MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Fair Pay Agreements Bill: Workability of timeframes

Date:	30 June 2022	**Priority:**	High
Security classification:	In Confidence	**Tracking number:**	2122-4918

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Agree** to the recommendations	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	✓
Erica Sefton	Principal Policy Advisor			

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- ☐ Withdrawn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

This briefing provides you with advice on various timeframes in the Fair Pay Agreements Bill (the Bill) in relation to submissions to the Select Committee.

Executive summary

1. Approximately 20 submissions were received on the timeframes-related provisions of the Bill. These related to a number of the specific timeframes throughout the development of a fair pay agreement (FPA) as well several mentioned the lack of an overall end-to-end timeframe.
2. We do not suggest any substantive changes to timeframes but have recommended a small number of improvements that will provide more certainty and clarity.

Recommendations

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

a **Note** that submitters provided feedback on both the overall timeframe for developing an FPA and on specific timeframes in the Bill.

Noted

b **Agree** to include a maximum timeframe of 30 working days for public submissions when considering an application to initiate bargaining under clause 33(2).

Agree / Disagree

c **Agree** to amend clause 36 so that an initiating union must, within 15 working days of the approval to initiate, make best efforts to identify other unions and employers, and then to notify all known parties.

Agree / Disagree

d **Agree** to amend clause 56 to require MBIE to provide other bargaining parties with the names of new approved bargaining parties as soon as practicable after they are approved.

Agree / Disagree

e **Note** that MBIE will be preparing guidance to make it clear that parties can commence (but not conclude) discussion towards an inter-party side agreement during the three-month formation period.

Noted

f **Agree** to including a requirement that when FPAs are consolidated the original inter-party side agreement be provided to the second bargaining side within five working days under clause 110.

Agree / Disagree

g **Agree** to require ratification votes to be held 'as soon as reasonably practicable' under clause 142.

Agree / Disagree

h **Agree** to including a maximum timeframe of five working days after the result is finalised for parties to notify other parties of the outcome of a ratification process under clause 145.

Agree / Disagree

i **Agree** to remove the three-month timeframe for the Employment Relations Authority to issue a determination on fixing terms, and replace it with 'as soon as reasonably practicable' under Schedule 3, clause 8.

Agree / Disagree

j **Agree** not to change any of the following timeframes in the Bill, as detailed in Annex One:

The requirement that evidence of support must be no more than 12 months old	Clause 30(1)(e)	*Agree / Disagree*
MBIE's timeframe for assessing an application for an FPA	Clause 32(1)	*Agree / Disagree*
The timeframe for employers to provide employee contact details unless they have opted out	Clause 39	*Agree / Disagree*
Timeframe for agreeing an inter-party side agreement	Clauses 59 and 60	*Agree / Disagree*
Timeframe for appointing a new lead advocate	Clause 59(3)	*Agree / Disagree*
The 20 working day period for agreeing to consolidate	Clauses 106 and 107	*Agree / Disagree*
The timeframe for MBIE to validate the terms of an FPA	Clause 156	*Agree / Disagree*
The timeframe in the Bill for notifying new employees when an FPA is varied	Clause 172	*Agree / Disagree*

k **Note** that you have agreed [briefing 2122-4865 refers] that the threshold for fixing the terms of an FPA should not include a criterion enabling the Employment Relations Authority to fix the terms of an FPA following a prescribed time-period for bargaining or following initiation (i.e. no overall timeframe).

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

30/06/2022

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. This briefing provides you with advice on the workability of timeframes in the Bill, building on previous advice we have provided you [briefings 2021-1897, 2021-1925, 2021-3525, and 2122-4865 refer], and based on issues raised by submitters to the Education and Workforce Select Committee.
2. You agreed that this was one of the priority areas for MBIE officials to provide you with further advice on.
3. There are multiple timeframes specified in the Bill, along with several processes that do not include legislated timeframes. These occur throughout the development of an FPA from initiation, through formation of the bargaining sides, bargaining and finalisation.
4. This briefing is not a complete reassessment of all timeframes in the Bill – only those which have been raised through submissions.

General feedback on timeframes

5. Approximately 20 submissions commented on the timeframes in the Bill. Some submitters (such as Young Labour NZ and NZ Council of Trade Unions) wanted to see shorter and more defined timeframes overall to ensure timely processes for FPAs. Others (such as Ia Ara Transporting NZ) noted concerns over the drawn-out timelines and the impact this will have on employees and employers.
6. Several mentioned the total end-to-end timeframe to complete an FPA, especially that because there is no overall timeframe indicated, getting to an agreed FPA will take longer than desirable.
7. In addition to these general comments, submitters provided feedback on many of the specific timeframes in the Bill. Again, there was a mixed range of views with certain timeframes being seen as either too short or too long by different submitters. Submitters sought certainty and clarity in a number of places by asking for the inclusion of specified timeframes in order to avoid "infinite delays".[1]

Approach taken to this advice

8. In line with our previous advice to you on timeframes [briefing 2021-1897 refers], we have reassessed several of the timeframes and processes in the Bill, using a similar approach. We seek to balance your desire for an expedient FPA development process with your objective for parties to as much as possible reach a bargained outcome.
9. We continue to take a good regulatory practice approach to recommendations around timeframes, using the following considerations:
    a. **What can reasonably be achieved by parties** – whether the timeframe can reasonably be met by the party given its capability and capacity, and the nature and complexity of the task.
    b. **The ability to complete an FPA in a reasonable amount of time** – whether, taken together, the timeframes allow parties to complete an FPA in a reasonable amount of time and prevent excessive delay and cost.
    c. **Interactions between timeframes** – whether the timeframes are proportionate to each other and work together well as a whole.

[1] For example, Unite Union.

d. **Providing certainty and transparency** – whether the timeframe provides sufficient certainty for parties where necessary and supports transparency and accountability.

e. **Consequences of non-compliance** – whether the timeframe is clear enough to be enforced and there are appropriate and meaningful consequences for failing to meet the timeframe.

f. **Consistency or interactions with other relevant legislation** – we have looked at the Employment Relations Act 2000 (ER Act), the Screen Industry Workers Bill (SIWB) and the Equal Pay Act 1972.

10. In summary we do not recommend any substantive changes to timeframes but have recommended a small number of improvements.

Specific timeframes in the Bill where we recommend changes

A maximum timeframe for public submissions would increase certainty for applicants

11. For applications made under the public interest test, or the 10 percent of covered employees representation test, MBIE has the discretion to call for public submissions. Under clause 33(2) the period for making submissions must be "as least 20 working days". This reflects the advice we previously gave you [briefing 2021-1897 refers] that a minimum of 20 working days for public submissions was appropriate and in line with Screen Industry Workers Bill[2].

12. Several submitters[3] were concerned that there is no maximum timeframe for public submissions and this could result in delays and uncertainty. Submitters recommended the insertion of a maximum timeframe for public submissions, but no specific alternatives were suggested.

13. While we consider that the risk of MBIE stipulating excessive, protracted public submission periods is relatively low, we do consider there is some merit in providing more certainty around this part of the process.

14. We agree there is merit in adding a maximum timeframe for submissions. We assessed the following options:

    a. Making 20 working days both the minimum and the maximum time for submissions (all applications would only be open for public submissions for the set period of 20 working days).

    b. As above but adding a discretion for this time to be extended in certain circumstances.

    c. Adding a maximum timeframe, such as 30 working days for all applications, commensurate with, for example, the standard select committee submission period.

15. Option a does not give any flexibility for complex or wide-ranging applications that would benefit from a longer time period for public input. It also does not allow for administrative flexibility, for example advertising on a certain day(s) of the week to accommodate restrictions of using certain channels, or to maximise the opportunities for awareness.

16. Option b would provide the opportunity for a longer time period if warranted but would add to the complexity of the process with a new power being required for MBIE and introducing a new element of discretion.

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[2] Note that the Screen Industry Workers Bill's timeframe is 28 days which is approximately 20 working days, but may vary depending on public holidays and when they fall.

[3] For example NZ Council of Trade Unions, NZ Nurses Organisation, NZ Public Service Association.

17. We recommend option c. This option provides certainty, accommodates more complex applications, and is similar to other public submissions processes. It does, however come with the risk that the maximum will become the default submission period, thereby potentially extending the initiation period by up to two weeks. This is theoretical as with no maximum in the Bill currently it was already open for MBIE to have an extended submission period of 30 working days (or more).

18. We recommend retaining 20 working days as the minimum period for making submissions and add a maximum of 30 working days.

We recommend clarifying the obligation for initiating unions to inform other employers and unions

19. Clause 36(1) requires the initiating union to identify other unions and employers that are likely to fall within coverage that it has received approval to initiate bargaining. This step must be carried out within 15 working days of approval to initiate.

20. You agreed [briefing 2021-1925 refers] to this timeframe when considering a package of measures to ensure broad and adequate notification and awareness when an FPA is proposed. We reconsidered this timeframe in later advice [briefing 2021-1897 refers] in the context of identifying possible notification reductions that might speed up the process. On balance we did not recommend reducing the agreed timeframes and you concurred with that advice.

21. A number of submitters[4] raised concerns about the practicalities of achieving the "monumental" task of identifying and notifying all likely covered employers within 15 working days. All considered the timeframe too short and/or the task not within the capabilities of an initiating union. Examples were given of a union representing cleaners where there might be "thousands or tens of thousands" of employers of cleaners. Another example was given of the difficulty of identifying affected employers in the early childhood education pay equity claim.

22. Submitters expressed concern that there is no publicly available information to assist in this exercise and that the initiating union would have to do nation-wide research in order to be confident they had reached all the required parties.

23. Suggested improvements from submitters included:

    a. A mechanism, which might include a statutory process, for identifying covered employers. The process would need to maintain employee privacy and confidentiality of employers' business information.

    b. Require MBIE to provide the initiating union with the contact details of likely covered employers, through the NZBN.

    c. Require MBIE to notify all likely covered employers.

    d. Give the chief executive of MBIE the ability to check if the list of identified employers is complete.

    e. Change the clause to "make reasonable efforts to identify and notify each employer."

24. Option a is likely to increase timeframes and add complexity to the process and is not recommended.

25. You have previously agreed [briefing 2021-3525 refers] that MBIE should not be responsible for notifying or identifying all employers and unions in coverage (options b, c and d). We have not changed our advice on this issue. The purpose of this notification is to alert as

[4] For example Aotearoa Legal Workers' Union Incorporated, Josh Marshall, NZ Council of Trade Unions, NZ Education Institute, NZ Law Society, NZ Nurses Organisation

many potentially covered employers and unions as possible, but this is not the only way that interested parties will be made aware of an FPA. MBIE is required to publicly notify the approval of initiation for an FPA and will also use its channels to inform employers of the opportunity to participate in the FPA process. This will help ensure as many parties as possible are made aware of an FPA.

26. In addition, this timeframe only applies to the initial notification to employers. The Bill includes an on-going obligation (clause 101) to notify any new employer identified (ie not already notified) through bargaining.

27. Without revisiting the underlying obligation on the initiating union or the specified timeframe, we do believe there is an opportunity to add some clarification to this aspect of the Bill. Applicants for FPAs could gain more clarity if they are required to make best efforts to identify other unions and employers, which makes this less of an absolute obligation. Once identified, then the applicant should be required to notify all known parties. These refinements should ameliorate some of the issues raised by submitters about the ambiguity of the task, rather than the timeframe itself.

28. We recommend that clause 36 be amended to clarify that the initiating union must, within 15 working days of the approval to initiate:

    a. Make best efforts to identify other unions and employers and

    b. Notify all known parties.

There is an opportunity to make it clear what actions can happen during the three-month period when bargaining sides are forming and advise of approved bargaining parties more quickly

29. Under clauses 35 and 45, employee and employer bargaining sides are formed three months after approval of initiation. The intention of the three-month period is to allow any interested eligible parties to join a bargaining side. Joining at this stage allows the party to be involved in the development of the inter-party side agreement and appointment of a lead advocate. Eligible parties can join after this three-month period, but it will be up to the existing bargaining parties on that side as to whether they amend the inter-party agreement or change the lead advocate.

30. At the completion of the three-month period MBIE must provide bargaining parties with the name of each other bargaining party (clause 56).

31. Several submitters[5], representing both employer and employee perspectives, expressed concerns about the three-month period to form bargaining parties. Some employee-related submitters suggested that bargaining sides should be able to constitute as soon as possible without having to wait the three months. Conversely, a group of employer-related submitters said that the three-month period was too short for employer bargaining parties to fulfil the requirements to become a bargaining party (e.g., forming an incorporated society). They consider this a disadvantage, as unions are “accepted by default”.

32. NZ Council of Trade Unions suggested that MBIE should disclose the names of bargaining parties as soon as possible as there is no need to delay disclosure.

33. Firstly, to address the above interpretation issue, we do not agree with a number of submissions that unions are “accepted by default”. It is true that it is more likely that a union will already meet the requirements for a bargaining party (including being an incorporated society, having a constitution that enables the union to represent the collective interests of covered employees, whether or not they are members) than an employer organisation, but

[5] For example E tū, Expol Ltd, HR Toolkit Ltd, NZ Council of Trade Unions, NZ Nurses Organisation, NZ Public Service Association, Topflite Ltd.

there is not a default acceptance. All unions who wish to become an employee bargaining party must meet these requirements and be approved by MBIE as a bargaining party under clause 49.

34. We have considered the following options for improving the workability of these provisions:

    a. Allowing for a reduced formation period if all parties can agree, for example if the parties are well-defined.

    b. Putting in place a determination role (for either the Authority or MBIE) to give some sort of 'approval' that all the parties have been identified and therefore are deemed formed within a shorter timeframe.

    c. Clarifying that certain activities, such as commencing discussion ahead of agreeing an inter-party side agreement, can take place during the three-month formation (noting, they could not formally agree the inter-party agreement until the three-month period is up, in case another bargaining party has joined just prior to the deadline). This could be achieved by the provision of guidance to bargaining parties once they are approved.

    d. Requiring MBIE to provide names of approved bargaining parties to other approved parties on a rolling basis as those are approved, rather than waiting until the end of the formation period.

35. We do not recommend either option a or option b. It would not be possible for either the bargaining parties, the Authority, or MBIE to be satisfied that all possible parties have had an opportunity to join as bargaining parties – some entities may not have yet come into existence. We note that parties can join at any time but giving a reasonable time period is necessary so that parties can take advantage of being involved in developing the inter-party agreement and appointing a lead advocate.

36. We recommend a combination of options c and d. Providing guidance will provide increased certainty for applicants and help streamline the overall process. Providing approved bargaining parties' names throughout the three months will allow conversations between parties to begin earlier, and therefore provide further opportunities to achieve an FPA within a reasonable total timeframe.

37. We recommend amending the Bill to add a requirement that as soon as practicable after a bargaining party is approved by MBIE their name is provided to other approved bargaining parties.

38. We also recommend making it clear through guidance that parties can commence (but not conclude) discussion towards an inter-party side agreement during the three-month formation period.

We recommend clarifying that the existing inter-party side agreement will be provided to the new bargaining side when FPAs are consolidated

39. Clause 110 also applies to the situation where two proposed FPAs are consolidated. In that situation the bargaining side for the second proposed FPA has 20 working days to request that the bargaining side for the first proposed FPA negotiate an inter-party side agreement.

40. We have provided you with previous advice on this timeframe [briefing 2021-3525 refers]. We advised, and you agreed, that a revised bargaining side agreement could be requested within 20 working days, with a further 20 working days to agree to a new agreement (or that the current one can remain in place).

41. Russell McVeagh submitted that 20 working days is too short for the second bargaining side to make a request to negotiate for an inter-party agreement. They did not provide an alternative timeframe. As an additional point they state that the Bill is unclear if the second bargaining party would have been provided with a copy of the existing inter-party side agreement.

42. We recommend making it clear in the legislation that in these circumstances the first bargaining side must provide the second bargaining side with a copy of the existing inter-party side agreement as soon as practicable, but within five working days.

43. We consider this to be commensurate with other similar, administrative type timeframes in the Bill. We consider that with that information, 20 working days is a reasonable timeframe for a request to negotiate an inter-party agreement, especially in the context that the Bill also specifies that 20 working days is the maximum timeframe for the parties to agree to a revised bargaining side agreement.

44. We recommend:

    a. No change to the timeframe for requesting a new inter-party side agreement be negotiated.

    b. Clarifying in the legislation that the original inter-party side agreement must be provided to the second bargaining side within five working days.

There is an opportunity to clarify details of the timeframes for holding a ratification vote

45. Clause 142 specifies the minimum timeframe for setting a date for ratification votes. For the employee side that date must be at least 40 working days after the Authority has approved the FPA or notified the outcome of a coverage overlap assessment. For the employer side the date for the ratification vote must be at least 10 working days after.

46. We have provided previous advice to you on timeframes around ratification [briefing 2021-1897 refers]. The advice was on the ratification process as a whole, rather than the timeframes for holding a vote. We advised you that there were three options – having no timeframe for holding a vote, as soon as reasonably practicable, and a maximum time limit of 20 working days. On balance we recommended, and you agreed, that the Bill should require parties to complete ratification as soon as reasonably practicable. This was considered to provide flexibility alongside a positive obligation to complete ratification in a timely manner. We also advised that this approach was consistent with other legislation – the Employment Relations Act, Screen Industry Workers Bill, and Equal Pay Amendment Act all have minimum requirements for ratification, but do not set a time limit on completing ratification. However, the ‘reasonably practicable’ phrase does not appear in the Bill, in what appears to be an error during the drafting process.

47. The NZ Law Society asked for a maximum timeframe for holding a ratification vote so that either party cannot hold-up the process by not holding a vote.

48. We agree that there is potential to reassess the timeframes around ratification. We have considered the following options:

    a. Providing specific minimum and maximum timeframes for both the employer and employee votes.

    b. Including the ‘as soon as reasonably practicable’ phrase recommended in previous advice.

49. Option a has the benefit of providing certainty and would allow the employer and employee ratification votes to be sequenced. If there is an unsuccessful employer vote this would effectively lead to a failed ratification overall, so there would be some advantage to the employee side of knowing that, and not committing time and resource to an employee ratification vote. The disadvantage would be that if the FPA proceeds to the Authority for terms to be fixed, the Authority does not have the benefit of knowing if the agreed terms were supported by employees. This option would also not be consistent with the approach taken in other employment legislation. We do not recommend this option.

50. Option b reflects our previous advice to you and would correct what appears to be an omission in drafting. A requirement for parties to hold their ratification votes 'as soon as reasonably practicable' (but allowing for the minimum notice periods in the Bill) provides a legislative imperative that could be challenged and enforced if necessary, including if delay was due to a breach of good faith.

51. We recommend adding the words 'as soon as reasonably practicable' to clause 142.

We recommend including a timeframe for advising of the outcome of a ratification vote

52. Clause 145 requires bargaining sides to notify the other bargaining side "as soon as reasonably practicable" of the outcome of their ratification vote.

53. NZ Council of Trade Unions asked for a clear maximum timeframe for bargaining sides to advise each other of the outcome of the ratification vote. They stated the advantage of the employer side notifying the employee side before the employee side vote – "this will give the union side valuable insight into how close the FPA process is towards concluding."

54. E tū requested that the employer side be required to notify the employee side prior to the employee ratification vote "to ensure that ratification does not occur should the employer side vote 'no'".

55. We think there is a benefit of specifying a maximum time period for parties to notify each other of the outcome of their ratification vote, to provide certainty and ensure an expedient process.

56. We recommend including a timeframe of a maximum of five working days after the result is finalised into clause 145 and removing the words 'as soon as reasonably practicable'.

We recommend replacing the three-month timeframe for Authority to fix terms with 'as soon as reasonably practicable'

57. Schedule 3, clause 8 gives the Employment Relations Authority three months to provide a written determination when they fix terms of an FPA. The Authority may extend this timeframe only if it decides that "exceptional circumstances" exist, creating a relatively high threshold.

58. The timeframe is based on the requirement in the ER Act for the Authority to issue determinations within three months.

59. The Employment Relations Authority has advised that they consider this timeframe to be "unworkable" and should be replaced with "as soon as reasonably practicable".

60. We have consulted further with the Chief of the Authority on this matter and agree the necessity for including a specified timeframe should be reassessed. The Authority would be required to fix terms under three quite different scenarios:

    a. In the event of a bargaining stalemate.

    b. After two failed ratifications.

    c. If an employer bargaining side is not identified and the backstop applies (subject to approval of the supplementary order paper relating to the backstop).

61. Depending on how much bargaining (if any) has occurred the Authority may need to undertake extensive research in order to reach a conclusion on the appropriate terms to include. This is a significantly larger task than its current functions. Given the nature and complexity of the task we do not think it is likely the Authority could meet a timeframe of three months in all cases.

62. We considered an option of making the timeframe longer but concluded that because of the variability of circumstances when the Authority would need to fix terms, this would not be possible to accurately estimate. We also consider it would be difficult to impose meaningful consequences if the timeframe is not met.

63. Changing the requirement to 'as soon as reasonably practicable' balances placing an obligation on the Authority to not delay in dealing with fixing terms of FPAs and allowing for the variety of situations in which the Authority will be called to fix terms.

64. We recommend Schedule 3, clause 8 be amended by removing the specified three-month timeframe and requiring the Authority to issue its determination with respect to fixing terms as soon as reasonably practicable.

Timeframes where we do not recommend changes

65. We do not recommend changes to the following specific timeframes in the Bill which have been raised in the submissions:

    a. The requirement that evidence of support must be no more than 12 months old – clause 30(1)(e).

    b. MBIE's timeframe for assessing an application for an FPA – clause 32(1).

    c. The timeframe for employers to provide employee contact details unless they have opted out – clause 39.

    d. Timeframe for agreeing an inter-party side agreement – clauses 59 and 60.

    e. Timeframe for appointing a new lead advocate – clause 59(3).

    f. The 20-working day period of agreeing to consolidate – clauses 106 and 107.

    g. The timeframe for MBIE to validate the terms of an FPA – clause 156.

    h. The timeframe in the Bill for notifying new employees when an FPA is varied - clause 172

66. We do not recommend including an overall timeframe for an FPA and note you have agreed [briefing 2122-4865 refers] to not including a criterion that would enable the Employment Relations Authority to fix terms following a prescribed time-period.

67. A summary of the issues raised in submissions relating to these issues, and our analysis is included in **Annex One.**

Next steps

68. We seek your decisions on the recommendations in this briefing by 4 July 2022, so we can include any relevant matters in the Cabinet paper to amend the FPA Bill. We are scheduled to provide your office with the draft Cabinet paper on 7 July 2022.

69. As we indicated in our previous briefing [2122-4865 refers] it is intended that this Cabinet paper will be considered by Cabinet's Economic Development Committee's meeting on 27 July 2022. The Departmental Report is due to be submitted to the Education and Workforce Select Committee on 8 August 2022.

Annex One: Timeframes where we do not recommend changes

A. The requirement that evidence of support must be no more than 12 months old

1. Clause 30(1)(e) requires applicants for approval to initiate bargaining for an FPA to provide evidence of how the application meets either of the representation tests (10 percent or 1000 covered employees), or the public interest test[6]. Clause 30(2)(a) states that the provided evidence cannot be more than 12 months old when submitted.
2. The purpose of the 12-month period is to ensure that indications of support are current. In our previous advice to you [briefing 2021-1897 refers] we considered that this timeframe allowed unions sufficient time to canvas the views of their members around the country, including seasonal workers.
3. One submitter (Presbyterian Support Southland) commented that this timeframe was "lengthy", and it would be difficult to verify information from employees 12 months after the fact. No specific alternative timeframe was suggested.
4. We consider that 12 months represents a balance between providing current, verifiable information, and an adequate time for consultation. Part of MBIE's assessment process is to confirm that the applicant has met one of the initiation tests and this will require some verification of the evidence provided. It is in the interests of the applicant to make sure the information is able to be checked easily and to build in a buffer in case of changes in employee status. Out-of-date or unverifiable information will lead to delays in an approval to initiate.
5. Therefore, we recommend no change.

B. Timeframe for MBIE's initiation assessment

6. The chief executive of MBIE must assess an application for an FPA "as soon as practicable" after receiving an application (clause 32(1)). The Bill does not include a specific timeframe for the assessment to happen. The assessment includes; if the application meets one of the initiation tests, if coverage is adequately defined, and if there is any overlap of coverage with proposed or existing FPAs. Further information can be sought from the applicant.
7. In our previous advice to you [briefing 2021-1897 refers] we canvased three options for a timeframe for this assessment[7]. These included:
    a. No timeframe, as per the approach in the Screen Industry Workers Bill.
    b. As soon as reasonably practicable (the recommended option).
    c. As soon as reasonably practicable and no later than 45 working days, extendable to 80 working days, similar to the approach in the Equal Pay Act 1972.
8. You agreed to option b above and this is what was translated through to the Bill as introduced.[8]

[6] Note we intend to include a recommendation in the Departmental Report that the 12 months only applies to evidence supplied for the representation tests, not the public interest test. Applications under the public interest test will need provide evidence of meeting the criteria in clause 29(4). This information will need to illustrate a current issue and is likely to include a mix of recent and older data or research.
[7] Noting at that stage consideration was still being given to who should be making the assessment, including a potential role for the Employment Relations Authority.
[8] Note that we are looking across the Bill to ensure consistency of the use of "as soon as practicable" versus "as soon as reasonably practicable" and will address any required changes through the Departmental Report.

9. Several submitters[9] raised a concern that there was no maximum timeframe set for this MBIE assessment. Submitters considered that there was potential for protracted timeframes given the nature of the assessment (NZ Nurses Organisation) which creates uncertainty for employers and employees (Russell McVeagh). Submitters requested the insertion of a specified timeframe for this step. NZ Council of Trade Unions suggested that the timeframe be inclusive of the public submissions process. (The timeframe for public submissions is discussed separately below.)

10. E tū suggested a timeframe of 15 working days for an initial assessment, followed by an additional 15 working days if further information is requested. They considered this timeframe to be consistent with the others in the Bill.

11. We agree that a specified timeframe would provide the most certainty for all parties. However, we think that would not be a workable option for several reasons:

    a. It would be difficult to calculate an accurate maximum timeframe as the nature and complexity of the assessment will be highly variable. That will depend on the quality of the application, the ease of verification of evidence provided, the lack of control over the number of applications in the system at any one time, and the need to request and verify additional information.

    b. If a generous maximum is put in place to accommodate the more complex of applications that could lead to a perverse incentive to use all of the time available.

    c. Non-compliance with the timeframe could result in judicial review and as a consequence divert MBIE's available resources from processing applications to dealing with litigation or complaints.

    d. A specified timeframe would not be able to take into account workflow and resourcing implications because of the possibility of multiple, concurrent applications.

12. We also considered, but discounted, an option where a timeframe is set but the clock does not start ticking until MBIE is fully satisfied that all the information has been received and/or the clock stops each time MBIE requests further information. While this would on the face of it create more transparency with a fixed timeframe, this would not create a high degree of certainty in practice and would introduce further complexity to the system.

13. MBIE will consider developing internal key performance indicators to set workable target timeframes and encourage process improvements over time.

14. We recommend no change.

C. The timeframe for employers to provide employee contact details unless they have opted out

15. Under clause 39 employers have 20 working days to provide the contact details of covered employees to the initiating union unless the employee has elected to not have their contact details provided.

16. You agreed [briefing 2021-1925 refers] to this timeframe when considering a package of measures to ensure broad and adequate notification and awareness when an FPA is proposed. The 20 working days relates to a similar requirement in the pay equity bargaining process.

17. We reconsidered this timeframe in later advice [briefing 2021-1897 refers] in the context of identifying possible notification reductions that might speed up the process. On balance we did not recommend reducing the agreed timeframes and you concurred with that advice.

[9] For example, E tū, NZ Council of Trade Unions, NZ Nurses Organisation, Russell McVeagh

18. One submitter (NZ Law Society) made a comment about this timeframe. They submit that the 20-working day timeframe is too short for an affected employee to consider and seek advice about giving their consent to providing their contact details. They suggest a longer timeframe, but do not specify what that should be.

19. The 20 working days is for the employer to provide the contact details of employees to the initiating union. An employee would need to opt out before that. The Bill does not actually specify when that would need to happen. Under clause 36(2)(d) employees will be provided with information about the FPA including "the process by which an employee who does not want their contact details to be provided…can elect not to have their contact details provided". Employees will also receive information under that clause about how their contact details will be used, the consequences of not providing their details, and how they can change their decision if they do decide to opt out.

20. We compare this to the opportunity at the pre-ratification stage for employees to opt out of providing their contact details. At that point five working days are specified. There may be some merit in considering a similar timeframe for the opt-out period during initiation, however this will not address the issue raised by the submitter. We will consider this as a possible technical change to be included in the Departmental Report.

21. We recommend no change to extend the timeframe as suggested by the submitter.

D. Timeframe for agreeing an inter-party side agreement

22. Clauses 59 and 60 require bargaining sides to agree an inter-party side agreement and appoint a lead advocate within 20 working days after the later of three months after the approval to initiate, or the date they are provided with the name of the other bargaining parties. This is in line with our previous advice to you [briefing 2021-1897 refers] that a timeframe was necessary to ensure a clear expectation that parties get ready for bargaining and provide certainty for parties. The timeframe of 20 working days was recommended by the FPA workshop held in 2021 on the basis that they thought developing an inter-party agreement would not take long.

23. The NZ Law Society, NZ Council of Trade Unions and Russell McVeagh submitted on this provision. They considered that the 20 working days would not be long enough to carry out this exercise especially if there are a large number of employer bargaining parties. The NZCTU also asks that we "*remove the obligation for parties to wait for a period after public notification before these agreements can be worked out. Instead bargaining parties should be allowed to develop these agreements as soon as possible between themselves*."

24. Russell McVeagh were also concerned that there is no mechanism for the process to be paused while matters between the same bargaining side are resolved.

25. As per our comments above, we consider that where the bargaining parties are confident in who will be on the bargaining side, they can begin to discuss the content of the inter-party agreement before the three-month deadline for forming the bargaining side is up (noting they cannot agree it until the deadline is up).

26. We note this may not be possible in some sectors where there are a number of entities that may wish to be a bargaining party or where an entity needs to form or amend its constitution before it can apply to be a bargaining party. We do not, however, recommend extending this timeframe as it would lead to further delays before bargaining between the two sides can begin.

E. Timeframe for appointing a new lead advocate

27. Clause 59(3) states that if during bargaining a new lead advocate is required (if a bargaining side lead advocate stops performing that role), the bargaining side has 20 working days to appoint a new one.

28. The NZ Nurses Organisation submitted that this timeframe was too long and could be used in a "frivolous, vexatious, or tactical" way. They asked that a shorter timeframe for appointing a new lead advocate be considered to reduce the opportunity for this kind of behaviour, or for restrictions around the ability for a lead advocate to stop performing its role, in combination with a penalty for vexatious changes.

29. We consider the 20 days may be required to appoint a new lead advocate if there is disagreement on who the lead advocate should be or if the bargaining party(ies) decide to contract someone with bargaining skills for this role.

30. If a bargaining side was engaged in vexatious behaviour in relation to this (e.g., changing the lead a number of times and using the maximum time to do so), we consider this would be covered by the parties' obligations under clauses 17 and 19 to deal with each other in good faith. Specifically, parties are required to be active and constructive in establishing and maintaining a productive relationship (clause 17(4)(b)), and to use their best endeavours to agree the terms of the FPA in an orderly, timely and efficient manner (clause 19(3)(e)). There are also penalties under the Bill for certain breaches of the duty of good faith, including breaches that are intended to undermine the process of bargaining (clause 20(2)).

31. For these reasons we recommend no change.

F. The 20-working day time period for agreeing to consolidate two FPAs

32. Clauses 106 and 107 apply when a proposed FPA is approved for bargaining six months or more after an already-proposed FPA that covers an occupation group within an industry in that FPA. The bargaining side for the first FPA has 20 working days to notify the bargaining side for the second FPA if it wants to consolidate the two processes.

33. Russell McVeagh submitted that in these circumstances 20 working days is too short for the bargaining side for the first proposed FPA to consider and decide if they want to consolidate. They did not provide an alternative timeframe.

34. We consider that 20 working days is a reasonable timeframe for this step and is consistent with other similar provisions in the Bill. For this reason, we recommend no change.

G. Timeframe for MBIE to validate the terms of an FPA

35. Under clause 156 the chief executive of MBIE may validate the terms of an FPA by issuing an FPA notice. Validating means putting the FPA into secondary legislation. The Bill does not include a timeframe for this. We have previously advised you on this [briefing 2021-1897 refers]. We considered if the Bill should include a requirement to create the new legislative instrument as soon as reasonably practicable, or within a specified time limit. We advised against either of those options and indicated that it is not standard practice to include a timeframe in legislation for the creating of secondary legislation.

36. Two submissions commented on this provision asking for a timeframe to be included for MBIE to complete this step. NZ Nurses Organisation requested a "clear and rapid" timeframe for validation. NZ Council of Trade Unions submitted that validation should take place "as soon as possible and within five working days following successful ratification".

37. We stand by our original advice and think this process will in practice proceed as quickly as possible but will be dependent on MBIE and PCO resourcing. Five days, as suggested by a submitter, would not be adequate time for this step in the process, as regulations take a longer period of time to make than that. It would also be difficult to specify meaningful consequences for non-compliance and responding to that would divert MBIE resources away from preparing the regulations and completing this final step. We therefore recommend no change.

H. The timeframe in the Bill for notifying new employees when an FPA is varied

38. Once an FPA is in place and if a variation is proposed, clause 172 states that employers have 15 working days to notify new employees that they are in a role covered by an FPA. Employers then have 60 working days to provide the employee's contact details to the employee bargaining side (unless they opt-out).

39. A number of submitters[10] commented on this provision. These submitters appeared to interpret this clause as giving employers up to 60 working days to notify new employees that they are covered. In actual fact that has to happen within 15 working days. The 60 working days should apply to the requirement to pass on new employee contact details to the employee bargaining side.

40. We have, however, identified some minor drafting errors in this provision that we intend to amend via the Departmental Report.[11]

41. We recommend no change.

I. Overall timeframe

42. As mentioned above several submitters suggested the inclusion of an overall timeframe for developing an FPA[12]. Some submitters also suggested that after that timeframe elapsed the FPA would go to the Authority for the terms to be fixed. We recently advised you on this issue [briefing 2122-4865 refers] and you agreed that the Bill should not enable the terms of an FPA to be fixed following a prescribed time period for bargaining.

43. In addition to this, we also consider that an overall timeframe is not practical because of the inherent uncertainties in specifying what that timeframe could be.

44. We recommend no change.

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[10] For example, NZ Council of Trade Unions, NZ Nurses Organisation, NZ Public Service Association
[11] Clause 172(2)(b) should state "employee" rather than "employer" and Clause 172(3) should cross reference to (2)(c).
[12] For example, the New Zealand Council of Trade Unions suggested an *"an overarching timeframe of 12 months for an FPA to come into force as a minimum standard."*