



BRIEFING

Fair Pay Agreements: mandatory to agree and mandatory to discuss terms and conditions

Date:	4 December 2020	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2021-1654

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations & Safety	Agree to the recommendations.	14 December 2020

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Beth Goodwin	Acting Manager, Employment Relations Policy	04 9011611		✓
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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Withdrawn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



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Purpose

The briefing provides you with advice on which terms should be mandatory to agree in FPA bargaining and which terms should be mandatory to discuss, as requested by you during a meeting on 17 November 2020.

Recommended action

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

- a **Note** that you have choices in relation to which FPA topics should be 'mandatory to agree' terms and which topics should be 'mandatory to discuss'.

Noted

Leave entitlement

- b **Note** that officials recommend that leave entitlement should be made a 'mandatory to discuss' term because it is not critical to your objective of improving labour market outcomes for vulnerable workforces through bargaining and is already covered by a statutory minimum entitlement of four weeks.

Noted

- c **Agree** that leave entitlement should be made a 'mandatory to discuss' term.

Agree / Disagree

Working hours, overtime and penalty rates

- d **Note** that making working hours, overtime, and penalty rates mandatory terms could improve security of hours, income, and compensation for non-standard working hours, which could improve the labour market outcomes for vulnerable workforces.

Noted

- e **Note** that there are risks in making ordinary working hours, overtime, and penalty rates mandatory terms that may have flow on impacts for innovative business practices and ongoing employment levels, especially when the labour market is experiencing an economic shock or uncertainty.

Noted

- f **Note** that on balance we recommend to make these terms mandatory to discuss only.

g **Agree** to either:

Option 1: Make working hours, overtime, and penalty rates 'mandatory to <u>discuss</u> ' terms (MBIE recommendation)	Yes / No
Option 2: Make working hours, overtime, and penalty rates 'mandatory to <u>agree</u> ' terms	Yes / No



Beth Goodwin
Acting Manager, Employment Relations Policy
Workplace Relations & Safety Policy, MBIE

04 / 12 / 20

Hon Michael Wood
Minister for Workplace Relations & Safety

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Background

1. On 17 November 2020 you met with officials to discuss the development of a Fair Pay Agreement (FPA) system. At this meeting you queried the decisions around which topics should be mandatory terms and conditions in an FPA and which should be mandatory to discuss. You asked for further advice on including leave entitlements and overtime hours as mandatory terms.

We advised the former Minister not to include leave entitlements and overtime hours/penal rates as mandatory

The Working Group made suggestions for minimum content of FPAs

2. The Fair Pay Agreement Working Group (FPAWG) recommended that the legislation should set the minimum content that must be included in each FPA, and recommended these topics must be included:
 - the objectives of the FPA
 - coverage
 - wages and how pay increases will be determined
 - terms and conditions, namely working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements
 - skills and training
 - duration e.g. expiry date, and
 - governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties.
3. The FPAWG did not further specify what form the provisions should take, or how substantive they should be.
4. It also considered it will be useful for parties to be able to discuss other matters, such as other productivity related enhancements or actions, even if they do not reach agreement on provisions to insert into the FPA.

We advised the former Minister around what topics should be mandatory and permissible

5. In July 2019 (briefing 0014 19-20) officials provided advice on scope to the former Minister. We proposed separating topics into mandatory or permissible terms. We suggested that only mandatory terms should be able to be fixed in the determination process and permissible topics should be by agreement only.
6. We noted advice received from the Legislative Design and Advisory Committee (LDAC) cautioning that each topic should be considered carefully for its potential effect on competition, for example, whether it could lock in business models and prevent innovation.
7. Overall we recommended that only four topics should be mandatory:
 - Base wage for the occupation and how that wage will increase over the term of the FPA
 - Superannuation, specifically if the base wage is inclusive or exclusive of employer contributions

- Requirements to operationalise the collective agreement: expiry, duration, coverage (for example)
- Governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties.

8. The former Minister decided to consult on a longer list of mandatory topics including ordinary hours, overtime/penal rates, and leave requirements:

Mandatory	Permissible
Base wage rates	Objectives of the FPA
How the wage rates will be adjusted	Other provisions on wage rates (falling outside of mandatory requirements)
Whether employer superannuation contributions are included in base wage rates	Other provisions on superannuation
Overtime/penal rates	Regional differences
Redundancy	Allowances
Leave requirements	Equal employment opportunities
Skills and training	Flexible working
Ordinary hours/days of work	

Submitters had mixed views on which topics should be mandatory

9. A majority of both employer- and worker-perspective submitters supported the use of mandatory topics. The main reasons given by employers were that some matters simply have to be mandatory and it would allow a fair playing field for all. Unions supported this idea, specifically referencing the recommendations made by the FPAWG.
10. A small number of submitters objected to a requirement for mandatory terms, suggesting that in collective bargaining everything should be up for negotiation.
11. A majority of submitters from all perspectives supported the suggested mandatory topics outlined in the discussion document. In addition, a large number of these submissions (predominantly from unions and workers) commented on a need for health and safety to be added to the list.
12. Some employers submitted that they feared overregulation by including mandatory topics that already exist in current legislation, or by creating new requirements which did not exist (such as redundancy).

After analysing submissions we continued to recommend that mandatory topics should be narrowly focused

13. Following consultation, officials advised the former Minister that the mandatory topics should be narrowly construed (briefing 2210 19-20 refers). We considered that some terms create a risk of locking in business models and prevent innovation. These risky terms could prolong bargaining.
14. Officials recommended **a short list of mandatory topics which focus on pay because:**
 - a. This would focus FPAs primarily on setting a minimum floor for wages.
 - b. It would increase the workability of the system as the bargaining parties could focus on wages and only venture into the 'permissible or mandatory to discuss' topics if there

was a willingness to negotiate, rather than employers being required to bargain on topics which they fundamentally opposed.

- c. It would also recognise that some of the permissible terms may be better suited to negotiation at the firm or individual level.
- d. This approach is also consistent with the Employment Relations Act, which has minimal requirements for what must be included in a collective agreement. However, it could reduce the effectiveness of FPAs by failing to improve other terms and conditions for workers, if employers declined to agree and a determination could be only be made on mandatory topics.

15. The below table sets out what officials recommended as mandatory and permissible topics:

Mandatory	Permissible
<ul style="list-style-type: none"> • Base wage rates • How the wage rate will be adjusted • Whether the base wage is inclusive of employer contributions to superannuation • Coverage • Duration • Governance arrangements to manage the operation of the FPA, including ongoing dialogue 	<ul style="list-style-type: none"> • Overtime/penal rates • Redundancy • Leave requirements • Ordinary hours / days of work • Other provisions on wage rates (falling outside of mandatory requirements) • Objectives of the FPA • Skills and training • Regional differences • Allowances • Equal employment opportunities • Health and safety • Flexible working

16. The former Minister wanted to encourage consideration of a wider range of topics and decided the system should include two categories of topics: mandatory to agree (which all FPAs must include terms and conditions for) and mandatory to discuss (which bargaining parties must discuss during bargaining to see whether they can reach an agreement on terms and conditions to include). Parties would be able, but not required, to discuss any other topics they consider to be relevant. The Employment Relations Authority would, however, be able to make a determination on the mandatory to discuss topics. The Minister ultimately decided that the scope would be established in the following way:

Mandatory to agree	Mandatory to discuss
<ul style="list-style-type: none"> • Base wage rates • How wage rates will be adjusted • Whether employer superannuation contributions are included in base wage rates • Coverage • Duration of FPA • Governance arrangements 	<ul style="list-style-type: none"> • Overtime/penal rates • Redundancy • Leave requirements • Ordinary hours/days of work • Objectives of the FPA • Skills and training • Regional differences • Health and Safety • Flexible working

You have indicated your preference to follow the Working Group’s model

17. We recognise that you have placed greater weight on the FPAWG model. In light of this, we have reviewed our advice on scope. In particular, you asked for further information on including leave entitlements and overtime/penal rates as mandatory terms.
18. In developing this advice we have not had time to do a comprehensive analysis, which would have included consultation with bargaining experts. We have considered the following:
 - a. Effectiveness in meeting the FPA objectives
 - b. Comparable sector-level bargaining systems
 - c. The risk of locking in business models and stifling innovation
 - d. Any unintended consequences

Leave entitlements

19. We continue to consider that leave should be a 'mandatory to discuss' but not a mandatory term of an FPA. Leave entitlements could be useful to discuss but are not critical to your objective of enabling workers to bargain for better labour market outcomes by mitigating inherent imbalances of power in vulnerable workforces.
20. The Holidays Act 2003 already provides a statutory obligation to provide four weeks paid annual leave for employees. Setting this as a mandatory term of an FPA will risk the strong expectation that sectors should be agreeing to more than minimum statutory entitlements. There is a risk that a one-size-fits-all approach to entitlements may have negative impacts on smaller businesses or others who are unable to afford increases to the statutory minimum. This risk would only be mitigated where smaller businesses represent a high proportion of the sector and can be a strong voice in FPA bargaining.
21. Including leave entitlements as a 'mandatory to discuss' rather than a 'mandatory to agree' term is consistent with the approach taken in the Screen Industry Workers Bill (SIWB) and in the Australian Modern Awards system.

Working hours, overtime and penalty rates

22. Working hours, overtime, and penalty rates are interlinked. For reference, the Australian Government Fair Work Ombudsman defines these terms as follows:

Ordinary hours are an employee's normal and regular hours of work, which do not attract overtime rates.

Awards, enterprise agreements and other [registered agreements](#) set out any:

- maximum ordinary hours in a day, week, fortnight or month,
- minimum ordinary hours in a day,
- times of the day ordinary hours can be worked (e.g. between 7am - 7pm).

The ordinary hours can be different for full-time, part-time and casual employees.

Overtime is when an employee works extra time. It can include work done:

- beyond their ordinary hours of work
- outside the agreed number of hours
- outside the spread of ordinary hours.

Penalty rates: Employees often get a higher pay rate when working:

- weekends
- public holidays
- overtime
- late night shifts or early morning shifts.

23. There are arguments for and against including working hours, overtime and penalty rates as mandatory terms of an FPA. On balance, we recommend to leave them as mandatory to discuss, to maintain flexibility for sectors and their participants and avoid unintended disemployment consequences, including in times of economic shock.
24. Arguments in favour of making these terms *mandatory to agree* include:
- a. Improving working hours, overtime and penalty rate provisions can help improve labour market outcomes for vulnerable workforces. Poor labour market outcomes are not only driven by low wages but can be driven by low, insecure or unsociable hours of work. Some employers also push the cost and risk of business fluctuations onto employees by only employing staff to work the peaks in demand i.e. split shifts. This can make an employee's working day long and limits what they can do in their free time, without compensation to reflect this.
 - b. There is a risk of arbitrage if parties agree on wages without agreeing on working hours. For example, employers may undercut any benefits gained from higher wages by reducing paid hours, resulting in either equivalent or worse net labour market outcomes. Including working hours and overtime as mandatory to agree in addition to wage rates would require parties to negotiate these terms in conjunction and reduces this risk.
 - c. Unlike leave and health and safety provisions, working hours and overtime are not subject to any legal minimum standards. Making these terms mandatory presents an opportunity to fill this gap when it is needed.
 - d. The Australian Modern Awards System includes working hours as a mandatory term and the Screen Industry Workers Bill includes both working hours and overtime as mandatory terms.
25. Arguments for making working hours, overtime and penalty rates *mandatory to discuss* but not mandatory terms, include:
- a. Our previous advice noted that including these terms as mandatory could entrench business models, prevent innovative practices and be potentially very costly for employers. Note, however, that we do not have evidence that working hours and overtime are a particular source of productivity-enhancing innovation. To the contrary, New Zealand's low productivity has been attributed, in part, to our economic growth being tied to population growth and staff working more hours rather than through more innovation, capital investment or international trade¹.
 - b. The potential unintended consequences of setting terms for working hours, overtime and penalty rates could be avoided if they are only mandatory to discuss. Examples of those unintended consequences include: workers could be impacted through reduced hours or a loss of income, if employers attempt to limit the costs of higher wages (e.g. penalty rates); or workers who can only work certain hours may have less opportunities (e.g. if night time hours carry a penalty rate employers may stop offering these hours of work); or employers seek to avoid the risks of this change through an uptake in the use of contractors.
 - c. Employers may be more able to manage employment risks when there are shocks in the labour market. Having a flexible labour market is critical to be able to respond quickly and adaptively to shocks. Including working hours, overtime and penalty rates can lock in patterns of work and pay that mean employers are less able to adapt

¹ Conway, P (2018). Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand. New Zealand Productivity Commission.

quickly to the changing landscape. This can result in blunt tools, such as making employees redundant, as opposed to temporarily reducing hours of work.

- d. A 'mandatory to agree' topic could have the unintended consequence of requiring parties to reach agreement in sectors where the matters of hours, overtime and penalty rates may not be relevant or problematic. It's possible this concern could be addressed through allowing flexibility in what types of provisions parties can agree to for the 'mandatory to agree' terms (e.g., whether they are able to agree a process, or agree that no specific provision is required). However, too much flexibility could undermine the purpose of including a topic as a 'mandatory to agree' term. We plan to provide further advice on this matter as part of the remaining system design matters.
 - e. It would be consistent with collective bargaining under the Employment Relations Act, which does not require working hours, overtime or penalty rates to be in a collective agreement.
26. Concerns around excluding working hours, overtime and penalty rates from 'mandatory to agree' terms could be addressed to some extent by the disputes resolution process. Under the proposed disputes resolution process, the determining body may make a determination on whether a 'mandatory to discuss' term must be included in an FPA, and may also make a binding determination on 'mandatory to discuss' topics. However, this places a significant weight on the determining body's judgement on whether these terms must be included.

Next steps

- 27. We are preparing a number of other briefings on aspects of the FPA system for you, with the first set of briefings all due to you by 11 December 2020.
- 28. The schedule for the project is set out in the table below:

Milestone	Date
Advice on design features requested by Minister	All provided by 11 December 2020
Advice on consequential changes to other design aspects Advice on remaining advice on system issues	All provided by 19 February 2021
Cabinet paper drafted RIA prepared	12 March 2021
Agency consultation completed and incorporated RIA quality assurance completed Finalised Cabinet paper provided to Minister	26 March 2021
Ministerial consultation completed (2 weeks)	29 March to 13 April 2021
Cabinet Committee	21 April 2021