



BRIEFING

Fair Pay Agreements: Exemptions and commencement period

Date:	22 June 2021	Priority:	High
Security classification:	In Confidence	Tracking number:	2021-3700

Action sought		
	Action sought	Deadline
Hon Michael Wood Minister for Workplace Relations and Safety	Agree to not include an exemptions process for individual employers within the Fair Pay Agreement system Agree to allow greater flexibility for the commencement dates that bargaining sides are able to agree	28 June 2021

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Tracy Mears	Manager, Employment Relations Policy	04 901 8438	██████████	✓
Vainui Moresi	Graduate Policy Advisor, Employment Relations Policy	04 830 7389		
Hannah Adams	Senior Policy Advisor, Employment Relations Policy	04 896 5262		

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 Withdrawn |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



BRIEFING

Fair Pay Agreements: Exemptions and commencement period

Date:	22 June 2021	Priority:	High
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Purpose

To provide further advice on:

- the inclusion of exemptions within the Fair Pay Agreement (FPA) system
- restrictions on the commencement period for an FPA.

We also seek agreement that the duration topic of an FPA be split into two topics: commencement date and expiry date of an FPA.

Executive summary

Exemptions

We consider the intent of the proposed exemptions tool is to provide a targeted delay to FPA terms coming into effect for particular employers where compliance with the FPA terms would lead to worse outcomes for employees.

In working through the detail of how an exemptions process would be framed in legislation and operate in practice, we have identified a number of legal and practical issues. In particular:

- a. there is a risk of gaming and flooding of applications for an exemption
- b. there is a high chance of employers challenging the outcome of an exemptions process
- c. assessing and approving applications would require significant time and resources.

All options we have considered will present issues and a level of complexity that is likely to outweigh the intended benefits of allowing exemptions for employers and could undermine the policy intentions of the FPA system. The FPA system would achieve its objectives more quickly and efficiently if it did not include the ability to allow exemptions for employers from FPAs. We recommend not including an exemptions process in the FPA system. We recognise this would be a departure from the description of the system that has been announced. If you consider it necessary to continue to include an exemptions process, we have outlined a 'most feasible' option in Annex one.

The policy objective of enabling employers more time to adjust to the new minimum employment entitlements set by an FPA could be achieved by allowing bargaining sides more flexibility in the commencement period that they are able to agree.

Commencement period

In response to a briefing on commencement timeframes, you indicated that FPAs should be required to come into effect within three months, but that some terms might come into force later due to practical reasons such as payroll implementation. We have engaged further with payroll providers and practitioners to test the feasibility of this approach. They have suggested that at least three months would be required to implement FPAs.

We recommend allowing bargaining sides to agree any commencement period (which would apply to the entire FPA) as long as it is at least three months, but no longer than twelve months. Allowing flexibility for the factors that bargaining sides take into account (ie by not restricting long commencement periods to only be possible when there are practical implementation reasons) would reduce the risk that complying with the FPA when it comes into force leads to worse outcomes for employees. New Zealand Council of Trade Unions (NZCTU) has suggested an even more flexible approach where there are no restrictions on what commencement period bargaining sides can agree.

If you continue to prefer that an FPA must commence within three months, but with flexibility for certain terms to be able to commence at a later date, then we recommend *not* restricting the circumstances in which a longer commencement date for a particular term is allowed. This would allow bargaining sides more flexibility to consider how long employers across the occupation or industry are likely to need to be able to comply, including whether a short commencement date could lead to worse outcomes for employees.

Recommended action

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

- a **Note** we have considered a number of options for including an exemptions process from an FPA for employers facing significant financial hardship and consider they all involve significant risks and issues.

Noted
- b **Note** we consider some of the benefits of an exemptions process could be achieved by allowing more flexibility for the commencement period of an FPA (as per options two, three or four below).

Noted
- c **Agree** to *not* include an exemptions process for individual employers within the FPA system

Agree / Disagree

If you agree with recommendation c:

- d **Note** the Cabinet decision to include an exemptions process for up to 12 months for employers in significant financial hardship could be rescinded when you seek approval for the FPA Bill from the Cabinet Legislation Committee.

Noted

If you disagree with recommendation c:

- e **Agree:**
 - a. To allow bargaining sides to agree that specified employers be named in the FPA as having a delayed commencement from specified terms for a specified period of up to 12 months where the bargaining sides consider:
 - i. compliance with the FPA term(s) would lead to a worse outcome for the employer's employees and
 - ii. a delay in when the employer must comply with the term(s) would enable them to arrange their business affairs to be compliant with that term(s) without the 'worse outcome' for employees occurring.
 - b. That the exemption process is managed by bargaining sides and occurs after bargaining sides have agreed the terms of the FPA, but before the FPA is vetted and ratified.

Agree / Disagree / Discuss

f **Note** we engaged with payroll providers, at your request, who indicated that a commencement date of three months (or longer) may be required for practical implementation reasons.

Noted

g **Agree** to EITHER:

Option 1: Restrict the commencement period for an FPA to one to three months, with the possibility of extensions to the commencement of certain agreed terms if they are not practically implementable in the overall timeframe (<i>current decision</i>).	<i>Agree / Disagree</i>
Option 2: Restrict the commencement period for an FPA to one to three months, with the possibility of extensions to the commencement of certain agreed terms if the bargaining sides agree (with no restrictions of the circumstances in which they can agree extensions).	<i>Agree / Disagree</i>
Option 3: Restrict the commencement period for an FPA to three to 12 months (which applies to all terms), with no restrictions of the circumstances that bargaining sides can take into account when deciding on a commencement period (<i>MBIE recommended</i>).	<i>Agree / Disagree</i>
Option 4: Include no restrictions on the commencement period for an FPA (which applies to all terms) and no restriction on the circumstances that bargaining sides can take into account when deciding on a commencement period.	<i>Agree / Disagree</i>

h **Agree** that the 'duration' topic is split into two mandatory to agree terms: the commencement date and expiry date of the FPA.

Agree / Disagree



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

22 / 06 / 2021

Hon Michael Wood
Minister for Workplace Relations and Safety

..... / /

Background

1. You have received policy approvals from Cabinet to start drafting the FPA legislation. We are providing you with a series of briefings on the remaining issues which need to be addressed in order to draft the legislation.
2. At the regular officials meeting on 8 June, we discussed with you the difficulties we identified when designing an exemptions process. This briefing provides more detail on the issues and risks that we have identified and options for your consideration. We have consulted with Business NZ during the initial design process of a potential exemptions process, but as per your request have not consulted with them about potentially not including an exemptions process for individual employers within the FPA system.
3. The Fair Pay Agreement Working Group (FPAWG) recommended “There may be a case for limited flexibility for exemptions from the agreement in some circumstances”.
4. Cabinet has agreed that the bargaining sides may agree to include exemptions within their FPA from the terms of the FPA for up to 12 months for employers in significant financial hardship [refer CAB-21-MIN-0126].

We consider the policy intent of the proposed exemptions is to allow specified employers a delay before they must comply with the FPA

5. Exemptions could be used to achieve a range of policy objectives depending on how and when they are enabled.
6. The FPAWG considered parties could agree that an FPA would include a mechanism for enabling temporary exemptions either by defining the circumstances for an exemption or including administrative procedures that either the parties or an independent third party would follow to enable exemptions.
7. This suggests that exemptions would be possible during the life of an FPA. We do not consider this appropriate for the following reasons:
 - a. It could undermine the policy objective of the FPA as it provides a way for employers to not apply the terms of the FPA. Once an FPA is in force it provides the minimum employment entitlements for that occupation or industry. Employers are not currently able to gain an exemption from minimum employment entitlements (such as minimum wage), so allowing exemptions to FPA terms could undermine their status as minimum entitlements.
 - b. Resourcing the system would require resourcing of an unknown inflow of exemption requests throughout the duration of the FPA.
 - c. Employees could be negatively affected and may be confused about what their terms and conditions of employment are. For example, an exemption given during the life of an FPA would mean an employee would be returning to lesser terms after having been on higher FPA terms.
 - d. Allowing an employer to reduce their terms and conditions below the level that other employers are paying could provide a competitive advantage in the product/service market.
8. We consider any exemptions included in the system should only be obtained before the FPA is due to come into force. We view the intent of the proposed exemptions tool should be to provide a targeted delay of FPA terms coming into effect for particular employers where compliance with the FPA terms would lead to worse outcomes for employees. An employer

who successfully receives an exemption would receive a specified delay before they must comply with specified FPA terms. The intention is not that exemptions would apply to employers who would go out of business or lay off staff even with an exemption.

9. This is consistent with the rationale for the exemptions outlined in the body of the cabinet paper¹: “This provides flexibility to avoid undue negative impacts (such as an employer going out of business) by giving employers who need it more time before they must comply with the terms of the FPA”. For example, we foresee exemptions could help in situations where an employer is locked into contracts in which a sudden change to minimum standards create face significant financial implications, which could cause them to close or reduce staffing levels.

The complexity and issues associated with including exemptions are likely to outweigh the intended benefits

10. We have considered the following options for how an exemptions process may work:
 - a. **Option one:** A process developed and run by the bargaining sides that occurs after the terms of the FPA are agreed, but before the time of vetting and ratification (meaning the employers that would receive an exemption are identified and named on the FPA before it goes to ratification).
 - b. **Option two:** A process developed and run by the bargaining sides that occurs after FPA bargaining is concluded but before terms come into force (meaning the FPA would describe the process agreed by bargaining sides, but the process for identifying which employers receive an exemption would happen after the FPA was concluded).
 - c. **Option three:** A process developed and run by a centralised government body that occurs after the FPA is concluded, but before terms come into force (meaning if bargaining sides agree there should be an exemptions process, the process would be a standard process run by a centralised government body after the FPA was concluded).
11. In working through the detail of how these options would be framed in legislation and work in practice, we have identified a number of legal and practical issues, which would apply (to varying degrees) in all options.

There is a risk of gaming and flooding of applications for an exemption

12. There is a high risk that a large number of employers would apply for an exemption regardless of whether they are confident they will receive one (whether the process is run by bargaining sides or a centralised government body). From an employer’s perspective, any opportunity to avoid an increase in business expenses would be worth applying for, particularly as the cost of the assessment process would not sit with them. This risk applies to a similar degree under all three options identified above.
13. A high number of exemption requests may lead to the exemptions process being overwhelmed. Employers may flood the exemptions process with applications in the hope of receiving de facto exemptions if their application had to be resolved before they had to comply with the FPA.
14. This risk could be mitigated by a clear objective test that considered both the financial position of the employers and the impact of the FPA terms. However, we have not been able to identify an objective test that would effectively achieve the policy intent. Any strict test based on financial hardship (eg insolvency and liquidation type tests) would only be available to employers that were facing extremely high levels of financial hardship before the FPA

¹ DEV-21-MIN-0082 paragraph 74.1

commences, meaning it is unlikely they would be able to comply with the terms of the FPA even if they were granted an exemption. This type of test would not assist employers who may not be in financial hardship before the commencement of the FPA, but would be if they needed to comply with the FPA terms immediately.

15. Without a readily available objective test, another approach would be to allow bargaining sides to assess and give exemptions based on a subjective test. A subjective test could request employers present a case for why they require an exemption without specifying what evidence is required. We consider the dynamics of the two bargaining sides should lead to exemptions only being granted when it could clearly benefit employees over the long term. This approach would still, present a major risk of gaming and flooding of applications as bargaining sides would need to consider the particular circumstance of every application made.

There is a high chance of employers challenging the exemptions process

16. Decisions that grant an exemption for a time up to 12 months from the terms of an FPA is likely to be controversial and lead to challenge, particularly given the competitive advantage such an exemption would provide.
17. The risk of employers seeking to challenge exemption decisions is likely to occur under all three options identified. However, the mechanism available may differ depending on whether it was the bargaining sides or a centralised government body that made the decision².
18. A way to mitigate this risk would be to provide clear parameters of what is required for an exemption and significant oversight by government. However, we have been unable to identify any relevant and objective tests that would achieve the policy intent. Government oversight of a process run by bargaining sides would also mean duplication in the assessment of whether an exemption is given and would cause further complexity.
19. Appeals of any form would require a greater use of time and resources and increase the risk of delays and flooding of the system. Challenges by judicial review would lead to even longer delays and would increase resource pressure on all parties involved.

It may be inappropriate to allow a non-legislative body to give other parties exemptions after the FPA has been put into secondary legalisation

20. The option of allowing bargaining sides to run the exemption process once the FPA was in force has an additional legal risk. Delegating the power to exempt other parties from what would be legal minimum standards to a non-legislative body raises significant legal issues about whether it is appropriate.

Assessing and approving applications is likely to take a large amount of resources or time (or both)

There would be very little time for an exemptions process to occur after the FPA was concluded but before the FPA comes into force

21. You have provided decisions that bargaining sides can agree when an FPA comes into effect but it must be at least one month and no more than three months from the FPA being finalised (noting we are providing further advice on this in the section below).
22. This would mean if the exemptions process occurred after the FPA was concluded, but before it came into force, those running the process (whether it be a centralised body or

² MBIE's statutory powers of decision in the FPA system will be subject to judicial review. We are currently preparing advice on whether and how bargaining sides' decisions might be subject to judicial review.

bargaining sides) would only have between one and three months to facilitate this exemptions process.

23. This timeframe would include the setting up of the exemptions process, the notification and communication of the process as well as the assessing and giving of exemptions. We view the tight timeframes may affect the appropriateness of exemptions given due to the speed in which they would need to facilitate the process. Running the exemptions process would also negatively affect the chosen body or party in their resourcing ability for their other core functions during this time.

There would be more time if the exemption process occurred before the FPA was ready for vetting, but it would delay progress of the FPA and not be possible if the FPA was fixed by determination

24. If the exemptions process took place once terms were agreed to but before vetting, there would not be the same time constraint as there is after terms are agreed. This would extend the time the sides spend bargaining and ultimately delay the FPA process and its benefits for everyone else.
25. This would also risk employers seeking exemptions for terms that are not yet ratified. If ratification does not pass, the exemptions process would need to be repeated if the FPA was renegotiated and put out for ratification a second time. In such cases, twice the resources involved in any exemptions process would be needed.
26. We do not consider the ability to run and include exemptions in the FPA would be possible if the FPA was fixed by determination.³

For all these reasons, we do not recommend the system include exemptions for individual employers

27. As outlined above, we consider the main policy intent of allowing a targeted delay of particular FPA terms coming into effect for specified employers (ie an exemption) is to reduce the likelihood of worse outcomes for employees where immediate compliance would lead to the business closing or reducing staffing levels.
28. A process for approving exemptions for individual employers would be complicated and resource heavy and is likely to be challenged due to perceptions of it being unfair and providing some employers with a competitive advantage.
29. Due to the complexity and issues associated with implementing an exemptions process we do not recommend including any exemptions for individual employers in the FPA system. We consider the system would operate more efficiently without exemptions.
30. This would be a departure from the Cabinet decision outlining that bargaining parties can agree to include exemptions within their FPA. If you are confident your Cabinet colleagues would agree with your decision to not include an exemptions process, we understand a new Cabinet decision would not be necessary before drafting. Instead, a Cabinet decision to rescind the relevant recommendation would be sought when the draft FPA bill was taken to the Cabinet Legislation Committee.
31. We discussed the issues we had identified in relation to an exemptions process for employers with our colleagues in the Small Business Policy team in MBIE. They agreed with

³ We do not consider it would be appropriate for the Employment Relations Authority (ER Authority) to run an exemption process for individual employers when fixing the terms and conditions of an FPA. Due to the inter-relationship between terms, you have previously decided that when the ER Authority fixes the terms of an FPA this covers the entire FPA. If bargaining sides had run an exemptions process and a dispute arose, we do not consider it appropriate that a dispute regarding whether a particular employer(s) should receive an exemption should result in an entire FPA being fixed by determination when bargaining sides have agreed all the other terms.

the issues identified and emphasised the importance of certainty for small businesses. They also raised general concerns about the compounding impact of the large number of regulation changes that will impact small businesses, of which FPAs are just one part, and that it takes time for small businesses to understand and implement regulatory changes. MBIE is already aware of the compounding compliance issues and is working with small business to mitigate this where they can and provide support.

32. We consider there are other ways to more effectively achieve the policy intent of an 'exemptions' process, which we have outlined below. However, if you still consider the FPA system should include an exemptions process for individual employers, we have outlined the option we consider to be the most feasible in Annex one.

A more effective way to achieve a similar policy intent would be to allow bargaining sides more flexibility to bargain the commencement period

33. As outlined above, the intent of the proposed exemption process is to provide a targeted delay of FPA terms coming into effect for particular employers, where immediate compliance with the FPA terms would lead to worse outcomes for employees. A targeted delay could allow an employer more time to rearrange its business arrangements to be able to comply with the new employment terms. For example, a firm could renegotiate contracts with clients to reflect the new higher costs of employment or increase their product prices.
34. The majority of the issues and risks outlined above are linked to the exemptions being for named employers. Another option to achieve a similar policy intent, but at a more generalised (rather than employer specific) level, would be to allow greater flexibility for bargaining sides to bargain a longer commencement date for the FPA, or for particular terms. Such an approach could reduce the risk that compliance with the FPA at the commence date would lead to worse outcomes for employees.
35. We have previously advised that there should be a minimum commencement period of three months before an FPA comes into force, with the bargaining sides able to agree any period equal to or longer than three months [briefing 2021-3277].
36. In response, you indicated that you consider FPAs should be required to come into effect within three months, but that some terms might come into force later due to practical reasons such as payroll implementation. We agreed to engage with payroll providers to get a better understanding of the timeframes required to amend payroll systems to comply with the terms agreed in an FPA. You also asked for our views on whether a minimum period of one month would be feasible.

Payroll providers suggested at least three months would be required to implement FPAs

37. We endeavoured to engage further with payroll providers and practitioners to test the time needed to operationalise, via payroll systems, changes in employment terms due to an FPA changes. We engaged two groups of payroll experts: the 'Better Rules' group for the Holidays Act 2003 and the government Payroll Practitioners working group. We specifically asked how feasible a commencement period of one, three and six months would be to implement from a payroll perspective. We received input from 18 people, reflecting a mix of payroll providers (eg System Analysis Programme and Advanced Management System) and payroll practitioners in both the public and private sector.

38. Many submissions recommended a period of at least three months, with a number suggesting at least six months and a small number a minimum of a year.⁴
39. A small number of responses suggested that giving employers the flexibility to backdate pay increases would provide additional flexibility and make implementation easier. Responses noted that subsequent iterations of FPAs (eg when they were renewed) could likely be implemented more quickly.
40. Many of the submissions reiterated that the time to implement the changes would be highly dependent on the complexity of the agreed terms. Annex two provides a summary of the factors identified by the payroll experts that would affect how long the implementation would take.

We continue to consider the FPA legislation should give bargaining parties flexibility to set the commencement period within some constraints

41. We consider there are a number of options for how much flexibility could be allowed for commencement dates depending on how long and when it is allowed:
 - a. **Option 1:** Restriction on commencement period of one to three months, with the possibility of extensions to the commencement of certain agreed terms only if they are not practically implementable in the overall timeframe (*current decision*).
 - b. **Option 2:** Restriction on commencement period of one to three months, with the possibility of extensions to the commencement of certain agreed terms if the bargaining sides agree (with no restrictions of the circumstances in which they can agree extensions).
 - c. **Option 3:** Restriction on commencement period of three to 12 months (which applies to all terms), with no restrictions of the circumstances or factors that bargaining sides can take into account when deciding on a commencement period (*MBIE's previous advice amended to include a maximum limit*).
 - **Option 4:** Include no restrictions on the commencement period (which applies to the all terms) and no restrictions on the circumstances or factors that bargaining sides can take into account when deciding on a commencement period.
42. Bargaining sides are able to agree terms differentiated by categories of employers or employees or regions (with some limitations where the terms are minimum entitlement provisions).⁵ However, we do not recommend allowing differential terms for commencement dates as it would add significant complexity and result in competitive issues. Therefore, for all four options the same commencement period would apply for all employers within coverage.

We consider option three to be the best approach as it allows flexibility without adding complexity

43. The feedback from payroll experts suggests that a standard timeframe of one to three months would be insufficient. This may mean that employers would be unable to comply with the FPA terms in the required time period. Therefore, we consider a minimum time period of

⁴ Sanford (an aquaculture company) suggested FPAs may take up to a year to implement: "While a year may seem like a very long time, taking a single agreement and applying it to a specific organisations payroll system would be similar to a reimplementing of the system... followed by education programmes to explain the new rules to employees....".

AMS (a payroll provider) suggested one year would be required for implementation, although this could be shortened to six months if no software development is required as a result of the FPA. Ideally they would have six months for software development, three months for testing and deployment by employers, and six months for detailed analysis and configuration by employers.

⁵ Cabinet has agreed that the Labour Inspectorate should only enforce the minimum entitlement provisions specified per occupation or role or per region (where these are agreed in the FPA). This means that terms differentiated on another basis must be above the rate that is enforced by the Labour Inspectorate.

three months should be required to ensure employers are provided with sufficient time to comply.

44. We continue to believe that the bargaining sides, in consultation with those parties they represent, will be best placed to determine how long the FPA will take to implement. It is difficult to establish a framework ahead of time which can account for the possible diversity and complexity of future FPAs.
45. Allowing more flexibility for the factors that bargaining sides take into account would also reduce the risk of compliance with the FPA terms leading to worse outcomes for employees. It would allow bargaining sides to consider the types of business arrangements common in the industry or occupation and how long they would take for employers to change those in order to be able to comply with the FPA terms without it having a serious financial implications and/or require them to reduce staffing levels.
46. The approach you suggested of allowing bargaining sides to agree term-specific extensions to commencement would be one way to reduce the risk of employers not being able to comply at the commencement date (options one and two). However, we are concerned that this approach would increase the complexity of FPAs and have a flow on impact to the ease of interpretation and enforcement. This could also make it harder for employees to understand which terms apply to them and when.
47. Given the complexity already present in the system, we consider a simple, consistent approach is more appropriate. As such, we recommend allowing bargaining sides' flexibility to agree any commencement period (which would apply to the entire FPA) as long as it was equal or greater than three months, but no longer than twelve months (option three).
48. This is consistent with our previous advice, but we have amended the option to include a maximum limit to reduce the range that can be disputed. In practice, we consider it would be unlikely that bargaining sides (particularly unions) would agree to a commencement date as long as the proposed maximum. However, the flexibility to agree up to 12 months would mean that if the employee side agreed that a longer commencement date would achieve better outcomes for employees overall, or agreed there were other legitimate reasons for the delay, then it would be possible.
49. This option would have lower compliance costs for employers, as the commencement date would be bargained for employers (based on information provided by employers to support the bargaining position), rather than requiring individual employers to collect sufficient evidence to support an application for an exemption.
50. In a follow-up conversation with NZCTU on commencement dates, they have indicated their preference is for bargaining sides to have full flexibility in deciding the commencement date (option four). They suggested that it was critical for the success of the FPA system for it to produce FPAs which were deliverable and enforceable, and which did not produce significant implementation challenges. They noted that it would be part of the employer bargaining side's role to test possible commencement periods with parties they represent, as well as informing them of progress and signalling the likely timeframes for FPA finalisation.

If you prefer a staggered commencement of terms, we recommend allowing flexibility when a longer commencement date for a particular term might be warranted

51. If you continue to prefer that the FPAs commence within three months with some flexibility for certain terms coming into force at a later date, then we recommend not restricting the circumstances in when this is allowed (option two).
52. This would allow bargaining sides more flexibility to consider how long employers across the occupation or industry are likely to need to be able to comply, including whether a short commencement date could lead to worse outcomes for employees. For example, they could consider the standard length of service contracts in that occupation or industry.

53. Both options two and three would achieve some of the same benefits as creating an exemptions process (although it would be based on more global considerations), without the complexity, costs and legal issues associated with an employer-specific exemptions process. As outlined above, both options one and two would significantly increase the complexity of FPAs.
54. Business NZ's preferred approach most closely aligns with option one or two. They consider bargaining sides should be able to agree the commencement period, but that a maximum commencement period may be required to reduce the risk of gaming. They consider the timing of when different terms come into force could be staggered, so that those that are easy to comply with come into force first, while allowing longer time for the terms that are more complicated.

We are seeking your confirmation that the commencement date should be a mandatory to agree term

55. We previously considered that the commencement date would be a component of the 'duration' mandatory to agree topic. In the preparation of the drafting instructions we realised it was unclear whether the commencement period could be considered as part of the duration of the agreement.
56. For clarity, we recommend splitting out the 'duration' term into two mandatory to agree terms: the commencement date and expiry date of the FPA, but still reflecting the decision that the time between the two must be at least 3 years and no more than 5 years. We are seeking your confirmation that you are comfortable with this approach and that you consider it fits within your delegation from Cabinet.

Next steps

57. Over the coming weeks we will continue providing advice on the remaining aspects of the FPA system and developing drafting instructions.

Annexes

Annex one: The most feasible option for an exemption process is for bargaining sides to agree exemptions before the FPA is vetted.

Annex two: Factors that would affect how long FPAs would take to implement from a payroll perspective.

Annex one: The most feasible option for an exemption process is for bargaining sides to agree exemptions before the FPA is vetted

1. If you continue to consider that the system should allow some form of exemptions for individual employers then the most feasible option would be to for it to:
 - a. be agreed and managed by bargaining sides
 - b. occur after bargaining sides have agreed the terms of the FPA, but before the FPA is vetted and ratified.
2. The CTU noted that an exemptions process could be communicated to employers before ratification or at a time within the bargaining process in which the terms were close to being finalised. Business NZ noted that an exemptions process could begin when the FPA process was nearly concluded and that notification could be a possible trigger point.
3. Under this option, the risk of flooding of exemption applications and resourcing implications would still be present, but it would be up to the bargaining sides to decide whether they could manage this process and whether the benefits outweigh the associated costs.
4. If the process occurred before the FPA was vetted and ratified, it may reduce the risks of an inappropriate delegation of power and challenge. The employers that would receive the delayed commencement date would be clearly named on the FPA before it was ratified and put into secondary legislation. There would still, however, be a risk of challenge; particularly if there are employers that were not aware of the exemptions process when it occurred.
5. This approach would not limit the time available to run the exceptions process (compared to the one to three months available if it occurred after the FPA was concluded but before it came into force). This could lead to delays as to when the FPA would be ready to progress to vetting, delaying when the FPA would commence. The bargaining sides may also have to run the process a second time if the FPA failed its first ratification and the terms were re-bargained.
6. This option may also reduce the likelihood of the FPA being ratified, as employers and employees that do not agree with the exemptions proposed (either those included or not included) may be more likely to vote against the FPA. Although, the employers that are proposed to receive a delayed commencement may be more likely to vote for the FPA (than if they hadn't obtained one).
7. While we consider this to be the most feasible of the options identified, it would still add significant complexity and risk to the system. In practice, it may also be unlikely to be used because:
 - a. The resources required to manage the process may result in bargaining sides being unwilling to agree to run an exemptions process.
 - b. It would not be available if the FPA was fixed by determination (for the reasons outlined in the footnote on page 7).
8. We do not recommend:
 - a. Allowing bargaining sides to run an exemptions process after the FPA has been concluded, but before it comes into force. This would raise significant legal issues about the appropriateness of delegating power to a non-legislative body to exempt other parties from what would be legal minimum standards.
 - b. A centralised government body running an exemption process after the FPA has been concluded, but before it comes into force. We have not been able to identify a suitable

objective test that a centralised government body could apply and it would require a significant amount of government resource.

Further detail of how this option would work

9. Under this option, the legislation would set out the criteria for what bargaining sides can agree and in what circumstances, while leaving flexibility for bargaining sides to apply it.
10. Representatives of the CTU have indicated they support leaving it up to bargaining sides to agree exemptions, as they consider that would set a sufficiently high bar. Representatives of Business NZ suggested there would need to be a legislative backing to ensure consistency, but that leaving it to the bargaining sides would be more efficient. They also suggested that if bargaining sides couldn't agree, they should be able to access support from the dispute resolution system.
11. The circumstances where bargaining sides could agree for an employer to have an exemption (ie delayed commencement date) would be where:
 - a. compliance with the FPA term(s) would lead to worse outcome for their employees, as it would cause the business to need to close, lay off employees, or significantly reduce employees hours
 - b. a delay in when the employer must comply with the term(s) would enable them to arrange their business affairs to be compliant with that term(s) without the 'worse outcome' listed above occurring. For example, by allowing time for existing business contracts to be renegotiated (either via a variation or because it will come up for renewal).
12. For employers in those circumstances, bargaining sides could agree for:
 - a. those employers to be named on the FPA as having a delayed commencement from specified terms within a list of potential terms. The terms listed below have been identified as those where compliance could have significant financial implications, which in turn could lead to worse outcomes for employees:
 - i. base wage rates
 - ii. how wage rates will be adjusted during the term of the FPA
 - iii. whether employer superannuation contributions are included in base wage rates
 - iv. ordinary hours, overtimes and penalty rates
 - v. Leave entitlements.
 - b. for a specified time period of up to 12 months (with no possibility of extension).
13. Within the specification listed above, the terms that employers could receive a delayed commencement for, and length of the delay, could vary depending on that employer's particular circumstances.
14. A delay in commencement would not be available for employers where the 'worse outcome' for employees would occur even with the delay (ie during the delay period or once they were required to comply with the term).

Annex two: Factors that would affect how long FPAs would take to implement from a payroll perspective

1. A common point raised was the timeframes involved with the implementation of FPAs would depend on what other changes employers were facing at any given time. These other factors include:
 - the period where tax years end is typically a busy time
 - the Holidays Act 2003 is currently being reformed which will have a significant impact
 - many employers are currently upgrading their payroll systems
 - whether collective agreements conclude negotiations and are implemented at a similar time
 - whether there are multiple FPAs coming into force at the same time for a single employer.
2. FPAs will evidently affect both small and large employers who significantly vary in the degree to which they have payroll systems capable of implementing the changes. Some responses noted that the time for implementation would depend on the sophistication of each employer's systems. If some employers only had simple payroll systems, in response to a complex FPA (eg with over-time, penal rates, and allowances) they may need to either undertake a significant upgrade or they may even need to purchase a new payroll system. It was suggested this upgrade or purchase process could take up to six months.
3. Finally, Inland Revenue noted FPAs could create a patchwork of different rules. For example:
 - Having different hours of work for different workers can add a lot of complexity, especially where systems have been automated to cater for existing arrangements. It suggested this could be particularly complicated where workers perform multiple jobs at the same employer (eg District Health Boards).
 - There would be similar issues in relation to the potential for different overtime rules for different groups.
 - It would be complex to have multiple pay round periods at different times of the year (ie each FPA may specify a different date at which employees receive an annual pay rise).
4. Some responses noted there is already a shortage of payroll practitioners, and FPAs would impact on the skill set required for these roles. The NZ Payroll Practitioners Association noted it is working with Business NZ to mitigate the shortage of workers.