MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements: Further advice on defining coverage

Date:	30 June 2022	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2122-4274

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister of Workplace Relations & Safety**	Agree to the proposed approach to deciding how FPAs should apply to an employment relationship and defining coverage of an FPA.	4 July 2022

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Beth Goodwin	Manager, Employment Relations Policy	04 901 1611	Privacy of Natural Persons	✓
Stacey Campbell	Senior Policy Advisor	04 901 4139		

The following departments/agencies have been consulted

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Date:	30 June 2022	**Priority:**	High
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Purpose

To provide you advice on addressing concerns relating to coverage in the Fair Pay Agreement (FPA) system.

Executive summary

Submitters have raised several concerns relating to coverage of an FPA which we consider warrant changes to the Fair Pay Agreements Bill (the Bill):

a) The Bill doesn't specify what should happen if more than one FPA could apply to an employee's role, or if an FPA only applies to part of an employee's role.

b) The way bargaining parties define an FPA's coverage could be too wide or vague to be workable. This is echoed by the regulator, who will potentially need to assess whether the representation tests are met based on coverage as specified by the initiating party.

Concern A: How FPAs should apply to employment relationships

Submitters were concerned that it was unclear what should happen if an employee's role could potentially be covered by multiple FPAs. In practice, this might mean only part of their role is covered by an FPA, or several FPAs could apply to their role.

The Bill as currently drafted means multiple FPAs, each with distinct and discrete coverage in terms of work, could potentially apply to a single employment relationship. The Bill does not provide further statutory guidance about how to read multiple FPAs into a single employment agreement. The Bill could also mean that a single FPA that only applied to part of an employee's role would apply to their entire employment relationship.

This reveals a broader set of questions that needs to be answered: *when* should an FPA apply to an employment relationship? For example, if an FPA applies to 5% of an employee's role, should it apply to them? And if it were to apply, would it only apply to that part of their employment relationship, or to the whole relationship? Should the answers to these questions change if the FPA applies to 90% of that employee's role?

We think there are six options that would provide clear answers to the questions above:

Option	Description
Option 1	FPAs apply in proportion based on work done. This could potentially require applying different sets of minimum standards within a single employment relationship, but would ensure employees receive what they are entitled to under any FPA.
Option 2	Employee receives most favourable terms across all applicable FPAs. While this would benefit employees, we have concerns about mixing and matching terms from across FPAs, and do not think this would be viable in practice.

Option	Description
Option 3	Time worked used to determine whether/which FPA applies. For example, the FPA that applied to the greatest portion of an employee's work hours would prevail over any other FPA. An additional feature of this option is that a minimum threshold could be set before an FPA could apply to an employment relationship (eg that it at least applied to 50% of an employee's work).
Option 4	Principal purpose used to determine whether/which FPA applies. In Australia, the principal purpose test is used to decide whether a Modern Award applies when there are coverage disputes. While this would ensure a link between the main work done by an employee and any FPA that applied to them, it would mean employees missing out on minimum standards/entitlements for any work below the 'principal purpose' threshold.
Option 5	Employee chooses whether/which FPA applies. Employees could choose between any applicable FPA for their work. However, this would result in different outcomes across employees doing the same work, including within the same workplace.
Option 6	If more than one FPA applies, use hierarchy of FPAs to determine which applies. This would involve the Employment Relations Authority setting a hierarchy of FPAs when doing the compliance check. This hierarchy would then be used to choose between multiple applicable FPAs if needed.

Of the six options above, we do not consider there is a clear, desirable option to recommend.

Concern B: Defining Coverage

Submitters were concerned about the complexity and difficulty involved in bargaining an FPA with extremely broad coverage, and said the rules for defining coverage are too vague. The regulator may also have difficulty assessing whether the relevant initiation test is satisfied (eg deciding what 10% of covered employees or employers amounts to) if coverage is defined very narrowly, widely, or including an unusual 'mix' of occupations. For example, initiating bargaining for an FPA for 'hotel workers' could include all tasks that you would expect from a range of otherwise quite different occupations, from housekeeping to check-in to being a waiter in the restaurant.

During public consultation on the FPA system in 2019, MBIE sought feedback on requiring coverage to be specified according to the Australia New Zealand Standard Classification of Occupations (ANZSCO) or the Australia New Zealand Standard Industrial Classification (ANZSIC) system. At the time, employers in particular did not support using ANZSCO or ANZSIC to define coverage.

At present, the Bill requires an initiating party to propose coverage, which must be sufficiently clear to ensure initiation tests can be carried out by the regulator, and so that potentially covered employers and employees can be identified. If the regulator approves the application for bargaining to be initiated, bargaining sides can alter coverage during the bargaining process.

We consider a balance can be struck between the permissive approach currently in the Bill, and the desire for more structure in how coverage of FPAs is defined.

We recommend amending the Bill to state that coverage of an FPA must be articulated in accordance with regulations, if any. We also recommend that regulations be made that require requiring parties to define coverage according to ANZSCO codes for occupation FPAs and according to both ANZSCO and ANZSIC codes for industry FPAs, unless there is a good reason not to. If the initiating party considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, then the initiating party must describe that occupation and industry with sufficient detail for MBIE to understand how

the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry.

We recommend that these regulations be made in tranche 1, so that they are ready as soon as possible after the commencement of the FPA Act.

In the time available, we have not been able to complete the necessary policy and data work to recommend more detailed rules for using ANZSCO and ANZSIC codes to define coverage (eg to advise on whether to limit the levels of these codes that can be used to articulate coverage). We also cannot tell whether the predicted problems relating to coverage will eventuate when the system comes into force.

We recommend that further work be undertaken on options for defining the breadth of the levels for ANZSIC and ANZSCO codes to control for extremely narrow or extremely broad initiations of coverage**.** We consider that these regulations will likely be able to be included in tranche 2 or tranche 3 (ie ready in the months after the Bill commences) depending on policy capacity to undertake the work required.

We also consider that coverage should not be able to be constructed in a manner that only includes one employer. In that instance, the FPA system could be used to avoid firm-level bargaining under the Employment Relations Act. Therefore, we recommend the Bill be amended to state that the Chief Executive of MBIE must reject an application that only covers one employer.

Recommended action

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

a **Note** we have not been able to conduct a full analysis due to time and consultation constraints.

Noted

b **Note** MBIE will reflect your decisions on this briefing in the Cabinet paper seeking changes to the FPA Bill.

Noted

How FPAs should apply to employment relationships

c **Note** it is uncertain how FPAs will apply to a single employment relationship, for example if an FPA only applies to part of an employee's work, or if multiple types of work are done as part of that employment relationship.

Noted

d **Note** submitters have said it will be difficult for employers and employees to work out how to apply terms from different FPAs when they are deemed into a single employment agreement, particularly if this requires assessing the proportion of time spent doing work covered by different FPAs.

Noted

e **Note** the Bill as currently drafted is not clear about how FPAs should apply to employment relationships, particularly if multiple FPAs apply to the same employment relationship at the same time.

Noted

f **Provide feedback** on the following options to clarify how FPAs should apply to employment relationships:

Option	*Description*
Option 1	FPAs apply in proportion based on work done.
Option 2	Employee receives most favourable terms across all applicable FPAs.
Option 3	Time worked used to determine whether/which FPA applies.
Option 4	Principal purpose used to determine whether/which FPA applies.
Option 5	Employee chooses whether/which FPA applies.
Option 6	If more than one FPA applies, use hierarchy of FPAs to determine which applies.

Feedback provided / Discuss

Defining Coverage

g **Agree** that the Bill be amended to require parties to define coverage of an FPA in accordance with regulations (if any).

Agree / Disagree

h **Agree** that regulations require parties to define coverage:

a. according to ANZSCO codes for occupational FPAs, and

b. according to ANZSCO codes and ANZSIC codes for industry FPAs, unless

c. the initiating party (or bargaining parties) considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, in which case the party/parties must describe that occupation and industry with sufficient detail for MBIE to understand how the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry.

Agree / Disagree

i **Agree** that the regulations for recommendation (h) be included in the tranche 1 regulations, to be completed as soon as possible after the commencement of the Bill.

Agree / Disagree

j **Agree** that officials provide you with further advice on options for defining the breadth of the levels for ANZSIC and ANZSCO codes to control for extremely narrow or extremely broad initiations of coverage.

Agree / Disagree

k **Agree** that the CE of MBIE must reject an application to initiate bargaining for an FPA if the proposed coverage will only cover one employer.

Agree / Disagree

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

30 / 06 / 2022

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

2. MBIE provided you advice on how coverage could work in the FPA system in January 2021 (briefing 2021-1837 refers). As a result of decisions agreed to in that briefing, as well as subsequent decisions along the design process, the Bill sets out that:

    a. An FPA must be defined as either an **Occupational FPA**, covering all industries within that one occupation, or an **Industry FPA**, covering an industry with one or more occupations.

    b. The initiating party is required to describe the occupation(s), including a description of the work.

    c. MBIE is then required to ensure the description of the occupations and/or industry proposed by the initiator (or bargaining parties where coverage is expanded during bargaining) is sufficiently clear so that the impacted parties can identify that they are within coverage.

    d. Where the work covered by a proposed FPA overlaps with an FPA that is in force, the Employment Relations Authority must decide which FPA offers the most favourable terms to employees doing work in overlapping coverage, and that FPA will apply to those employees.

3. In May 2022, officials had a meeting with you to discuss priority policy issues that remain in the FPA Bill. A key issue noted was around how coverage could be construed (i.e. too broadly, too narrowly or potentially a blend of occupations) and the workability of this in the system. You agreed that coverage was a priority issue and that advice should be provided once officials had assessed concerns raised by submitters on the FPA Bill about coverage.

4. The options in this briefing are assessed against the following criteria (where relevant):

    a. Effectiveness: whether the option supports improved outcomes for workers

    b. Preserving adaptability: whether the option enables firms to adapt flexibly to shocks in the market, and adopt innovative practices without undue restrictions

    c. Avoiding excessive impacts on employers: whether the option would have an excessive impact on employers relative to the benefits for workers

    d. Legitimacy: whether the option ensures there is a mandate or social licence for an FPA, as well as including appropriate checks and balances

    e. Workability and simplicity: whether the option supports the smooth operation of the FPA system and the process is clear to all parties and avoids unnecessary complexity

    f. Balance: whether the option strikes a suitable balance between certainty and flexibility for participants

    g. Consistency: whether the option is consistent with design of the FPA bargaining process, unless there is a good reason for divergence

    h. Cost effectiveness / efficiency: whether the option achieves the objective in a way that represents good value for money.

    i. Risk of undermining the intention of FPAs to be bargained: whether the option would incentivise employers and/or employee representatives to not bargain

    j. Enduring: The system is enduring, with minimal chance of frustration by key actors.

Submitters have identified a number of concerns with coverage

Submitters raised concerns that coverage could be too broad and questioned which FPA applies where the employee's role covers multiple occupations

5. A number of submitters raised concerns about coverage in the FPA Bill. These can be grouped into two set of concerns:

    a. **The Bill doesn't specify what should happen if an employee's role is covered or could potentially be covered by multiple FPAs.** The Law Society and a number of employer submitters raised concerns about the complexity involved with assessing whether an FPA should apply to an employee, or which FPA should apply. Some submitters pointed to the situation in Australia where it took years for cases to be heard about which Modern Award should apply to an employee that does multiple roles.

        i. *The employee has a job with one employer that covers multiple occupations that each have an FPA.* For example, a receptionist who also does housekeeping and food preparation for room service. Several submitters raised this as a concern, most notably employers in the hospitality and tourism sectors who said that this type of role was common and was informally known as 'stacking' in the industry. Stacking is where an employer will offer varied roles across the business to an employee to give them more hours of work.

        ii. *The employee has a job with one employer that covers multiple occupations, but only one of those occupations has an FPA*. For example, if an employee works 55% of the time as a receptionist where there currently is no FPA, and 45% of the time as a cleaner where there is an FPA.

    b. **Coverage may be defined too widely or be too vague to be unworkable.** There were around 60 submitters that commented on coverage, most of these were employers or employer associations. Of particular concern was the complexity and difficulty involved in bargaining extremely broad coverage. Woolworths New Zealand urged the select committee to consider mechanisms for requiring more details as to the intended coverage of an FPA. They considered that the requirement for 'sufficient clarity' was too vague and subjective and stated it is critical that the particular occupation and sector are defined and finalised in detail at an early stage in bargaining to ensure that the correct parties are at the bargaining table and invested in bargaining. The New Zealand Law Society also considered that the test, and the examples provided in the Bill, were too simple.

Concern A: How should FPAs apply to employment relationships?

The Bill as currently drafted is unclear about how FPAs should apply to employment relationships

6. There is a process in the Bill for resolving overlaps in coverage of types of work between different FPAs. However, the Bill is not clear about what should happen when multiple FPAs could potentially apply within a single employment relationship.

7. Under the Bill, currently, coverage in relation to an FPA means 'the employees who perform work to which the terms of the FPA apply'. This does not reflect how the coverage provisions were intended to apply, because they currently apply to the 'employee performing the work' and not to the 'work itself when done by an employee'. We consider that the coverage provisions need to be amended to fix this error, which could have implications for how FPAs are deemed into an employee's employment agreement.

8. Under clause 162, to the extent that an FPA provides a term that is more favourable than a term in the covered employee's employment agreement, the relevant term of the FPA prevails and is deemed to apply to the covered employee's employment agreement from the date the FPA covers the employee. The current drafting of the Bill's coverage provisions leads to two possible interpretations of the deeming clause:

    a. Even if the work that the employee performs is only partially described in the coverage clause of an FPA, the FPA could still apply to all the work the employee does as part of that employment relationship. In situations where multiple FPAs apply to that employment relationship, they would all be deemed into the employment agreement, and could mean that the employee would need to receive the most favourable terms for each topic covered by all the applicable FPAs.

    b. An alternative interpretation is that the terms of an FPA only apply when the employee is doing work described in the coverage clause of the FPA. For example, if an employee spent a portion of their time cleaning, being a receptionist and being a waiter, their minimum terms for the time they are performing each particular function would be set by the relevant FPA i.e. when cleaning the employee would be entitled to receive the terms and conditions relating to a Cleaner FPA. When the drafting issues relating to coverage are fixed, this is likely to be the interpretation that prevails if multiple FPAs apply to a single employment relationship.

9. Submitters on the FPA Bill also expressed concerns about navigating multiple sets of FPA terms for a single employment relationship, which they considered would be a very complicated exercise in practice.

10. This also reveals a broader set of questions that needs to be answered: ***when*** should an FPA apply to an employment relationship? For example, if an FPA applies to 5% of an employee's role, should it apply them? And if it were to apply, would it only apply to that part of their employment relationship, or to the whole relationship? Should the answers to these questions change if the FPA applies to 90% of that employee's role?

How should FPAs apply to an employment relationship, and if multiple FPAs apply, which one should prevail?

11. The first issue that needs to be resolved is whether FPAs can apply proportionally to employment relationships, or whether there should be a binary.

    a. By "proportionally", we mean that if an FPA applies to 20% of an employee's work, it would therefore apply to that proportion of their employment relationship.

    b. In contrast, by "binary", we mean that either an FPA applies to all of an employment relationship, or none of an employment relationship.

12. If FPAs should apply proportionally (**Option 1**), we think this means:

    a. If there is an FPA for part of an employee's role, it only applies to that part of their role.

    b. If there are multiple FPAs for an employee's role, each FPA only applies when the relevant work for that FPA is done.

13. For the binary approach (ie if FPAs should either apply entirely to an employment relationship, or not at all), there are several options in the table below:

Option	Description
Option 2: Employee receives most favourable terms across all applicable FPAs.	Across any FPAs that applied to their work, an employee would be entitled to the most favourable combination of terms. For example, if one FPA had a better base wage rate, they could choose that, in combination with other terms from a different FPA. MBIE does not consider this option viable, because of potential incompatibility between chosen terms.
Option 3: Time worked used to determine whether/which FPA applies.	The FPA that represents the greatest portion of the time worked by the employee applies. This would mean if 20% of an employee's work was covered by one FPA, but 30% of their work was covered by a second FPA, the second FPA would apply to the entire relationship. A version of this option would be to set a minimum threshold any FPA must meet before it can apply (eg 50% of an employee's work). This would prevent an FPA that only applied to a relatively small portion of an employee's work from applying to their entire employment agreement.
Option 4: Principal purpose used to determine whether/which FPA applies.	A rule could be created based on common law principles that have been developed under the Modern Awards system in Australia. For Modern Awards, the 'principal purpose test' addresses what Award should apply to a worker when coverage is in dispute.[1] The test used in Australia is: '*in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed*[2].' Adapting this test, we consider parties could be required to: • assess the nature of the work with a view to ascertaining the principal purpose for which the employee is employed; and • make more than a 'mere quantitative assessment' of the time the employee spends performing certain types of duties; and • assess work performed within a reasonable period of the date of the assessment. Under this option, the principal purpose test would also be applied by the Labour Inspectorate or Employment Relations Authority when resolving any disputes between parties.
Option 5: Employee chooses whether/which FPA applies.	This could be similar to how employees choose between multiple collective agreements at present. Employees could be able to change which FPA applies, for example, when a new FPA comes into force that applies to them or when the FPA they have chosen expires.

[1] Note, these rules are typically applied when an employee has been dismissed and they are attempting to work out which terms and conditions should have applied to that worker. See the discussion on the principled approach to Coverage here: https://www.fwc.gov.au/modern-award-coverage
[2] *Leigh Carpenter and Corona Manufacturing Pty Ltd* PR925731, https://www.fwc.gov.au/documents/decisionssigned/html/pr925731.htm

Option	Description
Option 6: If more than one FPA applies, use hierarchy of FPAs to determine which applies.	When resolving coverage overlaps after bargaining has finished, the Authority could be required to assess whether the proposed FPA offers better terms for employees than any of the FPAs that already in force. This would result in a creation of a hierarchy of FPAs, only to be used where multiple FPAs apply to a single employment relationship. Of all the FPAs that apply, the one the Authority considered better for employees would apply instead of any other applicable FPAs.

14. Of all six options, we do not consider there is a clear, desirable option to recommend. We have described their relative merits and drawbacks in the table at **Annex 1**.

15. A common element of all of the binary approach options (options 2 to 6) is that in some situations, they could result in an employee 'missing out' on FPA minimum standards and entitlements that apply to their work. In other situations, employees could receive FPA minimum standards and entitlements despite not doing the work concerned.

16. We consider the coverage provisions in the Bill need to be amended to refer to coverage in terms of types of work, rather than employees and employers. In addition, there is an opportunity for you to decide how FPAs should apply to an employment relationship by choosing from any of the six options presented.

17. We seek your feedback on whether you have a preferred option of the ones in this briefing, to be reflected in the Cabinet paper we prepare next week about changes to the FPA Bill.

Concern B: Coverage could be defined in an unworkable way

18. In addition to concerns raised by submitters, officials have a number of concerns about how an occupation or an industry can be defined.

19. Currently the CE of MBIE must work with the initiating party to ensure that coverage is sufficiently clear so that all employers and employees are able to determine whether they are within coverage of the proposed FPA (clause 31). While coverage can be altered during bargaining, the test as it currently stands could create a number of problems:

    a. **For an Occupational FPA, it does not prevent an initiating party from including an unusual 'mix' of occupations or a wide range of occupations** (i.e. an FPA that covers multiple occupations), for example, initiating an occupational FPA (rather than industry FPA) for 'hotel workers' could include all tasks from a number of occupations, from housekeeping to check-in to being a waiter in the restaurant. There are several risks with grouping multiple occupations into a single defined occupational FPA. It would be extremely complex to bargain because it could involve incredibly divergent bargaining interests (the occupational FPA would span *all* industries and, based on how an 'occupation' was defined, could involve what some might consider to be several occupations). Without using commonly understood definitions of occupations, it may be more difficult for those within the system to undertake their obligations to notify impacted parties. Bargaining across an extremely divergent set of issues is likely to be extremely costly and not efficient. Without limitations on how an occupational FPA can be construed, defining coverage in this way could also be used to have a 'second bite at the cherry' if an industry FPA had already been bargained, as well as create additional complexity in the system, particularly around the increased risk of overlapping FPAs. It may be more difficult for the ER Authority and MBIE to assess whether a coverage overlap exists if the occupational FPA or the occupations within an Industry FPA are in reality a blended mix of occupations.

b. **It does not prevent coverage from being extremely narrowly defined** i.e. an initiating party may define coverage so that only one large employer is covered or may define an occupation narrowly to only capture a portion of an occupation (for example, hospital and public health nurses, but omitting general practice nurses). Defining coverage in this manner would go against the purpose of the system, which is providing a framework for industry or occupation-wide collective bargaining. The intention is that an occupation reflects the common understanding of what that occupation is and not a subset. In addition, there is already a system in place for firm-level collective bargaining. The FPA system should only be used for its intended purpose and it is not intended to used for firm-level collective bargaining.

c. **It may be difficult to assess the initiation thresholds because the defined group may not reflect how labour market data is collected. It also may be difficult to assess whether there is an overlap.** It will be difficult to determine what the denominator for the 10% representation test is or whether criteria for the public interest test are met where the definition of coverage does not reflect known classifications of occupations or industries used to collect labour market data. There is also greater risk that there will not be any overlapping FPAs captured by the ER Authority because there is no guarantee that the groups of occupations across FPAs are described in a similar way (i.e. it would be less likely).

Background to decisions taken around defining coverage

20. Below is a short history of advice on FPA coverage that has been provided over the last few years:

a. **The FPA discussion document sought submissions on bargaining parties being required to define coverage using existing occupational or industry classification systems**. We previously recommended requiring coverage to be set by specifying named occupation(s) within named industry(ies) using the Australian New Zealand Standard Classification of Occupations (ANZSCO) and Australia New Zealand Standard Industrial Classification (ANZSIC) occupation and industry codes. ANZSCO and ANZSIC provide standard classifications for occupations and industries in New Zealand and Australia.[3] We identified the following advantages of this approach: it would be workable, consistent and limit the risk of overlap. We thought the requirement to specify both occupation and industry, combined with the representativeness test requirement, should drive initiators to only include relevant occupations who could benefit from an FPA. It would also be easier to assess whether the representation test had been satisfied, given the availability of information according to ANZSCO and ANZSIC codes. In theory, this would still provide flexibility to parties as in theory all occupations within an industry could be listed. Likewise, all industries for one occupation could also be listed. We expected this focussing of the scope of coverage to contribute to better bargaining as parties may have more in common.

b. After considering submissions, the requirement to use existing classification systems was no longer necessary because the then-Minister decided to specify the eligible workforces that met the public interest test in regulations. Many submitters opposed being required to only use the ANZSCO and ANZSIC codes to define coverage. Many employers provided examples from their own industries to illustrate why the codes were inappropriate. The former Minister then agreed eligible workforces would be specified in regulations. This meant that parties who initiate bargaining would be doing so within the constraints of the specified workforces set out in regulation. We then recommended that the bargaining parties must specify a

[3] This would have meant, for example, an initiator might name the coverage as Kitchenhands, Waiters, Bar Attendants and Baristas (occupations) in Cafes and Restaurants (industry). Kitchenhands who work in the Aged Residential Care Services industry would be excluded from coverage.

combination of occupations and industries within the constraints set by the specified workforces in regulations.

c. **In 2020, you decided that bargaining could be initiated for any industry (specifying the occupations to be covered) or occupation, so long as coverage is sufficiently clear.** When you became Minister, you decided that there should be no Government involvement in which industries or occupations can have an FPA. Rather, it would be up to the initiating parties based on the representation test or public interest test. Given submitters' concerns around being *required* to use the ANZIC or ANZSCO codes, it was decided that a permissive approach would be taken where the initiating party would be able to initiate for either an Occupational FPA or an Industry FPA, so long as they included the named occupation and a description of the work or type of work for each occupational grouping and that description was sufficiently clear. Parties could then negotiate and alter coverage during bargaining, which may require re-assessing whether the initiation tests are still met.

21. Defining occupations and industries can be challenging. Some submitters do not like a permissive approach, as is currently in the Bill. Conversely, there was no widespread support for an approach using New Zealand's occupation and industry classification system, based on submissions we received on the discussion document. We note that submitters representing employers tended to be more opposed to both approaches, whereas unions did not express disagreement on the same scale.

22. In addition, the regulator has indicated it will be easier to assess whether the representation test is satisfied if there is some requirement for bargaining parties to define coverage using existing classification systems. This is because assessing whether 10% of relevant employees or employers support initiation requires knowing the total number of employees or employers within coverage. If ANZSCO and ANZSIC are used to describe coverage, this would make it significantly easier for the regulator to obtain a figure against which to check whether the 10% threshold is met.

23. Also, it would be easier to gather relevant evidence for the public interest test if coverage was defined using known classification systems (though, as discussed in briefing 2122-4414 on the public interest test, there would be limits to its usefulness if coverage was not defined at the most specific classification levels for occupations).

24. For the reasons above, we consider the Bill should be amended to provide some structure in defining coverage, while still giving bargaining parties considerable latitude.

How the ANZSCO and ANZSIC classification systems work

The ANZSCO classification system

25. ANZSCO is a skill-based classification system used to classify occupations and jobs in the Australian and New Zealand labour markets.

26. ANZSCO defines these occupations according to their attributes and groups them on the basis of their similarity into successively broader categories for statistical and other types of analysis. The structure of ANZSCO has five hierarchical levels - major group, sub-major group, minor group, unit group and occupation. The categories at the most detailed level of the classification are termed 'occupations'. An 'occupation' is defined as a set of jobs that require the performance of similar or identical sets of tasks.

27. The classification system provides a list of tasks that are included at each level, an example is provided at the minor group, unit group, and occupational level in **Annex 2**.

Example of ANZSCO categorisation

3	Technician and Trade Workers			Major Group
35	Food Trades Workers			Sub-Major Group
351	Food Trades Workers			Minor Group
3511	Bakers and Pastrycooks			Unit Group
	351111	Baker		Occupation
	351112	Pastrycook		Occupation
3512	Butchers and Smallgoods Makers			Unit Group
	351211	Butcher or Smallgoods Maker		Occupation
3513	Chefs			Unit Group
	351311	Chef		Occupation
3514	Cooks			Unit Group
	351411	Cook		Occupation

28. Statistics concerning occupations in the labour market are currently gathered according to this classification system. Census data can be representative at the occupational level (ie six-digit level), however, for more frequently updated data (for example, from the Household Labour Force Survey), it tends to only be representative at the two to three-digit level due to sample size.

The ANZSIC classification system

29. ANZSIC provides a standard framework under which business units carrying out similar productive activities can be grouped together, with each resultant group referred to as an industry. An individual business entity is assigned to an industry based on its predominant activity (IRD assign a code to each business entity when the company forms).

30. ANZSIC is a hierarchical classification with four levels, namely Divisions (the broadest level), Subdivisions, Groups and Classes (the finest level). At the Divisional level, the main purpose is to provide a limited number of categories which provide a broad overall picture of the economy. The Subdivision, Group and Class levels provide increasingly detailed dissections of these categories for the compilation of more specific and detailed statistics.

Example of the hierarchical structure of ANZSIC

H	**ACCOMMODATION AND FOOD SERVICES**			Division
44	**Accommodation**			Subdivision
440	Accommodation			Group
	4400	Accommodation		Class
45	**Food and Beverage Services**			Subdivision
451	Cafes, Restaurants and Takeaway Food Services			Group
	4511	Cafes and Restaurants		Class
	4512	Takeaway Food Services		Class
	4513	Catering Services		Class
452	Pubs, Taverns and Bars			Group
	4520	Pubs, Taverns and Bars		Class
453	Clubs (Hospitality)			Group
	4530	Clubs (Hospitality)		Class

ANZSCO and ANZSIC have limitations, including that they are not easily updated and therefore do not reflect new and emerging occupations or industries

31. There are concerns that the ANZSCO system does not always accurately reflect occupations in the New Zealand market, this is because the system is not easily updated (the last largescale update was in 2006).

32. There are also discussions about transitioning from ANZSCO to another system called O*Net, the rationale is that the focus is more on the skills of the job rather than the job title.

This is likely to be over the longer term and there will likely be a transitioning process when ANZSCO codes are matched to the occupations in O*net.

33. ANZSIC has also faced similar criticisms around accurately reflecting the industries in New Zealand, though arguably these are more settled and less subject to change. New Zealand is not looking to replace the ANZSIC system.

Options to address concerns with defining coverage

34. The options listed below build on the requirements in the Bill, namely that the initiating party must still state whether they are initiating for an occupational FPA or an industry FPA, and must provide a description of the work per occupation and ensure coverage is sufficiently clear.

    a. **Option 1: Require that coverage be defined using the ANZSCO and ANZSIC classification systems, unless there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question.** Under this option the initiating party must (in addition to the requirements in the Bill) identify which ANZSCO and ANZSIC codes apply to the occupation(s) and/or industry they wish to be covered. For an occupational FPA, ANZSCO must be used. For an industry FPA, ANZSIC and ANZSCO codes must both be used. If the initiating party is unable to find an appropriate code, they must describe that occupation and industry with sufficient detail for MBIE to understand how the occupation or industry described relates to the other classifications and why it can't be covered by an existing occupation or industry. If parties alter coverage during bargaining, ANZSIC and ANZSCO codes must still be used where possible.

    b. **Option 2: Building on option 1, but also requiring that the description of the occupation or industry be set at a specific level of ANZSCO and ANZSIC.** This would control the breadth of occupation or industry definitions. For example, industry classification could be required to at least be at the Subdivision (two-digit)/Group (three-digit) level or wider. This would prevent very narrow definitions of industries at the Class (four-digit) level. Parties could also be allowed to combine three-digit level industries. A similar approach could be taken to the use of ANZSCO codes: if limited to three digits or more, this would prevent very wide definitions of occupations that might hamstring bargaining.

35. Using existing classification systems would help ensure clearer boundaries between occupations and industries which would assist the ER Authority when they need to do the overlap assessment. Under either option, we also suggest allowing bargaining parties to refine the task lists associated with the ANZSCO occupation (see Annex 2 for an example) to better reflect the occupations that they wish to cover. This would provide flexibility to amend the descriptions of the tasks as described by ANZSCO to be clearer about which occupations are covered.

Analysis of options

36. We recommend proceeding with option 1 but allowing for option 2 in the future, if necessary, for the following reasons:

    a. Option 2 would provide the most safeguards against risks identified with coverage, but is a greater limitation on bargaining parties' freedom to define coverage than option 1.

    b. In the time available, we also have not been able to complete the necessary policy and data work to advise you about what levels of ANZSCO and ANZSIC codes (and combinations thereof) should be permitted when defining coverage.

    c. As bargaining progresses, it may be that option 2 is not needed, if the issues foreseen with coverage do not eventuate.

37. We do not recommend leaving the coverage provisions in the Bill as they are. This is because there is a risk that the regulator cannot assess whether the representation or public interest tests are met if coverage is not defined in terms of ANZSCO codes (according to which labour market statistics are collected). Without amendment of this aspect of the Bill, there is a risk that bargaining will be hindered or delayed at the initiation stage.

Amendments needed to the FPA Bill

38. We therefore recommend the Bill be amended to require parties to define coverage of an FPA in accordance with regulations (if any).

39. We also recommend regulations require parties to define coverage:

    a. according to ANZSCO codes for occupational FPAs, and

    b. according to ANZSCO codes and ANZSIC codes for industry FPAs, unless

    c. the initiating party considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, then the initiating party must describe that occupation and industry with sufficient detail for MBIE to understand how the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry.

40. Setting the detailed requirements in regulations will provide flexibility over time. For example, more specificity can be added (eg in line with option 2 above), or removed if this is not needed over time.

41. We recommend regulations about defining coverage be included in the first tranche of regulations made under the FPA Bill, coinciding with commencement of the primary legislation.

We also recommend specifying that FPAs cannot cover a single employer

42. We consider that coverage should not be able to be constructed to only include one employer. Defining coverage in this manner would go against the purpose of the system, which is providing a framework for industry or occupation-wide collective bargaining. The FPA system should not permit firm-level collective bargaining, because this would subvert firm-level bargaining under the Employment Relations Act. Therefore, we recommend amending the Bill to specify that the CE of MBIE must reject an application to initiate bargaining that only covers one employer.

43. Requiring the use of ANZSCO and ANZSIC classification systems (as recommended above) should reduce the risk of this happening. However, there are a few occupations that may mean only one employer is included (for example, police officers).

Next steps

44. The timeline for incorporating your decisions on policy changes is:

Policy decisions received from Minister	4 July
Draft Cabinet paper provided to Minister	7 July
Cabinet paper lodged	22 July
DEV consideration	27 July
Draft departmental report to Minister for comment	28 July

Cabinet decision	1 August
Final departmental report to Ministers office	4 August
Departmental report to Select Committee	8 August

45. Officials will include your agreed decisions on the changes to coverage in the Cabinet paper in accordance with the above timeline.

Annexes

Annex 1: How FPAs should apply to employment relationships

Annex 2: ANZSCO description of work for Food Trade Workers at the minor group, unit group and occupational level

Annex 1: Options for how FPAs should apply to employment relationships

Approach	Option	Who decides if disputed	Pros	Cons
Proportionate approach	**Option 1** FPAs apply in proportion based on work done *Labour Inspectorate's preferred approach.*	Labour Inspectorate (LI) and Employment Relations Authority	• Terms apply based on actual work done, rather than an artificial rule. • Contributes to system legitimacy in one sense because employees receive the minimum entitlements that they are entitled to based on the work that they actually do (i.e. there is no smoothing effect).	• Complicated for employers and employees to work out how to proportionally apply FPAs and to manage the practical implications of this. For example: payroll systems will be unlikely to accommodate different rates of accruing leave, so in practice, employers are likely to end up offering the most favourable iteration of some/all terms (see Option 2 below). Thus more onerous for employers than under a binary approach. • Would be difficult and complex to enforce unless there are record-keeping requirements and employers follow those. • Will result in different minimum terms applying within a single relationship based on specific tasks. This may be difficult to manage for non-wage terms especially if the terms are contradictory e.g. different workload management terms. • Increased administrative costs for businesses who may need to manage multiple FPA terms per employee, including additional record-keeping requirements. • Arguably creates excessive impacts on employers, compared to a one FPA per employment arrangement approach. However, this needs to be balanced with employees receiving the nuanced entitlements and minimum standards based on the work that they do. • This approach could disincentivise employers from stacking roles to make up a full-time position or providing opportunities to employees that enable them to try different roles within the employer's business.
Binary approach	**Option 2** Employee receives most favourable terms across all applicable FPAs *MBIE considers this option is not viable.*	LI and Authority	• Employees receives best of each term they are entitled to across FPAs (i.e. this could mean picking a higher base wage rate from one FPA, then adding penalty and overtime rates from another). • If only one FPA applies then the terms of that FPA would apply (regardless of the amount of work the employee does that is covered by that FPA).	• This approach doesn't reflect the fact that the FPA is bargained as a package i.e. trade-offs between terms would have been made within the bargaining process to settle the agreed terms. Employers would bear the increased cost of cherry-picking the most favourable terms across FPAs. • May create significant workability issues if the best terms are not compatible across FPAs. For example, the specific hours designated as overtime/penalty hours across FPAs may differ, making it hard to mix-and-match. This is why MBIE considers this option not viable. • Could be difficult for employers to work out "most favourable" version of non-remuneration terms across various FPAs (eg comparing training terms, or health and safety terms). • Potentially complicated for LI to enforce as it could involve subjective assessments about which terms are most favourable for an employee, and the results may differ between employees doing the same work. • Most favourable terms may not align with principal purpose or bulk of work done in employment relationship – no level playing field. • Risks undermining the 'legitimacy' of FPAs as there are different minimum standards based on employee choice rather than based on the work they do. • Depending on how it operates, it could create excessive impacts on employers, compared to a one FPA per employment arrangement approach, especially if the employer and employee need to bargain every time a new FPA comes into force that is relevant to the employee.
	Option 3 Time worked used to determine whether/which FPA applies	LI and Authority decide whether/which FPA applies to the most work that the employee does	• Clear test that parties could apply to determine whether an FPA should apply to the employment relationship. • Clear rules for Authority and LI in determining whether or which FPA should apply to a worker. • Should provide a level of consistency of approach to how FPAs apply.	• Could lead to gaming around the boundary of the threshold in order to avoid the higher terms of an FPA (i.e. by only providing employees with 40% of work at the higher level). • Provides a blunt test that could lead to unintended consequences, including determinations that are not in line with what the employer and employee intended in the employment agreement (i.e. in Australia they look at the purpose for which the employee was employed as well as the work undertaken). • Pressure on system as some regulator involvement is needed when in dispute. • Relies on a willingness to seek assistance from the LI or regulator if there is disagreement. • In some situations, employees would not receive the minimum entitlements that they would otherwise be entitled to. In other situations, they might receive entitlements despite not doing the work to which those entitlements relate.

Approach	Option	Who decides if disputed	Pros	Cons
	Option 4 Principal purpose used to determine whether/which FPA applies.	LI and Authority, applying same principles/rules in Bill	• Takes into account the intention of the employee and employer (a more nuanced approach to a threshold test). • Arguably provides balanced approach between flexibility and certainty. • Once decided, simple and more efficient to apply than a proportionate approach. • Should provide a level of consistency of approach to how FPAs apply.	• Delays likely if employees and employers cannot agree, as regulator(s) will need to apply complex test to individual circumstances. • Pressure on system will increase as more regulator involvement is needed. • Relies on a willingness to seek assistance from the LI or Regulator if there is disagreement. • Employees would not receive the minimum entitlements that they would otherwise be entitled to, despite the agreement (i.e. it has a smoothing effect, in that one FPA will apply to all the work the employee does, as opposed to a proportionate approach). • If your principal purpose of the work is not covered by the FPA, then the employee does not receive those minimum standards, even though they actually do some of that work. • In some situations, employees would not receive the minimum entitlements that they would otherwise be entitled to. In other situations, they might receive entitlements despite not doing the work to which those entitlements relate.
	Option 5 Employees choose whether/which FPA applies.	Not applicable: employee decision is final	• Employee gets to pick best FPA for their situation. • Regulator involvement not needed (unless employee's choice is disputed). • Less complex and costly than multiple FPAs applying to one employment relationship.	• Different outcomes for employees doing same work (i.e. does not create a level playing field). • Employers will need to manage differing choices from their workforce (to a greater degree than they already would have). • Whenever new FPAs come into force/existing FPAs expire, may need employee to make a fresh election. • In some situations, employees would not receive the minimum entitlements that they would otherwise be entitled to. In other situations, they might receive entitlements despite not doing the work to which those entitlements relate.
	Option 6 If more than one FPA applies, use hierarchy of FPAs to determine which applies. Table determined by ER Authority at compliance check stage. *Note: we have not been able to consult the Authority on this option in the time available.*	Not applicable	• Same outcome for employees doing the same work. • Certainty for regulated parties. • Reduces need for individual decisions from regulators (less pressure on system). • Would make enforcement simpler.	• Very blunt decision that will not consider specific circumstances of employees/employers concerned and could produce strange outcomes (eg terms that relate to 10% of an employee's work applying to their entire employment relationship). • Difficult decision for Authority to make, particularly because it will likely require superficial comparisons between FPA terms. Decision will be complicated if there are multiple classes of terms within single FPAs. • Creation of "league table" of FPAs may result in some dissatisfaction. • Could affect future bargaining based on relativities between FPAs. • In some situations, employees would not receive the minimum entitlements that they would otherwise be entitled to. In other situations, they might receive entitlements despite not doing the work to which those entitlements relate.

Annex 2: ANZSCO description of work for Food Trade Workers at the minor group, unit group and occupational level

351 Food Trades Workers

Tasks Include:

- checking the cleanliness and operation of equipment and premises before production runs to ensure compliance with occupational health and safety regulations
- planning menus, estimating food and labour costs, and ordering food supplies
- monitoring quality of food at all stages of preparation and presentation
- preparing meat for sale and baking bread, cakes and pastries
- preparing food and cooking using ovens, hotplates, grills and similar equipment
- portioning food, placing it in dishes, and adding gravies, sauces and garnishes

3511 Bakers and Pastrycooks

Tasks Include:

- checking the cleanliness of equipment and operation of premises before production runs to ensure compliance with occupational health and safety regulations
- checking the quality of raw materials and weighing ingredients
- kneading, maturing, cutting, moulding, mixing and shaping dough and pastry goods
- preparing pastry fillings
- monitoring oven temperatures and product appearance to determine baking times
- coordinating the forming, loading, baking, unloading, de-panning and cooling of batches of bread, rolls and pastry products
- glazing buns and pastries, and decorating cakes with cream and icing
- operating machines which roll and mould dough and cut biscuits
- emptying, cleaning and greasing baking trays, tins and other cooking equipment

351111 Baker

Prepares and bakes bread loaves and rolls.

351112 Pastrycook

Prepares and bakes buns, cakes, biscuits and pastry goods.