



## AIDE MEMOIRE

### Fair Pay Agreements – Approach to preparing the backstop Supplementary Order Paper

<b>Date:</b>	13 May 2022	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-4394

<b>Information for Minister(s)</b>
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>

<b>Contact for telephone discussion (if required)</b>				
<b>Name</b>	<b>Position</b>	<b>Telephone</b>		<b>1st contact</b>
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<b>The following departments/agencies have been consulted</b>
Parliamentary Counsel Office

**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Withdrawn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

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This aide memoire provides, for your consideration, three options for the form of the Fair Pay Agreements (FPAs) Supplementary Order Paper (SOP) document that will contain the proposed backstop determination legislative provisions.

We would like to discuss these options with you and seek your preferred approach at our next fortnightly FPA officials meeting on **Wednesday 18 May 2022**. This will enable the Parliamentary Counsel Office (PCO) to commence drafting the backstop provisions.

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

13 / 05 / 2022

#### Background

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1. On 21 March 2022, Cabinet agreed to the proposed process to incorporate the backstop decisions into the FPA Bill, that is:
  - the proposals will be drafted in the form of a Supplementary Order Paper (SOP), which the Minister will provide to the select committee in July 2022; and
  - the Minister will ask the select committee to incorporate the SOP into the version of the Bill the committee reports back to the House [CAB-22-MIN-0080.02 refers].
2. In a normal legislative process, PCO prepares a revision tracked Bill (RT) for the Select Committee, following its consideration of the Bill, that incorporates all the proposed changes for its report back to Parliament. The RT Bill for the Select Committee is drafted to show the Committee's changes to the version of the Bill that was introduced to the House. To accommodate any additional changes that arise during the Committee of the Whole House (COWH) stage, an SOP is created for any recommended changes to the Bill as reported back. Where the Bill is complex and the relevant Minister requires substantive changes, an RTSOP can be created that better enables the readers to see and understand what changes are proposed.
3. MBIE has issued drafting instructions for PCO to draft the provisions of the determination backstop changes to be incorporated into the FPA Bill. We need to advise PCO on the

preferred form for the backstop document so they can draft the determination backstop provisions from our instructions so it can be referred to the Select Committee for consideration in July.

## **PCO's system only allows one RTSOP to be prepared for a Bill, which may affect your ability to make further changes after the Select Committee reports back**

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4. PCO's electronic drafting, publishing, and document management system is set up to follow the standard legislative process. The system only allows one RTSOP to be created for each Bill as it assumes one would not need to be prepared until after a Select Committee has finished considering the Bill and reported back.
5. Our current approach of drafting an SOP to accommodate the backstop changes in the FPA Bill at this stage of the Select Committee process does not conform to the standard legislative process.
6. Adding the determinations backstop to the Bill is a substantive change and is likely to require amendments throughout the FPA Bill. To make these changes more accessible and legible, the intention was to draft the backstop provisions as an RTSOP for the Select Committee to consider (rather than for consideration by the COWH). This would be a full version of the Bill with changes tracked with strike through and underlining.
7. However, creating an RTSOP for the backstop provisions now would prevent you from having another RTSOP prepared to accommodate any further changes when the Bill is at the COWH stage. Given the complexity and size of the FPA Bill, we consider it likely that you may want the option to make changes to the Bill at the COWH stage by using an RTSOP. Creating an RTSOP for the backstop provisions would mean that all changes to the Bill at the COWH stage would need to be made by a 'narrative SOP' (describing each amendment individually), rather than using revision tracking.

## **There are three options for preparing the backstop document**

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8. We propose the following options for you to consider:
  - a) **Stand-alone narrative SOP** - Prepare provisions as a 'stand-alone narrative' SOP, which describes each amendment to be inserted throughout the Bill ie "In clause XX insert subclause (YY)" or "after "these words" insert "these other words". This would be a separate document and would be read alongside the Bill.
  - b) **Draft of the Bill that contains the backstop provisions, in revision tracking (RT) format** - Prepare the document as a draft of the Bill, in RT format (similar to a consultation draft). This would be a full copy of the Bill with the Backstop changes tracked within it.

This document would look like a consultation draft of the Bill, but would have no legislative status. It cannot be published on the PCO website because it's not legislation, but you could send it to the Select Committee and ask them to adopt its contents in the version they report back to the House.

- c) **Revision tracked SOP (RTSOP)** - Prepare the document as an SOP in RT format. This would be a full copy of the Bill with the Backstop changes tracked within it.

This is the normal process for revising a Bill after the Select Committee has reported a Bill back to the House, and was the approach envisaged for the FPA SOP in the March Cabinet paper that was authorised by Cabinet.

9. A brief analysis of these options is provided in **Annex One**. Some key considerations are drawn out below.
10. **Legibility:** Option a) would require the reader to compare the FPA Bill and the backstop provisions side-by-side (as two separate documents) with the descriptions of the changes likely to be more detailed than the other options. Because option b) would provide provisions that look like an RTSOP, both options b) and c) would be more accessible and legible for the Select Committee and others to read than option a).
11. **Timing:** In addition to limiting your ability to make changes after Select Committee in an RTSOP format, option c) would mean that PCO would not be able to start drafting the RT for the Select Committee until after the RTSOP was completed.
12. **Cabinet approval:** As the previous Cabinet decisions specifically required you to prepare an SOP for the backstop determination provisions, option b) does not technically comply with that decision. Cabinet has delegated you the authority to “make decisions, consistent with the objective and overall design of the FPA system, on any issues that arise during the drafting of the backstop SOP”. We consider this issue may fall within the scope of this delegation, which would enable you to decide on the form of the backstop document without further Cabinet decisions. However, given the FPA policy is significant and attracting public attention, you may wish to consider raising this issue and your approach as an oral item at Cabinet to ensure your colleagues are informed of the change.

## Next steps

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13. Following our discussion next week, we will instruct PCO to draft the backstop provisions with a view to having an initial draft available for ministerial consultation and NZBORA vetting by 4 July 2022. If option b) is preferred, the BORA vet would be an informal one because the document would not be legislation at that point. We will consult with the Ministry of Justice on their likely approach to reviewing this option before we meet with you on Wednesday. We are also discussing the options with the Cabinet Office and Clerk of the Committee.
14. Following drafting, the plan is to seek Cabinet approval on 25 July 2022 to refer the backstop document to the Select Committee for consideration and request that it is incorporated into the FPA Bill as part of the Committee’s report back to the House.

## Annexes

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Annex One: Initial assessment for the form of the FPA backstop document (for discussion)

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Option	Advantages	Disadvantages	Comment
<p><b>Stand-alone narrative SOP</b></p> <p>Prepare the determination backstop provisions as a 'stand-alone narrative' SOP</p> <p>This describes each amendment ie "In clause XX insert subclause (YY)" or "after "these words" insert "these other words".</p>	<ul style="list-style-type: none"> <li>Follows the normal SOP processes</li> <li>Does not require Cabinet agreement to rescind the decision to draft an SOP, made in March 2022</li> <li>Enables an RTSOP to be drafted to accommodate any potential changes to the Bill arising at the Committee of the Whole House stage</li> </ul>	<ul style="list-style-type: none"> <li>SOP likely to be quite detailed</li> <li>Likely to be difficult for the Select Committee to read to decide whether to adopt it as part of their recommendations. This would require a side-by-side comparison of the Bill and the SOP</li> <li>MBIE's drafting instructions might need to change slightly in parts to make the SOP more readable to mitigate the above point.</li> </ul>	<p>This approach is appropriate when adding an entire new Part or similar to a Bill, or a small number of minor changes, but is more complicated if the proposed changes are more detailed or require multiple changes throughout the Bill.</p> <p>This is not PCO's preferred option as it is likely to be quite detailed, and harder for the Select Committee to consider.</p>
<p><b>Draft of the Bill that contains the backstop provisions, in revision tracking (RT) format</b></p> <p>Prepare the determination backstop provisions as a draft of the Bill (similar to a consultation draft), in RT format</p> <p>This would be a full copy of the Bill with the Backstop changes tracked with strike through and underlining).</p>	<ul style="list-style-type: none"> <li>Would appear like an RTSOP that is accessible and legible</li> <li>Easier to read than a stand-alone narrative SOP as it would be a copy of the full Bill with tracked changes</li> <li>Easier to prepare, reducing the risk of extended drafting time</li> <li>Enables an RTSOP to be drafted to accommodate any potential changes to the Bill arising at the Committee of the Whole House stage</li> </ul>	<ul style="list-style-type: none"> <li>Technically, would not be an SOP and would not be able to be published on the Legislation website</li> <li>May require further Cabinet decisions to rescind the decision to draft an SOP, made in March 2022 and agree revised approach</li> <li>If agreed to by the Select Committee, the proposed amendments would need to be separately transcribed into the RT Bill, before report back</li> </ul>	<p>When the Minister seeks Cabinet approval for this option, it could be noted that the SOP is in the form of a consultation draft and not technically an SOP, but that it achieves the same thing in principle. Note that it is unable to be published on PCO's website.</p>
<p><b>Prepare a revision tracking SOP (RTSOP)</b></p> <p>Prepare the determination backstop provisions as an RTSOP (ie a full copy of the Bill with the Backstop changes tracked with strike through and underlining).</p> <p>This is the normal process for making substantive changes to a Bill at the COWH stage and was the original planned approach for the FPA SOP.</p>	<ul style="list-style-type: none"> <li>Easier to read than a stand-alone narrative SOP as it would be a copy of the full Bill with tracked changes</li> <li>Easier to prepare, reducing the risk of extended drafting time</li> <li>Does not require Cabinet agreement to rescind the decision to draft an SOP, made in March 2022</li> </ul>	<ul style="list-style-type: none"> <li>PCO would not be able to start drafting the RT for the Select Committee until after the RTSOP was completed as PCO would have less time than it might otherwise to start setting up and preparing the RT version of the Bill</li> <li>Prevents another RTSOP being prepared when the Bill is at the Committee of the Whole House stage as PCO's system only allows one RTSOP to be created for each Bill</li> <li>If agreed to by the Select Committee, the proposed amendments would need to be separately transcribed into the RT Bill, before report back</li> </ul>	<p>Given the complexity and size of the FPA Bill, it is possible that an RTSOP may be required at the COWH stage to accommodate any changes proposed after the Select Committee report back.</p>