencement period is **three months.** This would be a reasonably fast lead-in period and would enable bargaining to start quickly after the legislation is passed (September/October 2022 at the earliest). Government functions should be ready in this timeframe. However, there is a risk that a three-month commencement period would not provide adequate time for stakeholders to understand the system or to prepare supporting secondary legislation.

23. We recommend a **six-month** commencement period, given the significant implications of the FPA system. This would provide government and affected parties with a more reasonable timeframe to prepare for the introduction of the FPA system. It would also enable more time for MBIE to prepare secondary legislation once the legislation had received Royal assent. However, we recognise that this would represent a more significant lead-in to the implementation of the system, the bargaining of FPAs, and therefore actual impacts from the system (i.e. this option is slightly less effective). This would mean the FPA legislation could come into force at the end of 2022 or the start of 2023 (at the earliest).

Section B: How quickly should an FPA apply to affected parties?

Issue

24. This section considers whether the FPA legislation should put in place any requirements about how quickly an FPA should apply to affected parties.

25. There are a few considerations in the following options, including how quickly the FPA should apply to everyone and whether the same FPA standard should apply equally to everyone or whether incumbent employers should have more time to adjust.

26. Time will be needed to get messages out to all affected parties within coverage of the finalised FPA. There may be employers who were not involved in bargaining but will still be affected, and time will be needed to try to reach them. Employers will also need time to adjust their processes, including discussing changes with their workers. Finally, workers may need time to adjust (e.g. changes to childcare arrangements to fit changes in hours).

27. One consideration is that in occupations or industries which operate on shift patterns, these are often agreed in advance (e.g. 12 weeks in advance). When an FPA comes into force and regulates working hours it is likely to require changes to these shift patterns so it would be prudent to allow time for workplaces to put in place processes needed to provide an orderly change in shift patterns.

28. The changes to statutory entitlements for rest and meal breaks in the Employment Relations Amendment Act 2018 are an extreme example of how regulatory changes can generate significant implementation challenges (e.g. for the public transport industry) which have taken many months to resolve.

29. There is a small risk that legislating a short timeframe could also undermine the ambitiousness of the resulting FPA, whereas if the bargaining parties could agree a longer timeframe for implementation they may be able to agree more ambitious terms. For example, employers who provide a labour-intensive service may wish to be able to signal to their customers that significant price increases are coming. However, this could also be achieved through terms other than commencement, such as the parties agreeing to a low initial wage rate and progressive increases over the term of the FPA, or differential terms (see Annex One).

30. Another risk is that the shorter the commencement period for FPAs, the higher the likelihood that there is non-compliance (including as a result of unawareness). With a short commencement period, government enforcement will likely have to focus more on educating affected parties rather than stronger compliance action.

31. The length of the commencement period is linked to the ultimate length of FPAs. A long commencement period combined with a short duration could result in an insufficient period for the FPA. We are providing separate advice on the duration of FPAs.

32. We note the process for amending the minimum wage is a relevant framework. As you are aware, the Minimum Wage Act 1983 requires the Minister of Workplace Relations and Safety to review the minimum wage by the end of December in each year. Recent practice has been to announce increases to the minimum wage at the end of each year or early in a new year for the changes to apply from 1 April. This process normally gives employers a few months to prepare and the changes align with common financial years for businesses.

33. We canvassed the views of the NZ Council of Trade Unions (NZCTU) and BusinessNZ on this point. The NZCTU recognised that some delay to commencement of FPAs would be necessary but asked that the period should be as short as possible, and no longer than three months. It suggested the default commencement period should be set in legislation unless otherwise agreed (option 3 below). BusinessNZ recommended the legislation should require a commencement period of at least a month, but noted that further information would be required on how long large companies may require to implement payroll changes.

Analysis

34. We have identified four feasible options, which we explore below.

Option 1: Full flexibility for the bargaining parties

35. This option would leave the commencement period up to the bargaining parties without any legislative constraints. This would be highly flexible and allow the bargaining parties to agree on a commencement period that made most sense for their industry or occupation. Flexibility could also allow representatives to agree a commencement timeframe which aligns with common financial periods for employers, if relevant.

36. This would be most consistent with the approach taken in the ER Act, where parties to collective bargaining can choose for themselves how quickly collective agreements should commence.

37. We consider the FPA system is somewhat different to current collective bargaining as the bargaining parties are representing a wider group of employers and employees, and the representatives may not have good information on how long other employers need to implement the changes required by the FPA.

38. Full flexibility for the bargaining parties could generate uncertainty for potentially affected parties, as even in the later stages of bargaining it could be unclear when the FPA will take effect. For example, although unlikely, the bargaining parties could agree for the FPA to commence only one month after the FPA is made into secondary legislation.

39. There is a small risk that this highly flexible approach could undermine the intention for the new FPA minimum standards to apply to everyone and the effectiveness of the system, as the bargaining parties could negotiate generous transitional provisions for some or all parties (e.g. up to a year, or two years). However, we do not consider it likely that unions would agree to a long transition period.

40. Giving the bargaining parties this flexibility could also reduce the workability and accessibility of FPAs, as affected parties may have to navigate complex transitional periods. It may be difficult for an employee to determine whether they are within coverage of an FPA at any given time if the commencement period is another factor they need to take into account.

41. In the event the bargaining representatives are unable to agree, we consider that the commencement period would be considered part of the 'duration of FPA' term, which is mandatory to agree, and therefore the ER Authority would be able to make a determination on this topic.

Option 2: Flexibility within constraints

42. Under this option, the bargaining parties would have the flexibility to set the period the FPA would come into force within statutory constraints. This could involve setting the minimum and/or maximum length of commencement period that parties can agree (e.g. no shorter than three months and/or no longer than a year).

43. The legislation could also potentially specify that the commencement period had to be consistent for all employers (except those with exemptions), in order to avoid giving some employers a competitive advantage.

44. This option is less consistent with the established practice in the ER Act, where the bargaining parties have full flexibility to determine how collective agreements commence.

Option 3: Flexibility with a legislated backstop

45. Under this option, the bargaining parties would have flexibility, but in the event the parties cannot agree the legislation could specify a backstop commencement period. For example, FPAs could automatically come into force after a three-month lead-in unless the bargaining parties agree otherwise.

46. This would be similar to option 1 with a slightly better balance between certainty and flexibility. There are sub-options as to whether the legislated backstop would be

automatically applied in the event of disagreement, or whether the ER Authority could deviate from the backstop if appropriate. If the ER Authority could not deviate from the backstop in the event of a determination, it could lead to poor outcomes if the backstop is not appropriate for the particular circumstances of the occupation or industry.

47. This option is mostly consistent with the established practice in the ER Act, as the legislation would only have an impact in the event that the bargaining representatives failed to agree.

Option 4: A legislated commencement period

48. Under this option the legislation could establish a commencement period for all employers after which the FPA would apply (e.g. three months, six months or one year).

49. This would be consistent with the approach in the Screen Industry Workers Bill (SIWB), which specifies that occupation-level collective contracts come into force six months from the date they are notified in the Gazette. However, if an engager of workers and an individual worker enter into a contract prior to the date of the collective contract, then the collective contract only applies after one year.

50. This would delay the benefits (and costs) of the FPA from coming into force.

51. This approach would be equitable between employers (as there would no discrimination based on whether they are incumbents or new, or large and small). It would also be simple and workable.

52. However, a blanket approach to commencement periods set in the legislation may not account for the particular needs of a sector or occupation, who may want to agree to a shorter or longer period but be unable to.

We recommend giving the bargaining representatives flexibility within constraints (option 2)

53. We recommend option 2: giving the bargaining parties flexibility to agree how quickly the FPA should commence so long as the commencement period is not shorter than three months. This would still be reasonably flexible and allow the bargaining parties to agree on a commencement period that made most sense for their industry or occupation (so long as it was three months or greater).

54. Although the bargaining parties will be representing affected employers and workers, they may not have perfect information on the necessary timeframe for implementing the FPA. For example, smaller employers may need longer to implement the changes and adjust their payroll systems or potentially hire new staff.

55. This would provide some certainty to affected parties that there would be at least three months between the secondary legislation being made and when it comes into force.

56. To support the bargaining representatives, the government could produce guidance to encourage them to choose a commencement date that took into account factors such as usual pay periods, firm financial periods, and shift patterns.

57. We talked to a payroll provider who indicated that a minimum three-month commencement period should be sufficient, provided the FPA includes only topics which are the same or similar to existing terms and conditions that payroll software typically deals with. However, if the FPA included non-standard terms or required additional reporting or record keeping more time may be required. In addition, a precondition for implementation payroll changes would be the employer understanding which employees were within coverage.

We have discarded two options

58. We have considered but discarded two other options:

- The legislation could specify the terms of the FPAs could apply immediately to everyone once put into secondary legislation. We do not consider this would be feasible or workable given the likely changes that employers would have to make to their systems to comply with the FPA.
- The legislation could differentiate between existing employers (or even employees) and new employers, so that incumbents would have a grace period whereas new entrants would have to comply with the FPA immediately. We consider this would be too complex and could be perceived as creating an uneven playing field for businesses and workers.

We recommend the bargaining parties have full flexibility in the event of a variation, but that renewals be consistent with a new FPA

59. We have considered whether the bargaining representatives should have full flexibility in cases of variation or renewal in relation to commencement timeframes.

60. In relation to variations, we recommend the representatives should have full flexibility in order to allow for potentially quicker implementation of the changes where they were urgently required (e.g. in response to a significant economic shock).

61. In the case of a renewal, we do not consider there is a need to diverge from our recommendation above. Therefore we recommend that where an FPA is being renewed it cannot come into force in less than three months. We will soon provide advice recommending that FPAs should be extended while negotiations to renew it are ongoing. Therefore we envisage that in the case of renewal the previous FPA would still be in place, but employers and employees would have time to adjust to amended terms and conditions during the commencement period.

Section C: Once an FPA is in effect, how should employment agreements change to reflect the new standard?

Issue

62. FPAs are intended to set new minimum standards across a sector or occupation. Each term in an FPA will need to be better for employees than – or equal to – existing legislated minimum standards. This is part of a wider requirement that the terms negotiated in an FPA must not be inconsistent with the FPA legislation, minimum employment standards or otherwise unlawful.

63. Once an FPA has been finalised and comes into force, the FPA then needs to be translated into employment agreements. The translation process will only need to occur the first time the FPA is introduced, or when it is varied or renewed, as new employment agreements entered into after the FPA is in force will not be able to be below the FPA standard. This section explores how this translation process should occur.

By what process should FPAs be translated into existing employment agreements?

We consider the only viable approach is for FPAs to deem changes to employment agreements

64. We consider the only viable option for translating FPAs into employment agreements is for the FPA to directly deem changes. This would mean it would not be necessary to adjust existing contracts if the FPA deems changes to contracts – rather the terms of the FPA would be 'read in' to the agreement. Like with minimum wage increases, if wages are lower than required then the contracted terms do not apply (i.e. terms which are below the new standard are invalidated). When the individual employment agreement (IEA) or collective agreement (CA) gets renegotiated or renewed then it can be made consistent with the requirements of the FPA. In addition, employers would always have the option of updating affected employment agreements to reflect the new FPA standard at any time.

65. After the FPA is in force, where a new employee starts work within coverage and their employment agreement purports to specify terms under the level of the FPA, then the employment agreement should be modified by the FPA to include the FPA term instead.

66. This approach would be consistent with the approach taken in the Support Workers Settlement Act and the recently amended Equal Pay Act.[2] However, as these processes primarily focus on wages/remuneration the implementation of FPAs will likely be more complex given the breadth of terms likely to be included (e.g. ordinary hours, overtime and penalty rates).

67. This approach would be workable and would have relatively low compliance costs compared to requiring all agreements to be amended in response to an FPA. However, there could be situations where it is unclear whether the FPA should result in changes to existing employment agreements, particularly in relation to non-wage terms and conditions (see below section).

68. Both BusinessNZ and the NZ Council of Trade Unions supported a deeming approach.

69. One drawback of deeming changes to employment agreements is that where the terms of the FPA are superior to employees' existing terms, employees' employment agreements may not actually contain their full terms of employment. Rather, employment agreements would need to be read in conjunction with the terms of the FPA itself, which could reduce the accessibility of entitlements and cause confusion. Under the current law this sometimes happens when increases to the minimum wage (or other changes to minimum standards) overtake rates in individual employment agreements or collective agreements.[3]

70. To mitigate the risk of confusion, there will be a significant role for unions and government to educate and inform employees, and for employer organisations and government to educate and inform employers.

The other option of requiring employers to adjust employment agreements in response to an FPA is not viable

71. We do not consider it would be viable to require employers to adjust employment agreements in response to the FPA.

72. This could also involve frequent, costly changes to employment agreements if the FPA specified yearly wage increases (unless the employment agreement specified that the worker would be paid the FPA rate).

73. However we recognise that requiring an update to employment agreements in every case may make it easier for employees to understand.

How should it be determined if terms in the FPA are more favourable than existing terms?

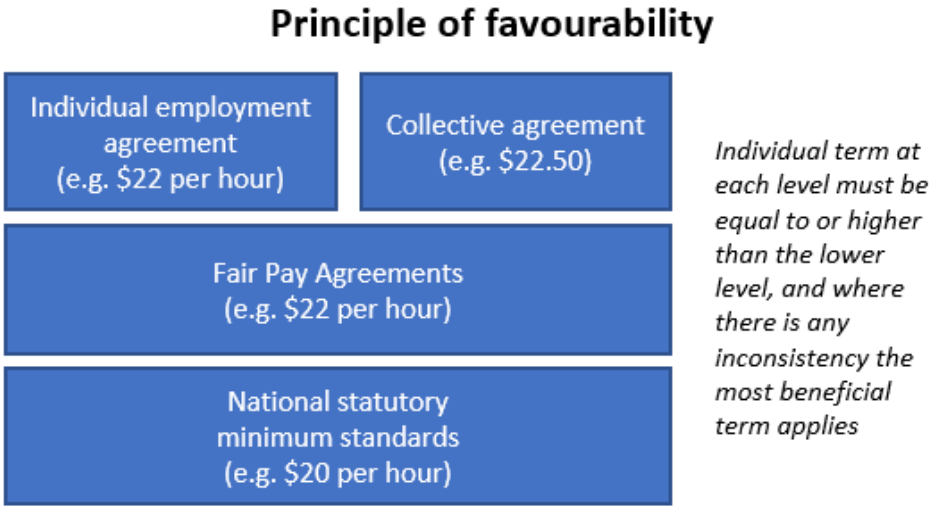
The principle of favourability should apply

74. The principle of favourability should guide the relationship between FPAs, collective agreements and individual employment agreements. By this we mean that when judging which term from all source of employment entitlements should apply (FPAs, collective agreements, individual employment agreements), it should be the term most favourable to employees (as a group).

[2] Under the SIWB, by the time collective contracts come into force (six months after publication) some contracts will not need to be amended because they will have run their course. FPAs by comparison will need to apply to employment agreements which are effectively permanent, so requiring amendment of employment agreements is more likely to be onerous.

[3] Data from the Centre of Labour, Economics and Work (CLEW) suggests this is a relatively rare occurrence. CLEW, "Employment Agreements: Bargaining Trends & Employment Law Update 2019/2020", July 2020, pp 34–35

75. As the FPA Working Group set out, collective agreements can be agreed in addition to FPAs but they must equal or exceed the terms of the relevant FPA.[4] The same principle should apply to IEAs.



76. One likely consequence is that there would be situations in certain workforces where there had been an explicit trade-off between terms in employment agreements (e.g. low hourly wage in exchange for higher penal rates) this trade-off at the firm-level would be undermined as the less favourable terms would be brought up to the level of the FPA. After the FPA was in force, the employer and union/employees could bargain over time to rationalise the terms if needed.

We recognise that there is likely to be ambiguity in the process of translating FPAs into employment agreements

77. We note there are likely to be difficult judgements about nested terms within FPAs as to whether they should replace existing terms in employment agreements. In other words, within each category of terms (e.g. base wage rates, how wage rates will be adjusted) what should happen in a situation where some terms in an FPA are more beneficial but some existing terms are superior. For example, if an existing CA specified a 20% premium for evening work after 10pm but the FPA specified a 10% premium after 8pm, should:

- the employee receive the best of both benefits (a 10% premium after 8pm and a 20% premium after 10pm), or
- only the most beneficial set of penalty rates apply (either 10% or 20%, but not both).

78. We believe that the principle of favourability should be specific to avoid unnecessary disputes in the implementation of FPAs. You have a choice about how granular the principle of favourability should be applied. We consider there are two main options.

Option 1: The principle of favourability could apply down to a granular level

79. Under this option, employers and employees/unions would assess whether each specific term of the FPA was more favourable compared to existing IEAs/CAs. As the comparison process would be against the specific IEA or CEA term – rather than against the preferences of employees – it could be done on a relatively objective basis.

80. This could create a situation where the employer has to "pick and mix" elements of an IEA/CA and FPA. To implement the FPA in this way, in relation to the example above, affected employees would need to receive the best of both benefits (a 10% premium after 8pm and a 20% premium after 10pm). In other words, within the penalty rate category, there

[4] Fair Pay Agreements Working Group report, p 42

could be individual terms which relate to each time period which could be chopped and changed. This option would therefore be most beneficial to employees as they would effectively receive the 'best of all worlds'.

81. Depending on the relative level of IEAs/CAs versus the FPA, this could be a difficult task for employers to look at each term in employment agreements and compare them against the FPAs. The payroll implementation of the changes under this option would also likely be complex, as within each category of terms there could be complex differences arising from the different sources of the entitlements.

82. This option would involve less judgement and consequently we consider it would make enforcement by the Labour Inspectorate (if relevant) or self-enforcement easier. This is because, to ascertain whether the FPA was being complied with, it would only be necessary to determine if each granular term of the FPA was either met or exceeded in the IEA or CA. We consider this option is also more consistent with the status of FPAs as new minimum standards.

83. Overall, we recommend this option as it is the most workable and consistent with FPAs as new minimum standards.

Option 2: The principle of favourability could apply to each group of terms

84. An alternative option is that each category of terms in IEAs/CAs would be compared against the FPA (i.e. overall package of ordinary hours; base wage rates).

85. As this comparison would be much less granular, there could be more significant trade-offs when comparing categories of terms. This may make it difficult to determine which category is more beneficial. Under this approach, in the example above, the employees would receive the most beneficial set of penalty rates (either 10% or 20% for certain periods, but not both). Part of the challenge of this option is that one set of terms could be more beneficial to one group/type of employees and the other set more beneficial to other groups of workers. The employer would then need to make a judgement about which option benefitted employees overall.

86. In judging which option is better for employees, there would also be design choices as to the size of the group of employees considered. For example, employers could determine which set of terms is more favourable for employees at their workplace overall, for the majority of employees, or even for each individual employee. The legislation could potentially require that employers consult with employees in making the decision as to which category of terms was more beneficial.

87. As this option would involve more judgement, we consider it would also be more difficult to enforce. This is because, to ascertain whether the FPA was being complied with, it would be necessary to understand whether terms in an IEA/CA which appeared to fall below the FPA standard for a particular worker were not applicable because the category of terms in the IEA/CA was more favourable overall.

How would disputes about the translation process be resolved?

88. Despite recommending a specific principle above, it is still likely that in some situations affected parties will not be able to easily determine whether the FPA is more favourable and therefore has deemed changes to employment agreements. Although increases to wages are likely to be relatively clear-cut, non-wage terms and conditions could be more difficult to assess.

89. There could also be ambiguity in situations where an employer is unsure whether an employee is within coverage of a particular FPA (or even which FPA of multiple FPAs they fall within), and therefore whether the FPA has amended the IEA or CA.

90. In the event there was ambiguity, employers and unions/employees could work together to establish which terms apply (i.e. which are more favourable) or whether the worker(s) is within coverage. This would mean that informal decisions on how to comply with the FPA could be made on a decentralised basis. However, the principle of favourability would ultimately be enforced on an objective basis.

91. In the event that an employee and employer could not agree and there was a dispute, how it would be resolved would depend on whether the term in question was a minimum employment entitlement:[5]

- If the term was a minimum employment entitlement: the Labour Inspectorate (LI) would have the power to assist, and if the LI was not available to help the employee could apply to have the matter resolved by the ER Authority (which must not recommend mediation unless it is appropriate).
- If the term was not a minimum employment entitlement: normal dispute resolution processes would apply, including mediation, and the ER Authority and Employment Court would be the only bodies which could make binding decisions. The LI would not be involved in the dispute.

Section D: What should happen to employment agreements with terms from the FPA in the event that an FPA expires?

92. We will soon be providing advice on the variation and renewal process for FPAs. In advance of this advice, we consider here what should happen in the event an FPA expires because it is not renewed.

93. Under the ER Act (s61), employees who are covered by a collective agreement which then expires are moved automatically to an individual employment agreement (IEA) based on the expired collective agreement (CA), in addition to any additional terms and conditions agreed previously. The employer and employee could also agree to change this individual employment agreement or negotiate a new IEA.

94. The FPA situation is slightly different, as FPA do not supplant the need for an employment agreement. However, we consider the underlying principle is sound; where employment entitlements flow from a source – in this case the FPA – the employment entitlements should remain intact even after the source expires.

95. Where an FPA has deemed changes to an IEA or CA, those agreements are permanently altered by the FPA. Therefore if the FPA subsequently expires, employers would still be obliged to pay employees within coverage at least the FPA minimum rate. However, in the absence of the FPA minimum standard, employers could seek to renegotiate changes to the IEA or CA.

96. There could also be a situation where a CA or an IEA incorporates the FPA rate by reference (i.e. 'you will be paid the applicable FPA rate'). In order to provide certainty in this situation we think the FPA legislation should explicitly set out what should happen where employment agreements reference an FPA which has expired. We recommend that after an FPA has expired, if the terms have been incorporated by reference then they should continue to apply in employment agreements as though the FPA still existed. However, this should not prevent the parties to the employment agreement from renegotiating the FPA terms.

[5] Cabinet agreed that the following terms of FPAs will form new minimum employment entitlements: the hourly base wage(s), adjustments to the hourly base wage, increases to minimum leave entitlements, the hourly overtime rate, and the hourly penalty rate.

Annex One: The interaction between commencement provisions, differential terms, and exemptions

The bargaining representatives may want to temporarily or permanently have the terms of an FPA apply differently to different groups of employees or employers. They will have access to a variety of different tools within the FPA framework to do this:

- **Commencement provisions**: as we explore in the main body of the briefing, there are a number of ways to design the commencement provisions, but the general idea is that the FPA would not apply to all or some groups for a certain period of time to allow affected parties adequate time to implement FPAs.
- **Differential terms**: Cabinet has agreed [CAB-21-MIN-0126] that the bargaining parties can agree to include differential terms in FPAs based on any characteristic, so long as they comply with minimum employment standards and do not breach the Human Rights Act 1993. The parties could therefore choose to apply part or all of the FPA to certain employers or employees at different times, or choose to exclude certain groups from coverage.
- **Exemptions**: Cabinet also recently agreed [CAB-21-MIN-0126] that the bargaining sides can agree to include an exemption from the terms of the FPA for up to 12 months for employers in 'significant financial hardship'. We will soon be providing advice on exemptions.

These tools mean that, if the bargaining representatives are concerned about the potential impact of FPAs on certain groups, a commencement lead in period for the FPA may not be the best tool and they could instead agree a differential term or an exemption.