MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

# BRIEFING

## Final summary of submissions on the Fair Pay Agreements discussion document

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| **Date:** | 7 February 2020 | **Priority:** | Medium |
| **Security classification:** | In Confidence | **Tracking number:** | 1892 19-20 |

| **Action sought** | | |
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| | **Action sought** | **Deadline** |
| Hon Iain Lees-Galloway<br>**Minister for Workplace Relations and Safety** | **Note** the contents of this briefing. | 17 February 2020 |

| **Contact for telephone discussion (if required)** | | | | |
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| **Name** | **Position** | **Telephone** | | **1st contact** |
| Tracy Mears | Manager, Employment Relations Policy | 04 901 8438 | 9(2)(a) | ✓ |
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| **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- ☐ Withdrawn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

To provide you with a summary of submissions received on the Fair Pay Agreements (FPA) consultation in relation to coverage, the bargaining process, dispute resolution and conclusion of an FPA.

This briefing covers the remaining topics covered in the discussion paper and is a follow-up from the briefing provided to you on 19 December 2019 [1866 19-20]. We have separately prepared a briefing summarising submitters' views on the overall merits of the FPA system [2009 19-20].

Annex One contains the detailed summary of submissions. Annex Two explains the recording of responses from NZCTU's online form submissions that could not be categorised in the general summary of submissions.

## Recommended action

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

a **Note** this briefing provides detailed summaries of submissions in relation to the coverage, bargaining process, dispute resolution and conclusion elements of the FPA system in Annex 1, with an overview on pages 2-5.

*Noted*

b **Note** that we will provide advice on the topics summarised in this briefing on 17 February 2020.

*Noted*

c **Note** that once you have made decisions on the major elements of the system, we will prepare a paper for you to seek agreement on the system from Cabinet in May 2020.

*Noted*

Tracy Mears
**Manager, Employment Relations Policy**
Labour, Science and Enterprise, MBIE

07 /02 / 2020

Hon Iain Lees-Galloway
**Minister for Workplace Relations and Safety**

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## This briefing summarises the remaining results of the FPA consultation

1. Public consultation on 'Designing a Fair Pay Agreements (FPAs) System' was open from 17 October to 27 November 2019. In total, we received 648 submissions including 110 standard and oral submissions.

2. On 19 December 2019 we gave you a briefing summarising submissions on three important topics: initiation, representation and market impacts [briefing 1866 19-20]. That briefing also gave a breakdown of the number of submissions received in various formats, meetings we held with stakeholders, and the general sentiment of submissions (positive, negative or unclear). We also summarised the submissions from the New Zealand Council of Trade Unions (NZCTU) and Business NZ as the main social partners.

3. This briefing gives an overview of the submissions received on the remaining topics in the discussion paper: coverage, the bargaining process, dispute resolution and conclusion of an FPA. Annex One includes a more detailed summary of the submissions on these topics.

4. In summarising submissions, we have focussed on the most important design questions on each topic, and we have not included a summary of every question. Our approach has been to omit minor questions related to the mechanics of the system – we will consider those submissions when providing you advice on second-tier matters later in 2020.

5. Annex Two summarises the recording of responses from NZCTU's online form submissions that could not be categorised in the general summary of submissions.

## Overview of coverage submissions

6. Few submitters engaged with the issue of whether the applicants should have to define coverage in terms of **both occupation and sector** (as opposed to occupation *or* sector). Unions generally recommended applicants should only need to specify one or the other.

7. Most submitters opposed the use of Australia New Zealand Standard Classification of Occupations/Australia New Zealand Standard Industrial Classification (**ANZSCO/ANZSIC**) codes to define FPA coverage, arguing that that these systems are too restrictive, unfit for purpose, and could add confusion and complexity. The main proposed alternative, where one was mentioned, was to leave definition of coverage to the parties.

8. The majority of submitters supported an ability for parties to **renegotiate coverage**, with some proposing specific limitations on when this could be done. The dissenting minority noted the delays and compliance costs this option could create.

9. Workers generally supported temporary **exemptions** from FPA coverage, with many citing the FPA Working Group's (FPAWG) recommendations. Some employers and workers were concerned that exemptions could lead to negative competition outcomes. Business NZ and other employers recommended that if the entire FPA process were voluntary as they preferred, no exemptions would be needed.

10. Submitters who supported **regional variations** in FPAs were generally from an employer perspective, arguing that they were necessary because of significant differences in living costs and market dynamics between regions. NZCTU, many workers and some employers opposed regional variations, arguing they would undermine the purpose of FPAs to create a level playing field, and would be difficult to implement.

11. Some submitters commented on the inclusion of **contractors** in FPA coverage despite no questions on this topic in the discussion paper. Supporters of inclusion mostly noted that

employee-only FPAs would incentivise employers to misclassify workers as contractors to avoid coverage. Critics noted that inclusion of contractors in collective bargaining would be inconsistent with the employment relations and employment standards system and argued that alternative mechanisms are or will be better suited to addressing worker misclassification.

## Overview of bargaining process submissions

12. Submitters were mixed in their views on who should have responsibility for **notifying parties** that bargaining has been initiated. Submitters who saw the FPA system as a form of compulsion argued that this justifies a larger responsibility for government.

13. Almost all submitters supported **good faith obligations** during FPA bargaining, and that at a minimum, those responsibilities should reflect those under the Employment Relations Act. However, many submitters acknowledged fundamental differences in what the current good faith obligation covers and what would need to be covered in an FPA bargaining context, notably the involvement of non-affiliated workers/employers. Business NZ questioned the workability of good faith in an FPA context.

14. Submitters from all perspectives supported the use of a category of mandatory **topics**. Views were mixed on whether additional topics should be explicitly allowed, via a 'permitted' category, or implicitly, via an 'excluded' category.

15. A large number of worker-perspective submitters supported the list of mandatory topics in the discussion paper, but would also include health and safety. Many submitters (primarily employers) expressed concern with the breadth of terms in the discussion paper list, and some suggested topics for an 'excluded' list instead.

16. There was no consensus on how **bargaining costs** could be shared, but a majority of submissions opposed introducing a bargaining fee/levy. A majority of submissions argued there were good reasons for departing from the current situation where bargaining parties cover the costs of bargaining; notably that the system is not voluntary (employers) or that having prohibitive cost barriers would undermine the system's objectives (workers).

17. Worker-perspective submitters proactively advocated for **paid staff meetings** to instruct representatives and participate in ratification, although this was not a question in the discussion paper.

18. The '**navigator**' role described in the discussion paper was generally supported by submitters, with some noting the need for sector-specific knowledge.

19. There was almost unanimous agreement that bargaining representatives should have primary responsibility for **communicating with the parties** they represent, but there was some disagreement on whether NZCTU and Business NZ should also support communication, particularly in the case of non-affiliated unions or employers. Some submitters suggested the navigator oversee or take a direct role in communicating with parties.

## Overview of dispute resolution submissions

20. Only a small proportion of submitters commented on the dispute resolution system. Of those that did, the majority of submitters supported most aspects of the dispute resolution process described in the discussion paper. In particular, most submitters supported:

    a. using the existing employment relations dispute resolution system

    b. formal **mediation** being mandatory before parties could seek a determination

c. the determining body should be able to seek advice from experts.

21. The most contentious aspect was whether there should be a **determination** process in the event of a bargaining stalemate and what this should cover: mandatory topics or all terms.

22. Workers and union representatives generally supported including a determination process to incentivise parties to reach an agreement. Employers and employer associations were more likely to be against including a determination process, primarily as it would undermine the principle of voluntary collective bargaining, although a few supported one.

23. Businesses generally considered the determining body should only be able to set terms for the mandatory topics of the FPA, and make non-binding recommendations on other topics. Workers, in particular union representatives, largely disagreed. They considered that the determining body should be able to set terms for all disputed aspects of a FPA so as to not remove the incentive to agree them in bargaining.

24. A majority of submitters who addressed the topic supported leaving the declaration of a bargaining stalemate to the bargaining parties. Some submitters suggested a set time limit or alignment with the existing grounds for facilitation by the Employment Relations Authority (the Authority) under ERA.

25. Most submitters supported the Authority as the most appropriate organisation to carry out the determination function, but many noted that this would be an extension beyond its current responsibilities. Therefore, support was high for the Authority to have access to a **panel of experts** when making this decision.

26. Two thirds of submitters supported limiting **appeal rights** in some way, either to align with the recommendation of the FPAWG or with the current appeal rights for collective bargaining. Some submitters (largely employer or employer associations) expressed concern with limiting appeal rights generally or limiting them to matters of law only, as they argued this would limit access to justice and could threaten the viability of businesses.

27. Some confusion was evident in submitters' responses about role or necessity of navigation, mediation, facilitation (proposed by some submitters but not included in the discussion document), and determination, particularly where the role of one dispute resolution function was seen to merge with another.

## Overview of submissions on concluding an FPA

28. Most submitters supported the option that FPAs need to be **ratified** by a majority of affected workers and employers, and most submitters agreed that ratification by a majority of *voters* is a more workable requirement than a majority of all *affected parties*.

29. Submitters were evenly divided in their preferences for whether employer votes should be counted as one vote per business or allocated votes based on the proportion of workers they employed in the covered sector.

30. Most submitters agreed that if an agreement doesn't pass ratification, the FPA should be returned to bargaining. Most submitters also agreed that the entire FPA needs to be ratified, but a few thought that determined terms should not be ratified, or believed any determination should apply to an entire FPA and thus not need any ratification.

31. Most submitters were opposed to the prospect of government altering any terms of an FPA in the process of enacting it in regulations. A few employer-perspective submitters were open to the prospect, albeit in limited circumstances (such as mistakes or potential illegality).

32. A majority of submitters supported the Labour Inspectorate having the ability to **enforce** minimum terms set by FPAs, with some suggesting extra resourcing would be required.

Some unions suggested that unions should have powers equal to the Labour Inspectorate to enforce to FPAs.

33. Submitters generally viewed the charging of **fees** for administrative functions to be inappropriate. Worker-perspective submitters warned against creating barriers to entry and employer-perspective submitters focused on the appropriateness of the government supporting the costs of a system it has created to fulfil public interest objectives.

## Next steps

34. We will provide you with advice on the topics in this briefing on 17 February 2020.

35. Once you have made decisions on the major aspects of the FPA system we will prepare a paper for you to take to Cabinet Economic Development Committee in late May 2020, seeking approval to draft.

36. We are available to discuss the submissions with you.

## Annexes

Annex One: Detailed summary of submissions

Annex Two: Recording of NZCTU online form submissions

# Annex One: Detailed summary of submissions

## Coverage

1. 93 submitters answered one or more questions relating to coverage. Of those 93, 38 came from a worker perspective, 44 came from an employer perspective, and 11 were categorised as 'Other' (including perspectives from academia, community groups, legal perspectives and think tanks).

### Defining coverage by occupations and sectors (Q22)

*Very few submitters directly engaged with the question of whether coverage should be defined in terms of the occupation and/or sector concerned*

2. The discussion paper sought submitters' views on whether applicants should need to define the coverage of their proposed FPA in terms of the occupation *and* sector concerned. The alternative would be the expectation that applicants would have to specify the occupation *or* the sector.

3. 24 submitters responded 'yes' (or variants) to this question, while three responded 'no' (or variants). However, some responses assumed the counterfactual would not require defining coverage at all, while other submitters used this section to respond to other questions in the discussion paper. Only seven responses gave justifications or reasoning which confirmed they had understood the intended question.

4. The Restaurant Association NZ responded 'yes' to the question but explained:

> *"consideration also needs to be given to instances in which there is significant overlap between industries. For example, the hospitality sector also employs personnel who may come under other sectors with differing FPAs, i.e. marketing or office staff. These types of disputes caused significant disruption prior to 1991."*

5. Foodstuffs expressed concern that the nomination of whole sectors was "*problematic*" because of the many fields of work and levels of skill in any sector. It described the range of occupations employed in the supermarket sector to illustrate this point. It recommended that FPAs should only cover occupations, and that the intention not to capture management roles be clarified.

6. A worker disagreed with the option in the discussion paper on the grounds that:

> *"In the case of labour-hire workers, defining workers by the occupational sector they may be working in is fraught with problems, mainly because in the labour-hire industry the employment sector is not the same thing as the occupation sector. Several workers may be working for the same employer (e.g. a labour-hire business) but they could be individually hired out to the employer's clients who could be in any one of a multitude of various industries."*

7. NZCTU, E tū, NZ Meat Workers and Related Trades Union, and Centre for Labour, Employment and Work (CLEW) supported the FPAWG's recommendation that applicants propose the intended boundaries of the sector or occupation to be covered by the agreement.

### Use of ANZSCO/ANZSIC to define coverage (Q23)

8. The discussion paper included a question on the use of Australian and New Zealand Standard Classification of Occupations (ANZSCO) and Australian and New Zealand Standard Industrial Classifications (ANZSIC) codes as a basis for defining coverage.

9. 42 submitters responded to this issue. Seven submitters supported the use of ANZSCO/ANZSIC, while 29 submitters – the vast majority of those who answered – opposed the use.

10. The Coalition for Equal Value Equal Pay (CEVEP) supported the use of ANZSCO/ANZSIC. It also recommended ensuring that employers are using ANZSCO job categories in their pay period reports to IRD as a way of identifying all employers who should be notified that a registered FPA now applies to them and their workers. CEVEP also "*strongly supports the future use of this data source for labour market analysis and average wage information*."

*Most submitters opposed the use of ANZSCO/ANZSIC codes to define coverage*

11. The major concerns expressed about using ANZSIC and ANZSCO to define coverage were that the codes are too restrictive, unfit for purpose, and could add confusion and complexity. Some of the concerns related to the exclusive use of the codes, with some submitters suggesting the codes be used alongside other information and measures. Several submissions pointed out that Immigration New Zealand is moving away from the use of these classifications.

12. Employers used examples from their own industry to illustrate why the codes were inappropriate for their industry, including the Baking Industry Association, Briscoe Group (retail), AWF Madison (labour hire), AFFCO (meat processing), Federated Farmers, Print NZ (printing industry), OCS (cleaners), Patoa Farms (agriculture), Restaurant Association NZ. Tourism Industry Aotearoa also submitted that its members "have a long history of problems with matching ANZSCO classifications to job roles and titles as it pertains to employing skilled migrants."

13. NZCTU cited experience in pay equity bargaining as a recent example of the difficulty with using ANZSCO/ANZSIC codes:

> *"affiliates inform the CTU that the use of ANZSCO codes became problematic in pay equity bargaining because the ANZSCO codes are based on qualification expectations, so they do not provide an accurate assessment of the level of skill / experience needed for a particular job. CTU affiliates found there were inconsistencies in levels meaning that the ANZSCO descriptions did not accurately represent the actual role."*

14. The NZ Private Surgical Hospitals Association criticised the codes for not taking into account differences between the private and public sector.

15. Other suggestions for defining coverage included:

- The New Zealand Education Institute Te Riu Roa (NZEI), Forest Owners Association, Restaurant Association and E tū suggested coverage be defined and agreed by parties, with reference to other evidence if needed. This suggestion was also raised in workshops with union members (organised by NZCTU).
- The NZ Law Society suggested that "*there is merit in aligning the system used by Immigration New Zealand with flexibility to take into account reasonable variations including between regions*."
- The NZ Air Line Pilots Association said that other important factors to consider include employer size, customer base and geographic region.

## Bargaining different coverage (Q24)

16. The question in the discussion paper of whether parties should be able to renegotiate coverage had three sub-questions within it, but most submitters only engaged with the first part of the question. The sub-questions were:

- whether parties should be able to bargain different coverage,

- whether significant changes should need to pass the initiation tests again, and
- whether there should be restrictions to prevent the test being used to delay an FPA.[1]

17. The ability to bargain different coverage was supported by both worker-perspective groups and business-perspective groups (18 submitters), and only a minority of submitters opposed the option (four submitters).

18. Some submitters who supported the option qualified that this should not be used to delay an FPA, but did not explain how this could be done.

19. NZCTU suggested that bargaining around substance should continue whilst coverage renegotiation or arbitration is taking place.

20. The NZ Law Society supported the option, but only if there was a genuine mistake, administrative error, or all parties agreed. It and the Motor Trade Association recommended significant changes should have to pass the initiation test, to avoid the risk of encouraging strategic changes in coverage following initiation.

21. E tū supported an ability to renegotiate different coverage, but did not think the changes would need to pass the initiation test:

> *"However, if the coverage is wider than initiated for, the parties will need to decide whether it means other employers or workers have to be informed. If this was the case, then the independent body would be informed so they could contact the wider group to ensure they knew what was happening."*

22. The Baking Industry Association, Foodstuffs, Gilbert's Fine Food and Print NZ did not support an ability to renegotiate coverage. Print NZ commented:

> *"This could be a compliance nightmare with the requirement to advise employees they are covered, will not now be covered, will now be covered etc. This would be time consuming and could create further confusion about who is and is not covered by an FPA."*

23. Foodstuffs was also critical, claiming:

> *"To allow the parties to negotiate different coverage after the fact would undermine the whole system. It would invalidate the public interest test, because the test will not have been applied to the modified coverage. It would also undermine the "mandate" for representation because the affected parties may not have had a say."*

## Exemptions (Q26, 29)

24. 42 submitters gave views on whether employers should be allowed temporary exemptions from an FPA's coverage. 19 submitters were in favour of exemptions, and 12 submitters were opposed. 11 submitters – including Business NZ – did not express a clear view on exemptions, instead arguing that FPAs should be voluntary, therefore exemptions would be unnecessary.

*Workers generally supported temporary exemptions*

25. Support for exemptions came from mainly worker and union perspectives, two sector representatives, two 'other' perspectives (NZ Law Society and CLEW). Some submitters supported exemptions for certain terms, or permissible terms only.

26. Those who supported exemptions generally supported a temporary period of 6-12 months.

[1] The question in the discussion paper was worded: "Do you think that parties should be able to bargain different coverage, with any significant changes needing to pass the initiation tests? If so, should there be any restrictions to prevent the test being used to delay an FPA?"

27. Unions that supported the use of exemptions referenced the FPAWG's recommendation, which provided the following parameters:

    a. There may be a case for limited exemptions from the agreement in some circumstances.
    b. Parties could include defined circumstances for temporary exemptions for employers or workers in the FPA.
    c. Parties could include administrative procedures for the parties or a third party independent body to approve requests for an exemption after the FPA is ratified.
    d. Particular circumstances where exemptions are allowed should be set in legislation and be agreed on by parties in the bargaining process.
    e. As a general rule, any exemptions should be limited and typically time bound (e.g. up to 12 months).

28. The NZ Law Society agreed with the FPAWG and made recommendations on the design of exemptions:

    *"Any mandatory exemption should be clear, objective and consistent with existing exemptions in employment law, such as for small businesses. Any temporary exemption could be agreed by the parties through an exemption clause within the FPA. This could allow a party to apply for a temporary exemption on certain grounds such as financial hardship… The Working Group suggests 12 months. However, in some cases a longer period could be warranted; for example, where hardship is caused by other commitments such as long-term contracts with distributors or suppliers entered into on the basis of a set cost for labour pre-dating any FPA."*

29. The Motor Trade Association supported a temporary exemption for small businesses to give them time to adjust to a new system (noting clear definitions would be important), but did not support blanket exemptions for businesses who enter the sector after the FPA has come into force.

30. Some submitters (D Anderson Contractors, Unite Union, OCS) supported exemptions if they were limited to certain terms of the agreement.

31. E tū supported exemptions, but recommended that one of the criteria must be that the business is not allowed to tender for any business whilst they are on an exemption, because:

    *"One of the most important roles of the FPA is to stop companies being able to undercut each other solely on what they are paying their workers. If there is an ability for an exempted employer to tender, based on the lower wages or terms being paid due to their exemption, it is giving them an unfair advantage over their competitors."*

*Some employers and workers were concerned that exemptions could lead to negative competition outcomes*

32. Some employers and their representatives were concerned that exemptions would only be used by employers displaying behaviours the system is designed to address – they considered this would undermine the purpose of FPAs, and could introduce anti-competitive behaviour. The NZ Private Surgical Hospitals Association stated:

    *"There should be no exemptions to an FPA, this would be anti-competitive and serve to only further exacerbate a "race to the bottom mentality" – especially if there are some sectors/industries/regions who are not able to benefit from the exemptions. Exemptions would be unfair and give a substantial advantage to any business who may be covered by it over others who have to comply with the FPA."*

33. The NZ Security Association also expressed concerns that exemptions based on the size of a business would encourage subcontracting.

34. Workers were concerned that exemptions could lead or exacerbate a "race to the bottom". A worker commented "*if a minimum entitlement is going to close them down they shouldn't be in business. They should get mentoring and try again later*."

*Some business-perspective submitters did not think exemptions would be necessary because all FPAs should be voluntary*

35. Eleven submitters, including employers, employer representatives and The New Zealand Initiative, did not support or oppose FPA exemptions, but did argue that the entire FPA process should be voluntary. This was recommended in Business NZ's submission (which was endorsed by eleven other employer-perspective submitters).

36. As well as recommending a voluntary approach, the Restaurant Association suggested: "*to simplify the process, FPAs could be implemented only for those employers who are not meeting the correct standards or following minimum requirements*."

## Regional alternatives for FPAs (Q31, Q33)

37. An ability to include regional elements in FPAs was supported by 59 submitters (including 27 worker submissions via the E tū form), but opposed by 357 (including 333 via the E tū form and four via NZCTU's online Together survey). Views on this topic generally did not distinguish between *regional variations* in a nationwide FPA on the one hand, and *regional FPAs* on the other. Those who did make a clear distinction are described in paragraphs 49-53.

*Employers and other organisations viewed regional alternatives as a necessity*

38. Most submitters who supported allowing regional variations were from an employer perspective, but also included the NZ Law Society, CEVEP, CLEW, and some workers.

39. The New Zealand Timber Industry Federation submitted that regional variations would be appropriate for sawmilling:

> *"A mill in rural Southland or on the West Coast has different circumstances to one operating on the edge of an urban area. Similarly, a mill located close to a forest resource has different circumstances to one distant from forest resources. Furthermore, a mill serving its local market with a range of products suited for local needs such as fence posts for the farming community operates to market drivers that are different to a sawmill serving an export market with kiln dried high value timber mouldings."*

40. The Early Childhood Council supported regional variations for the early childhood sector:

> *"There are significant regional differences in childcare around the country, exacerbated by the current ECE teacher shortage. Auckland wage prices have sky-rocketed and shortages are impacting on supply and wage prices in different pockets in the country. Establishing a sector wide FPA would create unnecessary stresses on the services experiencing these regional variations. In our view, these variations are better handled at the local level."*

41. CEVEP supported regional variations *"if appropriate"*, but warned FPA regional variations may actually increase regional differences.

*Workers and some employers believed regional alternatives undermined the purpose of FPAs, and would be difficult to implement*

42. Opposition to regional variations or regional FPAs was shared by many workers and some employers. On the E tū form, 333 participants agreed with the statement "*There should be no regional variations in Fair Pay Agreements*".

43. NZCTU opposed regional variations/FPAs on the basis that doing so would mean FPAs are no longer a 'minimum standard'. It also raised concerns there would be practical difficulties:

*"Regional demarcations will create anomalies where two people working near the border between regions and doing similar jobs could have different pay and conditions for no reason other than where the job is situated.*

*The CTU is not convinced that there are in any case large and widespread regional differentials. To the extent that they exist it is important to ask what the reasons for them might be…In any of these cases, it would not be in the public interest to reinforce a situation where many people feel they have to leave the regions to earn a decent living."*

44. While supporting the concept, the NZ Meat Workers and Related Trades Union raised concerns about implementation of regional variation:

*"MWU thinks the issue that has been raised about regional differences is a red herring, designed to scaremonger. Some standards are already set by statute, ie minimum wage, holidays, sick leave etc which do not have regional variations…Setting regional variations would also be impractical. What is a region? Where does it start and finish? What if there are larger workplaces in one region and smaller workplaces in another, or even in a city? Why would one region have a variation and not another? What would be the defining factors? And would it create anomalies in some industries where cheaper variations mean it is more desirable to move to a region with an exemption?"*

45. Employers who opposed regional variations/FPAs were similarly concerned about implementation. Foodstuffs submitted that permitting regional FPAs would add another level of complexity/cost, and that regional employment agreements could be achieved on a voluntary basis via multi-employer collective agreements. Briscoe Group expressed similar sentiment regarding the implementation difficulties:

*"This could be extremely problematic for dispersed employers adding yet another layer of administrative complexity…Introducing more complexity through FPAs is a recipe for disaster and increases the burdens and costs to employers."*

46. Retail NZ recognised that there are regional labour market differences, but argued that there also differences *within* regions that ought to be taken into account:

*"There could still be significant inequities between firms within a region and the imposition of additional regional bargaining would drive significant administrative and transaction costs for everyone – both employers and employees."*

47. Simpson Grierson similarly agreed that regional differences posed "*very plausible*" risks, but argued regional variations/FPAs "*are not be-all and end-all solutions to negate this risk, nor are they guaranteed to work if implemented. We would need more information to assess whether these ideas can address the considerable risk of regional inequality*."

48. AFFCO did not support regional variations/FPAs, arguing:

*"…it is, with respect, short-sighted of MBIE to opine that the location of the employer is to be the sole and determinative factor in allowing FPA differentiation. In reality, there can be employers even within the same street of the same town/city in which one employer can have competitive advantages over the other… In addition, there is the possibility that you may have employers on the other side of the country whose commercial position is more closely aligned... However, under the proposed policy, these employers would be able to be treated differently and have different FPA terms and conditions, despite possibly being in a similar commercial position."*

<u>*There was some specific support for regional FPAs, but also some concerns*</u>

49. Few respondents had specific comments on regional FPAs (as distinct from regional variations in a nationwide FPA).

50. The NZ Law Society was concerned with the risk of excluding workers in regions who could benefit from coverage:

*"A way of mitigating this risk would be to allow coverage to go beyond more than one region as agreed during bargaining. Alternatively, the settlement of an FPA in one region may encourage workers in another region to initiate bargaining, which could serve as a positive catalyst."*

51. The NZ Air Line Pilots Association supported regional FPAs, which it suggested should involve the ability for whole regions to be exempt from national level FPAs where regional workers wish to contract on different terms.

52. The Restaurant Association supported regional FPAs, but expressed concern about complexity:

*"This process could therefore potentially be prohibitive in terms of managing these agreements, as well as adding complexity for employers (and employer organisations) needing to be across the requirements of the different FPAs in different areas."*

53. Respondents who opposed the option for regional FPAs generally gave the same reasoning/justification as their opposition to regional variations.

## Inclusion of contractors

54. The discussion paper did not ask questions about the inclusion of contractors in FPA coverage, however it did mention that the FPAWG recommended that FPAs cover all workers including contractors. The discussion paper also noted that:

*"We are currently considering options for strengthening protections for contractors and it would make sense to include them in FPAs. We plan to progress this work in parallel."*

55. 21 respondents discussed the inclusion of contractors in their submission, with nine respondents supporting inclusion, and 12 respondents opposing inclusion.

*Submitters who supported inclusion argued that contractors and other worker categories should be covered by a FPA to avoid creating inconsistencies*

56. Those who supported the inclusion of contractors in FPA coverage generally came from a worker perspective, but also included two employers and CEVEP.

57. Submissions from union representatives emphasised the importance of consistency in the treatment of different kinds of workers (employees, contractors etc.) if they are essentially performing the same kind of work.

58. One submission from an individual worker commented at length on the inclusion of labour-hire workers, and expressed concern that they may be excluded because they do not have the same arrangements as traditional employees, nor are they self-employed contractors.

59. An individual submission from a worker who self-identified as a 'dependent contractor' argued contractors should be included in FPA coverage, and pointed to examples from their own experiences of the imbalance of bargaining power, such as an inability to renegotiate terms of a six year contract with outgoings increasing.

60. CEVEP commented on both the inclusion of contractors, and the timing of inclusion:

*"Fair Pay Agreements will not meet the government's policy purposes if MBIE postpones thinking about dependent or independent contractors till later. Exemptions or phasing-in-later will re-create the downward spiral in the labour market that has resulted in low wages, inequality and household poverty. The main point of sub-contracting work and using labour agencies in the last few decades has been to squeeze down wage rates, hours of employment and other employer obligations, and therefore the cost of labour to the principal company. They are part of the problem that Fair Pay Agreements are trying to fix."*

61. Building Service Contractors NZ argued that "*it is critical that 'coverage' of workers within an industry FPA include employees, subcontractors, sub-contractors, franchisee, franchisor. The key here will be the legislation covers all cleaners regardless of their status – employee, contractor or business owner*."

*Submitters who opposed contractor inclusion were concerned it would create inconsistencies with other employment law*

62. Those who opposed the inclusion of contractors in FPA coverage generally came from an employer perspective or 'other' organisation (including The New Zealand Initiative, human resource consultancy ER Resolutions, NZ Law Society, and employment lawyer Susan Hornsby-Geluk).

63. The Employers and Manufacturers Association (EMA) noted other policy work that is underway (by MBIE) including consultation on dependent contractors and the Employment Relations (Triangular Employment) Amendment Act 2019. It expressed particular concern about setting up "*unnecessary conflicting regimes with different coverage scopes and rules*".

64. The NZ Law Society agreed with the FPA Working Group that extending FPA coverage to contractors "*could significantly change employment law in New Zealand*", and argued that such a change might not be beneficial:

> *"Such a significant change could detract from rather than enhance how the FPA system will function. The Law Society notes a stated objective of the Working Group and proposed FPA system is to complement and not replace existing employment law. Extending coverage to workers who are not employees risks undermining existing employment law premised on determining the real nature of working relationships… Any exceptions to expand coverage beyond employees ought to be well considered and incremental if they are to complement existing employment law rather than replace it."*

65. AWF Madison was concerned about the implications for temporary workers:

> *"Aside from a recommendation that contractors will also be covered by Fair Pay Agreements, the FPAWG has made no comment or allowances for the impact on temporary workers and their employers. These workers choose roles types and assignments that suit personal circumstance. Having FPAs applicable across different assignments - some concurrent - will be inefficient and complicated. At worst, some workers will not be chosen as they can effectively price themselves out of some roles."*

66. AFFCO questioned the likelihood that employers would define work outside of employment (e.g. contractors) to avoid FPA obligations. It mentioned that there is already a system in place to address the problem of employers deliberately misclassifying workers as employees, and that it is already serving as an effective disincentive:

> *"No logical employer would risk such liability just so they can ensure that one employee fell outside of the ambit of the FPA; and no employer would be irresponsible enough to try it on across their whole workforce just to try to 'get rid' of the FPA in that workplace. The potential losses would be catastrophic."*

67. Freightways' submission focussed entirely on the issue of contractors, arguing that FPAs are unworkable and unnecessary in the courier industry. Freightways argued that a risk of extending FPA coverage to contractors could incentivise less secure business models to shift towards a gig economy-type model. It was concerned about the pressure to offer the same rates as state-owned enterprises:

> *"in the courier industry, there is the highly undesirable potential to be tied to the rate of pay offered by a state-owned enterprise who makes a negative return on capital. If contractor or employee payments were linked to a non-commercial tax-payer subsidised operator such as NZ Post then you have the potential to drag the entire industry into a loss making position."*

## Bargaining process

68. 459 submitters answered one or more questions related to the bargaining process. Of those, 408 came from a worker perspective, including 363 workers who engaged with a statement in the E tū form about paid meetings for workers to instruct bargaining representatives. 41 came from an employer perspective, and 10 were categorised as 'Other' (including a charity, community health groups, a university lecturer and a group interested in pay equity).

### Notifying affected employers and workers (Q20, 21)

69. 38 submitters answered one or both of the questions regarding who should have responsibility for notifying affected employers and workers that an FPA has been initiated.

70. The majority of submitters who addressed this question (22 out of 37) agreed that the government, employers, employer organisations and unions should all play a role in notifying people that FPA bargaining has been initiated. Three submitters commented that this would be necessary as ensuring all affected parties are notified would require a lot of effort. Some submitters indicated they thought a particular party should have the main responsibility or lead role in notification. Views on who should assume the main (but not exclusive) role included:

- employers (Foodstuffs and NZ Air Line Pilots Association),
- employers or employer representatives and workers or worker representatives (Taranaki Sawmills and Patoa Farms),
- government (Motor Trade Association), or
- unions and an independent government body (NZCTU).

71. Seven submitters did not consider all parties should have a role, as they considered it should be the exclusive responsibility of:

- government – via MBIE or IRD (an employer and Red Stag Timber),
- the body set up to oversee FPAs (E Tū and CLEW),
- government and employer organisations (Maori Point Wines), or
- the applicant party (a worker).

72. A majority of those who answered this question (17 out of 30), particularly those from a business perspective, supported employers having the responsibility for informing workers that an FPA has been initiated. The main reasons provided were:

- it would be consistent with the approach for collective bargaining (NZ Air Line Pilots Association, Briscoe Group, OCS)
- the importance of employer and worker relationships (New Zealand Timber Industry Federation Inc, Red Stag Timber), or
- employers are best placed to notify workers (First Security and Patoa Farms).

73. Eight submitters did not support employers having the responsibility for providing information to workers (including NZCTU and E tū). The reasons provided included concerns about the burden it places on employers, that employers might attempt to deter workers, whether employers would know they are covered, and because it should be the responsibility of someone else.

74. Suggestions for who should be responsible for notifying employers included:

- government and IRD (one employer and Print NZ)

- the independent body set up to oversee FPAs (E tū, CLEW)
- unions and an independent government body (NZCTU)
- the applicant party (Meat Industry Association and Motor Trade Association)
- a representative outside of the workplace (a worker)
- relevant professional or industry bodies (Aotearoa Legal Workers Union)

75. CEVEP suggested the following process:

> *"The initiating party should formally notify all relevant other unions and employers of the initiation of Fair Pay Agreement bargaining. All employers should then formally notify all employees likely to be affected: they know who they are."*

76. Business NZ, Federated Farmers, and the Meat Industry Association did not comment on who should notify affected parties, but emphasised how difficult it would be.

77. NZCTU, NZ Meat Workers and Related Trades Union, and NZEI commented that employers should be required to distribute union material and provide the contact details of workers to unions. The Law Society suggested a standard form be developed for employers to use when notifying workers.

## Good faith (Q36, 37)

*There was almost unanimous support for good faith obligations during FPA bargaining*

78. Submissions from workers and employers alike overwhelmingly supported extending good faith obligations, as currently exists in the ERA, to FPA processes. Some submissions responded that 'good faith' is already central to the employment system in New Zealand and well understood, so it should be included in the FPA process too.

79. NZ Law Society submitted in support, commenting:

> *"Yes, the duty of good faith should apply to the FPA process. There is fairly well-established case law in this area, including the requirement that a Bargaining Process Agreement (BPA) be entered into defining specific obligations. Given the widening of the parties that may be participating in bargaining for an FPA (and given that some of these parties may have limited recent experience of collective bargaining), consideration could be given to providing more explicit guidance in section 4 ERA 2000 regarding the principles of good faith applicable to collective bargaining situations."*

80. Meat Industry Association highlighted the importance of good faith obligations in regards to bargaining representatives interacting with the party they are representing:

> *"This is already a requirement under the ERA. However, the requirement for acting in good faith will be even more important given that there will be a situation in which organisations (unions, trade associations) are having to bargain on behalf of large numbers of employer /employees who are not their members."*

81. Six submissions suggested other responsibilities good faith obligations should encompass in an FPA process. Suggestions included:

- expanding good faith provisions to include explicit penalties for breaches of Bargaining Process Agreements to reinforce constraints around bargaining behaviour (NZ Law Society),
- an expectation on parties to reach a conclusion quickly (worker),
- requiring unions to have a duty of good faith obligation to non-union workers and to workers in non-unionised occupation or sectors (Meat Industry Association, worker), and

- introducing a responsibility for employers to share information about all workers with worker representative/union (worker).

82. E tū supported the idea of good faith obligations yet did not think these needed to be extended to dealings with government bodies, commenting:

> *"...However, we do not see it as necessary with "government bodies" as we are presuming this is the independent body, the navigator, or the mediation services. They are working outside of the bargaining process in a different role, so it is not obvious why they would need to be covered by the concept of Good Faith bargaining as put forward within the Employment Relations Act."*

*Business NZ did not think good faith obligations would be feasible in the FPA process*

83. The strongest and almost only opposition to good faith obligations came from Business NZ, stating that good faith obligations in an FPA context would prove impossible:

> *"But, in the context of FPAs, the obligations will be almost impossible to comply with, particularly those relating to communication with employees about matters affecting them. That is because there is no infrastructure to support national level communication with employees whose employers are not connected to industry bodies or employer associations. And the fact that FPAs are intended to cover workers, a much broader category than employee, means the problems will be amplified several fold.*
>
> *The only effective means of avoiding this conflict with the present good faith obligations is to water them down by allowing indirect or no communication with some workers. However, this would not be good faith, and should not even be considered, leaving the probability that FPAs will place employers in an impossible situation. Overall, the FPAWG failed to note that the present good faith obligations, which did not exist prior to 1991, could not be complied with in relation to its recommendation to introduce FPAs covering all workers in a specified industry or occupation."*

## Scope

*A majority of employers and workers alike indicated support for the use of mandatory topics within the FPA process (Q38)*

84. A majority of both employer- and worker-perspective submitters supported the use of mandatory topics. The main reasons given by employers were that some matters simply have to be mandatory and it would allow a fair playing field for all. Unions (including E tū, NZCTU, NZ Meat Workers and Related Trades Union and NZEI) supported this idea, specifically referencing the recommendations made by the FPAWG.

85. NZ Air Line Pilots Association indicated it was cautious about the need to specify mandatory and excluded categories yet noted if mandatory topics were to occur, a mirroring of the terms within s54(3) of the ERA would be appropriate.[2]

86. NZ Law Society noted that mandatory topics would help meet the intent of FPAs, commenting:

> *"The Law Society is cautious about excluding particular categories in the FPA, as it is important to retain flexibility to cater for changing work patterns/environments and to allow parties to reach agreement on terms that may be specific to their industry or sector. However, to ensure that the concept of FPAs meets base-line standards and to meet the intent of the legislation, the specification of core mandatory provisions is likely to be required."*

[2] This section requires a collective agreement contain a coverage clause; a plain language explanation of the services available for the resolution of employment relationship problems; a clause providing how the agreement can be varied; and the date on which the agreement expires or an event on the occurrence of which the agreement is to expire

87. Taranaki Sawmills, OCS and Briscoe Group responded that neither a category of mandatory topics or excluded topics was beneficial. Taranaki Sawmills commented:

> *"The nature of bargaining is that everything is up for negotiation. If you were to make some things mandatory this may weaken a party's position. It would depend on what was going to be made mandatory but again, this attacks the very principle of bargaining."*

88. Two workers opposed the idea of excluding topics. One commented *"It's a dangerous precedent. As soon as you start excluding categories, people miss out."*

*The mandatory topics outlined in the discussion paper were supported but many submitters argued that the list should include health and safety (Q39)*

89. A majority of submitters from all perspectives supported the suggested mandatory topics outlined in the discussion document. In addition, a large number of these submissions (predominantly worker-perspective) commented on a need for health and safety to be added to the list.

90. Other suggested topics included:

- obligations to create career pathways (workers),
- flexibility (NZCTU),
- regional differences (Baking Industry Association, Gilbert's Fine Food),
- representation, and unions access rights (employee)
- different shift allowances, e.g. night shift rates (employee)
- relevant Crown-Maori obligations and responsibilities (NZNO), and
- the gender pay principles, to ensure gender-equal agreements are developed (PPTA, NZEI, CEVEP).

*Employers expressed concern about overregulation and the breadth of proposed topics*

91. Some employer-perspective parties feared overregulation by including mandatory topics that already exist in current legislation. The Restaurant Association NZ commented:

> *"Many of the mandatory topics are either already addressed by existing legislation, or run the risk of hindering the opportunity for an employer to run their business in an open business environment due to overregulation. It also outlines redundancy which current minimum requirements do not currently legislate for in terms of compensation in this area. This may expose employers to increased costs, regardless of their current financial position."*

92. Print NZ and Meat Industry Association argued that the list of mandatory topics was too broad. Meat Industry Association strongly opposed the topics listed in the discussion paper, arguing that the topics described vary greatly across an industry.

93. Print NZ said the breadth of the suggested mandatory topics could cause adverse effects on employers who have smaller voices in an FPA bargaining process:

> *"…This may be seen as an opportunity to introduce topics that are not currently covered by legislation and be imposed on employers who have little or no say in bargaining for the FPA"*

*Submitters suggested that some topics may operate better under a different category*

94. Submitters gave various suggestions of change regarding the placement of certain topics in either the permissible or mandatory category.

95. NZ Law Society argued:

*"…mandatory topics should be focussed on core minimum employment terms that are likely to be easily and widely applicable, such as minimum wage rates, overtime rates, leave entitlements, redundancy, coverage, duration, variation etc. Terms that are more employer-specific, such as working hours, skills and training and superannuation (as well as the other terms listed in the permissible category) may be better placed in the permissible category."*

96. First Security was also concerned about how employer-specific terms, such as defining ordinary hours, ordinary days of work, and overtime and penal rates could be mandatory across an industry or across numerous different customer types.

*Submitters generally opposed excluding topics, but those who supported the category gave some suggestions (Q40)*

97. Of the 27 submissions on this question, 16 submissions opposed excluding topics, and 9 submissions (Taranaki Sawmills, Foodstuffs NZ, Tatua Co-operative Dairy Company, NZ Private Surgical Hospitals Association, First Security, Restaurant Association and two workers) gave suggestions of what topics should be in the excluded category. Of the 16 who opposed excluded topics, 7 were worker-perspective parties, 8 were employer-perspective parties and one party categorised as 'other'.

98. Suggestions of topics to exclude were:

- How wage rates should be adjusted. Submitters commented that wage rate adjustment should be performance-related and between the employer and worker, and that smaller businesses may have trouble keeping up with an industry wide rate.
- Any terms based on ethnicity, sex etc.
- Hours of work – as individual businesses need flexibility on this matter.
- Skills and training – as individual businesses are best to judge their needs, and this can be a point of difference.
- Overtime and penal rates.
- Redundancy.
- Minimum standards such as leave, flexible working, breaks etc; anything already covered by legislation.
- Superannuation employer contributions for schemes different to KiwiSaver.

99. The NZ Law Society suggested that FPAs should align with current practices within the ERA, commenting:

*"The current provisions in the ERA 2000 regarding unenforceable terms (for example, regarding trial periods and availability provisions in section 67B(4) and section 67D(4) ERA 2000 respectively) should however also apply to FPAs."*

100. Submitters that opposed excluding topics made the point that it diminishes the flexibility for bargaining parties to reach agreements on terms specific to their occupation or sector.

*Both workers and employers generally supported the option to have only mandatory and permissible categories (Q41)*

101. Only 25 submitters commented on the alternative option of having only mandatory and permissible categories.

102. A majority of those who did comment supported this option of having only mandatory and permissible options. Employer-perspective submitters (Taranaki Sawmills, Baking Industry Association, Foodstuffs NZ, Forest Owners Association, Gilbert's Fine Food and one employer) supported this option, noting its ability to provide parties with more flexibility.

103. Foodstuffs NZ supported the option if topics such as hours of work and skills and training were included in the permissible category.

104. Unions (NZCTU, NZ Meat Workers and Related Trades Union, NZEI and E tū) heavily supported this option, referencing its alignment with the recommendations made by the FPAWG.

105. E tū supported a permissible category as long as its contents were not defined in statute.

106. Parties such as the NZ Law Society, NZ Air Line Pilots Association, CLEW and Work and Motor Trade Association all supported this option with the general rationale that this option would allow for better freedom in negotiation between the bargaining parties compared to having mandatory and excluded categories.

*A minority group of mainly employers opposed the alternative option to have mandatory and permissible categories*

107. Four submitters (OCS, Restaurant NZ, Print NZ and a worker) directly opposed the option of specifying mandatory and permissible categories, with a general rationale that this still infringes on the ability of a business to dictate terms and conditions of an agreement before they begin the bargaining process.

108. Print NZ argued a permissible category would adversely affect employers who don't hold equal participation levels in the bargaining process.

109. The worker commented that this option would be *"exclusion by stealth".*

## Bargaining Costs

*Submitters offered a number of reasons for departing from the current situation where bargaining parties cover the costs of bargaining (Q51)*

110. Submissions were varied on how the burden of bargaining costs should be distributed amongst the bargaining parties, the government, and the wider sectors involved.

111. A majority of submitters gave reasons for departing from the current situation where bargaining parties cover the costs of bargaining. Reasons included:

- The government should be paying for bargaining costs, considering the FPA process is being imposed by the government. Unions similarly supported the idea of a fully funded model distributed by the government.
- A stated reason for FPAs is that is in the public interest
- The breadth of worker and employer groups that will be involved in bargaining and the likelihood that the agreement will also bind and benefit parties that have not participated in or incurred any costs of the bargaining process. Non-members should have some way to contribute to the funding of the costs of the respective representative organisations or else they enjoy a 'free ride'.
- FPA costs will be significantly higher than the usual bargaining costs of a collective agreement and not controlled by all parties.
- As an FPA will cover a large group of workers and require a prolonged negotiation, a small group of representatives should not bear the cost. Coverage will be sector wide by requirement and therefore sector wide contribution will be necessary.
- FPAs will require bargaining which is outside the normal functioning of both a union and employer body.

*Many submitters argued for full government responsibility to cover bargaining-related costs (Q48)*

112. Several submitters (Baking Industry Association, NZ Air Line Pilots Association, NZ Air Line Pilots Association, Red Stag Timber, E tū, Gilberts Fine Food, Meat Industry Association, First Security and a worker) suggested the government pay for all bargaining related costs.

113. Restaurant Association NZ suggested that government has a responsibility to contribute to the cost of bargaining to avoid leaving employer organisations and members under financial strain if they are to enter into FPA negotiations based on legislative requirements, as opposed to voluntarily. It did not suggest the level of contribution government should make.

114. The EMA suggested that government should pay for the full cost of implementation and the cost of bargaining due to the compulsory nature of the FPA initiative, commenting:

> *"Trying to apportion costs across all small employers will cost many thousands of dollars as will developing an equitable system of payment. The suggested low threshold of 10%, could also mean that 90% of employees and their employers, who don't want to be part of an FPA process, may be forced into paying an unknown cost of bargaining. EMA insists that "pass on" fees cannot be sanctioned under the terms or conditions of FPAs. As participation is mandatory, participating parties should not be entitled to gain financially from the process."*

*Submitters generally opposed the introduction of a levy or bargaining fee upon workers/employers ('Option 1')*

115. A majority of submitters who addressed the topic opposed Option 1 related to bargaining costs in the discussion paper: that, if unions and employer associations are the only representatives, there could be a one-off charge on non-members to cover the costs of the bargaining process. Common reasons for opposition were:

- The government should be funding the bargaining costs.
- It would not work efficiently in practice.
- Concerns of cost increases for smaller employers involved in FPAs.

116. NZEI, NZCTU, NZ Meat Workers and Related Trades Union and First Security reiterated their position given in Q49 stating the government should provide a fully funded model. First Security did however offer compromise, commenting:

> *"The costs of the FPA process should sit with the government. If such a bargaining fee was introduced it needs to be a statutory levy to all parties."*

117. The Meat Industry Association showed concern at the practicality of such a process, commenting:

> *"MIA is puzzled as to how this is practically possible. Employer associations or employers are unlikely to wish to become embroiled in payment of levies or seeking repayment of debt from recalcitrants."*

118. Road Transport Forum NZ was concerned with how the costs would transfer to smaller employers, commenting:

> *"FPAs will impose high administration and cost burdens on small firms to ensure their interests are represented in fair pay bargaining rounds. The need for employers to be represented, and then approve negotiated agreements, will have to be met by the growth of employer associations and independent bargaining agents, which the RTF opposes."*

119. Restaurant Association shared the sentiment that only a small number of costs should be passed on to the employers, yet commented:

*"…however should this proceed against our recommendations this fee should be based on individuals agreeing to be part of the process"*

120. NZ Air Line Pilots Association saw no reason for exceptions to be allowed if a levy was introduced.

121. In contrast, several submitters supported the bargaining levy in Option 1. Tatua Co-operative Dairy Company and CLEW argued that those who are involved or wished to be involved in or covered by an FPA should pay. Tatua Co-operative also suggested there should be an ability to opt out and choose an individual employment agreement (IEA). CLEW commented:

*"Wages of worker bargaining team representatives should be paid by their employer and a one-off bargaining fee should be paid to the union by non-members. Employers who are not members of the employer organisation should also pay a one-off fee to the employer bargaining agent(s) following any determination or ratification."*

122. Four submitters (D Anderson Contractors, JEM Contracting, Patoa Farms and a worker) supported a bargaining fee or levy being introduced on all workers/employers.

*Some submitters provided suggestions for improving the workability of a bargaining fee/levy*

123. Some submitters offered suggestions of how to go about a bargaining fee levy or similar process. Briscoe Group suggested that employees should be levied as they are the recipients of the outcome. NZ Law Society noted flexibility should be built into the bargaining costs process, commenting:

*"Consideration should be given to building some flexibility into the bargaining costs process, with parties able to agree as part of the Bargaining Process Agreement details of bargaining costs to be allocated as an agreed term of the FPA. These processes could consider whether exceptions are appropriate by reference to the specific occupation or sector; they could also consider whether the triggering of fees should be date based, or whether new employees (who commence employment after the commencement of the FPA) will also be required to make a contribution."*

124. Motor Trade Association offered suggestions on how costs could be paid across time, commenting:

*"To mitigate against a large bill at the end of a lengthy process, interim invoices for shared costs could be issued at regular points during the FPA process (three monthly?). The bill would go to all identified parties as at the date of invoicing (based on the list developed during the early phase of initiating an FPA). As noted elsewhere in this submission, MTA would suggest small businesses that would be exempted from the FPA in the early stages might also be exempted from bargaining costs."*

125. E tū and CLEW suggested this proposed levy should be charged at the date of ratification or determination of the FPA.

*Some submitters supported costs lying where they fall except for a government contribution to tangible costs ('Option 2)*

126. Some submitters (Hutt Union & Community Health Service, NZEI, NZ Private Surgical Hospitals Association, Forest Owners Association, Print NZ, OCS and a worker) supported Option 2 in relation to bargaining costs: that the government should contribute to tangible costs (flights, catering etc.), with the remaining costs lying where they fall.

127. OCS described their support for Option 2 by highlighting the downsides of Options 1 and 3:

*"Option 2, as Option 1 assumes that Unions will represent non-members, which is not a feasible approach. In addition, if there are effective unions in a sector, FPAs will not be required as collective bargaining will be taking place (unless inhibited in law). Option 3 is*

*innately unfair on larger organisation with the likely ability to assert a bargaining team member and a greater likelihood of having employee representatives at the table."*

*There was some support for costs as they fall ('Option 3)*

128. A number of employer-perspective submitters (D Anderson Contractors, Taranaki Sawmills, Foodstuffs NZ, Briscoe Group, Federated Farmers, Patoa Farms) supported the option for costs to lie where they fall with no government contribution.

*NZ Law Society and Motor Trade Association proposed a mix of Options 1 and 2*

129. NZ Law Society and Motor Trade Association suggested a combination of Options One and Two. They commented, respectively.

> *"…Tangible costs could be funded centrally, with additional costs being funded by a bargaining fee would be factored into the wage rates agreed. This would be consistent with the objectives set out in section 3 ERA by reducing a reasonable level the direct impact of bargaining costs on affected workers and on those who have borne the costs of preparing for and attending bargaining."*
>
> *"We recommend a hybrid between Options 1 and 2. Government should contribute to tangible costs such as flights, catering and venue hire, with the remainder of the cost being attributed to employers and workers through bargaining fees."*

*NZCTU proposed an alternate funding model with most costs being covered by employers and the government*

130. NZCTU labelled the options outlined as *"prescriptive and more limited than that advanced in the FPAWG report*". It proposed the following funding model, which was endorsed by the NZ Meat Works and Related Trade Union.

- Paid meetings for workers (including contractors paid by engagers) to elect bargaining reps and at ratification, to be put into statute.
- Government funding for travel and accommodation to attend bargaining meetings.
- Employers/engagers to pay wages/costs for bargaining representatives.
- Government funding for provision of sitting fee to cover indirect costs such as venue, catering and the administrative burden.

*Worker-perspective submitters suggested staff should have the right to attend paid meetings*

131. The consultation paper did not ask a specific question about whether the FPA system should allow for paid meetings to elect or instruct representatives. However, NZCTU and some other submitters (Hutt Union & Community Health Service, NZ Meat Workers and Related Trades Union, NZEI, E tū, CLEW, as well as some workers) proactively submitted in favour of paid meetings, most referencing the FPAWG's recommendation.

132. In addition, 361 respondents to the E tū form submission agreed with the statement that "Workers should have the right to attend paid meetings to elect their negotiating team and endorse what they want their advocate to put up and also attend paid meetings to ratify any proposed settlement", while 2 respondents disagreed.

133. As this topic was not a formal question, no views from employers or others were received.

## Active support

*Submitters strongly agreed to the use of a 'navigator' to support bargaining parties, though some emphasised the need for sector knowledge (Q52, 53, 56)*

134. Almost all submitters who responded to the question about active support agreed that a navigator should be provided to support bargaining parties (28 submitters).

135. NZCTU (and affiliates) agreed with the concept of 'navigator' as described in the discussion paper, but disagreed with the use of the term:

> *"As recommended by the expert tripartite FPAWG, there should be a body overseeing bargaining, as part of the expanded facilitation function. 'Navigation' is not appropriate terminology for this function, was not recommended by the expert tripartite FPAWG and has no counterpart precedent internationally."*

136. Building Services Contractors NZ submitted that they have not historically needed government intervention during collective bargaining, but recognised that "*where businesses are forced to join us at the negotiating table and prove to be difficult, a 'navigator' would be useful to remind the individuals representing these businesses of their legal obligations of 'good faith bargaining'*."

137. Four submitters disagreed with this option, all from a business perspective. Briscoe Group was concerned that "*if it's anything like mediation, it won't truly be impartial*", while the Meat Industry Association was concerned that any navigator would not have the necessary sector/industry knowledge including of the workforce, employers, business models and markets, and dynamics in that industry.

138. The discussion paper included a question on what skills would be most useful for a navigator to have. The responses generally supported skills similar to a collective bargaining mediator (impartiality, dispute resolution, diplomacy, knowledge of employment law/relations).

139. Other suggestions from submitters include a need for sector/industry knowledge, a wide knowledge of businesses' employment contracts, and commercial skills. The Motor Trade Association suggested "*this technical adviser would be familiar with the sector and know specifics about how employment in the sector is run*."

140. Views were mixed on whether parties should be allowed to provide their own navigator, or agree not to have one. Fourteen submitters supported such flexibility, while 12 opposed it. The Motor Trade Association supported the option, arguing that problems around perceived conflict of interest of a navigator may also be mitigated if both parties agree to their own navigator.

141. E tū opposed such flexibility, arguing:

> *"this role should be performed and resourced by the Government due to the important role this person will pay in the negotiations, it is important that they are there as of right and that they are appointed by the Government and not by either of the parties to the bargaining."*

142. The Forest Owners Association also opposed the option, arguing a neutral party is essential in order to ensure efficiency, fairness and compliance given "*parties to a negotiation are rarely equal*".

## Communication

*Submitters thought bargaining representatives should have primary responsibility for communicating with those they represent (Q57)*

143. Submitters who commented on communication almost unanimously agreed that bargaining representatives should have primary responsibility for communicating with the parties they represent. Only OCS disagreed, arguing:

> *"Primary responsibilities for communicating should fall to the Government appointed 'navigator' so that what is communicated back is a true reflection of the views communicated in bargain."*

144. A worker raised concerns about logistical communication issues in the labour-hire industry:

*"Because of the high dispersal and turnover of employees in the labour-hire industry…the Government surely has the most information as to the whereabouts of these workers. The government is therefore perhaps best placed to be the prime communicator with them. There may be privacy issues here to work through.*

*It would be inappropriate, however, to ask employers to be the vehicle through which bargaining communications are made to employees. The government also has the best centralised systems for broad communications such as the publication of agreements."*

145. The NZ Law Society envisaged that communication responsibilities should be covered in the Bargaining Process Agreement.

*Unions suggested the 'navigator' role should oversee communication (Q59)*

146. The discussion paper asked how much oversight the government should have over the communication process, that is, over the body or bodies given primary responsibility for communication.

147. NZCTU and affiliates suggested the independent government facilitation service (what we have described as a 'navigator') be empowered to oversee the communication process.

148. The Restaurant Association agreed there should be some oversight given FPAs is a new process for many. The NZ Air Line Pilots Association supported the option for government oversight, stating:

*"This is particularly important for non-unionised workers of non-associated employers. Once the parties have initiated the FPA process the Government should use Government statistics to compile a list of employers and employees it believes may be affected and should ensure that these individuals are informed that a relevant FPA process has been initiated."*

149. A small number of submitters (seven) argued the government should not have any role in overseeing communication.

*Some employers disagreed with the option that NZCTU and Business NZ should support bargaining parties to communicate with members (Q60)*

150. A mix of business and worker submitters agreed that NZCTU and Business NZ should support communication for bargaining parties (18 submitters).

151. Some submitters supported this option, but only if the function is funded by government. This was the view of NZCTU and some affiliates.

152. The Motor Trade Association submitted:

*"These associations with many years of experience in communicating around industrial relations should support the parties. This does not stop the government from having to also support – as much support as possible will be advantageous for the parties."*

153. Seven submitters from a business perspective and one submitter from a worker perspective opposed this option.The NZ Air Line Pilots Association did not support the option because "*Not all unions are affiliated with the NZCTU or all employers with Business NZ. NZALPA is not a member of the NZCTU. It is not clear what legal liability or responsibility would be borne by these organisations and to whom*."

154. Māori Point Wines submitted there was still a need for lower-level organisation such as Federated Farmers and NZ Winegrowers.

155. The Meat Industry Association argued that Business NZ is a voluntary organisation, expected to provide a service to its members but would not extend to non-members. OCS

and Patoa Farms did not think the duty should be imposed on Business NZ or NZCTU, as participation should be voluntary.

156. Business NZ did not comment on this issue.

# Dispute resolution

157. 51 submitters answered one or more of the question relating to dispute resolution[3]. Of those 51, 19 came from a worker perspective, 25 came from an employer perspective and seven were categorised as 'other'.

*Submitters generally supported using the existing employment relations dispute system (Q61)*

158. The majority of submitters supported using the existing employment relations dispute system (25 out of 31). Four submitters specified they supported the current system with modifications as recommended by the FPAWG. Three submitters suggested the systems should include arbitration. Two submitters commented that the current system would require additional resources if FPAs were to be included.

159. Three submitters from a worker perspective did not support using the existing employment relations dispute system, as the processes took too long, it was not fit for purpose or because they do not consider there should be any government involvement in the bargaining process. Three submissions could not be classified.

## Mediation (Q62 and 63)

*There was general support for mandatory mediation and mediators being able to provide non-binding recommendations*

160. The majority of submitters supported formal mediation being mandatory before parties could seek a determination for FPAs (22 out of 29). Mediation was seen as a way to help parties resolve issues themselves. For example, Business NZ commented:

> *"Mediation is an appropriate option in all forms of bargaining. It provides a neutral environment in which issues can be addressed without expensive litigation. It seems unnecessary to offer a mediation option that is different in form and function from that which exists already under the Employment Relations Act."*

161. The NZ Law Society suggested the use of a facilitation service (as is currently provided by the Authority) should be considered in addition to mediation.

162. Five submitters (including NZCTU, NZ Meat Workers and Related Trade Unions, NZEI) disagreed, as they considered mediation should be voluntary, mediators were not effective currently, or it was already covered by the navigator role.

163. Submitters generally supported mediators being able to provide non-binding recommendations (18 out of 26). NZ Private Surgical Hospitals Association and the Forest Owners Association emphasised that these recommendations should be non-binding.

164. The Baking Industry Association and Gilbert's Fine Food both commented:

> *"Yes, mediators often need to reword things or highlight a different approach to parties, the only practical way to do this is by offering thoughts, observations and recommendations."*

165. Seven submitters (including three union representatives, three employers and an academic) disagreed. The reasons for not supporting mediators being able to provide non-binding recommendations included:

[3] We have also included question 43, which was asked under the bargaining section but replicated Q68 in the dispute resolution section.

- there should not be an entity empowered to make non-binding recommendations outside of the formal bargaining oversight process conducted by the facilitator
- it would undermine the purpose of FPAs
- it should require the parties' agreement
- it is not the mediators' role to provide their opinion or a solution
- the mediator would not have the evidence that the determining body would receive prior to making any decision.

166. AFFCO expressed the following concern:

> *"To implore mediators to comment on the actual merits of the parties' proposals and make recommendations without having the same intrinsic knowledge of the industry as the bargaining representatives cannot be desirable. There is a real risk that mediators could get their recommendations "wrong", and that is not their fault. That is simply an unfortunate product of asking mediators to comment on matters that delve into industry-specifics (beyond their overarching mediation role)."*

167. Two submitters made suggestions on other functions that a mediator could have: that mediators could engage in arbitration or make binding recommendations if the parties agree.

## Determination (Q64 – 72 and Q43)

168. The most common responses for what should be considered a 'bargaining stalemate' was when parties agree it's a stalemate (12 submitters out of 22) or when parties could not reach an agreement (10 submitters). Responses were mixed as to whether both parties needed to agree it was a stalemate or whether one party could request a stalemate be declared.

169. Other suggestions for what should be considered a 'bargaining stalemate' were:

- when parties cannot reach an agreement on mandatory terms (three submitters)
- the threshold in s50C of ERA – which relates to when matters relating to collective bargaining may be referred to the Authority (two submitters)
- after a set time (two submitters)
- if one party is delaying/ refusing to listen (one submitter)
- using the Equal Pay Amendment Act and the 1988 version of the State Services Act as a working model (one submitter).

170. Four submitters thought the circumstances for a stalemate should be set in law and six submitters suggested alternative approaches. These included: either party should be able to request a stalemate be declared (three submitters), it should be obvious (two submitters), and the mediator or facilitator could decide (one submitter).

*Workers and businesses tended to disagree as to whether there should be a determination process*

171. The most contentious aspect of the dispute resolution process was whether there should be a determination process in the event of a bargaining stalemate. Twenty-nine submitters commented: sixteen supported a determination process, twelve opposed it and one submission could not be classified.

172. Submitters from a worker perspective generally supported including a determination process. They considered it was necessary in order to incentivise parties to reach an agreement or because there needed to be an arbitration process available if parties cannot agree. NZCTU and the NZ Meat Workers and Related Trade Union commented: "*The expert tripartite*

*FPAWG recommendations operate on the clear basis that there be access to arbitration as part of the FPA system*."

173. Submitters from a business perspective were more likely to be against including a determination process, although a few did support one. Reasons provided for not supporting a determination process varied. They included:

- it would breach international obligations (Business NZ , EMA, Tourism Industry Aotearoa)
- parties must reach an agreement (Māori Point Wines and an unnamed employer organisation)
- a preference for mediation and facilitation (Foodstuffs and Forest Owners Association)
- it could result in significant unrest (Baking Industry Association)
- the proposed threshold is much lower than the current threshold for a determination in relation to collective bargaining (s50J of the ERA) (AFFCO)
- given the proposed low threshold for initiating a FPA it is unlikely the rest of the sector would benefit from a forced outcome (Print NZ).

*Business thought the determining body should only be able to set terms of mandatory topics, while workers thought it should be able to set terms for all aspects of the FPA*

174. There was also a split in the views on whether the determining body should be able to set terms for *only* the mandatory topics of the FPA. Of the thirty-three submitters that responded, twenty (generally from a business perspective) considered they should only be able to set terms for mandatory topics. Eleven submitters (largely from a worker perspective) thought the determining body should be able to set terms for all aspects of the FPA. Two submissions could not be categorised.

175. The Law Society considered determining mandatory terms only was in keeping with the purpose of the FPA system:

> *"Consideration should first be given to the purpose of the FPA system…the Law Society considers that, while it may be open to the parties to agree additional terms and further tailor agreements to their particular sector/worker population, additional protection (by way of Authority determination) ought only be conferred on a core set of mandatory terms to be included in all agreements. Restricting the Authority's jurisdiction in this way will also confer speed, efficiency and cost benefits."*

176. NZCTU and NZ Meat Workers and Related Trade Union provided this reason for not limiting determinations to mandatory topics:

> *"The determining body should have jurisdiction to fix all terms of an FPA as the principal outcome of any dispute resolution system is that the entire dispute between the parties, however described, should be able to be resolved to finality. Additionally, if only mandatory terms can be arbitrated there will be insufficient incentives of the parties to reach agreement on these matters. This is particularly the case in a system which prohibits the taking of industrial action. Not being able to access arbitration to fix all terms is counterintuitive to the objectives of FPA bargaining system."*

177. Eighteen (out of 24) considered the determining body should have a role in relation to bargaining stalemates for permissible FPA terms. The main variations supported were:

- Making determinations on all aspects, including permissible terms – seven submitters (including NZCTU, NZ Meat Workers and Related Trades Union, NZEI, E Tū, and Unite Union)

- Making non-binding recommendations – seven submitters (generally from a business perspective)
- Setting terms for permissible topics if the parties consented – four submitters (a mix of workers and businesses).

*Most submitters consider the Authority should be the determining body, although some are concerned they don't have the required expertise*

178. Most respondents supported the Authority being the most appropriate organisation to carry out the determination function (17 out of 31). The reasons provided were: it is the most logical option, it has the required expertise, and it avoids creating another body.

179. Seven submitters did not agree. The most common reason for not agreeing was because they did not consider the Authority has the required expertise or sector knowledge. An employer lawyer suggested the determining body should be a specialised commission, rather than the Authority because the latter's focus is quick justice, and the check and balance for that speed is parties' ability to appeal to Employment Court.

180. NZ Air Line Pilots Association and E tū thought the Employment Court should be the determining body, citing the experience of the judges, their statutory independence and the status of the Court in relation to the Authority.

181. The Law Society supported the Authority being the determining body, but considered there could be case for it being the Employment Court on the grounds that the nature of the matter creates a public interest.

182. Seven submissions could not be categorised. In particular, NZCTU, NZ Meat Workers and Related Trades Union and NZEI outlined the standing and expertise needed by the body performing the arbitration function, but did not comment on whether they considered the Authority has these.

*Submitters supported an independent panel of experts, but views were more mixed as to whether their advice should be public or confidential*

183. The majority of submitters considered the determining body should be able to ask for advice from experts (25 out of 29). The three submitters that did not agree (which included E tū and the Law Society) considered the determining body should base their decision on the expertise advice obtained by the relevant parties. One submission could not be categorised.

184. The NZ Law Society suggested it would be simpler and less costly if the onus was on bargaining parties to obtain their own evidence and expert opinion:

> *"…Having a determining body seek its own advice will raise questions regarding: the composition of that body, its independence and the relevant terms of reference; the weight then given to expert opinion provided by bargaining parties; and where the determining body's costs in obtaining expert advice should lie…We consider the most efficient way to determine these issues would be to allow the determining body to assess and weigh up the advice obtained by the relevant parties (and provided to the determining body as part of the determination process) in making its determinations. This methodology would also be simpler from a cost allocation perspective, with each party bearing the cost in respect of its own evidence (subject to any overall cost allocation decisions made)."*

185. The majority of submitters consider the panel of experts should be independent (21 out of 26). A further two submitters supported experts being independent where possible, but allowing exceptions when necessary.

186. Half of the submitters who commented thought the advice of the experts should be public (12 out of 24). The main reason provided was because it was in the public or sector interest.

Seven submitters thought the advice should be confidential. Most submitters didn't provide a reason for why they considered the advice should be confidential.

187. Briscoe Group suggested the information provided to the decision maker should be publically confidential, but the rationale for the decision(s) should be available to the bargaining parties.

188. Five submissions could not be categorised, with three commenting that normal rules for the use of expert evidence should apply.

189. Submitters largely agreed that experts should be protected from liability for their advice (14 out of 15).

## Appeal rights (Q73 and 74)

*Workers supported limiting appeal rights, while businesses responses were more mixed*

190. The submitters who answered this question generally supported limiting appeal rights in some way in the dispute resolution system (19 out of 29). Seven submitters did not support it and three submissions could not be classified. Submitters from a worker perspective generally supported limiting appeal rights. Submitters from a business perspective were mixed, but were more likely to support limiting appeals rights than not.

191. The main reasons provided for agreeing appeal rights should be limited were:

- because the FPAWG recommended it.
- to align with the current appeal rights for collective bargaining.

192. The reasons provided for not limiting appeal rights were concerns regarding natural justice because the effect of FPAs would be so significant, or because the right of appeal provides an essential safety valve.

193. Foodstuffs considered it would be contrary to Legislative Design Advisory Committee guidance to limit appeal rights. The EMA suggested: "*Limiting appeal rights to points of law, will diminish all parties' rights to natural justice, which again may be contrary to international employment law ratified by New Zealand*."

*Submitters generally supported limiting appeal rights to matters of law, but some thought there should be a right to appeal when the viability of a business or industry was threatened*

194. Of those that commented on the type of limitation, the most common response was to limit appeals to matters of law (nine out of 17).

195. Other suggestions were to:

- apply time limits (two submitters),
- reasonable grounds (two submitters),
- where it would have significant impact/detrimental to industry (two submitters),
- only when workers/union request it (one submitter), or
- when the majority affected party request it (one submitter).

196. One reason suggested for not supporting limiting the right of appeal to matters of law was that there should be a right of appeal if the viability of a business, or stability of the industry, was threatened.

## Conclusion of an FPA

197. 55 submitters answered one or more questions relating to the conclusion of an FPA. Of those 55, 19 came from a worker perspective, 31 came from an employer perspective, and 5 were categorised as 'Other' (including perspectives from a university lecturer and community groups.)

### Ratification

*Most submitters supported a need for ratification from employers and workers (Q86)*

198. Employers and workers largely supported the option that FPAs should be ratified by a majority of both employers and workers.

199. Only two submitters opposed this option, pointing to difficulty in identifying all affected parties, and in organising a voting process for workers.

*Submitters were divided on whether requiring ratification by a majority of voters would be preferable to that of a majority of all affected parties (Q87)*

200. Nearly all worker-perspective submitters who responded to this question supported the option of the majority of voters, rather than a majority of all affected parties, being the more workable requirement for ratification. Unions in particular supported this option.

201. The NZ Meat Workers and Related Trades Union acknowledged ratification by a majority of workers would allow better representation for individuals not attached to organised work groups:

> *"Yes. Absolutely. FPAs envisage including workers who work in industries that have not been able to organise into large workplace groups. Restricting ratification in this way would not only disadvantage these groups, but also run counter to ratification procedures currently in law that do not require a majority of all affected parties."*

202. Employer submissions were evenly split in their support for this option. Employers who supported this option included: OCS, Patoa Farms, D Anderson Contractors and Foodstuffs NZ. Patoa Farms commented:

> *"Yes. This puts responsibility on those affected to vote and does not result in an abstention being counted as a negative vote."*

203. Employer submissions that opposed this option included: Baking Industry Association, NZ Private Surgical Hospitals Association, First Security, Print NZ, Maori Point Wines, Briscoe Group, Red Stag Timber and Gilberts' Fine Food.

204. Gilbert's Fine Food and an employer expressed concern that voters would not fully understand what they are voting for and therefore the representative expertise of the affected parties is a necessary input.

205. The NZ Law Society acknowledged that a majority of voters presents a more workable requirement yet described possible challenges this option raises, and therefore did not support the requirement:

> *"…it could create a perverse outcome: there would be less incentive for parties to accurately scope a coverage clause in an FPA and encourage engagement of all parties. In the event of low voter turnout, a minority could then ratify an FPA for the majority. Consequently, we consider that a majority of all affected parties is a reasonable ratification threshold and would enhance the credibility of the process. It would also create an incentive for parties to accurately scope the coverage clause in an FPA."*

*Submitters were divided on how employer votes should be counted (Q88)*

206. Submissions from workers were divided evenly between counting employers as one vote per business, or counting them as a proportion of workers employed within coverage. More employers responded to this question than submitters from a worker perspective, and showed the same split of opinion.

207. Employers who supported a one vote per business approach argued this would allow small businesses to maintain a voice during the process.

208. The NZ Law Society recommended a proportionate vote based on the number of workers, rather than one vote per business:

> *"The Law Society considers a proportionate vote is a more accurate representation of all parties, as opposed to one vote per business. This does risk smaller businesses being more easily outvoted by businesses with a larger number of workers. However, larger businesses are potentially more affected by the impact of an FPA. Exemptions for smaller businesses may go some way to address this."*

209. Six submitters (NZCTU, 2 unions, Federated Farmers, First Security and CLEW) suggested that employers should decide this point among themselves, or should bring their own ratification systems to the negotiation table.

210. Business NZ did not respond to this question.

*Submitters agreed that the government should provide financial and communication support for the ratification process (Q89)*

211. A majority of submitters who responded to this question indicated that some government support was necessary for ratification. Two submitters (Baking Industry Association and Gilberts Fine Food) were unsure why government should be involved during this stage.

212. The general themes of suggestions for government support were: financial support during the FPA process, and support setting up systems for circulating information to workers and appropriate parties to ensure they are aware of when voting occurs and what the vote entails. These suggestions came from parties including: NZ Law Society, Motor Trade Association alongside individual workers and employers.

213. Financial support was suggested in both the form of overall assistance throughout the process and ensuring workers are able to be paid by employers during the time in which the vote may take place. Supporters of paying workers during a vote include: NZCTU and NZ Meat Workers and Related Trades Union.

214. NZCTU commented:

> *"FPA bargaining should pick up features of ratification as was used for the care and support pay equity settlement, including a mechanism to ensure employers facilitate all employees being able to attend a paid stop work for a ratification vote. The CTU understands that during the care and support settlement the Ministry of Social Development engaged directly with providers and employers to ensure such meetings occurred. The Ministry also held a series of public meetings to inform workers of the settlement process."*

*Most submitters agreed that, if an agreement doesn't pass ratification, the FPA should be returned to bargaining (Q90)*

215. A large majority of submissions on the topic indicated that a return to bargaining would be needed if an agreement doesn't pass ratification.

216. Within this group, some employers suggested a stand down period, with mediation, then ratification or determination according to how the mediation went.

217. A minority of submissions opposed returning to the bargaining table and offered alternative suggestions:

- The bargaining process ends and the sector returns to the current employment agreements that are in place.
- A five year stand down period before an FPA for the same sector and occupation can be initiated again.
- If the vote on the non-initiating party's side fails, then the process should return to bargaining. If the vote on the initiating party's side fails, then the process should be called off as the group who initiated the process has lost their mandate; this party would have to start the process again, including re-passing the public interest test in order to continue.
- The Authority or an independent body could step in as a suitable final decision point.

*Most submitters believed the whole FPA needs to be ratified, including in situations where some terms have been issued by the determining body (Q91)*

218. Submitters largely supported the whole agreement needing to be ratified even if some terms had been set by determination. Some submissions argued that an FPA must be viewed holistically due to individual clauses having direct effects on one another. Others noted that for an FPA to be successful, terms and conditions agreed upon must be final so ratifying a whole agreement is preferred.

219. Submissions offered reasons for ratification of the whole agreement, including:

- Whole agreement needs to be ratified. Otherwise, it leaves the potential for issues at later dates.
- The whole agreement works together – therefore the whole agreement needs to be ratified as one.
- The whole agreement needs to be ratified but the terms and conditions determined by the determining body can't be changed.
- All items need to be agreed on. Employment law covers the majority of items while an FPA is meant to cover a more targeted and specific range of areas.

220. Foodstuffs NZ commented:

> *"The whole agreement. Determination will be utilised to settle unresolvable disputes between the bargaining parties, but the employers and employees who are affected by a FPA agreement should be entitled to vote on it."*

221. NZCTU suggested the system should not allow this scenario to occur. It commented:

> *"The determining body is to be empowered to arbitrate all terms of the FPA. There will not be a circumstance where parts of an FPA are expressed in a fixing determination and other parts subject to a ratification process. The expert tripartite FPAWG did not envision a process of referring only certain matters to arbitration. Agreed matters between the parties can be expressed as agreed in the arbitrated outcome."*

222. Four submissions (Maori Point Wines, Patoa Farms, one employer and one worker) believed that only the agreed terms need to be ratified while determination can be used for the rest of the agreement.

223. The Motor Trade Association argued it should be up to the bargaining parties to decide what terms requires ratification:

> *"The parties should be free to determine what response equates to ratification. For example, the parties may agree that all mandatory items must receive positive responses*

*but that additional items are successful. Thought will need to be given to any interdependencies between provisions within an FPA (i.e. can one additional item be rejected, and other terms continue to operate without detrimental effect?)."*

## Enactment

*Most submitters believed the government should not be allowed to change any terms of an FPA in the process of enacting it through regulations (Q92)*

224. All submitters of the worker perspective, and most from the employer perspective, who commented on this issue opposed the idea of government being able to change any terms of an FPA in the process of enacting it through regulations.

225. Business NZ commented: "*New Zealand's international legal obligations prohibit the Government from altering the terms of a collective agreement, especially after it has been concluded*."

226. A few submitters from an employer perspective indicated government intervention should be allowed under limited circumstances, such as administrative error or the FPA contained terms which did not comply with the law.

227. The Motor Trade Association suggested the agreement should be vetted before ratification, so no changes should be made after ratification.

## Enforcement

*Submitters supported the Labour Inspectorate having the ability to enforce minimum terms set by an FPA, with some unions advocating for union enforcement as well (Q95)*

228. Submissions overwhelmingly supported the Labour Inspectorate having the ability to enforce minimum terms set by an FPA. Business NZ commented:

*"Since FPAs will be employment agreements setting wages and terms of employment it seems axiomatic that the Labour Inspectorate should be able to enforce them as they do now for all other employment agreements."*

229. The Motor Trade Association supported the Labour Inspectorate enforcing FPAs but recommended a specific FPA team be set up.

*"Yes, although this raises the problem that the Labour Inspectorate may not know there is an issue or know the details of FPAs. There would need to be a dedicated FPA team in the Inspectorate who would be able to interpret FPAs and have knowledge about their mechanisms. If the government wants to put in place a regime of sector awards and minimum employment standards, then the government must ensure that regulatory bodies are in place and resourced appropriately to conduct oversight."*

230. The NZ Law Society stated:

*"…There is merit in enabling Labour Inspectors to enforce an FPA because some parties will be unable to afford to progress matters themselves. This would require better resourcing of the Inspectorate than currently. Whether or not an FPA has been breached ought to be subject to a test similar to that used in Australia. This requires an assessment of all the terms and conditions as to whether the worker is "better off over all…"."*

231. A worker questioned whether other tools of enforcement (i.e. other than Labour Inspectors) may be better suited for situations in which a company is unable to meet financial minimum terms and requirements. Other suggestions included a MBIE support service via a hotline number or government website, mediation processes differing to current systems and the use of existing 'whistle blower' or escalation policies within the organisation.

232. NZCTU and some unions (Unite Union, NZ Meat Workers and Related Trades Union, and NZEI) suggested that unions should wield the same powers as the Labour Inspectorate.

## Cost recovery

*Most submitters agreed that the costs of dispute resolution in the FPA process should be consistent with the current system (Q96)*

233. Only 26 submitters interacted with the section regarding cost recovery. The majority of submitters (including Foodstuffs NZ, Briscoe Group, NZ Law Society and E tū among others) agreed with consistency with the current system in determining where the costs of dispute resolution should lie. Answers gave little detail.

234. Seven submissions (some employers and some unions) suggested alternatives, including:

- there should be no legal costs able to be awarded in the FPA dispute resolution system
- there should be no mechanism to recover legal costs for FPA bargaining or arbitration, and
- costs should lie where they fall.

235. Some employer submitters (Baking Industry Association, Gilberts Fine Food and First Security) argued that, due to FPAs being an imposed procedure, requiring either party to cover the costs is unacceptable and the costs of the process should sit with the government.

*Submitters identified a number of other FPA-related functions and services for which there should be no fee (Q97)*

236. 25 submissions were received on the question of whether there were any other functions, other than dispute resolution, for which it would be inappropriate to charge a fee. A majority of submitters argued that to charge fees for functions and services like arbitration, public interest test assessments and a number of others would be inappropriate.

237. Foodstuffs NZ commented:

> *"The government is looking to mandate the regime for public interest reasons and should fund the government infrastructure and the activities needed to support it."*

238. Submitters (including NZCTU, NZ Air Line Pilots Association Briscoe Group, OCS, Restaurant Association and JEM Contracting) suggested a variety of functions or services for which it would be inappropriate to charge a fee. These included:

- circumstances that deal with individuals, or when groups or individuals are being exploited,
- arbitration,
- expert panels, public interest test assessment or market impact test assessment,
- any function or service required as part of the FPA process.

239. NZALPA commented further:

> *"The Government should seriously consider how it will resource unions and employers' associations to carry out public interest and market impact tests if the burdens of such tests are placed on those parties. Unions and Employers Associations are not sufficiently resourced to carry out such tests at this stage. Requiring members to pay further fees to finance such assessments is likely to be a disincentive to membership. Government should also seriously consider how it can make resources available to unions and employer associations to assist with the research and scoping work they will need to carry out to address coverage, notification and ratification."*

240. A minority of submissions answered '*no*', i.e. implying there were no functions or services besides dispute resolution for which it would be inappropriate to charge a fee. This group included Motor Trade Association, Patoa Farms and Baking Industry Association.

241. NZ Law Society commented:

> *"No. It will be important to adequately resource all aspects of the FPA process including ensuring equitable access to representation. This will require further resourcing of Mediation Services, the Labour Inspectorate, the Authority and the Employment Court, as well as the cost of engaging representation. This may also include payment of a bargaining fee to a union or sector group, or expansion of existing funding for legal aid providers and community groups giving advice on employment."*

*Submitters generally supported the government covering all non-bargaining, non-dispute resolution costs, although there was some support for splitting all costs according to general principles*

242. Twenty-eight submitters commented on the government and bargaining parties sharing costs of non-bargaining functions. Many submitters referred to their answer given for the splitting of bargaining costs. 13 submitters commented that the government should cover the non-bargaining costs of FPAs, and 7 provided suggestions of how to split the costs.

243. A majority of submissions opposed the idea of government and bargaining parties sharing costs due to a general rationale that government should be covering all costs of the bargaining process. Submitters of this view were primarily employer parties and union groups including submissions from: Foodstuffs NZ, New Zealand Council of Trade Unions, NZ Law Society and others.

244. NZ Law Society noted:

> *"Ideally, the FPA process would be cost-free, in the same way the current minimum employment terms system is. Alternatively, any cost for assessing the initial and market impact tests ought to be minimal to ensure it does not create a barrier to entry. While the applicant could bear this cost in the first instance, limits on these costs could be set, either on a fixed basis or by the Authority."*

245. Submissions indicating support of costs being shared across the government and bargaining parties included E tū, CLEW, D. Anderson Contractors. Ideas suggested were:

- 50-50 split between government and bargaining parties,
- initial stages being paid for by government while day to day progress should move to costs being covered by the bargaining parties via forms of membership costs or levies, and
- 75% burden on the bargaining parties.

246. Both E tū and CLEW submitted that government should pay for mediation, determination, travel and accommodation while bargaining parties could carry the costs of wages. Also included should be a one-off bargaining fee paid to unions and employer bodies that are co-coordinating their sides of the process once the agreement has been enacted.

247. Forest Owners Association gave a suggestion of staggering costs across a timeline, commenting:

> *"For the first five years of an agreement all costs should be met by government – agreements will take time to become understood. The learning period can be facilitated by government bearing associated costs. Appropriate, unbiased, guaranteed funding will lead to superior outcomes. Subsequently, 50% of costs by the sector. Note – the government will often be part of the sector."*

# Annex Two: Recording of NZCTU online form submissions

NZCTU coordinated submissions via its campaign website together.co.nz. Submitters provided answers to a survey and had the opportunity to provide free-form comments. MBIE received 150 submissions from these free-form comments, and one submission summarising 287 responses to the survey.

We have incorporated the survey responses, and the free-form comments that responded to specific topics from the discussion paper, into our main summary of submissions.

A number of submissions in this format did not comment on specific parts of the discussion paper, but gave general support for either the FPAWG's recommendations or NZCTU's six principles for 'what will make a good fair pay agreement law'.

Of the 150 free-form comment submissions:

- 10 supported the FPAWG's recommendations; and
- 15 supported NZCTU's six principles.

NZCTU's six principles, published in its report *Fair Pay Agreements: a framework for fairness* are:

1. Fair Pay Agreements will enable working people to improve their terms and conditions of employment, develop their skills, have these skills recognised and work with employers to improve performance and workforce planning across an industry or sector.
2. Working people will have a voice through their unions to negotiate Fair Pay Agreements.
3. Fair Pay Agreements should cover every person working and every employer in a defined industry or occupation.
4. Fair Pay Agreements need to be about more than pay rates – they need to provide a minimum standard for decent incomes, career pathways and good working lives for New Zealanders.
5. If union members and employers in an industry or sector can't agree on what's fair, they will be able to go through an independent assessment process to determine a Fair Pay Agreement.
6. If a Fair Pay Agreement is reached, it should be final.