MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Background information and next steps on Fair Pay Agreements

Date:	12 November 2020	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2021-0627

Action sought		
	Action sought	**Deadline**
Hon Michael Wood **Minister for Workplace Relations and Safety**	**Note** you have choices in relation to both the coverage of the FPA system and the process for enacting it, and there is a trade-off between speed and the scope of the system. **Note** there are still a number of outstanding policy issues which need resolution to enable a full set of decisions for drafting. **Discuss** this briefing and your preferences for this policy with officials.	20 November 2020

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Beth Goodwin	Acting Manager, Employment Relations Policy	04 901 1611		✓
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The following departments/agencies have been consulted
The Treasury, DPMC, Te Kawa Mataaho/Public Service Commission

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- ☐ Withdrawn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

Your election manifesto includes a commitment to introducing a Fair Pay Agreements (FPA) system in line with the FPA Working Group's (FPAWG) recommendations.

This briefing provides you with background information on the FPA policy and sets out choices available to you and possible next steps.

Executive summary

The Government established the FPAWG in June 2018. The Rt Hon Jim Bolger chaired the FPAWG, which comprised employer representatives, worker representatives, academics and community representatives. It submitted its report to the former Minister on 20 December 2018. Within the report, the employer representatives expressed a preference for a different system which would be based on voluntary participation for employers at the start, and for reasonable grounds for employers to opt out from the process or resulting agreement later on.

Following receipt of the FPAWG's report, MBIE provided advice to the Minister on the major design features the FPAWG had identified, as well as on some of the topics for which the FPAWG identified further work was needed (for example, how to mitigate potential negative effects on competition or consumer prices).

The Government released a discussion document in October 2019 which was broadly consistent with the FPAWG's proposals. Submissions on the proposals sharply diverged between unions and their members (who supported the FPAWG's model), and employers (who typically opposed the whole system and argued for a voluntary model).

MBIE prepared a high-level Cabinet paper in mid-2020 seeking agreement to continue working on the system, but it was not considered by Cabinet.

There are a number of significant risks associated with the proposed FPA system which have been identified by MBIE, stakeholders and experts:

- The FPA system will touch international law and human rights issues. The compulsory nature of FPA bargaining and the bar on industrial action may not comply with New Zealand's international labour obligations and a rights analysis is needed.
- The Legislation Design and Advisory Committee has advised that the system is "complex, novel and lacks specific international precedent". It recommended the scope of the system be kept as narrow as possible to achieve its goals.
- There is a lack of incentive for employers to participate in the FPA system, with the main motivation for employer participation likely to be the desire to avoid a determination on FPA terms. The system lacks the support of BusinessNZ.

MBIE's preferred option in the Regulatory Impact Analysis we have prepared is to strengthen existing mechanisms in the employment relations system, combined with setting targeted sector-based minimum standards where there are problematic outcomes for employees.

You have choices about how to progress with FPAs, both in terms of the coverage of the FPA system (narrow coverage will help with speed) and in relation to the process for enacting the system. You have indicated that you want to proceed with the FPA project as quickly as possible, which (all running smoothly) would involve Cabinet decisions in February 2021 and introduction of the Bill in September 2021. This timeline does not allow for any further targeted consultation, and excludes contractors from coverage of the system. With the speed of work required, this heightens the risk that a further Cabinet paper will be required during drafting, if we cannot identify and analyse all relevant issues ahead of drafting.

We would like to discuss this briefing with you. Policy work and decisions are still needed on a number of features of the proposed FPA system, including some key design features, in order to obtain a full set of Cabinet decisions for Parliamentary Counsel Office (PCO) to begin drafting a Bill. If Cabinet made high-level decisions only, it would substantially slow down the drafting process as the preparation of drafting instructions would take longer and further Cabinet decisions would be required. We will begin providing you with advice on those design features following our discussion.

Recommended action

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

a **Note** that the Labour Party policy for the 2020 General Election was to introduce a Fair Pay Agreements system broadly in line with the Working Group's recommendations.

Noted

b **Note** that a high-level Cabinet paper was prepared in mid-2020 seeking agreement to continue working on the system, but it was not considered by Cabinet.

Noted

c **Note** there are still a number of outstanding policy issues which need resolution to enable a full set of decisions for drafting, and advice will be provided on those in forthcoming briefings.

Noted

d **Note** that the FPA system touches various international law and human rights issues, and there is a risk that the system will be perceived or assessed as inconsistent with New Zealand's international law obligations or the NZ Bill of Rights Act 1990.

Noted

e **Note** you have choices in relation to both the coverage of the FPA system and the process for enacting it, and there is a trade-off between speed and the scope of the system.

Noted

f **Note** once final policy decisions have been made, and Cabinet approval is given to draft legislation, we have been advised by PCO that drafting will take at least five months.

Noted

g **Note** that if you do not undertake any further consultation and exclude contractors from coverage of the system, it may be possible to seek Cabinet approval to draft in February 2021 and introduction of the legislation in September 2021 (assuming a smooth process).

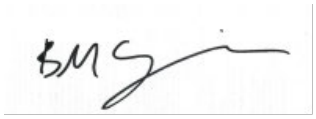
Noted

h **Note** once the final design of the FPA system has been agreed, we will need to reassess and refine our initial costings, and prepare a Budget bid.

Noted

i **Discuss** this briefing and your preferences for this policy with officials.

Discuss



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

12 / 11 / 20

Hon Michael Wood
Minister for Workplace Relations and Safety

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Background

1. The Fair Pay Agreements (FPA) project will create a legislative system for sector-wide collective bargaining. This briefing summarises progress to date. We have:

    - supported the Fair Pay Agreements Working Group (FPAWG) to develop its recommendations on the scope and key design features of an FPA system,
    - collated and considered stakeholder views on a proposed model, and
    - advised the Minister for Workplace Relations and Safety on those key design features, as well as on the complexities, risks and suggested mitigations.

2. This briefing then outlines a suggested timeline for progressing this policy, based on our understanding that this is one of your top priorities for the portfolio. You have choices about how to proceed with this policy, for example whether you wish to do further consultation, as well as choices still to be made on some key design elements.

Outline of the FPA process so far

3. Ahead of the 2017 election, the Labour Party manifesto committed to introducing a Fair Pay Agreements system.

4. In May 2018, Cabinet agreed in principle to establish a system so that employers and workers could bargain for FPAs that set minimum employment terms and conditions across a sector or occupation [DEV-18-MIN-0100]. Cabinet's in-principle agreement was subject to the policy being further considered by Cabinet once the FPAWG had reported back on the scope and design of the system.

Fair Pay Agreements Working Group (2018)

5. The FPAWG was established in June 2018. The Rt Hon Jim Bolger chaired the FPAWG, which comprised employer representatives, worker representatives, academics and community representatives. It submitted its report to the former Minister on 20 December 2018.

6. It reviewed sector bargaining models in other countries, but determined that it was not possible to simply 'lift and shift' those models to New Zealand, without being adapted to suit our social and economic context.

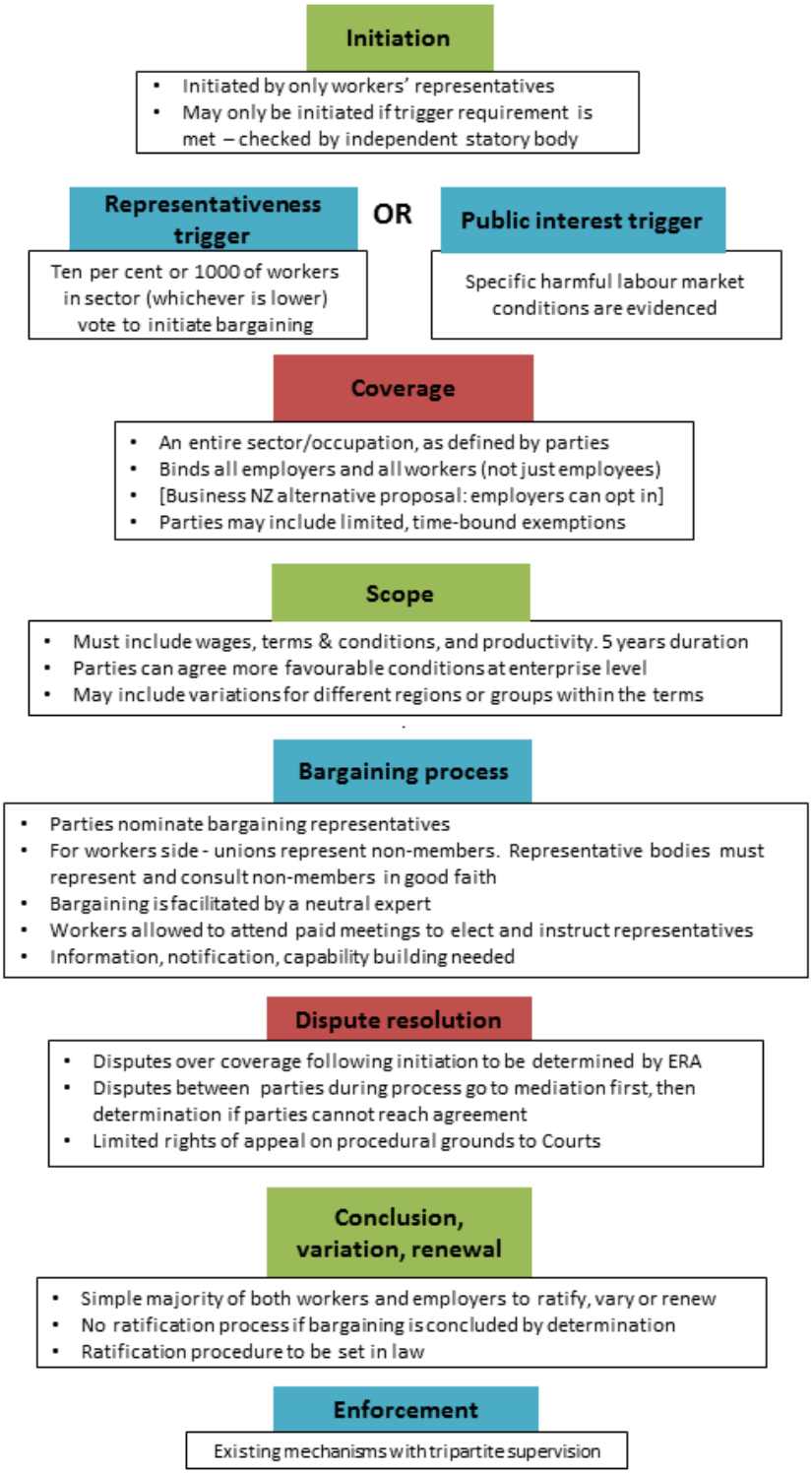
7. The FPAWG noted that FPA bargaining could be most useful in sectors or occupations where particular issues are identified, but also may be useful where workers and employers identify room for improvement. It noted that FPAs may not be necessary or useful in some sectors or occupations, but did not elaborate on which.

8. It emphasised that an FPA system is most likely to gain traction if it presents real opportunities for both employers and workers to gain from the process. To that end, the FPAWG explored the opportunities for productivity gains to be pursued in FPA bargaining, such as investment in skills and technology.

9. The FPAWG members held divergent views on whether employers should be obliged to participate in and be bound by an FPA bargaining process if it was triggered. Employer representatives' preference was for a system which is based on voluntary participation for employers at the start, and for reasonable grounds for employers to opt out from the process or resulting agreement later on. The majority of the FPAWG considered that voluntary coverage would undermine the fundamental objective of FPAs – to set new minimum standards which apply to all parties in the sector or occupation to avoid under-cutting of terms, although they did recommend that limited, time-bound exemptions be allowed.

10. The FPAWG's design was necessarily high level, given the timeframes for its work and the need for decisions to be made on the overall model before the detail can follow. It noted that a considerable amount of detailed policy and design work would be required before recommendations could be put to the Government to implement the system into law and practice. In particular, it noted that further work needed to be done on issues such as how competition impacts could be managed, how contractors could be included in the system, and how the costs of bargaining should be dealt with. To minimise complexity, it recommended building on existing institutions and practices where appropriate, for example in dispute resolution and enforcement.

11. The following diagram sets out the FPAWG model:



The Government released a discussion document in late 2019

12. Following receipt of the FPAWG's report, MBIE provided our advice to the Minister on the major design features the FPAWG had identified, as well as on some of the topics for which the Working Group identified further work was needed (for example, how to mitigate potential negative effects on competition or consumer prices, and on the compatibility of the system with New Zealand's international obligations).

13. In September 2019, Cabinet agreed to consult on a proposed FPA model broadly consistent with the Working Group's model, and to release the discussion paper "Designing a Fair Pay Agreements System" [DEV-19-MIN-0266]. The discussion paper included 98 questions related to the detailed design of the FPA system. The paper also consulted on possible alternatives for elements within the FPA process.

14. Public consultation was open from 17 October to 27 November 2019. Overall, 648 submissions were received, including a large number of employee submissions coordinated by E tū and the NZ Council of Trade Unions.

15. Submissions on the consultation sharply diverged between unions and employers. Unions and their members typically endorsed the model proposed by the FPAWG, where it would be relatively easy to initiate bargaining, unions would represent workers, and there would be compulsory determinations. In contrast, employers questioned the need for the FPA system, predicted it would have negative consequences, and instead preferred a voluntary model (like the one proposed by BusinessNZ).

16. A full summary of the consultation feedback is attached at Annex One.

A Cabinet decision on high level policy for FPAs was to be sought in mid-2020

17. Following consultation on the discussion document, we provided a set of recommendations on the high level design features of the Fair Pay Agreement system to the previous Minister, and he made decisions on those features. Those decisions, and our advice are described in Annex One.

18. The Minister had approved these recommendations, subject to a few amendments, and was about to undertake Ministerial and support party consultation on those design features.

19. The Minister intended to take a paper to Cabinet Economic Development Committee (DEV) on 27 May 2020 and seek agreement to the FPA system. Due to that short timeframe, it would have covered only the fundamental policy decisions required to begin drafting, while further work on the processes for the system would have needed to occur during drafting. PCO had not confirmed it would agree to begin drafting on this basis.

20. In drafting the Cabinet paper, we had identified some important issues that needed more policy work and Ministerial decisions in order to be included in the Cabinet paper. They related to:

    - how to describe the objective of the FPA system;
    - what requirements to put on employer representation;
    - further advice on bargaining costs to address inconsistencies between systems;
    - how contractors would be included in the FPA system;
    - whether the law should provide for workers to attend paid meetings (e.g. to instruct representatives or vote on ratification); and
    - what remedies and penalties should be included in the system, and who should be liable.

21. There were also a range of lower-level matters yet to be addressed, mostly related to details of the FPA process, for example:

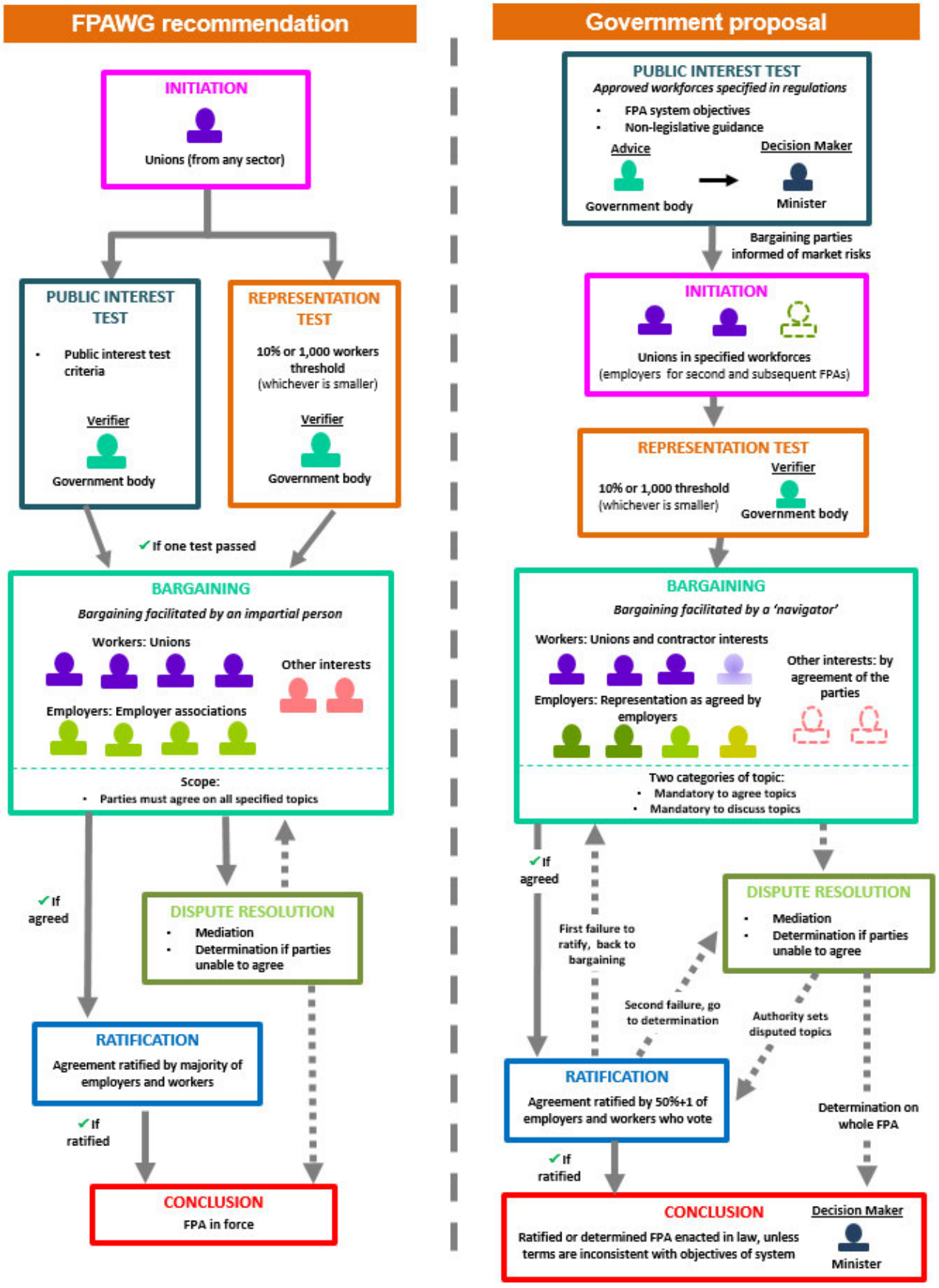
    - what evidence will be required that a 10% worker threshold has been met;
    - how will an entity be defined for the purposes of voting on ratification;
    - how will the ratification process run;
    - what is the threshold for the Minister to refuse to enact an FPA into regulations; and
    - what rules to place around exemptions from an FPA.

22. These decisions are needed for PCO to begin to draft a Bill.

23. We were part-way through preparing the draft Cabinet paper and advice on these issues when work was halted in mid-March due to COVID-19, following a discussion with the Minister, and resources were diverted to other projects.

24. In June 2020 the Minister asked us to prepare a Cabinet paper which would propose a high-level model and seek agreement to continued policy development of the system. This paper was ultimately not considered by Cabinet. We also have not yet completed work on the policy issues listed above in paragraph 20 and 21.

25. A high-level comparison of the FPAWG model and the model agreed by the Minister to be proposed in his Cabinet paper is described in the below diagram:



Support, institutional functions and budget will also be needed for the FPA system

26. Based on the choices made by the Minister, on balance we did not consider there was a case to create new institutions to take on the new functions needed for the FPA system. Instead, we recommended the new functions should be allocated as follows:

- Employment Relations Authority to do quasi-judicial functions – such as determining the terms of an FPA if parties cannot agree.
- A government department (likely MBIE) to do administrative and advisory functions – such as verifying that initiation tests are met and vetting a finalised FPA against the Act's objectives.
- The Minister for Workplace Relations and Safety making significant 'stop/go' decisions – such as specifying eligible workforces in regulations, and making the final decision about whether an agreed FPA should be put into regulations.
- The Labour Inspectorate to do enforcement functions.

Indicative cost of the system

27. The Minister sought funding for the FPA system in Budget 2020, with three different options ranging from $10 to 30 million over three years. The difference in cost related to how substantive the market impact test was, how significant the funding would be for enforcement by the Labour Inspectorate and the degree of extra resources for the dispute resolution system.

28. The bid was unsuccessful. We then advised that it would be necessary to seek funding from the Between-Budget Contingency when seeking Cabinet agreement to the FPA system, as it would not be possible to implement the FPA system without funding. The FPA system was not considered by Cabinet, so this Between-Budget Contingency was never secured.

29. After subsequent decisions from the Minister, including the removal of a substantive market impact test, we estimate the minimum cost is approximately Confidential advice to Government This funding would provide:

    - Additional resources for the dispute resolution system. This includes the provision of 'navigators' to support the bargaining parties, additional mediators, Employment Relations Authority members, and support staff.
    - A government contribution towards the costs of bargaining for the peak bodies and the bargaining parties themselves ($1.2m).
    - A small increase in funding to cover the additional information/education and regulatory functions that MBIE will undertake in the new system
    - A small increase to the number of Labour Inspectors

30. Note this is still an early, indicative budget. As the final design of the system becomes clearer we would need to recheck and refine these costs. We anticipate a Budget bid will be required for Budget 2021.

Key stakeholders and experts have identified risks

The FPA system will touch international law and human rights issues

31. In designing the FPA system, it is important to consider the implications of design features for New Zealand's International Labour Organisation (ILO) obligations and to comply with human rights requirements. The FPAWG recommended that the Government seek advice on the compatibility of the system with New Zealand's international obligations. Issues identified by MBIE and other stakeholders include:

    - **Freedom of association, and who should represent workers**: in the development of the FPA system we have explored the issue of whether it would be appropriate for unions to represent all workers in a relevant occupation/industry. ILO jurisprudence is clear that unions should be the primary bargaining agent in collective bargaining, and that so long as a union is the most representative party, it is acceptable if its members

form only a minority of affected workers. Overall, because unions are the bodies with the most bargaining capability and special role in collective bargaining under ILO jurisprudence, and there are mitigations built into the design of the system,[1] we recommended that unions alone should represent affected workers during bargaining for an FPA. The Legislation Design and Advisory Committee (LDAC) noted the "significant" issue of freedom of association, in relation to both employees and employers, and recommended we undertake a rights analysis to consider international law and Bill of Rights Act consistency.

- **Voluntary nature of bargaining**: There is a risk that the model could be viewed as impacting on the principle of the voluntary nature of collective bargaining. Once an FPA is initiated there is no ability to opt out of the process (other than limited-time bound exemptions from the final agreement, if both parties agree) and the resulting mandatory terms and conditions will apply to the whole sector – including those not involved in the bargaining – as bargained minimum standards. Some business groups such as BusinessNZ have also raised this concern with us.[2] We note the requirement in this option for evidence of problematic outcomes in the sector would contribute to a public good argument for a limitation on this right.
- **Right to strike**: the terms of reference for the FPAWG ruled out industrial action as part of FPA bargaining. Instead, any disputes will be resolved by dispute resolution and potentially a determination. This may not comply with New Zealand's international labour obligations. The ILO considers the right to strike a fundamental corollary of collective bargaining, and the supervisory bodies do not generally support a total ban (although there are some limited circumstances where limiting industrial action may be permissible).

Legislation Design and Advisory Committee has warned of the complexity of this system

32. We sought advice from LDAC and its views have influenced our advice. LDAC first provided advice on an FPA system in June 2019. In addition to the rights issues noted above, LDAC commented generally that:

> *"this Bill is complex, novel and lacks specific international precedent. The significance and effects of the proposals should not be underestimated. There is a real risk of unintended effects from some of the proposals. The current proposals need to be carefully worked through and any risks identified should be well articulated in any policy documents. LDAC strongly recommends that MBIE consider keeping the scope of the Bill as narrow as possible to achieve the policy objective. This will allow time for the implications of the Bill to be seen before any decision is made to extend the scope of the Bill."*

33. Connected to this issue of scope of the Bill is the role of checks and balances. LDAC suggested that the more significant the scope of the eventual legislation the more significant the checks and balances would need to be to avoid negative or unintended consequences.

34. LDAC also identified the risk of inappropriate delegation of law-making powers, by enabling sector participants to bargain for terms which would then apply as minimum standards to the whole sector. It advised that the government should take care designing an appropriate 'status' for FPAs (i.e. how they would come into legal effect and bind parties). It also noted

[1] These mitigations include the fact that workers will still have a choice whether or not they want to join the union, workers could form an alternate union if they are not satisfied with the existing one, unions will be required to represent non-members in good faith, and there will be a ratification process.

[2] BusinessNZ suggests that the FPA proposals breach the ILO's Right to Organise and Collective Bargaining Convention 1949 (C98), to which New Zealand is bound. This convention requires bargaining systems to be consistent with the principle of free and voluntary negotiation. BusinessNZ argued that the breach would be found in the compulsory arbitration process and the automatic coverage of "workers and employers who, being remote from the bargaining process, can have no direct influence on its outcomes yet are forced by default into the coverage of an agreement they may not agree with."

that the FPA system would benefit from an early human rights analysis. Finally, it cautioned that many of the institutional functions proposed in the system would be complex regulatory assessments, and not necessarily well-suited to quasi-judicial bodies such as the Employment Relations Authority.

35. In December 2019, LDAC expanded on the latter point. It noted that decisions about whether the public interest test and market impact test were met would not be a natural fit for a regulator as they would involve decisions about 'fairness' and the 'public interest'.[3] LDAC suggested one option could be for the decisions to be made closer to Government (e.g. by a Minister), which would allow the decision maker to take a broader view. LDAC agreed that it would be appropriate for the public interest test and confirmation of agreements to be given effect by the Minister.

Our regulatory impact analysis suggested alternatives to an FPA system would be a better option

36. To accompany the release of the discussion document on the FPA system, MBIE prepared a regulatory impact analysis (RIA) in August 2019.

37. We assessed the Government's preferred model (at that time) would be effective at improving outcomes for workers where the relevant group were able to meet the initiation thresholds. However, we were concerned that it would not preserve the adaptability of employers in the labour market, would not be cost effective, and would not be consistent with the existing employment relations/employment standards system.

38. MBIE's recommended option was to do both of the following, instead of the government's preferred model:

    - Strengthen existing mechanisms: remove barriers to greater take up of multi-employer collective agreements (MECAs), increase bargaining capability to encourage collective bargaining and social dialogue, and proactively assess whether occupations which are experiencing poor outcomes should be added to Schedule 1A of the Employment Relations Act (and thus covered by the additional employer protections in Part 6A); and
    - Set targeted sector-based minimum employment standards, in consultation with social partners, where there are problematic outcomes for employees: a government body could proactively assess occupations that may be experiencing poor terms and conditions. Where there was evidence of a problem, the body could commence a process with employers and unions to establish new sector-based minimum standards. The government body would make the final decision.

39. We worked towards updating the RIA in anticipation of the Cabinet paper requested by the Minister in June 2020. It was not finalised as that paper did not reach Cabinet, but our preferred option remained the same.

We are concerned at the lack of incentives for employers to participate

40. We have expressed concerns that the proposed FPA system will provide few to no incentives for employers to participate constructively. This view was reinforced by public consultation. An unwillingness to participate on the employer side could result in delayed and dispute-heavy bargaining processes, which could restrict the effectiveness of the system.

[3] LDAC noted that "technocratic" systems can work, such as the Commerce Commission's expert regulatory role in both regulated markets and in competition clearances/authorisations. But it suggested that roles like this are more successful where there is a narrowly focussed test (e.g. 'substantial lessening of competition'). See paragraphs 8–10 of Annex Four for more detail.

41. We have noted that the main motivation for employer participation in FPA bargaining (the threat of a determined outcome) is negative. Furthermore, if employers are convinced that any determination will not reflect their preferences, then even this incentive loses strength.

42. The lack of incentive for employers to participate creates flow-on risks that employers will be reluctant to participate in the system as bargaining representatives. This means that the government may have to use the threat of regulation or a determination to incentivise employers to come to the bargaining table. We will provide you with advice on the processes around representation of employers in a forthcoming briefing.

43. The FPA system lacks the support of a key social partner, BusinessNZ, which instead proposed an alternative voluntary FPA system. This was endorsed by a majority of employer submitters, who also sent a strong message that they believe that FPAs will reduce productivity in covered workforces. This lack of social consensus increases the risk that the system will not be durable, which could further reduce the incentive for parties to participate in bargaining.

44. Where employers do participate in FPA bargaining, these incentives could lead to unproductive or protracted 'surface level' bargaining. Combined with the ban on industrial action, this could lead to parties moving to the dispute resolution and determination steps in the process relatively quickly. Moreover, some stakeholders have identified the risk that the determination would put significant decision making power in one Authority member's hands.

45. In contrast, other labour market interventions in development do build incentives for employers:

    - The Equal Pay Amendment Act 2020 shifts the consideration of pay equity issues from a court based approach under the Equal Pay Act 1972 to a bargaining approach more consistent with the current employment relations framework, which is preferred by employers.
    - The Screen Industry Workers Bill will retain the current employment status of all workers in that industry, which provides certainty to production companies while also providing for collective bargaining for workers.
    - Immigration Sector Agreements would create compulsory, but cooperative, sector-government partnerships that will provide greater certainty for employers in sectors with high reliance on temporary foreign workers, in exchange for employers making progress against an agreed, sector-wide Workforce Plan to place more New Zealanders into jobs and reduce their reliance on temporary foreign workers over time.

You have choices about how to progress with FPAs

46. Progressing the FPA system was included in the Labour Party election manifesto, and you have indicated you want to progress the FPA system quickly.

47. In light of this, we have set out an indicative timeframe for the remaining stages of the FPA project below. Cabinet milestones are bolded.

48. The timeframe assumes a smooth pathway for preparing advice, Cabinet agreement, and drafting. It does not include any time for further consultation with key stakeholders, and excludes contractors from coverage of the system. We believe this could enable a Cabinet decision seeking approval to draft in February 2021. This timeline would involve fast advice, without full assessment of policy options, and would require diverting resources from other projects such as the Screen Industry Workers Bill. There is a risk, given the complexity and interconnectedness of the system, that it may take us longer to finalise advice or that you may need to seek further Cabinet decisions.

Timeframe for Fair Pay Agreements legislative steps without consultation or contractors	
Milestone	**Timeframe**
Provide advice on remaining key design topics and remaining process matters	Nov 2020 – Jan 2021
Provide Cabinet paper and RIA, with agency consultation completed	Mid Feb 2021
Cabinet approval to draft	**Late Feb 2021**
Drafting instructions prepared	Late Mar 2021
Legislation drafted (if all decisions agreed before drafting)	Late Aug 2021
BORA vet completed and LEG paper provided	Mid Sep 2021
Cabinet approval to introduce the Bill	**Late Sep 2021**
Introduction, first reading, referral to Select Committee	Late Sep 2021
Normal Select Committee report back (6 months) (or) *Shortened Select Committee report back (4 months)*	Mar 2022 (or) *Jan 2022*
Remaining stages in the House completed (or) *Remaining stages in the House if shortened Select Committee*	May 2022 (or) *Mar 2022*

49. Note this timetable only focuses on the legislative steps. We will also need to prepare a Budget bid for the government support aspects of the FPA system, concurrently for Budget 2021, likely involving concurrent work needed in approximately December 2020 – March 2021.

50. Alternatively, you could choose to spend more time testing the final design of the system with stakeholders, or to include contractors within the system, in which case more time would be required for the pre-introduction stages. These options are discussed below.

Choices relating to coverage of the FPA project

51. The narrower the scope of the regulatory system, the more straightforward the design and drafting will be. This is because there should be fewer scenarios to prepare for.

The existing decision to specify eligible sectors in regulations will help with speed

52. The former Minister's decision (in line with our recommendation) to name eligible sectors in regulations should result in an FPA system which is focussed on the workforces where there is a need for intervention, and where the number of initiations can be limited. This reduces risks in relation to overwhelming the support system, and it means that less time can be spent designing safeguards which address different scenarios or prevent negative unintended consequences (for example, initiations in sectors where workers already have good bargaining power, or initiations which may create competition risks by crowding out small employers).

You can choose whether to include contractors at this stage

53. Previously, the Minister directed us to include contractors in the coverage of an FPA system, and we had provided initial high level advice on how this could be done, but substantial work would be required to assess how all aspects of an FPA system will apply to contractors. We have been still working to assess to what extent including contractors would reduce the risk of regulatory arbitrage and/or benefit vulnerable contractors.

54. Including contractors in the FPA system adds considerable complexity: as contractors are currently governed by competition law it will involve interactions with that regulatory regime, as well as work needed to determine how to define and include contractors. We estimate that providing advice on how to include contractors in all aspects of the FPA system will take 3.5 months (until March 2021, or February 2021 if you choose not to do not the further consultation outlined below).

55. Given you want to progress this project quickly we have excluded contractors from coverage under the default timetable above. Excluding contractors from coverage has its own risks, as stakeholders have strong views about the inclusion of contractors, with unions in favour.

56. You may want to consider the issue of contractors separately as part of your parallel project on non-standard workers (e.g. by enabling contractors to bargain collectively or through some other intervention), or you could add contractors through a later amendment to the FPA legislation.

57. Of the sectors which the NZCTU has identified are priority sectors for FPAs (cleaning, security and supermarkets), only the cleaning industry has widespread use of independent contractors (owner-operator franchise companies). We can attempt to predict how likely it is that an FPA could incentivise market participants to shift to a contractor model, but our research to date indicates predictions will be estimates.

Choices relating to further consultation

58. In July 2020 the previous Minister for Workplace Relations and Safety received correspondence from Syd Keepa, the NZCTU Vice President Māori, regarding consultation with Māori on the FPA system. Syd reiterated points made to officials during the public consultation:

    - the consultation timeframe was too brief;
    - the consultation was not culturally appropriate for Māori; and
    - an offer from the NZCTU Rūnunga to be involved in an advisory capacity on the progress of the FPA legislation.

59. In his response, the Minister noted that he had made his expectations clear to officials that they should engage with Te Arawhiti in preparation for future consultations. The Minister also said that "[t]he next Government will need to consider the best approach for the continued development of the system, which include considering what further consultation will be the most beneficial and appropriate."

60. You have a choice about whether to do targeted further consultation with key stakeholders on your proposed design for the FPA system. Consultation with Māori stakeholders will enable consideration of how an FPA system can best support improved Māori work outcomes, and align with the Crown's Treaty obligations. Consultation with BusinessNZ and NZCTU on some of the practical implementation elements will contribute to a more practical and workable FPA system. Both of these would improve the Bill's outcomes as well as flushing out any major issues ahead of drafting, which will in turn smooth the Bill's passage through the House. However, it would also add one to two months to the time needed to get Cabinet decisions.

Choices relating to parliamentary process

61. You could specify a shortened Select Committee process, for example four months rather than the usual six month period, but this is not recommended. Given the likely complexity of the FPA legislation, it would be difficult for the Select Committee (and the Government) to adequately consider stakeholder feedback and respond in a period shorter than six months.

Some timeframes cannot shift

62. PCO has consistently stated that at least five full months are needed to draft a FPA Bill. This timeframe reflects the complexity of a FPA system.

63. We do not believe there is a viable option to seek high-level Cabinet decisions now to begin drafting. If Cabinet made high-level decisions only, it would substantially slow down the drafting process as the preparation of drafting instructions would take longer and further Cabinet decisions may eventually be required in relation to unexpected issues during drafting.

Next steps

We would like to discuss this briefing with you

64. We would like to hear your priorities for the FPA project, including your views on the choices outlined above. The most important choice is whether to include or exclude contractors within the system.

We are preparing further advice on a number of topics

65. As described above, policy decisions are still needed on some design features of the proposed FPA system, including some key design features, in order to obtain sufficient decisions for PCO to begin drafting a Bill. The topics are summarised below.

    - Finalising the objectives of the FPA system.
    - How employers should be represented in bargaining and what if there is no suitable organisation willing to represent employers.
    - Whether the law should provide for paid meetings for workers (eg to instruct bargaining representatives or vote on whether to ratify an agreement).
    - To what extent the government should contribute to bargaining costs (this also involves considering consistency with the Screen Industry Workers Bill system).
    - How contractors should be included in the FPA system (if you decide to include them).
    - Which party is responsible for the ratification process.
    - What remedies and penalties should be provided in the law.

66. We can begin providing you advice on these topics following our discussion with you on this briefing.

Annexes

Annex One: Summary of previous advice and decisions on FPA design features

Annex Two: Summary of submissions on the FPA discussion document

Annex Three: Copy of LDAC's advice (July 2019)

Annex Four: Copy of LDAC's advice (December 2019)

Annex Five: Diagram summarising the FPAWG's model vs Ministerial decisions

Annex 1: Summary of previous advice and decisions on FPA design features

1. This section summarises our latest advice on the key aspects of a FPA system. We have noted where the Minister chose an option which differed from our advice. We can provide further detail for any of the advice described below if you wish. All of the decisions below were made by the former Minister but not confirmed by Cabinet.

Initiation of FPAs

Initiation tests

2. The FPAWG recommended that the initiating parties would need to meet one of the following tests in order to initiate:

   - Representation test: support of 10% or 1,000 workers in the sector (whichever is lower)
   - Public interest test: if the representation test is not met, an FPA could still be initiated where there are harmful labour market conditions in the nominated sector or occupation.

3. We recommended requiring both a public interest test and a representativeness test. A combined test would provide sufficient representation to ensure the system would be effective and the FPA would also have a mandate. Our advice on this was also provided in recognition that there is no way to exit from a FPA bargaining without concluding an agreement once it is started. Therefore, it is designed to be a reasonably high test to justify this imposition on parties' choices, while not so high that it meant few or no FPAs would be initiated.

4. We recommended requiring a public interest test in every case to tie initiation of the system to occupations or industries which have problematic labour market conditions. This was intended to ensure that the FPA system would be targeted to benefit workers whose wages or terms are suppressed by inherent imbalances of power in some workforces.

5. In terms of what the public interest test would involve, we recommended there should be two overarching criteria: a problematic outcome for workers in the sector, and the potential that more sectoral coordination could be beneficial. We also suggested that a more comprehensive set of indicators should be developed.

6. We also recommended a higher representation test of 20% of workers (and no absolute threshold of workers), as we do not consider a 10% or 1,000 worker threshold to be a sufficient mandate. A higher threshold would help to ensure that initiation of the FPA would have support beyond just union members.

7. The Minister agreed with the above recommendations, but as a consequence of political consultation the numerical thresholds changed: the discussion paper ultimately presented a 10% or 1,000 worker threshold for the representativeness test and the Minister decided to take this forward into the draft Cabinet paper.

Order of the initiation tests

8. The FPAWG saw both initiation tests as reactive – unions (on behalf of workers) from any sector could signal an intention to initiate bargaining, and only then would the relevant test be assessed.

9. We ultimately recommended that the public interest test should be assessed up front, so legislation could provide that the Minister would decide which occupations or industries satisfied the public interest test and specify those in regulations. This would provide a higher degree of certainty for employers and allow the system to be targeted to where it would be most beneficial, and allow only a manageable number of workforces to be able to bargain at

a sector level. There is still work to be done to refine the list of criteria which the Government would use to proactively assess the public interest test.

Which parties can initiate

10. We recommended that in relation to the first agreement in an occupation or industry, only unions should be able to initiate bargaining. Once an FPA has been established, employers would then be allowed to initiate subsequent bargaining.

Coverage

11. We originally advised that coverage should be limited to occupation(s) within industry(ies) defined using technical ANZSCO and ANZSIC codes. However, most submitters to the discussion document opposed the use of these codes.

12. After consultation, we recommended that legislation should allow the Minister for Workplace Relations and Safety to set workforces eligible to use the FPA system in regulations. Initiating parties and bargaining parties would then have to specify a combination of occupation(s) and industry(ies) within the boundaries of the workforce specified in regulations. This gives the Minister the flexibility to identify where there is a problem and where the FPA system could help (which could be a single or multiple occupations, industries, or a combination of the two), but leave it up to the parties to define the FPA which makes most sense practically. An example of how this could work is set out below:

    - The Minister specifies only an industry as an eligible workforce in regulations (supermarket and grocery stores).
    - The initiator and bargaining parties agree to refine coverage within that constraint, by choosing a subset of the industry (supermarkets only) and/or specifying an occupation (checkout operators).

13. We suggested the bargaining parties should be able to renegotiate coverage in the initial stages of bargaining, but if there are significant changes they must be rechecked against the representation test. The Minister agreed, but did not consider a representation test should be required where the coverage narrowed.

14. We recommended that bargaining parties could negotiate two types of exemptions from FPAs: for employers facing severe financial hardship, or where there is a valid collective agreement in place with similar coverage and under which employees were better off overall. The Minister did not agree to include an exemption for where there was an existing collective agreement.

15. Finally, we also recommended that the bargaining parties should be able to negotiate regional variations in FPAs, but that region-specific FPAs should not be allowed.

Inclusion of contractors

16. The FPAWG noted that the introduction of the FPA system could create a perverse risk to define work outside of employment regulation (regulatory arbitrage), so it suggested FPAs should cover all workers (not just employees). However, it did acknowledge that including contractors within coverage would be a significant change to the existing regulatory model. Finally, it also noted that the Government may wish to address the issue through other work in the employment relations/employment standards system.

17. In response to the FPAWG's report we advised that the question of extending regulation from employment to work should be taken forward in a holistic way across the employment relations and standards system (and in our advice responding to the Future of Work across portfolios). We noted that including contractors would have significant implications for designing and implementing the FPA system, and recommended that the issue would be best addressed in the separate dependent contractors project.

18. The Minister instructed us to develop options for including contractors in FPAs, to manage the risk of regulatory arbitrage (as identified by the FPAWG).

19. We developed some high level models for how contractors could be included, with options in terms of when contractors would be included in the bargaining process, which business models would be included, who should decide which contractors are within coverage, and which terms and conditions would be available to contractors. Because we did not have time to fully develop these models for the intended May 2020 Cabinet paper, we recommended the Minister state his intention in the paper to "apply at least some FPA terms to at least some contractors, taking into account complementary work programmes underway".

20. Since then, we have undertaken consultation on options to better protect contractors and have developed our thinking about issues in relation to contractors.

Scope (topics which can be bargained on)

21. The FPAWG recommended that the FPA legislation should specify minimum topics to be bargained in an agreement.

22. We recommended that the mandatory scope of FPAs should be kept narrowly focussed on pay. We also recommended that the law should specify mandatory and permissible topics.

23. Following consultation we recommended the following topics to be specified as minimum topics:

Mandatory	Permissible
• Base wage rates • How the wage rate will be adjusted • Whether the base rate is inclusive of employer contributions to superannuation • Coverage • Duration • Governance arrangements to manage the operation of the FPA, including ongoing dialogue	• Overtime/penal rates • Redundancy • Leave requirements • Ordinary hours/days of work • Other provisions on wage rates (falling outside of mandatory requirements) • Objectives of the FPA • Skills and training • Regional differences • Allowances • Equal employment opportunities • Health and safety • Flexible working

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

Mandatory to agree	Mandatory to discuss
• Base wage rates • How wage rates will be adjusted • Whether employer superannuation contributions are included in base wage rates • Coverage • Duration of FPA • Governance arrangements	• Overtime/penal rates • Redundancy • Leave requirements • Ordinary hours/days of work • Objectives of the FPA • Skills and training • Regional differences • Health and Safety • Flexible working

Bargaining process

Notification

25. We recommended an approach by which various parties would share responsibility for notifying workers and businesses that an FPA could affect them:

    - Employers should notify all affected employees
    - Unions should notify all relevant members
    - Peak bodies should raise awareness among employers and unions
    - The government should publicise the fact bargaining has been initiated.

Communication and union rights

26. We recommended that the bargaining parties should have the primary responsibility to communicate with affected parties, supported by peak bodies and the government.

27. In order to enable communication between unions and the workers they represent (who will not necessarily be members) we recommended that employers should have some obligations. These include obligations for employers to share the contact details of workers with unions, and to enable workplace access.

28. We noted we would have to do more work on the situations in which unions must obtain employer consent before entering a workplace, and whether paid meetings should be an essential component of an FPA communication process.

29. We recommended the FPA system should have similar provisions to the Employment Relations Act in relation to union delegates having paid time off to participate in bargaining. These provisions would help to ensure that those with practical experience of the work to be covered by the FPA would be able to be bargaining representatives.

'Navigator' to support bargaining parties

30. We recommended that the government should provide a free 'navigator' to facilitate the bargaining process. As a default, the navigator would be provided by MBIE's Employment Mediation Services. Parties could provide their own navigator if both agreed, and at their own cost.

Bargaining representatives

31. The FPAWG recommended that bargaining parties on both sides should be represented by incorporated entities. It recommended that workers be represented by unions and employers may be represented by employer organisations. Representative bodies should be required to represent non-members in good faith.

32. Consistent with the FPAWG recommendation, we recommended that workers should be represented by unions. Representation of employers is a more complicated issue. Based on the consultation feedback, we recommended that employers should have flexibility to decide how they will be represented, which could include a combination of organisations and/or individual employers. However, we have subsequently identified some issues with this approach and are preparing further advice on this matter.

33. As per the FPAWG's advice, we recommended that unions should have an obligation to represent workers within coverage in good faith and employer representatives should have an obligation to represent employers within coverage in good faith.

34. Bargaining parties would be able to include other interest at the bargaining table by mutual agreement.

Costs of bargaining and government support

35. We recommended that bargaining representatives' costs should lie as they fall, with parties to agree how shared costs of bargaining are paid. Such a system would be simple, certain, consistent with the existing employment relations system and cost efficient (costs are paid by those who incur them, which is an incentive to keep costs low).

36. In response the Minister questioned whether there should be some form of government support provided, and requested advice on options for a potential capacity and bargaining support fund for social partners.

37. We suggested the Minister select one or both of the following options:

- Providing funding to the peak bodies (Business NZ and NZCTU) to assist them to develop their capability and capacity to support FPAs. We suggested funding of $50,000 per peak body each year, for a total of $300,000 over three years.
- Providing funding to confirmed bargaining parties, which would ensure that funding is clearly targeted to FPA bargaining. We suggested $50,000 per bargaining side, per FPA, for a total of $900,000 (spread across three years, which assumes three FPAs are initiated per year)

38. In response the Minister decided to pursue both approaches, and included these costs in the Budget 2020 bid.

Dispute resolution

39. We supported the dispute resolution process proposed by the FPAWG, with some modifications reflecting stakeholder feedback and the Minister's decisions in other related aspects of the system.

40. As per the FPAWG recommendation the dispute resolution process would maintain the existing processes under the Employment Relations Act, with additions or simplification where appropriate. In particular, it would include:

    a. Mediation in the first instance (for disputes that arise during bargaining).

    b. If unresolved, a party applies to have the matter determined. The determining body should, where necessary, have support of expert advice to assist in making a determination.

    c. Appeal rights only on procedural matters.

41. The Minister supported this approach but wanted to be clear that the limit was on appealing the substantive determination (i.e. no terms and conditions the Authority set could be appealed).

42. The approach for determinations that set the terms and conditions of an FPA would, however, reflect the Minister's decisions regarding the scope of FPAs. In particular, the determining body *must* make compulsory determinations on 'mandatory to agree' topics and *may* make a binding determination to fix the terms and conditions of 'mandatory to discuss' topics.

43. Submitters on the discussion document were clear that an FPA should be considered as a whole package and a determination on particular aspects should not be made in isolation, due to the interdependence and potential trade-offs between topics. Therefore, we recommended an amended dispute resolution process in situations where parties have agreed terms and conditions for some topics, but cannot reach agreement on others. In this scenario:

    a. The Authority would set the terms and conditions of the disputed topics

    b. The entire FPA (including the terms or conditions set by the Authority) would go to parties for ratification

    c. If the FPA failed to be ratified, the entire FPA would return to bargaining

    d. If the bargaining parties are unable to come to an agreement on all topics during the second round of bargaining, the next request for the Authority to set terms and conditions would result in a determination on the terms and conditions for the entire FPA, with no opportunity for ratification.

44. The intention of this approach is to encourage parties to agree as many topics as they can through bargaining and enable (where possible) the sector to have a voice though the ratification process, while preventing FPAs getting caught up in endless bargaining.

Conclusion of bargaining

Ratification

45. The ER Act requires the union to notify the employer of the ratification process to be used. We did not think this lack of prescription was appropriate if ratification procedures also need to involve non-union members.

46. We noted there are high-level decisions to be made on whether unions should be responsible for running ratification (as with traditional collective bargaining) or whether more central coordination (e.g. a government-supported online platform) could be beneficial. We also were not able to provide a view on whether paid meetings for ratifications should be enabled.

47. We recommended that an FPA (unless determined by the ER Authority in full) should have to pass a ratification vote of 50%+1 of each side. The 50%+1 threshold would only apply to those who vote in the ratification process. We recommended that employers should be counted on the basis of 'one employer, one vote'. The Minister chose another option for counting employers, which would be a staggered count by number of workers in an employer (i.e. employers would get one vote per X employees, with the value of X not yet determined).

48. In the event that an FPA was determined by the ER Authority in full, there will be no subsequent ratification process.

49. We recommended that in the event that ratification failed, the FPA would be referred back to the bargaining parties. If it failed to be ratified again it would trigger the determination process.

50. Ratified or determined agreements would then be vetted against the FPA objectives and enacted through an Order in Council, in order to have effect beyond direct signatories to the agreement.

51. The Labour Inspectorate would be empowered and resourced to enforce the terms of FPAs.

Market impact test / test against objectives of the FPA system

52. The FPAWG suggested the Government should consider how to address possible competition issues which could arise out of FPA negotiations and agreements (e.g. shutting out new entrants or small employers; higher prices for products).

53. We initially recommended that an independent party should be tasked with checking that agreements reached among the parties or by determination are not likely to have an unduly negative impact on the sector itself, the labour market, or the wider economy. This test would occur at the end of the process once the terms of the agreement were clear and settled. We envisaged the test would be a high threshold before an agreement or a particular term could be rejected by the independent party.

54. Stakeholders and the Minister did not agree with us that market impacts should be considered at the enactment stage. We maintained in our subsequent advice that some safeguard against potential negative outcomes would be required. We therefore recommended that agreed FPAs should be vetted against the overall objectives of the FPA system, with a high threshold for refusal. This step is necessary to provide assurance that the agreements are suitable to be enacted.

55. The Minister agreed once it was clarified that this would be a light touch assessment against the objectives of the FPA, with an expectation that the FPA would be approved for enactment unless there was a significant risk that the terms of the FPA were not consistent with the objectives.

Annex 2: Summary of submissions on the FPA discussion document

Overview of initiation submissions

1. Submitters were split on how the initiation tests should be designed. One group, mostly comprised of unions and workers, wanted initiation to be triggered easily (if either a public interest test or a representation test was satisfied). The other group, mostly comprised of employers and their representatives, wanted initiation to be restrictive, such as by requiring both tests be met.

2. Submitters were divided on the idea of limiting the FPA system to **pre-selected occupations and sectors**, with those in favour largely arguing for certainty and efficiency, and those against largely arguing for accessibility and flexibility.

3. Responses on whether the 10% **representation threshold** was appropriate were quite clearly polarised between worker perspectives (who supported 10%) and employer perspectives (who wanted it raised). There was a similar divergence in relation to an absolute threshold for initiation (e.g. 1,000 workers).

4. Submitters generally did not support the suggested public interest test **criteria** which were grouped under two broad themes of:

    - potentially problematic outcomes for workers in the sector. Indicators included that wages are not matching the value of worker productivity, or workers were experiencing poor returns on training.
    - potential that more coordination in the occupation or sector could be useful. Indicators included that there was evidence of low coordination, or barriers to successful coordination, or there was evidence of a limited ability for employers to improve terms.

5. Opposition was either because they deviated from the FPAWG's recommendations or they failed to accurately encompass the submitter's understanding of the problem definition and objectives of FPAs.

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** after bargaining had started, 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 FPAWG's 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 noted that people who were performing essentially the same kind of work should be treated consistently, and that employee-only FPAs could 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 representation submissions

12. In terms of how **employers** should be represented during bargaining, employers generally believed that they should either be directly at the bargaining table or have an employer organisation represent them. There was significant concern that the capability to coordinate among employers and engage in bargaining was lacking, especially compared to unions. Unions generally endorsed the FPAWG's suggestion that employer organisations should represent employers.

13. In terms of how **employees** should be represented, unions and most workers submitted that unions should represent all workers, in line with the FPAWG's recommendations. In contrast, employers argued that unions did not have a mandate to represent all workers, and such a model would be a risk to freedom of association.

Overview of bargaining process submissions

14. 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.

15. 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.

16. 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. A large number of worker-perspective submitters supported the list of mandatory topics in the discussion paper, but considered it should 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.

17. 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).

18. 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.

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

20. 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

21. 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.

22. 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.

23. 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.

24. 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.

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.

Overview of submissions on concluding an FPA

26. 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*.

27. 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.

28. 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.

29. 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).

30. 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.

31. 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.

Overview of market impact test submissions

32. A large number of submissions opposed a market impact test (MIT). Concerns related to the feasibility of the test, the complexity of the test, the time and resources required, and the interference of government/a third party in collective bargaining. Some submitters also questioned whether there was any body in government with the capability to undertake such a test.

33. The submitters who supported the MIT were overwhelmingly employers or their representatives. Few provided reasons for their support of an MIT.

34. There were a number of different interpretations of what the purpose or nature of the MIT would be, with some submitters criticising the discussion document for a lack of detail.

35. Submitters recommended other ways to consider market impact, including changing the timing of the test to the same time as the public interest test.

Overview of submissions on the overall merits of the FPA proposal

36. Many submitters commented on the overall merits (or risks) of an FPA system, even though the discussion paper did not seek submitters' views on this.

Many submitters described problems in the labour market, though the definition and evidence of 'problematic outcomes' were also questioned

37. Many submitters (particularly individual workers) described how the terms and conditions provided to many workers fail to live up to reasonable standards of fairness. Workers described unsatisfactory wages, irregular or inadequate hours of work, low staffing levels, insufficient training or equipment provision, unsafe workplaces, and difficult relationships with management. More broadly, submitters described how poor working conditions negatively impact productivity, economic growth, and the wellbeing of individuals, families, and society more broadly. The general consensus among these submitters was that these poor outcomes would not exist if workers had adequate bargaining power or regulatory support to leverage fair treatment from their employers.

38. Some submitters (notably the NZ Initiative) questioned the intervention logic presented in favour of FPAs. These submitters argued that the FPAWG report and the FPA discussion document rely on spurious or misrepresented data and research to justify the intervention (e.g. the Organisation for Economic Cooperation and Development's findings on the effects of collective bargaining on productivity). Many employers questioned the characterisation of some outcomes – such as low pay in certain entry-level 'foothold' jobs – as problematic.

Submitters debated whether problematic outcomes in the labour market can be linked to a regulatory gap or if existing mechanisms are sufficient

39. A large number of submitters (predominantly unions, workers and community groups) noted the need for the ERES system to minimise the imbalance of bargaining power between workers and employers. They argued that New Zealand's current enterprise-based collective bargaining mechanisms fail to achieve this. These submitters argued that this problem is particularly acute in sectors where union membership is low, structural inequalities exist based on ethnicity or gender, workers are isolated, jobs are short-term or insecure, or where employers are hostile to unions. A mechanism for setting a level playing field in such cases

was described as a gap in the ERES system, since the abolition of awards through the Employment Contracts Act 1991 which had encouraged a commodification of labour.

40. Many employer-perspective submitters argued that the labour market is performing well by most measures, that the ERES system currently provides sufficient mechanisms to address poor labour market outcomes where they do exist, and that a regulatory gap therefore does not exist. Such submitters frequently noted and emphasised New Zealand's high minimum wage.

Submitters were polarised on the potential risks and benefits of FPAs as an intervention (because of or despite aforementioned arguments)

41. Supporters of the FPA proposals argued that FPAs would set a level playing field that would address income inequality and poverty (and their social externalities). They claimed that sectoral coordination would give workers the bargaining power to address unfair, unsafe, demoralising, and ultimately unproductive wages and working conditions, and in doing so, promote broader productivity and economic growth. Supporters largely endorsed the findings of the FPAWG report, with some greater emphasis placed on potential for FPAs to address health and safety issues and structural inequality based on sex and ethnicity.

42. However, some other submitters (predominantly employers and employer associations) argued that the intervention logic presented by the FPAWG report and FPA discussion document fails to justify FPAs as the most appropriate intervention (for the problems that do exist). They argued FPAs would create a costly and complex system whose negative outcomes would outweigh any potential benefits.

43. Those submitters highlighted a range of risks presented by the FPA proposals, principally:

- impacts on productivity and international competitiveness
- the stifling of innovation and flexibility when they are needed more than ever
- the complexity and cost of the system (for both employers and government)
- the compromised quality of industrial relations
- anti-competitive behaviour or unfair terms for small businesses
- the dis-employment effects of higher labour costs
- the inflationary effects of higher labour costs
- the potential inconsistencies with the right to freedom of association (or non-association), and
- the potential inconsistencies with International Labour Organisation protocols.

Some submitters argued for cautious policy design

44. Foodstuffs NZ noted many of the risks outlined in paragraph 42 but did not consider them to invalidate the entire FPA system. Instead, it advocated for careful policy design choices aimed at mitigating known risks, and a generally cautious approach in the implementation of the system, with narrow application and scope.

45. The NZ Airline Pilots Association endorsed the aims and logic of the FPA proposals, but submitted that "more planning, consultation and careful drafting need to be put into the FPA proposal before it can effectively achieve its aims." Its particular points of concern were the need to resource unions and employer associations, and for greater focus on skills and training.

46. The NZ Security Association was supportive of the aim of FPAs to raise standards (particularly the living wage) and address undercutting (particularly through subcontractors and owner-operators), but was sceptical whether the FPA proposals would achieve this aim. It argued that strong enforcement would be critical but difficult to achieve in practice, and expressed a preference for an industry-union-purchaser agreement.

Annex 3: Copy of LDAC's advice (June 2019)

Annex 4: Copy of LDAC's advice (December 2019)

Annex 5: Table summarising the difference between the FPAWG's model and Ministerial decisions

	Design feature	FPAWG recommendation	Ministerial decisions ☑ = adopt FPAWG rec wholesale
Initiation	Initiation threshold	Representation OR public interest test	Representation test AND public interest test
	When to do the public interest test	On-demand	Minister of WRS will proactively approve eligible workforces in regulations, guided by objectives of the FPA system
	What representation threshold	10% or 1,000 workers, whichever lower	☑
	What the public interest test will assess	Whether there are harmful labour market conditions in that workforce	Whether an FPA in the workforce would support the objectives of the system (with indicators in guidance)
	Who can initiate bargaining	Unions	Only unions for the first agreement in relation to a given workforce
Representation and communication	Who should represent employers	Employer organisations	Employers decide for each FPA how they will be represented. Government body may appoint representatives after a set period if no agreement can be reached
	Who should represent workers	Unions	☑
	How should union delegates participate in bargaining	-	Union delegates who form part of the bargaining team have paid time off for FPA bargaining
	How should representatives represent non-members	Must represent non-members in good faith	☑
	Who should notify affected parties that bargaining has been initiated	An independent body should inform all affected parties that bargaining will commence	Employers notify all affected workers, unions notify members, and peak bodies and government raise awareness
	Who should communicate with affected parties	Bargaining representatives have primary responsibility, coordination support from peak bodies	Bargaining representatives have primary responsibility, supported by peak bodies and government
	How should bargaining representatives communicate with parties	Representatives should consult non-members throughout bargaining. Workers should have paid meetings to instruct representatives	TBC whether communication methods will be specified in law, and if so, which methods (e.g. paid meetings) – officials have been instructed to discuss with social partners
	How should worker representatives gain access to workers	-	Employers must share contact details of affected workers with union, unless the worker objects. Unions can access workplaces for FPA purposes with employer consent
	Whether other interests should be represented in bargaining	-	Other interests represented if bargaining parties agree
Coverage	Whether (and if so, how) to limit parties' choice about coverage	Defined and negotiated by the parties	Initiating union and bargaining parties must specify occupation(s) and industry(ies) within the boundaries of the specified workforce set by Minister
	Whether parties can negotiate changes to coverage	Parties can negotiate changes to coverage, but new coverage must meet the initiation tests	Parties can negotiate changes to coverage, within boundaries in regulation. Any significant expansion must re-satisfy the representation test
	Whether contractors should be included	Include all workers in the defined workforce, subject to any exemptions (majority view)	Include at least some contractors in bargaining and in FPA coverage. TBC: which types of contractors, which terms
	Whether exemptions are allowed	Parties can agree time-limited exemptions within limits set in law	Parties can agree exemptions up to 12 months for employers in serious financial difficulty
	Whether regional differences are allowed	Parties can include regional differences by agreement	☑
Bargaining process	Who should pay for the costs of bargaining	Costs should not disproportionately fall on bargaining parties. Government should consider financial support, a levy, or bargaining fee	Costs lie where they fall, but a one-off grant for bargaining parties once bargaining has been initiated ($50,000 to each party).
	How should parties build their bargaining capability	Government should support parties to build their bargaining capability	Capability / bargaining support funds provided to NZCTU and BusinessNZ ($50,000 each for 3 years)
	Should there be support for parties during bargaining	A neutral facilitator should be available to support parties during the bargaining process	A 'navigator' supports parties during bargaining
	What topics can be negotiated during bargaining	The FPA law should specify minimum topics (named in report)	Two categories: 'mandatory to decide' topics and 'mandatory to discuss' topics
Dispute resolution	In the event of a dispute, should mediation be required	Yes – mediation required	☑
	Should there be a binding determination process	Yes – binding determination process	Yes – decision maker *must* make binding determination on 'mandatory to decide' topics, and *may* on 'mandatory to discuss'. If the decision maker sets terms for a subset of disputed topics, the entire FPA (including the terms set) would be ratified.
	What should trigger a determination	Parties should be able to apply for a determination	Determination if one side requests it and requirements have been met (e.g. mediation has been tried, all other avenues exhausted)
	Who should perform dispute resolution functions	• Mediation: Mediation Services • Determination: Employment Relations Authority or Employment Court • Appeals: Existing appellate courts	• Mediation: Mediation Services • Determination: Employment Relations Authority • Appeals: Existing appellate courts
	Should the determining body be able	Yes – determining body can seek expert advice	☑

	to seek expert advice		
	Should appeal rights be limited	Appeal rights on procedural matters only	Appeals not allowed on the substantive determination
Conclusion of an FPA	How the ratification vote should be conducted	Process should be set in law. Silent about who should run the vote. Workers should be allowed to attend paid ratification meetings	Process to be set in law. TBC who should run the vote (representatives or Govt). TBC whether workers allowed to attend paid ratification meetings.
	What votes are required for ratification to pass	A majority of employers and workers	50%+1 of employers who vote and 50%+1 of workers who vote
	How employers should be counted in ratification	-	Proportional: employers get one vote for every [TBC number] of workers.
	What if an FPA does not pass a ratification vote	-	Back to bargaining parties. After two failed votes: refer to binding determination
	How to give effect to an FPA	Parties must register the FPA	FPA put in force through regulations
	Should agreements be vetted before enactment	-	Light touch assessment of FPA to ensure terms are consistent with FPA system objectives, with high threshold for refusal
	How should FPAs be enforced	Labour Inspectorate	☑