



BRIEFING

Fair Pay Agreements: Variations and renewals

| | | | |
|---------------------------------|---------------|-------------------------|-----------|
| Date: | 27 May 2021 | Priority: | Medium |
| Security classification: | In Confidence | Tracking number: | 2021-3120 |

| Action sought | | |
|--|--|-------------|
| | Action sought | Deadline |
| Hon Michael Wood Minister for Workplace Relations and Safety | Agree the requirements and processes for varying and renewing a Fair Pay Agreement | 4 June 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 | ✓ |
| Hannah Adams | Senior Policy Advisor, Employment Relations Policy | 04 896 5262 | | |

| The following departments/agencies have been consulted |
|--|
| |

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



BRIEFING

Fair Pay Agreements: Variations and renewals

| | | | |
|---------------------------------|---------------|-------------------------|-----------|
| Date: | 27 May 2021 | Priority: | Medium |
| Security classification: | In Confidence | Tracking number: | 2021-3120 |

Purpose

This briefing seeks your decisions on the requirements and processes for varying and renewing a Fair Pay Agreement (FPA).

Executive summary

Cabinet has authorised you to make decisions on how to vary and renew FPAs to inform the drafting of legislation to give effect to the FPA system.

Duration

We recommend that FPAs should be three to six years in duration. This balances allowing some flexibility while ensuring FPAs are not so short it leads to continuous bargaining or so long that the terms become out of step with the economic environment.

Variations

Bargaining sides should be required to agree a process for varying FPA terms so there is a mechanism to respond to significant unexpected changes or unintended impacts.

Bargaining of a variation will create costs and uncertainty for the industry or occupation and override the existing terms. It is, therefore, important that bargaining of variations is only initiated when there is a clear need (as agreed by both bargaining sides) and the process supports those impacted to participate. We recommend that while bargaining sides can agree how the variation process will work in practice, the system specifies:

- Bargaining sides must agree to initiate bargaining of a variation – This is intended to ensure bargaining of a variation is only initiated when there is an issue that is recognised by both sides and to avoid the risk of one side attempting to relitigate the terms of the existing the FPA as they are not happy with the outcome of the original bargaining.
- Variations must be ratified by those within coverage of the FPA – The ratification is an important check on the representativeness of the bargaining sides. This means bargaining sides could not agree to a process where they approve to vary a term(s) themselves.

Where occupations within the same industry bargained the terms of their aspect of the FPA separately¹, bargaining of a variation should also occur separately. Therefore, the requirement to agree to bargaining a variation would only apply to the bargaining parties involved in the original bargaining of those terms (ie, either in the initial FPA or schedule) and the ratification would only involve the employees/employers covered by those terms.

In terms of the process for bargaining a variation:

¹ This can occur when an initial FPA was bargained for an occupation in an industry and an additional FPA was subsequently bargained for another occupation in that industry and attached to the initial FPA as a schedule.

- The relevant bargaining obligations, and notification and communication requirements will apply.
- Employers can be required to provide a two hour paid meeting once for a proposed variation during the duration of an FPA. This is intended to ensure employees are supported to participate in a variation (as it could override the existing terms), while limiting the impact on employers. When bargaining a variation, the employee bargaining side would need to decide whether to request a paid meeting or save it in case there may be a more significant variation required later for that FPA.
- Bargaining parties and sides could request support from a bargaining support person (depending on availability). Bargaining sides will not receive any additional financial support for bargaining a variation.
- The dispute resolution processes will be amended. We recommend that bargaining sides can agree to request a recommendation (but not a determination) from the Employment Relations Authority (ER Authority) that must then go to a ratification for a vote. This approach is intended to provide a circuit breaker if bargaining sides agree a variation is required, but cannot agree on the content, while ensuring the impacted employees and employers have a voice in whether the FPA term(s) should be varied. The risk with this approach is that there may be a serious issue with a term (eg, due to the term having unintended consequences or a significant unexpected change) but employees or employers are not willing to support the variation as they are benefiting from it. If you had serious concerns with this risk, an alternative approach would be to allow the ER Authority to vary a term by determination if both bargaining sides agree. This would, however, mean that a democratically set term could be varied by the ER Authority at the request of bargaining sides that may not be fully representative.
- The requirements and processes for ratifying an FPA and finalising it would be the same.

Renewals

We recommend the system specify that when applying to initiate bargaining for a renewal of an FPA, the coverage at the start of bargaining should be at least the same as the coverage of the previous FPA. The initiator could, however, extend the coverage as part of the application. This reflects the consolidation decisions, which had the intention that when an FPA is being renewed the bargaining will – at least initially – cover all occupations of the consolidated FPA (including any attached by a schedule). Coverage could still be negotiated during bargaining.

Consistent with collective bargaining under the Employment Relations Act 2000 (ER Act), both unions and employer associations should be able to initiate bargaining to renew an FPA. Unions will, however, be able to initiate bargaining of a renewal earlier than an employer association. If an employer association initiates bargaining for a renewal, there is a low risk that there is no suitable union willing to bargain the renewal. To mitigate this, we recommend that New Zealand Council of Trade Unions (NZCTU) is asked to be the default employee bargaining representative.

We recommend that the same initiation test (either the representative test or public interest test (PIT)) should be required to initiate a renewal. It is important that there continues to be valid and recent mandate or social licence for the FPA. Once bargaining to renew an FPA has been initiated, the intention is that an FPA will result, and bargaining imposes a number of cost on employers and bargaining parties.

The initiation tests would need to be amended slightly for a renewal so that:

- An employer association can initiate a renewal. The equivalent requirement for the representation test would be for an employer organisation to have the support of employers that employed either 1,000 employees or 10% of the industry or occupation within coverage.

- An industry or occupation that initiated an FPA via the PIT can still initiate a renewal using the PIT if the applicant can provide evidence that if it were not for the FPA, the PIT criteria would still be met (noting, they could also initiate a renewal using the representation test or original PIT criteria). This would avoid the system requiring improved employment outcomes to be lost before another FPA can be initiated. In practice, however, it will be extremely difficult to prove.

We recommend that if a renewal has been initiated, the existing FPA should remain in force until replaced by the new FPA (with no maximum time limit). This is intended to avoid the risk that there is a gap between the existing FPA expiring and the new FPA coming into force.

Once bargaining for the renewal of an FPA has been initiated, the standard processes, requirements and obligations should apply.

Recommended action

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

- a **Note** Cabinet has authorised you to make decisions, consistent with the policy framework agreed by Cabinet on any issues that arise during the drafting process, including how to vary and renew FPAs.

Noted

- b **Agree** the duration of an FPA that bargaining sides can agree to must be at least three years and no more than six years.

Agree / Disagree

Variations

- c **Agree** to require bargaining sides to agree a process for varying an FPA as part of the FPA's governance arrangements.

Agree / Disagree

- d **Agree** that the process for varying an FPA must require:

- agreement of both bargaining sides to initiate bargaining of a variation, and
- ratification.

Agree / Disagree

- e **Agree** where different occupations within the same industry bargained the FPA terms for their occupation separately (which were then consolidated by attaching the subsequent occupations' terms to the initial FPA in a schedule), the process and requirements for a variation would only apply to the relevant bargaining parties involved in original bargaining and the employees/employers covered by those terms.

Agree / Disagree

- f **Agree** the obligations, requirements and dispute resolution processes that apply during bargaining of a variation are the same as for normal FPA bargaining, with the following amendments:

- employers will be required to provide one two hour paid meeting for a proposed variation during the duration of an FPA.

Agree / Disagree

- amend the dispute resolution process so that either:
 - terms cannot be varied by determination, but bargaining sides could agree to request a recommendation from the Employment Relations Authority on how to vary the term(s) that must then go to ratification (**MBIE recommends**).

Agree / Disagree

- ii. **OR:** terms can be varied by determination if both bargaining sides agree.

Agree / Disagree

- g **Note** if you select option (b)(ii) for recommendation (f), this would mean that while the variation process agreed by bargaining sides must require the variation to be ratified, ratification would not be required if the term(s) is varied by determination.

Noted

Renewals

- h **Agree** for the initiation of a renewal, coverage should be at least the same as the coverage of the previous FPA (noting, bargaining sides can agree to change coverage during bargaining).

Agree / Disagree

- i **Agree** a union or employer association that meet the requirements to be a bargaining party can initiate a renewal.

Agree / Disagree

- j **Agree** a union can initiate a renewal 180 days, and employer association can initiate a renewal 160 days, before the existing FPA expires

Agree / Disagree

- k **Agree** that if a renewal has been initiated, the existing FPA should remain in force until replaced by the new FPA.

Agree / Disagree

- l **Agree** to seek NZCTU's approval to be the default bargaining representative if there is no union (with members within coverage) willing to bargain a renewal initiated by an employer organisation and notify MBIE of the outcome of this discussion.

Agree / Disagree

- m **Agree** that the initiation tests (ie either the public interest test or representation) should be required to initiate bargaining of a renewal.

Agree / Disagree

- n **Agree** that to meet the representation test, an employer association would need to have the support of employers that employed either 1,000 employees or 10% of the industry or occupation covered by the existing FPA.

Agree / Disagree

- o **Agree** that if the original FPA was initiated by the public interest test, the initiation test for the renewal using the public interest test would allow bargaining of a renewal to be initiated if the applicant can prove that if it wasn't for the FPA the public interest test criteria would still be met (in addition to the option of proving the criteria is still met despite the FPA being in place).

Agree / Disagree



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

27 / 05 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. Cabinet has approved the key features of the FPA system and for drafting of legislation to give effect to the FPA system [refer CAB-21-MIN-0126].
2. Cabinet has authorised you to make decisions, consistent with this policy framework on any issues that arise during the drafting process, including how to vary and renew FPAs

Duration of an FPA

3. Under the ER Act, collective agreements can be any duration up to a maximum of three years. In the Screen Industry Workers Bill (SIWB) an occupation-level collective contract must be in force for a minimum of three years and for no more than six years.
4. We recommend that the FPA system specifies a minimum and maximum duration of an FPA. Including a minimum length would mitigate the risk of continual bargaining and recognise the bargaining costs incurred by employers, bargaining parties, and the government. Including a maximum duration would ensure that the mandate or social licence for the FPA remains valid and the terms of the FPA do not get out-of-step with the economic environment.
5. This approach would provide some flexibility for bargaining sides to determine what is most appropriate for their industry/occupation sector at that time, while providing clear boundaries to limit the size of potential disputes on the FPA's duration. If the industry/occupation is undergoing a lot of change and/or if this is the first FPA, a shorter duration may help the bargaining sides to reach an agreement on the terms as they know they will have an opportunity to reconsider them in a few years. Alternatively, if the occupation/industry is relatively stable and/or it is a renewal (so they are comfortable how the FPA terms work in practice) they may select a longer duration to provide greater certainty and reduce future bargaining costs.
6. We recommend that an FPA must be in force for a minimum of three years and for no more than six years (as per the SIWB). We are concerned that a shorter minimum duration would create higher costs for employers (eg from notification and paid meeting requirements); particularly, as bargaining sides can start bargaining a renewal while the existing FPA is in force (the timeframes for this are discussed below).

Variations

7. During the life of an FPA, circumstances may arise where it would be beneficial for both employers and employees if the terms of the FPA were varied. For instance:
 - a. If particular term is having significant unintended consequences
 - b. A severe economic downturn (eg the base wage adjustments might be set too high) or particular change that means a particular the term(s) is no longer appropriate
 - c. Where the terms were set by determination and both bargaining sides consider they could now agree (and ratify) more appropriate terms.
8. While there may be a strong rationale for varying a term(s) of an FPA, the process of bargaining a variation creates additional costs and uncertainty. It is, therefore, important that the FPA system ensures bargaining of a variation only occurs when there is a clear need that is recognised by both sides.
9. When assessing options for the requirements and processes for varying an FPA, we used the following criteria:

- a. Preserving adaptability – The purpose of enabling an FPA to be varied is to provide a mechanism to respond to unexpected circumstances that mean a term(s) is no longer appropriate. The requirements and processes need to balance providing this adaptability with the other criteria below.
- b. Effectiveness – The other purpose of enabling an FPA to be varied is to provide a mechanism to respond if the terms of FPA are no longer supporting improved outcomes for workers.
- c. Avoiding excessive impacts on employers – Bargaining of a variation leads to uncertainty in the sector, as to whether the FPA terms will change. If this happens regularly it could create continued and unnecessary uncertainty for business. It is, therefore, important that variations are only used when needed. It is important to ensure that the requirements do not create unnecessary or unjustified costs for employers.
- d. Legitimacy – There is a risk that variations could be seen as undermining the process taken to bargain the existing FPA (eg through continually debating the aspects that had been disputed and not respecting the conclusion reached via the dispute resolution process). Therefore, it is important that variations are only used when needed (ie there is an unexpected and significant change), rather than as a tool to try to force re-bargaining of disputed terms. The variation process also needs to ensure any changes have the same level of legitimacy as the original FPA in order to justify overriding the original term(s) and binding the entire occupation or industry.

FPA's must include a term providing how to vary the FPA

10. The ER Act and SIWB requires all collective agreements/contracts contain a term providing how the agreement/contract may be varied. Both NZCTU and BusinessNZ agree there should be a process for how an FPA can be varied. The FPA Working Group did not cover the requirements for varying an FPA in any detail, but recommended that before an agreement expires, either party should be able to initiate a variation of some or all terms.
11. We recommend that bargaining sides be required to include a term providing how the FPA can be varied. This is consistent with the ER Act and SIWB and would ensure there is a mechanism to adjust to any shocks (preserving adaptability) and to respond if the terms are no longer appropriate (so that the FPA is effective in achieving the intended outcomes for workers).
12. Cabinet has agreed that 'governance arrangements' are a 'mandatory to agree' topic'. We recommend the term providing for how the FPA can be varied should be part of the compulsory 'governance arrangements' topic.

Bargaining of a variation must be at the agreement of both bargaining sides and any resulting variation must be ratified

13. While bargaining sides will be required to agree how the FPA can be varied, we recommend that the FPA legislation specify the particular requirements the process must include (which bargaining sides cannot bargain to change). These are intended to ensure that there is a clear need for initiating bargaining a variation (as agreed by both bargaining sides) and that resulting variation of term(s) is supported by the industry or occupation.
14. BusinessNZ thought the variation process should be up to the bargaining sides, but that the Government could specify what the process must include. NZCTU thought that both parties needed to be willing to initiate bargaining for a variation, but that it did not have to lead to an agreement to a variation (although they considered either party could apply for a determination to vary a term(s)).

Both bargaining sides must agree to initiate bargaining of variation

15. The FPA Working Group indicated that any variation or renewal of the FPA agreed between the bargaining parties must meet the same initiation and ratification thresholds as for the original FPA.
16. We do not recommend allowing a variation to be triggered by the same initiation criteria as an FPA as this could lead to endless bargaining if a sub-section of employees (and potentially employers) are unhappy with the FPA that resulted from bargaining. This would undermine the process taken to establish the existing FPA and create additional costs and uncertainty for employers and bargaining parties that may not be justified.
17. The purpose of the initiation criteria for an FPA is to ensure there is a mandate or social licence for the FPA. Once in force the FPA sets the minimum employment standards for that industry of occupation. In order to protect the legitimacy of the existing FPA (and the process undertaken to put it in place) and avoid continuous bargaining, we recommend bargaining of a variation should only be initiated if both sides agree that the term(s) should be varied and are willing to re-bargain that term(s). If both bargaining sides do not agree that the term(s) should be varied, then the bargaining side wanting the variation will need to wait until the renewal process to re-bargain the term(s).
18. The decision of each bargaining side on whether to initiate bargaining for a variation will need to be made by the bargaining parties that were involved in the initial bargaining (including any that joined late) and in accordance with the agreement on how they reach decisions for that FPA. Once bargaining of a variation had begun, other unions or employer associations that meet the criteria to be a bargaining party could join.
19. A risk with this approach is that there may be a clear reason for varying the term(s) but one bargaining side may not be willing to initiate bargaining of a variation. We do not consider there is any way to mitigate this risk without undermining the bargained nature of the system.
20. We also considered letting bargaining sides decide what is required to initiate bargaining of a variation (without specifying any requirements), but discarded this option. We consider there to be very little difference between the two options, as it is likely that they would require agreement from both bargaining sides to initiate bargaining of a variation. So for the sake of certainty and clarity, we thought it best to specify this as a requirement and then allow bargaining sides to agree any additional details of how they would work in practice.

All variations must be ratified

21. Once bargaining sides have bargained and agreed to a variation of a term(s), this should be ratified to come into force. It is important that the employers and employees within coverage have a voice on whether the FPA should be varied. This provides a check that what the bargaining sides have agreed is supported by those they are representing. This is important because while bargaining sides are required to represent those within coverage of their side, they may not be fully representative.
22. BusinessNZ agreed that ratification should generally be required, as it is proof of the representativeness of the bargaining sides. They raised concerns regarding the costs that could be associated with ratification (particularly if this involved a paid meeting), which we have considered below.

Where occupations within the same industry bargained the terms of their aspect of the FPA separately, bargaining of a variation would occur separately

23. BusinessNZ suggested that ratification (and any associated paid meeting) should only include those impacted by the proposed variation. We have considered this and have serious concerns regarding the workability and legitimacy of such an approach because:

- a. It will add significant complexity (and some costs) as employers would need to identify which of their employees within coverage are potentially affected.
 - b. It will generally be difficult to identify the individual employees that would be impacted if a term(s) was varied and which employees would not. As a result there is a significant risk that employees are incorrectly classified and incorrectly included (or not) in ratification, impacting the validity of the ratification results.
 - c. It is also inconsistent with the focus on prompting sector wide dialogue and could lead to the feeling of fragmentation/being excluded from discussions. This could include issues in terms of the relatively of terms within the FPA.
24. As BusinessNZ's main concern was in relation to the ratification costs for employers (with the assumption that paid meetings would be required), we consider a more workable way to address their concern is to limit the number of paid meetings required for variations (discussed below).
25. There is one situation, however, where it is very clear that a variation only affects a subset of employers and employees. This is where an initial FPA was bargained for an occupation within an industry and a subsequent FPA was initiated in another occupation in that industry and was bargained separately and attached to the original FPA by a schedule. In this situation, the coverage of the FPA terms and bargaining parties are clearly different. The two aspects of the FPA (the main FPA and attached schedule) are required to expire at the same time, so that when the FPA is renewed it will include the occupations within the schedule.
26. We think it would be too complicated and time consuming to require the bargaining parties representing the different occupations to work out how to bargain together for the purpose of a variation. In this situation, we recommend that the occupations covered by the original FPA and the schedule can bargain a variation separately (if required). This means only the:
- a. bargaining parties of each side that bargained the terms (ie in the initial FPA or the schedule) originally would need to agree to initiate bargaining of the variation, and
 - b. employers and employees that were within coverage of the terms originally (ie within coverage of the initial FPA or schedule) would be part of the ratification process.
27. The process requirements (eg in relation to notifications and paid meetings) outlined below would also only apply to the relevant bargaining parties, employers and employees.

The process for bargaining a variation will be the same as for the original FPA, with amendments to the paid meeting requirement, provision of financial support, and dispute resolution process

28. We reviewed the processes that apply, or are required, during bargaining of an FPA to assess whether any amendments are required when bargaining a variation.

The same bargaining obligations will apply

29. The duty of good faith will apply to bargaining parties and bargaining sides during bargaining and once the FPA is in force. Therefore, they will apply during discussions on whether a variation is required and during bargaining of a variation.
30. This is part of the ongoing role of bargaining parties during the life of an FPA. We are intending to provide advice on the ongoing role of bargaining parties in early June.

The relevant notification and communication requirements will apply

31. Employers and employees within coverage of the FPA need to know that bargaining is about to start again and could result in a variation.

32. As their representatives, the bargaining parties on each side should have sought the views of employers and employees before initiating bargaining of a variation. Once bargaining for a variation has been initiated, the bargaining sides will be required to keep those they represent updated (as part of their bargaining obligations).
33. Any new employers in the sector should be aware of the existence of the FPA and will be required to abide by the terms. However, their representative may not be aware of their contact details. Therefore, the government and national level social partners should use their networks to raise awareness that a variation is being bargained (as per their role for the original FPA).
34. Cabinet has agreed that employers must inform their employees within coverage when:
 - a. An FPA is being renegotiated or renewed – in this context we consider the reference to ‘renegotiated’ is intended to cover any variations during the life of the FPA, and
 - b. A ratification vote is imminent, an FPA is finalised, and when an FPA comes into force – we consider that when these stages occur in relation to a variation the requirements also apply.
35. It is important that unions have the contact details of the employees that could be impacted by a variation. The requirement for employers to pass on the contact details of employees within coverage of the FPA should also apply during the period when the variation is being bargained.

Employers can be required to provide a two hour paid meeting for a proposed variation once during the duration of the FPA

36. BusinessNZ raised concerns about the impact that variations could have on employers and national productivity. One of the main aspects of bargaining that can impact these is the requirement for employers to provide paid meetings.
37. During the bargaining of the initial FPA, employers are required to provide two, two hour paid meetings. We share BusinessNZ’s concerns about the cost that requiring paid meetings when bargaining a variation would impose on employers. However, it is important that employees are adequately supported to participate in the bargaining process of a proposed variation (in particular the ratification), as the variation would amend the existing FPA and the bargaining sides may not be fully representative of all those impacted.
38. We recommend that employers can be required to provide a two-hour paid meeting in relation to a proposed variation once during the duration of an FPA. This is intended to:
 - a. Reduce uncertainty for employers. While we are not expecting many variations during the life of an FPA, limiting the number of paid meeting (regardless of the number of variations) means employers know the maximum number they may be required to provide during the life of the FPA.
 - b. Incentivise variations only to be initiated when necessary and encourage unions to only request a paid meeting when it is of value given the significant of the variation.
39. The main risk associated with this approach is that it could result in variations where no paid meeting is required to be provided (noting, employers could still decide to provide them). This would have a negative impact on participation. As the intention is that variations should only occur when needed, we do not see this as a high risk. When a variation is being bargained, the relevant unions will need to consider whether to request a paid meeting, or communicate in other ways to save the paid meeting in case a more significant variation is required in the future.

40. We considered other options where paid meetings would only be required for significant variations (with different ways of defining this). We did not, however, identify any options that would be workable as they would all add complexity and/or costs to the process and potentially lead to disputes.
41. One of the options, suggested by BusinessNZ, was to only require paid meetings for variations that would either impact the amount of money employees receive and/or impact employers' costs. We do not consider this would be workable, as the majority of terms would either impact compensation or costs and there could be quite different views as to what was meant by impacting costs. We agree with the concerns raised by BusinessNZ about the potential costs and impact of a large number of paid meetings for proposed variations, but consider this is better managed by the limit on paid meetings proposed above.

Bargaining sides should not receive any additional financial support for bargaining a variation

42. The funding provided to bargaining sides is not intended to cover all the costs associated with bargaining, but support bargaining sides to build capability to bargain an FPA. There is no mechanism for obtaining further funding if FPA bargaining is prolonged. Similarly there should no mechanism for obtaining further funding if a variation is bargained.

Bargaining parties and sides could request support from a bargaining support person, but access may depend on availability

43. A bargaining support person is intended to be available to support FPA bargaining, which could also include bargaining for a variation. If a large number of FPAs are being bargained (or varied) at the same time, there may be delays, or restrictions, in accessing a bargaining support person. We are currently considering how to mitigate this risk in relation to FPA bargaining generally. This may impact the availability of, or access to, a bargaining support person for a variation.
44. The nature of a variation means that bargaining sides have a higher level of agreement going into bargaining as opposed to bargaining of the original FPA (as they must both agree to initiate bargaining), so bargaining sides may choose to proceed without a bargaining support person.

The dispute resolution process should be amended for variations to reflect the difference in bargaining circumstances

45. Bargaining sides may agree a term needs to be varied, but may have difficulty agreeing how to vary the term. In this situation, they could access mediation to help resolve the dispute.
46. If they still cannot agree, we do not recommend allowing one side to apply for a determination to fix the term, or for two failed ratifications to trigger a determination (per the approach for dispute resolution during initial bargaining of the FPA). We consider this would not be appropriate as:
 - a. There is a risk that if one bargaining side could apply for a determination to vary a term it could lead to one side seeking a determination to vary a wider range of terms than was agreed by both sides when initiating the variation.
 - b. It could result in an FPA that was set by a democratic process being overridden by the ER Authority. The inclusion of a determination process for fixing terms for the initial FPA is included to prevent bargaining being stalled if bargaining sides don't agree. This is because parties do not have recourse to industrial action and the intention is that once initiated an FPA will result. The situation when a term is being varied is different, as there is already an FPA in place.
47. Instead, we recommend that if bargaining sides both agree, they can request a recommendation from the ER Authority on the relevant term and that this must be ratified. This approach is intended to provide a mechanism to respond when there is a bargaining

stalemate, while still ensuring that the employees and employers within coverage have a voice as to whether the existing FPA term is varied.

48. Following one (or more) failed ratifications in relation to a variation, bargaining sides could return to bargaining in the hope of identifying a variation that employees and employers would support or cease bargaining.
49. Requiring a variation to be ratified (with no option for it to be varied by determination) should also incentivise bargaining sides to only initiate bargaining where there is a clear and strong rationale for it, as they will need the support of both sides for the variation to be made.
50. The main risk with this approach is that even if there is a clear reason for varying the term it may fail at ratification. For example, if there was a severe economic downturn and both sides agreed that a particular term should be changed to reduce the risk of businesses failing, but employees are not willing to accept the changed term. FPAs are, however, intended to set minimum standards for that sector or industry. Minimum standards are not reduced during an economic downturn. Instead the government utilises other mechanisms (if necessary) to support businesses and reduce job losses. On the other hand, given the range of topics that FPAs can cover (ie not just wages), there is a greater risk that an unexpected change in the market or economy may impact the appropriateness of a term.
51. If you consider this risk should be given greater weight, an alternative option, which was suggested by BusinessNZ, would be to enable the term(s) of an FPA to be varied by determination if both bargaining sides agree. This option is an amendment to the usual process, as it would require both sides' agreement (rather than allowing one side to apply once the criteria is met). It would provide a mechanism to vary terms (via a determination) when the representative organisations agree there is a need, but are unable to get the support of employees and employers. This would, however, give a lot of power to the bargaining sides, who may not be fully representative. It could also result in a determination overriding an FPA term that had been ratified by employers and employees, which could undermine the legitimacy of the FPA.

The requirements and processes for ratifying an FPA and finalising it should be the same

52. The same vetting process should apply to ensure that what has been agreed does not contain any unlawful terms or mean the FPA would no longer contain all the required terms.
53. Each bargaining side will have freedom to agree their ratification process, but it must meet the specified minimum statutory requirements for FPA ratification processes. A successful ratification would require a simple majority of those within coverage who vote from both the employee and employer side to vote in favour. The weighing of employee and employer votes would be the same as for the original FPA.
54. Before a ratified variation is finalised, MBIE will conduct a verification check of the ratification process and results. The existing FPA, which would have been put into secondary legislation, would then be varied by an amendment to the relevant secondary legislation.

Renewals

55. When assessing options for requirements about renewals, we used the following criteria:
 - a. Effectiveness – whether the option supports improved outcomes for workers
 - b. Legitimacy – whether the option ensures there is a mandate or social licence for an FPA
 - c. Workability – whether the option supports the smooth operation of the FPA system

- d. Consistency – with the process for the original FPA and other ERES bargaining systems.

Coverage when initiating a renewal should be at least the same as the coverage of the previous FPA

- 56. When bargaining of an FPA is initiated, the union that applies specifies the coverage of the FPA, which can then be varied during bargaining if bargaining sides agree.
- 57. Cabinet has agreed that bargaining will be required to be consolidated if another FPA is initiated within the same industry (eg, different occupations within the same industry) within a specified period of the first FPA being initiated (noting, you have agreed the period should be six months, refer briefing 2021-1837). After that point bargaining may be consolidated if the existing bargaining sides agree. If bargaining of the FPA is not consolidated, the new bargaining sides would be required to bargain a Schedule to the Industry FPA.² The Cabinet paper states the FPA, and its Schedule, would expire at the same time as the FPA so that when the FPA is being renewed all the occupations already within it will be bargained at once.
- 58. Therefore, when a bargaining of a renewal is initiated, the intention underpinning Cabinet decisions on the consolidation of FPAs is that the coverage of the new FPA should include all those covered by the existing FPA (noting, it could be increased).
- 59. If the initiating party were able to decrease the coverage, this would not support the intention of the system to improve social dialogue across an industry or occupation and could result in consolidation issues being repeated. It could also risk employees and employers not realising they are no longer covered by the new FPA being bargained.
- 60. We recommend that the system specify that when applying for a renewal of an FPA, the coverage must include the occupations within that industry that the existing FPA covers. The initiator could, however, extend coverage as part of the application.
- 61. During bargaining of the renewal, bargaining sides could agree to amend coverage.

Both unions and employer associations should be able to initiate a renewal

- 62. Under the ER Act, only a union can initiate bargaining for a collective agreement; however, a union or employer can initiate bargaining to renew an existing collective agreement.
- 63. The SIWB takes a similar approach and also allows engager organisations to initiate bargaining for a renewal of an occupation-level contract. It also extends what is considered a 'renewal', by enabling engager organisations to initiate bargaining if an applicable occupation-level contract had existed and expired less than two years prior.
- 64. We do not see any reason to take a different approach for FPAs. The main risk of enabling the employer side to initiate a renewal would be if they used this as a strategy to decrease coverage. However, as we have recommended that the starting point for a renewal should be at least the existing coverage, this would be not possible.
- 65. Another risk is that if a single employer could initiate bargaining for a renewal (if they met the requirements, discussed below) they could do so for anti-competitive reasons. BusinessNZ agreed this could be a risk and recommended allowing employer organisations³, but not employers, to initiate bargaining for a renewal. We support this approach, as it would be

² This detail is specified in Annex A of the Cabinet paper 'Fair Pay Agreements: Approval to draft'.

³ These employer organisations would need to meet the requirements specified for bargaining parties (refer briefing 2021-3525).

consistent with the approach on the employee side (where only unions, and not employees, are able to initiate FPA bargaining) and the SIWB.

66. We therefore recommend that both unions and employer associations, which meet the requirements to be bargaining party, can initiate bargaining for a renewal. They would mean not need to have been involved in the bargaining of the original FPA.
67. We also recommend adopting the approach taken in the SIWB of treating the initiation of bargaining within two years of a previous agreement expiring as a renewal. This would mean that when bargaining for a subsequent FPA is initiated within two years of the expiry of the previous one:
 - a. an employer organisation would be able to initiate bargaining for a replacement FPA (rather than it being limited to unions), and
 - b. the scope of the new FPA must be at least the same as the previous FPA.

The system will need to include a backstop if an employer organisation initiates bargaining for a renewal and there is no suitable union willing to bargain

68. If an employer organisation is able to initiate a renewal, there is a risk that there is no suitable union willing to bargain for the renewal. We consider this to be a very low risk, as there would have been a union that initiated bargaining for the initial FPA. We think the system should, however, include a backstop if this does occur as it would be inconsistent if the system required there to be an employer bargaining representative when a union triggered bargaining of an FPA, but did not require an employee bargaining representative when an employer organisation triggered bargaining of an FPA.
69. We recommend adopting the same approach as the employer side, and specify that NZCTU would be the default bargaining representative if there is no union (with members within coverage) willing to bargain for a renewal initiated by an employer organisation. In this situation, NZCTU would be required to:
 - a. use its best endeavours to find a willing and suitable union to represent employees, and
 - b. be the employee bargaining representative if it cannot find a willing and suitable union within three months.
70. We have discussed this with a representative of NZCTU. While they could not provide an official response (as it would need to be discussed with NZCTU's affiliates), their initial view is that NZCTU would accept being named as the default representative as the chance of this happening was extremely low. They indicated that if there was no union willing to represent employees this would either suggest a serious issue with the FPA system (eg, the associated costs were prohibitive) or within that sector, which NZCTU would be likely to want to discuss with you. We note that a similar idea has recently been raised in relation to the SIWB and in that discussion NZCTU had indicated that this would not be within their capacity.
71. We recommend that you seek formal agreement from NZCTU that the FPA legislation include NZCTU as the default representative of employees if there is no union (with members within coverage) willing to bargain a renewal initiated by an employer organisation.

The initiation tests should be required for a renewal

72. The FPA Working Group did not cover renewals in any detail, but recommended that before an FPA expires, either party should be able to initiate a renewal. It indicated that any renewal of the FPA must meet the same initiation and ratification thresholds.

73. Under the SIWB, the same application process applies for a renewal as for the initial occupation-level contract. This requires the ER Authority to run a submission process and decide if there is sufficient support for bargaining to be initiated.
74. We recommend that the same initiation test (either the representative test or PIT) should be required to be met to initiate a renewal. Once bargaining of an FPA has been initiated, the intention is that an FPA will result (either via ratification or determination). It is, therefore, important that there is a continued mandate or social licence for an FPA to be renewed.
75. NZCTU consider that if the same union that initiated the FPA applies for the renewal, they should not be required to rerun the initiation test, but if the applicant is a different union they should. This would mean that the mandate for the ongoing continuation of an FPA could be based solely on the first initiation test. This is a significant power to be provided by quite a low initiation threshold, as it could mean 1,000 employers would be able to trigger not just the bargaining of one FPA, but the renewal of an FPA every few years. We do not consider this to be appropriate.
76. BusinessNZ suggested that the tests be revalidated to check the factors or support are still relevant. We do not see there being a clear distinction between revalidating the tests and rerunning them, as in practice the information required would be the same.
77. We recognise that there are costs associated with these tests, but consider these costs are justified, particularly as once bargaining of a renewal is initiated:
 - a. it will result in a renewed FPA (either agreed or by determination), and
 - b. the bargaining process creates costs for employers, bargaining parties and the government.
78. The union (or employer organisation) should have developed communication structures as part of the bargaining of the first FPA. These should assist with rerunning the representation test to initiate the renewal (if this is the preferred test).

The same criteria for representation should apply if it is an employer organisation applying

79. Enabling an employer organisation to initiate bargaining for a renewal raises the question of what the representation test would involve. It would not be appropriate for the employer side to initiate a renewal based on support from employees as this would undermine unions' role as employees' representative. Instead it should be based on support by employers.
80. To initiate bargaining for a renewal of an FPA, we recommend an employer organisation should need to have the support of employers who employed either 1,000 employees or 10% of the industry/occupation covered by the existing FPA.
81. As only employer organisations can initiate bargaining for a renewal this should mitigate potential competition risks that could occur if a single employer could initiate bargaining for a renewal. This approach was supported by the BusinessNZ.
82. We considered whether other criteria should be applied (eg requiring a certain number of employers support). However, this would add complexity and it would be difficult to determine a suitable equivalent from the employer side given the differing sizes of employers. Keeping the same criteria but applying it via an employer is a simpler approach.

The criteria for the PIT could be varied so that subsequent initiations allow the impact of the existing FPA to be taken into account

83. If the FPA was triggered by a PIT then the criteria used for the initial FPA (eg low wages) may have been addressed (at least to some degree) by the FPA. Therefore, that industry or occupation may no longer meet the PIT criteria for initiating a renewal, although they could initiate bargaining for a renewal by using the representation test instead.

84. The intent of including a PIT is to allow FPAs to be initiated in sectors where there are labour market issues, but the representative test cannot be met due to low coordination or other barriers. In most situations, the previous FPA bargaining and ratification process should have improved coordination in the sector and unions should be in a better position to obtain sufficient support from employees to initiate bargaining for a renewal using the representation test.
85. It is possible, however, that an FPA could be initiated via a PIT and then brought into force via a determination. So there may be some sectors where the FPA is improving outcomes for employees, but coordination may still be an issue.
86. To mitigate the risk of the PIT being difficult to apply once an FPA is in place, we recommend that the PIT for a renewal be amended to allow bargaining of a renewal to be initiated if the applicant can provide evidence, that if it were not for the FPA, the PIT criteria would be met. Cabinet has agreed that MBIE can take specified indicators into account when assessing the PIT. The exact wording of these indicators will be considered during drafting, but they are:
- a. A high proportion of migrant workers
 - b. Evidence of systematic migrant exploitation
 - c. High proportion of temporary work
 - d. Evidence of systematic non-compliance with minimum standards
 - e. High proportion of small firms
 - f. Evidence of systematic health and safety issues
87. If these factors continued to be present in the industry or occupation, they could be used as evidence that the criteria required for the PIT⁴ would have continued to be met if it were not for the FPA. The intention of this approach to avoid the system requiring improved employment outcomes to be lost before a sector can initiate another FPA to regain those improvements.
88. In practice, however, it will be very difficult test for a union (or employer representative) to satisfy this, as it requires evidence for a counterfactual. Therefore there is a risk that applications based on this criteria may be more likely to be declined.

A union can initiate a renewal 180 days, and employer organisation can initiate a renewal 160 days, before the existing FPA expires

89. Under the ER Act, if more than one applicable collective agreement is in force:
- a. a union must not initiate bargaining before 120 days before the date on which the last applicable agreement expires or 60 days before the first applicable agreement expires (whichever is later), and
 - b. an employer must not initiate bargaining before 100 days before the date on which the last applicable agreement expires or 40 days before the first applicable agreement expires (whichever is later).
90. In the SIWB, if there is an applicable occupation-level collective contract in force,
- a. a worker organisation may apply to initiate bargaining no earlier than 180 days before the date on which the contract expires, and

⁴ The criteria for the PIT is: low pay, low bargaining power, lack of pay progression, and long or unsocial hours, or contractual uncertainty that is not adequately compensated.

- b. an engager organisation may apply to initiate bargaining no earlier than 160 days before the date on which the contract expires.
91. The ability to initiate bargaining for a renewal earlier in the SIWB reflects the additional complexity of sectoral bargaining compared to collective bargaining.
 92. We recommend applying the same timeframes in the FPA system. We did consider whether a longer timeframe may be required, given the potentially wide scope of an FPA. However, we are concerned that this could lead to a sense of continued bargaining, particularly if the existing FPA had a shorter length.

If bargaining for a renewal has been initiated, the existing FPA should remain in force until replaced by the new FPA

93. The main risk associated with the timeframes proposed above is that the new FPA is not bargained, ratified (or determined), and in force before the existing one expires. This risk could be mitigated by allowing the existing FPA to continue to be in force past its expiry date.
94. In the ER Act, a collective agreement that would otherwise have expired continues to be in force for a period of up to 12 months during which bargaining continues for a collective agreement to replace the collective agreement that has expired. This the approach currently in the SIWB, but officials are considering recommending this be modified to say that if bargaining has been initiated for a replacement before expiry, the original occupation-level collective contract will continue in force until a replacement is in force (ie not specifying a limit of 12 months).
95. A risk of specifying a maximum extension time is that there could be a gap between the time that the extension expires and the new FPA comes into force, particularly if the bargaining sides have been unable to agree terms and there is a delay in accessing determination. This would create confusion and mean any new employees hired during the gap would not be required to receive terms of the previous FPA (noting their terms would change when the new FPA came into force).
96. For this reason we recommend enabling the existing FPA to remain in force until the new FPA is in force if bargaining for a renewal has been initiated before the existing FPA expires.
97. There is a risk that this could lead to prolonged bargaining. For example, if it impacts a union's incentives to compromise, as employees would continue to benefit from the terms of the existing FPA. However, this is no different to the risk of prolonged bargaining that could occur during the first FPA (eg, if the employer side wants to delay the FPA coming in force) and the system includes a number of mitigants for this (eg good faith obligations and the potential to apply for a determination to fix terms, which we propose be available for renewal).

Once bargaining for the renewal of an FPA has been initiated, the standard processes, requirements and obligations should apply

98. Once bargaining for the renewal of an FPA has been initiated, the processes, requirements and obligations should be the same as for bargaining of an original FPA.
99. Bargaining sides are likely to start negotiations from the existing FPA, or at least the terms they agreed (as opposed to ones that were determined), for efficiency reasons. One side may choose not to, if they consider it would achieve a better outcome for those they are representing to open everything up again.
100. We do not consider there is a suitable rationale for requiring bargaining sides to start from the existing FPA that would justify interfering with their ability to set their own bargaining strategies. The only exception is the proposed requirement for coverage at the start of bargaining to be at least the same as the existing FPA. This is consistent with the approach

for the first FPA, where the coverage is proposed as part of the initiation, but bargaining sides are able to amend it during the bargaining.

101. There is no rationale for amending notification and communication requirements, bargaining obligations, dispute resolution processes, or ratification requirements when bargaining for a renewal because the process will result in a new FPA.
102. The only potential difference may be in relation to the provision of financial support and availability of a bargaining support person. We will be providing advice on how to prioritise financial contributions for bargaining parties in mid-June. We are currently considering the impact of the Budget decisions on access to a bargaining support person.

Next steps

103. We will be providing you remaining advice on the FPA system imminently, and will continue to work on drafting instructions for the Bill.