



BRIEFING

Fair Pay Agreements: Minimum commencement date and implementation settings

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|---------------------------------|------------------|-------------------------|-----------|
| Date: | 24 February 2022 | Priority: | High |
| Security classification: | In Confidence | Tracking number: | 2122-2682 |

| Action sought | | |
|--|--|------------------|
| | Action sought | Deadline |
| Hon Michael Wood Minister for Workplace Relations and Safety | Agree the proposed commencement date for the FPA Bill | 24 February 2022 |

| Contact for telephone discussion (if required) | | | | |
|--|--------------------------------------|-------------|--|-------------|
| Name | Position | Telephone | | 1st contact |
| Beth Goodwin | Manager, Employment Relations Policy | 04 901 1611 | | ✓ |
| Oscar Cornfield | Senior Policy Analyst | 04 913 3929 | | |

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

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose

To seek your agreement on a proposed commencement timeframe for the Fair Pay Agreements (FPA) Bill for Cabinet's consideration by 28 March 2022.

Executive summary

We estimate that the shortest possible timeframe for commencement of the FPA Bill is one month after Royal Assent, based on implementing the minimum Day One regulatory requirements. This will require completing the policy work early and commencing drafting once we know the final scope of the regulation-making powers after Select Committee consideration.

Recommended action

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

- a **Note** that our estimate of the earliest possible commencement of the FPA Bill is one month after Royal Assent based on implementing the minimum Day One regulation requirements.
Noted
- b **Note** that this commencement date relies on the Bill progressing according to plan and assumes no delay in the legislative process to implement the minimum regulation requirements.
Noted
- c **Agree** to specify the commencement date in the introduction version of the Bill as one month after Royal Assent.
Agree/Disagree

Beth Goodwin
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

24 / 02 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. You indicated that you want the FPA Bill (the Bill) to commence as soon as possible after Royal Assent. This briefing provides advice on the earliest timeframe possible for commencement and the risks and caveats associated with this timeframe.

Earliest possible commencement date

2. Based on the timeline option you chose for the Bill and the backstop Supplementary Order Paper (SOP), we expect the Bill to pass third reading on or around 27 October 2022 (aide memoire 2122-1834 refers).
3. We estimate it is possible to have a commencement timeframe for the Bill of one month after Royal Assent at the earliest. This timeframe is very tight and depends on several assumptions (discussed below). A one-month timeframe will have resource implications which must be balanced against the resources required to support the Bill through the Select Committee process.
4. If the Bill is passed on 27 October 2022 and receives Royal Assent a week later on 3 November 2022, then commencement could be as early as 3 December 2022.

We can have the minimum viable Day One FPA regulations implemented by one month after Royal Assent

5. It is possible to implement the minimum regulations needed for Day One if the Act comes into force one month after Royal Assent. However, it is likely that Select Committee could recommend changes that impact on the regulation-making powers, given that there are still aspects of the FPA Bill, including regulation powers, to be addressed at Select Committee (eg implementing your decision on the Public Interest Test (PIT) criteria). In addition, PCO can only start drafting the regulations after Cabinet has agreed to them being drafted once the regulation making powers are settled. This means it is unlikely that there will be enough time to do more than the minimum needed for Day One of the FPA system.
6. If the Bill is amended in a way that means more regulations are required to implement the FPA system or if more elements of the system are delegated to regulation-making powers, this could push back the timeframe for the regulations and the commencement date. However, when we advise on any such late changes, we will alert you to any implementation implications.

Essential FPA regulation-making powers

7. The introduction version of the Bill has six regulation-making powers, with an additional regulation-making power to be included in the backstop SOP to allow for parties to file for determination. Several regulations will be essential for the system to function properly, with the rest being potentially useful but not essential for the FPA Bill.

Regulation powers essential for Day One of FPA system

8. The regulation-making power for specifying the PIT criteria for initiating bargaining is essential for Day One of the FPA system.¹ This is because the first FPA application may require this further specification to qualify for initiation under the public interest criteria. Without this regulation in force, the Chief Executive of MBIE could not assess a PIT-based FPA application received on Day One, which may delay the initiation process and incur reputational risk for the FPA system.

¹ The PIT regulation will set out the detailed criteria the Chief Executive of MBIE will use when determining whether an industry or sector meets the PIT criteria agreed by Cabinet (aide memoire 2122-2129 refers).

Regulation powers needed within three months of FPA Act commencing

9. Several other regulations are required for the FPA system to function properly. Ideally, they would be in place for Day One but must be implemented within three months, in time for when the first set of FPAs could enter the bargaining stage (following initiation). These are:
 - a. Prescribed form and content for FPAs – this specifies the structure for the ‘mandatory to agree’ and ‘mandatory to discuss’ FPA topics, including the FPA minimum entitlement provisions, eg wages, overtime and penalty rates.
 - b. Application form for a bargaining party to apply for determination because:
 - i. Bargaining sides cannot agree on terms and conditions of FPA, ie determination for failure of bargaining to result in a FPA.
 - ii. Employer bargaining side fails to participate in bargaining, ie the backstop determination is triggered because there is no bargaining party on one bargaining side (*to come in backstop SOP*).

Setting a commencement timeframe earlier than one month is not feasible

10. Once the Bill is passed, the following steps must be completed to implement the regulations:
 - a. complete drafting of the regulations
 - b. PCO certification that the regulations are consistent with the finalised empowering provisions of the Act and are not ultra vires
 - c. prepare Cabinet paper for LEG committee
 - d. Cabinet decision
 - e. Executive Council for Governor-General signing
 - f. gazette regulations.
11. At least two to three weeks is required to complete the above steps, assuming the drafting of the regulations are completed by or around Royal Assent. If the commencement timeframe was less than one month, it is unlikely there will be sufficient time to complete the above steps before the FPA Act commences.

Regulations cannot be made until the regulation-making empowering provision is in force

12. Before the Governor-General can make regulations, the empowering provision for those regulations in the primary legislation must be in force, ie the Act must have commenced before regulations can be made.
13. Once the Bill is passed, but before its provisions commence, regulations could be made in reliance of Section 44 and 43 of the Legislation Act 2019. Section 43 of the Legislation Act enables a power conferred by legislation to be exercised before the legislation comes into force, including the power to make secondary legislation, so long as it is necessary or desirable to do so. We would take this approach for implementing the regulation(s) required for Day One to achieve the one-month commencement timeframe for the Act.

Exemption to the 28-day rule

14. The commencement date for the regulations assumes that we will successfully apply for a waiver of the 28-day rule. The 28-day rule reflects the principle that regulations should be publicly available and capable of being ascertained before coming into force.

15. The threshold for obtaining an exemption is high and the reasons for seeking a waiver must be clearly outlined to Cabinet. We may be able to seek an exemption for some of the regulations on the grounds that the regulations have little or no effect on the public or confers only benefits on the public.

Risks and caveats with the one-month commencement timeframe

16. This commencement timeframe has the following risks and caveats:
 - a. **Timeframe risks.** The commencement date relies on the necessary Cabinet and Executive Council meetings falling within the one month following Royal Assent of the Bill. To ensure commencement this year, this relies on the Bill passing its third reading by late October 2022 and receiving Royal Assent by mid-November 2022 at the latest. This is to ensure that we can have the system ready before the summer holidays when Cabinet is not sitting. In contrast, if the Bill were to pass in mid-December 2022 (the last Parliamentary sitting week), at least two months is required for before the Act can come into force to account for the summer holidays.
 - b. **Resourcing.** This approach will challenge our resource capability given that the policy work and preparation of drafting instructions for the regulations must be done concurrently with the Bill while at Select Committee and the backstop SOP. We will increase our resources to mitigate this risk. However, if one milestone for the Bill is delayed, and later milestones are not pushed back, we may need to divert resources from the regulations to the Bill.
 - c. **Changes to the regulation-making powers.** PCO can only commence the drafting of the regulations once the regulation-making powers are settled and Cabinet has authorised drafting. Even if we complete the policy work for the regulations early (ie May or June 2022), we currently cannot predict when the regulation making powers in the Bill will be settled enough for PCO to begin the drafting work before the third reading. We may get a better sense of what the final regulation-making powers will be after Select Committee consultation and therefore when drafting can commence. Late changes made to the Bill could also impact on the timeframe for implementing the regulations. To mitigate this risk, when we advise on any such late changes, we will alert you to any implementation implications.
 - d. **Quality of regulations.** The speed at which we will need to develop and finalise the regulations increases the risk of mistakes or omissions. To mitigate this risk, we will be undertaking policy work on the regulations as early as possible, including for the regulations which may not be implemented for Day One.
 - e. **28-day rule.** There is a risk we may not meet the criteria for a waiver to the 28-day rule for the FPA regulations. This is especially a risk for the PIT regulation, as it impacts on who can initiate a FPA and therefore which employers incur potential costs from the FPA, and which employees will receive the benefits of an FPA.

Next steps

17. If you agree to the one-month commencement date, MBIE will specify this as the commencement date in the introduction version of the Bill for Cabinet's consideration by 28 March 2022.
18. We will advise you throughout the Bill process if we believe that date needs to change.