



## AIDE MEMOIRE

### Enforcement approach to Fair Pay Agreements

<b>Date:</b>	19 February 2021	<b>Priority:</b>	Medium
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-2448

#### Information for Minister(s)

Hon Minister Wood  
**Minister Workplace Relations & Safety**

#### Contact for telephone discussion (if required)

Name	Position	Telephone	1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	✓
Stacey Campbell	Senior Policy Advisor, Employment Relations Policy	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Withdrawn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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### Purpose

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There are two different enforcement approaches that you could take to enforce a Fair Pay Agreement (FPA) that differ depending on your view of their status. This note explains the choices and their implications.

We would like to discuss this note with you at the FPA meeting on Monday, 22 February in your office at 3.30 pm.

Tracy Mears  
**Manager, Employment Relations Policy**  
Workplace Relations & Safety Policy, MBIE

19 / 02 / 2021

## There are two different approaches that you could take to enforce an FPA that differ depending on how you view their status

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1. An FPA is bargained like a collective agreement, however, because it is intended to apply beyond the bargaining parties (including to all workers and all employers within coverage of the FPA), the FPA will be put into regulations to ensure that the rights and obligations extend beyond the bargaining parties.
2. Under any of the options below parties can enforce their own rights. The question is whether the government has a role in enforcement and that is linked to the status of the FPA. If it was decided that the FPA is a new minimum standard, for example, you would be effectively creating different minimum wages depending on what industry or occupation you are in.
3. We looked at the Cabinet paper that agreed to set up the FPA legislative system (Cabinet minute DEV-18-MIN-0100 refers). It said: 'agree, in principle, to introduce a legislative system that allows employers and workers to create Fair Pay Agreements that set minimum employment terms and conditions across an industry or occupation'. We do not think it is sufficiently clear whether the FPA was intended to be an agreement given effect to by way of regulations or an employment standard for the occupation or industry.
4. There are two possible enforcement approaches depending on whether the status of the FPA is treated more as a collective agreement or an employment standard for that occupation or industry:
  - a. **Option 1: No Labour Inspectorate enforcement. Treat the FPA as a contractual agreement (ie a collective agreement or individual employment agreement).** This option would use the existing approach to enforcing an agreement under the Employment Relations Act 2000 (the ER Act). The parties to the agreement (or in the case of FPAs those who are within coverage) can enforce the agreed terms and conditions through the dispute resolution process (including by way of compliance orders through the ER Authority). As is the case currently, the Labour Inspectorate does not have a role in enforcing individually or collectively agreed terms and conditions and will only take action if there are minimum entitlement breaches (such as where an employee has not been paid the equivalent of the minimum wage for hours worked).
  - b. **Option 2: Treat the FPA as a minimum standard.** If the FPA is conceptually equivalent to a minimum standard, there is an argument that the Labour Inspectorate could or should have a role in enforcing some or all of the terms of the FPA.
    - i. **Option 2 (a): Limited enforcement.** The Labour Inspectorate would be able to take enforcement action where an employer breaches their obligation to pay the FPA base wage (and any subsequent adjustments) or agreed minimum leave entitlements. We consider that this would be an extension of the Labour Inspectorate's existing role in enforcing minimum entitlement provisions.
    - ii. **Option 2 (b): Full enforcement.** This option would be a considerable extension of the Labour Inspectorate's existing function by enabling the labour inspector to have a role in enforcing matters agreed by parties and not set by Parliament (these matters, under the ERES system currently, are left to the parties to the agreement to enforce through dispute resolution).
5. The FPA Working Group said: the system would "provide for the parties who believe there has been a breach of an FPA to turn first to the dispute resolution services, including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system."

6. We used the below criteria to provide an initial assessment of the options:
- a. **Consistency with existing enforcement mechanisms under the ERES system.**
  - b. **Impact:** the FPA is enforced and workers receive the benefit of the agreed terms and conditions.
  - c. **Workability:** the enforcement option is workable and fits within the existing parties' capability and skillset.

## Assessment

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### Option 1: Enforce the FPA as though it is a contractual agreement.

- Arguably, **most consistent with the ER Act**. Parties to a collective agreement under the ER Act can only have those terms enforced through dispute resolution processes (including to the Authority and Courts) and not through the Labour Inspectorate (other than where there are breaches of minimum entitlement provisions). FPAs can be characterised as a form of minimum standards but they are collectively bargained outcomes (even if eventually set by determination in some cases) and only apply to those covered by the FPA, not to all employees.
- This option is **workable and straightforward**. It mirrors the existing roles in the ERES system for both the parties that are responsible to negotiate and are bound by an employment or collective agreement (in this case the parties in coverage of the FPA) and the Labour Inspectorate.
- Locating the responsibility for the bargaining parties (unions) or those covered to enforce their agreement **promotes ownership by the parties** as well as **equity between other forms of collective bargaining outcomes**.
- Risks having **less impact overall** as it relies on individual workers knowing about the FPA and enforcing their rights or there being a union who knows about the breaches. The FPA is likely to apply to many workplaces that do not have any union presence. However, similar information issues would occur should labour inspectors be charged with enforcement. There is an argument that having employees and unions responsible to enforce their own agreements through the ERES machinery may also incentivise greater union membership by those covered by FPAs.
- By mirroring the existing roles you are replicating the existing issues with personal enforcement. There are risks of **employers not complying** with the terms and conditions of the FPA if the signal is that there is a low likelihood of them being held to account for failing to comply with the terms and conditions. This risk is likely heightened for workplaces where there is no union who is monitoring the employer's compliance with the FPA and for workers who already have low bargaining power and do not want to rock the boat. Again, however, similar information/monitoring issues would arise for the Labour Inspectorate.

### Option 2 (a): Treat the FPA as a minimum standard where the Labour Inspectorate has limited powers to enforce.

- This option would permit the Labour Inspectorate to enforce those terms that are equivalent to the existing "minimum entitlement provisions" as defined by the ER Act (and attract full enforcement powers). We recommend that the following should be treated as 'minimum entitlement provisions' for the purposes of enforcement:
  - i. FPA base wage(s),

- ii. incremental adjustments to the FPA base wage(s), and
  - iii. minimum leave entitlements that build on existing leave entitlements under the Holidays Act 2003.
- The base wage (and any incremental adjustments) in the FPA, in effect, will be setting a new 'minimum wage' for that industry or occupation that would be able to be enforced by the Labour Inspectorate. Likewise, if leave entitlements are agreed that are above the minimum entitlements provided for in the Holiday's Act, these will be enforceable by the Labour Inspectorate.
  - Enforcement of the base wage would create a **strong signalling effect** that this core element of the FPA must be abided by or else risk enforcement consequences. This mitigates some of the risk that there will be many workplaces that do not have a union presence to monitor compliance with FPAs. We consider this option would strongly incentivise that the base wages of an FPA are provided to those workers in coverage.
  - It would be **more consistent** with the notion that an FPA sets a new floor for minimum standards if the Labour Inspectorate was able to take action where there had been a minimum wage breach, as well as a breach of the FPA base wage.
  - This option could be **workable** if there were adequate safeguards to ensure that the agreed base wages (and adjustments) and minimum leave entitlements were specified in a way that were able to be enforceable.
  - In order to do this, we would recommend that the Parliamentary Counsel Office draft a template that specifies the parameters of the base wage, adjustments and leave entitlements. This template could provide sufficient flexibility for parties to specify a process to get the base wage (and adjustments), or the figure specifying the base wage, adjustments or minimum leave entitlements. The proposed agreed wording could be checked by the vetting body to ensure it is able to be enforceable by the Labour Inspectorate. The parties would be required to agree wording that is considered enforceable before the FPA could proceed to the ratification stage.

**Option 2 (b): Treat the FPA as a minimum standard where the Labour Inspectorate has full powers to enforce.**

- **Not consistent** with the current ERES system: it would be a considerable extension of the Labour Inspectorates existing function by enabling the labour inspector to have a role in enforcing matters agreed by parties and not set by Parliament. This function would likely extend beyond the existing capability, skillset and resourcing of the Inspectorate.
- Minister agreed that the FPA would be largely drafted by the parties, with PCO drafting certain important terms like coverage. There is a strong risk that the terms agreed will **not be sufficiently clear** to be enforceable by the Labour Inspectorate.
- This could result in different enforcement approaches depending on the level of drafting clarity in each FPA and could lead to some employers actions being able to be enforced with more severe consequences (for example, the Labour Inspectorate can seek higher penalties), and others not. This could create **inconsistent outcomes** that are likely to be viewed as unfair by employers who receive harsher consequences.
- Inconsistent outcomes can equally occur for workers, who, even within the same workplace, could receive **different treatment** by the Labour Inspectorate where there is a breach. For example, take an employer who has failed to pay redundancy compensation, as agreed, to its workers. The workers who are covered by an FPA could seek to get the Labour Inspectorate to enforce compliance where this has not been paid, while others in

the same workplace who do not have an FPA, would have to pursue their own action against the employer.

- This option could **have the greatest impact**, as the Labour Inspectorate would be empowered to take a greater role in enforcing the FPA. However, the Labour Inspectorate's risk-based compliance approach will mean **resources must be directed** to addressing the most severe harm and systemic breaches (which may not focus on a sector that has an FPA).
- This option poses **severe workability risks**, not just in terms of inconsistencies in enforcement across the labour market, but also for the Labour Inspectorate to understand what the scope of their enforcement role is for any given FPA. There could, for example, be several enforcement approaches to keep track of, depending on the specificity and clarity of obligations established in the FPA.