



## COVERSHEET

<b>Minister</b>	Hon Michael Wood	<b>Portfolio</b>	Workplace Relations and Safety
<b>Title of Cabinet paper</b>	<b>Fair Pay Agreements – Approval to introduce</b>	<b>Date to be published</b>	29 April 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
28 March 2022	<i>Cabinet Paper: Fair Pay Agreements Bill: Approval for Introduction</i>	<i>Office of the Minister of Workplace Relations and Safety</i>
28 March 2022	<i>Cabinet Minute: Fair Pay Agreements Bill: Approval for Introduction</i> <i>CAB-22-MIN-0095</i>	<i>Cabinet Office</i>

### Information redacted

**YES**

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of confidential advice to Government.

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Business Committee

## Fair Pay Agreements Bill: Approval for Introduction

### Proposal

- 1 I propose that the Fair Pay Agreements Bill be approved for introduction to the House

### Policy

- 2 The Fair Pay Agreements Bill gives effect to an April 2021 Cabinet decision to establish a legal framework to enable employer associations and unions to bargain collectively to set occupation-specific and/or industry specific minimum employment terms and conditions [CAB-21-MIN-0126].

### Executive summary

- 3 On 19 April 2021, Cabinet agreed to the key features of the FPA system and to begin drafting legislation to give effect to these decisions [CAB-21-MIN-0126].
- 4 I was authorised to make decisions consistent with the policy framework in that paper on any issues that arise during the drafting process. I have reported these at **Annex 1**.
- 5 In this paper I am seeking to amend several of Cabinet's previous decisions [CAB-21-MIN-0126]. This is because of decisions taken during the drafting process to ensure the Fair Pay Agreements Bill is workable. These decisions are detailed at **Annex 2**.
- 6 I intend to prepare a Supplementary Order Paper to introduce a backstop if there is no willing and suitable representative on one side of bargaining for an FPA. This is covered in a separate paper provided to Cabinet Economic Development Committee on 16 March 2022 titled *Fair Pay Agreements: Backstop where one side is not represented*.
- 7 I propose expanding the powers currently available to the Labour Inspectorate so they can decide whether an employee is covered by an FPA if this is disputed. The Attorney-General has agreed that Parliamentary Counsel Office (PCO) may draft in advance of Cabinet decisions in order to stay on track for timely introduction of this Bill. I therefore now seek Cabinet's agreement to:
  - 7.1 extend the concept of 'employer' to include a 'controlling third party' when the Labour Inspectorate reasonably believes the party has

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information relevant to determining coverage of an FPA, which would allow the Labour Inspectorate to question a party or require them to provide documents;

- 7.2 enable the Labour Inspectorate to interview, with their consent, employees of a business which holds a contract with the employer that is subject to the coverage determination, if the Labour Inspectorate reasonably believes the information would be important to determining coverage;
- 7.3 enable the Labour Inspectorate to conduct any interviews with employees within its powers at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview;
- 7.4 clarify that when the Labour Inspectorate requires documents be provided, this includes information stored electronically; and
- 7.5 allow appeals from Labour Inspector decisions to the Employment Relations Authority within 28 days.

### Status of the Bill

- 8 This Bill is a work in progress and subject to further changes. A replacement version will be provided for Cabinet to approve for introduction at its meeting on 28 March 2022. The following changes are proposed to be made before the updated Bill is provided for approval:
  - 8.1 insertion of the clause by clause analysis
  - 8.2 editorial changes to incorporate feedback from PCO proof reading and quality control processes
  - 8.3 restructuring (e.g. merging of certain Parts) to improve the readability of the Bill
  - 8.4 substantive changes to settle drafting in particular areas (listed on the front of the Bill and in Annex 3), in line with existing policy decisions
  - 8.5 consequential changes (if any) to the *Departmental Disclosure Statement: Fair Pay Agreements Bill* to ensure consistency with changes made to the Bill.

### Background

- 9 In May 2018, Cabinet agreed to establish the FPA Working Group to make recommendations on the scope and design of an FPA system [DEV-18-MIN-0100]. Based on those recommendations, the Government developed a range of options relating to the FPA system. Public views on these options were sought via public consultation in late 2019.

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- 10 The proposals in this Bill support the Government's priority to provide an inclusive economy where economic growth is shared by all. Implementing the FPA system was a manifesto commitment and included in the Speech from the Throne as a policy that will contribute to accelerating the recovery from the COVID-19 pandemic.

*Why a bill is required*

- 11 While collective bargaining already exists under the *Employment Relations Act 2000*, New Zealand law currently only provides a framework for this to take place at the enterprise level. It is possible for bargaining to cover union members working for multiple employers in one collective agreement, but this is significantly less common than single-employer collective bargaining.
- 12 A Bill is needed to both:
- 12.1 establish a system with legislative backing so that employers and workers can collectively bargain minimum employment terms that will be binding on their respective industries or occupations by way of union and employer representation; and
  - 12.2 provide an enforceable framework for FPA bargaining, which is not yet covered by the *Employment Relations Act 2000*.

*I intend to prepare a Supplementary Order Paper to introduce a new backstop*

- 13 I have provided the Cabinet Economic Development Committee with a paper entitled *Fair Pay Agreements: Backstop where one side is not represented* which sought agreement to a new backstop in the FPA system, to apply where there is no willing and suitable representative on one side of bargaining for an FPA.
- 14 To meet the desired timeframe for the introduction of this Bill, I plan to introduce the backstop as a Supplementary Order Paper (SOP) and provide it to the relevant select committee during its consideration of the Fair Pay Agreements Bill. I intend to inform the select committee of this intention and the proposed policy change, and ask the committee to seek submissions on the policy of the backstop, alongside the Bill.
- 15 I estimate drafting of the SOP will be finalised late July 2022, about two months after submissions on the Bill are projected to close on a standard select committee timetable. I will invite the select committee to incorporate the SOP, with any changes it considers necessary, into the version of the Bill it reports back to Parliament.
- 16 I consider this approach necessary to pass the Fair Pay Agreements Bill in 2022 as publicly signalled.

*Relationship to other work underway*

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- 17 I have been considering options for improving rights and protections for contractors. This includes ensuring all employees receive their statutory minimum rights and entitlements and reducing the imbalance of bargaining power between firms and vulnerable contractors. There are also inter-dependencies between this work stream and any future decisions about the treatment of contractors in the FPA system. Officials will continue to work together as these two initiatives progress to ensure that a consistent approach is taken.
- 18 The Screen Industry Workers Bill (SIWB) is currently awaiting second reading. It introduces a workplace relations system for contractors in the screen industry, based on unanimous recommendations from industry. The SIWB reflects the unique position of contractors doing screen production work—who cannot challenge their employment status as a means of accessing employment rights—that this Government has committed to addressing. The SIWB will still be needed, even when the FPA system is available. That is because the Fair Pay Agreements Bill will not apply to contractors.

### **Key elements of the Fair Pay Agreements Bill**

- 19 A detailed explanation of the FPA system was provided in the *Fair Pay Agreements: Approval to Draft* paper I brought to Cabinet in April 2021. The key features are summarised below.

#### *Initiation*

- 20 Unions can initiate bargaining for an FPA by meeting a representation threshold of support from 10 percent or 1000 employees in coverage, or meeting the criteria of a public interest test. If coverage substantially expands during bargaining, the public interest or representation test will need to be retested.
- 21 The initiating union(s) must decide what work should be covered by that FPA. Bargaining parties can later agree to change the coverage. FPAs can apply to either an occupation (eg cleaners), or an industry (eg the supermarket industry, which can be limited to only one or a few occupations within that industry). If there is an overlap in coverage between two FPAs, the later FPA only applies to the employees affected by the overlap if they would be better off overall.
- 22 Contractors are not currently included. Employers may be liable for financial penalties if they try to avoid FPA coverage by misclassifying employees as contractors.
- 23 Employers, unions, business representatives and the Government will each have a role in notifying employees and employers who would be covered by the FPA, to reach as many affected parties as possible. This will allow them to have a say in bargaining through their bargaining representative.

*The bargaining process*

- 24 Unions will represent employees. Employers will choose representatives who meet specified requirements. The bargaining sides must use best endeavours to represent all those in coverage, including non-members, and to ensure Māori interests and views are effectively represented.
- 25 Industrial action will be prohibited within the FPA system.
- 26 All FPAs must include certain topics like base wage rates, ordinary hours, overtime and penalty rates. Some other topics must be discussed but do not have to be agreed, like redundancy, leave, and health and safety. Other employment terms can be included if the bargaining sides agree.
- 27 An FPA can allow for exemptions (ie delayed commencement) for businesses if they are in significant financial hardship. An FPA can set regional differences, and other differential terms if they comply with the *Human Rights Act 1993* and minimum employment entitlements. An FPA can set a preferential payment for union members, up to a maximum value of their union membership fees. Bargaining fees cannot be imposed on non-members.

*Support for FPA bargaining*

- 28 Bargaining sides will be offered bargaining support and training. The government will also contribute up to \$50,000 per bargaining side, with additional funds if the side has low rates of membership of a union or industry group. Funding for this support is based on a projected four FPAs per year. If bargaining is initiated for more than four FPAs, support may be rationed and prioritised. The New Zealand Council of Trade Unions and BusinessNZ will each be offered funding of \$250,000 per year for three years to support their coordination roles in the FPA system, although to date BusinessNZ has declined this funding.
- 29 Employees will receive direct updates from unions unless they opt out of communications. Employers must allow employees to attend two, two-hour paid meetings during FPA bargaining. There is an entitlement to a further two-hour meeting if an FPA fails the first ratification vote and/or for bargaining of a variation. Unions can visit workplaces on FPA business without needing the employer's consent.
- 30 If bargaining parties encounter difficulties, mediation services are available to them. The Employment Relations Authority can also make recommendations. If bargaining parties reach a stalemate, the Employment Relations Authority (the Authority) can fix the FPA's terms by determination (once specified criteria are met).

*Finalising an FPA*

- 31 The Authority will vet an agreed FPA to ensure the terms are lawful before it goes to a ratification vote.

- 32 Ratification requires support from a simple majority of both employee and employer voters. Employers have one vote per employee in coverage, with slightly higher vote weighting for employers with fewer than 20 employees in coverage. If a first ratification vote fails, parties go back to bargaining. If a second vote fails, the FPA goes to the Authority to be fixed.
- 33 Once finalised, the Ministry of Business Innovation and Employment (MBIE) will make secondary legislation to bring the FPA into force, so it will apply to all employees and employers within coverage. Those within coverage can enforce their rights through the standard employment dispute resolution system. In addition, the Labour Inspectorate can enforce certain terms of the FPA.

**The Attorney-General has given approval to draft in advance of Cabinet policy decisions**

- 34 In April 2021, Cabinet authorised me to decide whether, and how, the Labour Inspectorate could decide if an employee is in coverage of an FPA and take enforcement action based on that decision [CAB-21-MIN-0126, paragraph 77 refers]. I have decided that the Labour Inspectorate will take on that role. This ‘coverage determination’ role only applies once an FPA is in force, as is consistent with the Labour Inspectorate’s current regulatory role.
- 35 Extra powers are needed for the Labour Inspectorate to do this role effectively. While Cabinet authorised me to make decisions on this topic, I am seeking specific agreement to the new powers due to their significance. To stay on track for timely introduction of this Bill, the Attorney-General agreed PCO could draft provisions relating to the Labour Inspectorate’s powers in advance of Cabinet decisions.
- 36 The Labour Inspectorate’s existing powers only enable them to make determinations in straightforward cases where coverage is not in dispute, or in dispute but clear cut. In situations where an employer is uncooperative or unable to be interviewed, the Labour Inspectorate is likely to have very little evidence on which to base a coverage determination and will lead to cases having to go to the Authority. This will add significantly to the Authority’s workload which could have flow-on impacts in terms of the timeliness of the wider employment dispute resolution.
- 37 Therefore, I propose the following changes to the Labour Inspectorate’s powers or related processes, for the purposes of determining if an employee is covered by an FPA:
- 37.1 extend the concept of ‘employer’ to include a ‘controlling third party’ when the Labour Inspectorate reasonably believes the party has information relevant to determining coverage of an FPA, which would allow the Labour Inspectorate to question a party or require them to provide documents;
- 37.2 enable the Labour Inspectorate to interview, with their consent, employees of a business which holds a contract with the employer that

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is subject to the coverage determination, if the Labour Inspectorate reasonably believes the information would be important to determining coverage;

- 37.3 enable the Labour Inspectorate to conduct any interviews with employees within its powers at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview;
  - 37.4 clarify that when the Labour Inspectorate requires documents be provided, this includes information stored electronically; and
  - 37.5 allow appeals from Labour Inspector decisions to the Authority within 28 days.
- 38 Broadening the Labour Inspectorate's powers has privacy implications. These new powers would allow the Labour Inspectorate to collect information from third parties about an employee where the employee has authorised that collection. This will solely be to ensure it can make a decision about coverage, requested by an employee. The Labour Inspectorate will, as they do for their existing functions, take reasonable steps to ensure that the employee subject to the determination about coverage knows:
- 38.1 what information is being collected, why it is being collected and who will receive the information;
  - 38.2 whether the person is required to provide the information to the Labour Inspectorate (ie whether it is compulsory or voluntary); and
  - 38.3 what will happen to the information (ie its use, storage, and retention).

### *Comment from Office of the Privacy Commissioner*

- 39 The Office of the Privacy Commissioner supports the approach for the employee to retain autonomy in the process of determining if an employee is covered by an FPA and provide the necessary authorisations to the Labour Inspectorate to collect the relevant information about the employee in question from the relevant third parties for the purposes of making a determination.

### **Consequential penalty relating to the changes to Labour Inspectorate powers**

- 40 The expansion of the concept of 'employer' to include a controlling third party (as described in paragraph 37.1) means that the controlling third party or employer may be required to provide the requested documents by a Labour Inspector. If the controlling third party or employers fails to provide the documents without reasonable cause, I propose that the controlling third party or employer could be liable to a penalty of up to \$10,000 for an individual or up to \$20,000 in the case of a company or other corporation, under the FPA Bill, in an action brought by a Labour Inspector.

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- 41 This is consistent with the Labour Inspectorate's powers to require documents under the Employment Relations Act 2000.

### **Decisions made using delegated authority**

- 42 On 19 April 2021, Cabinet authorised me to:
- 42.1 make policy decisions regarding the eligibility requirements in relation to the structure/form and representativeness of employer bargaining representatives, and level of government oversight on the selection of employer bargaining representatives;
  - 42.2 decide any process the Authority must follow when making a determination to fix terms, including any factors that the Authority must take into account in making its determination;
  - 42.3 decide whether, and how, the Labour Inspectorate can decide if an employee is covered by an FPA and take enforcement action based on that decision;
  - 42.4 make decisions, consistent with the policy framework in that paper, on any issues that arise during the drafting process, including transitional provisions, how exemptions from FPAs apply, record keeping requirements for employers, and how to vary and renew FPAs.
- 43 I have summarised the significant decisions I made under this authorisation in **Annex 1**.
- 44 During the drafting of the Bill, some issues required consequential changes to the details of the FPA system already decided by Cabinet in April 2021. I have indicated these decisions in **Annex 2**, and seek Cabinet's endorsement for these to supersede some of our April 2021 decisions.

### **Impact analysis**

- 45 The impact analysis requirements apply to the proposals being given effect through the Fair Pay Agreements Bill, and a regulatory impact statement was submitted at the time that policy approval relating to the Bill was sought [CAB-21-MIN-0126].
- 46 MBIE has provided an updated Regulatory Impact Analysis covering the decisions relating to the extension to the Labour Inspectorate's powers when making decisions on coverage of FPAs (covered in paragraphs 34-41 of this paper).
- 47 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meet the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

## Financial Implications

- Confidential advice to Government  
[Redacted]
- Confidential advice to Government  
[Redacted]
- Confidential advice to Government  
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## Compliance

- 54 I consider the Bill complies with:
- 54.1 the principles of the Treaty of Waitangi (see paragraphs 57 – 61 below);
  - 54.2 a disclosure statement (Departmental Disclosure Statement: Fair Pay Agreements Bill) has been prepared and is attached to this paper;
  - 54.3 The Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee (LDAC). Officials have also been in regular contact with LDAC during policy development and drafting given the novelty and complexity of the FPA system and this Bill.

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<sup>1</sup> Cabinet Economic Development Committee has considered this via the paper entitled 'Fair Pay Agreements: Backstop where one side is not represented'.

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- 55 The Bill engages the rights and freedoms contained in the *New Zealand Bill of Rights Act 1990* and relevant international obligations. This is addressed in paragraphs 62 – 77 below.
- 56 The Privacy Commissioner was consulted on the privacy issues raised in the policy proposals, and the Bill's interactions with the Privacy Act are contained in paragraph 78 – 82 below, including a comment from the Office of the Privacy Commissioner.

### **Te Tiriti o Waitangi**

- 57 While the FPA system will allow parties to bargain for new minimum standards, the Crown cannot delegate its responsibilities under the Treaty of Waitangi.
- 58 Māori, and especially wāhine Māori, are overrepresented in jobs where liveable pay rates, job security, health and safety and upskilling are lacking. Labour market outcomes for Māori may be improved if FPAs occur in workforces where there are poorer working conditions.
- 59 Both employers and employees will be represented in FPA bargaining by bargaining parties, collectively known as a bargaining side (eg when several unions are negotiating together on behalf of employees). The Bill does not mandate Māori representation in bargaining, and traditional bargaining practices may not support inclusive partnership, which risks locking out Māori. The mitigation is the Bill's requirement for each bargaining party to ensure Māori are effectively represented in bargaining, and to consider Māori interests and views.
- 60 Although there was engagement with the CTU Rūnanga, the FPA system is modelled on sector-level bargaining frameworks, and was not designed with tikanga Māori in mind.
- 61 There is work underway to ensure implementation of the FPA system is designed in partnership with Māori and iwi groups. This is particularly important given the obligations on bargaining parties to ensure Māori are represented effectively in bargaining. The implementation plan is guided by Treaty principles of partnership, active participation, sovereignty, equity and options.

### **Human rights**

- 62 Overall, I consider the FPA system as a whole contributes towards New Zealand's obligation to encourage and promote the full development and utilisation of machinery for voluntary collective bargaining. The FPA system will be a key addition to our collective bargaining landscape, and I believe it will improve working conditions over time.
- 63 When seeking Cabinet's agreement to the details of the FPA system in April 2021, I noted that several elements of the FPA system engage domestic human rights law and international human rights obligations [CAB-21-SUB-

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0126 refers]. The key rights engaged relate to the right to strike<sup>2</sup> and to the principle of voluntary bargaining.<sup>3</sup>

- 64 At the time, I expressed my view that any limitations are justified given the importance of improving working terms and conditions and labour market outcomes more generally. The only other viable option for achieving this core objective would be for the state to directly mandate employment terms and conditions, which would provide for less input and engagement from employers and employees.
- 65 Employers have indicated an intention to bring their concerns to the formal notice of the International Labour Organisation. There are two options for this. First, through a representation made to the ILO Governing Body that the introduction of FPAs will put New Zealand in breach of ILO Convention 98 on the Right to Organise and Collective Bargaining. This could see a tripartite committee of the Governing Body set up to investigate and recommend action to the Governing Body. Second, by having New Zealand included in the list of countries for examination by the ILO Committee on the Application of Standards at the International Labour Conference, which will occur in mid-2022. Neither option has yet occurred.
- 66 In addition to my previous comments, there are three elements of the FPA system which have human rights implications that were not covered in the human rights section of the April 2021 Cabinet paper [CAB-21-MIN-0126]. These are discussed below. I continue to believe that any limitations in the FPA system are justified given the expected benefits of the FPA system.

#### *Searches under Labour Inspectorate's powers*

- 67 The exercise of the Labour Inspectorate's powers when deciding whether an employee is within coverage of an FPA could amount to a search (per section 21 of the *Bill of Rights Act 1990*). It also likely engages the right to freedom of expression (per section 14 of the *Bill of Rights Act 1990*), particularly in terms of the right to not be compelled to say certain things or provide certain information.
- 68 The Bill expands the Labour Inspectorate's existing powers to allow it to request and compel the provision of certain information, including from a controlling third party<sup>4</sup> (existing powers apply only to employers). A controlling third party is a person who has a contract with an employer under which an employee of the employer performs work for the benefit of the controlling third

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<sup>2</sup> This stems from the International Labour Organization's (ILO's) Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87). New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO. The right to strike is also related to freedoms of association, expression and peaceful assembly, which are part of our domestic human rights law and international obligations.

<sup>3</sup> This stems from the ILO's Right to Organise and Collective Bargaining Convention (Convention No. 98), which New Zealand has ratified.

<sup>4</sup> A controlling third party includes a person who has a contract with an employer under which an employee of the employer performs work for the benefit of the person.

party. This would cover a situation where the employer is actually a labour hire company whose employees do work at a client's worksite (known as a triangular employment relationship). In this situation, the client or the client's employees may have the information that is relevant to assessing what work the employee is actually undertaking.

- 69 The power is narrowly construed, applying only if the Labour Inspector has a reasonable belief that the controlling third party would have information relevant to determining whether an employee is covered by an FPA. The controlling third party should also have a reasonable expectation that this information might be required from them, given that the person is performing work at their worksite for their benefit.
- 70 The information collected by the Labour Inspectorate will only relate to a person's employment.
- 71 Employees will also need to authorise the collection of information about them from third parties, without which the Labour Inspectorate will not be able to access such information.

#### *Judicial review*

- 72 When the Authority makes decisions under the Bill, appeal and judicial review rights are consistent with those available under the *Employment Relations Act 2000*. This means a party must exhaust any appeal rights before seeking judicial review, and judicial review is limited to situations where the Authority lacked jurisdiction. This engages the right to justice (per section 27 of the *Bill of Rights Act 1990*).
- 73 The rationale for the restriction on review in the *Employment Relations Act 2000* is the difference in roles of institutions in the employment system (eg the role of the Authority compared to the role of the Employment Court). The Authority is a less formal body focussed on investigation and problem-solving. The limitation on review focuses the attention of parties on resolving the issue at hand, rather than on revisiting how the issue was dealt with by the institution that previously handled it (usually the Authority).
- 74 There are also alternative appeal mechanisms by which parties can challenge the substance of Authority determinations, like the ability to elect for matters to be heard de novo by the Employment Court.

#### *Appeals*

- 75 The Bill limits appeal rights if an FPA's terms are fixed by the Authority. Where the Authority has fixed the terms of an FPA, appeal rights are limited to whether the legal criteria for a determination to fix the terms of an FPA had been met. As such, a party cannot appeal the substantive determination (ie the terms of the FPA that are fixed). This engages the right to justice (per section 27 of the *Bill of Rights Act 1990*).

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- 76 This recognises the difference in roles of institutions in the employment relations system: the Authority is the body with responsibility for setting terms and conditions of employment, and this is within their exclusive jurisdiction (per section 161 of the *Employment Relations Act 2000*).
- 77 This is also intended to provide finality around the terms of the FPA, by removing the possibility for different courts to set and change FPA terms.

### Privacy

- 78 Employers must pass on contact details of employees within FPA coverage to union bargaining representatives unless employees opt out. This is important to the workability of the system that employee bargaining representatives can communicate both with union members and non-union members. It is important to balance system workability with employees' privacy rights. Giving employees the opportunity to choose not to have their details passed on to the union bargaining parties' strikes the right balance.
- 79 The Privacy Commissioner was consulted on this aspect of the FPA system and supports the opt-out model for employees. The Privacy Commissioner recommends that unions should use and retain non-union employee contact details only for the intended purpose and unions should not keep non-union employee contact information for any longer than the need to ensure compliance with the non-union employee's authorisation.

### *Comment from office of the Privacy Commissioner*

- 80 The Fair Pay Agreement Bill is complex and involves significant flows of personal information between different interested parties, governed by prescriptive legislative provisions. To protect the privacy of employees and build trust in the system, many of whom may be in vulnerable employment situations, it is important to pursue a data minimisation approach to the design of the Fair Pay Agreement system, and ensure employees are made aware of how their personal information will be used and disclosed.
- 81 The Privacy Commissioner considers there are important design questions that need to be addressed with regard to:
- 81.1 the level of personal information needed at the initiation stage of bargaining for a proposed FPA;
  - 81.2 ensuring the provisions related to use, storage and retention of personal information are applied consistently through the process of a FPA; and
  - 81.3 notifying employees why their personal information is needed, how can they opt-out, implications of opting out and the process of opting back in at the initiation stage as well as before the ratification stage.
- 82 The Privacy Commissioner considers that drafting amendments are needed to help clarify and enhance privacy safeguards in the Bill, so as to ensure

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employee personal information is protected. This includes amendments to the proposed clause 23 which, as drafted, would operate as an override of the Privacy Act. The Privacy Commissioner notes the assurances provided by MBIE officials to ensure the Bill is drafted to work alongside the Privacy Act, and will continue to work with officials in finalising drafting of the Bill to give effect to that intent.

## Consultation

- 83 The following agencies were consulted on this paper: the Department for Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, Te Puni Kōkiri, Ministry for Justice, Ministry for Pacific Peoples, Inland Revenue, Ministry for Transport, New Zealand Police, Ōranga Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, and Ministry of Health.
- 84 All regulators and bodies who have functions under the Bill were consulted during policy development.
- 85 BusinessNZ and the Council of Trade Unions were consulted on policy detail during the drafting process.

### *Climate Implications of Policy Assessment*

- 86 The Ministry for the Environment has been consulted and confirmed that the Climate Implications of Policy Assessment requirements do not apply to proposals relating to the design of the backstop process in the FPA system as the threshold for significance is not met.

## Binding on the Crown

- 87 In April 2021, Cabinet agreed the Fair Pay Agreements Bill would be binding on the Crown [CAB-21-MIN-0126].

## Allocation of decision-making powers

- 88 The Fair Pay Agreements Bill allocates decision-making powers between the executive and judiciary as follows:

<b>Executive</b>	<i>Chief Executive of MBIE</i>	<ul style="list-style-type: none"> <li>• Approving applications to initiate FPA bargaining (for a new FPA and for a renewal of an existing FPA). This also includes ensuring coverage is clear and identifying any coverage overlaps with other FPAs.</li> <li>• Approving bargaining parties.</li> <li>• Notifying default bargaining parties about when they must/can become a bargaining party.</li> <li>• Verifying that ratification requirements for an FPA are met.</li> <li>• Putting the FPA in secondary legislation.</li> </ul>
	<i>Labour Inspectorate</i>	<ul style="list-style-type: none"> <li>• Deciding whether specific employees are within coverage of an FPA.</li> </ul>



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		<ul style="list-style-type: none"> <li>Enforcing FPA terms that are minimum employment entitlement provisions.</li> </ul>
<b>Judiciary</b>	<i>Employment Relations Authority</i>	<ul style="list-style-type: none"> <li>Resolving disputes. This can include making recommendations on and fixing FPA terms.</li> <li>Checking an FPA after bargaining is complete to ensure statutory requirements are met (eg all mandatory terms are included).</li> <li>If there are overlapping FPAs, determining which takes precedence for affected workers using a 'better off overall' test.</li> <li>Awarding penalties and issuing compliance orders as provided for in the Bill.</li> </ul>
	<i>Employment Court and appellate courts</i>	<ul style="list-style-type: none"> <li>De novo hearings, appeals and reviews (where permitted).</li> </ul>

89 Criteria relating to the qualifications and responsibilities of decision-makers and the procedures that they follow, have been applied in determining the allocation of decision-making powers above.

**Associated regulations**

90 Regulations are not needed to bring the Fair Pay Agreements Bill into operation. However, one set of regulations is critical to the functioning of the FPA system and would ideally be in force at commencement of the Bill. These are the regulations that will set out the detailed criteria that the chief executive of MBIE will apply when assessing an application to initiate FPA bargaining based on the public interest test.

91 Regulations may also be made for the following reasons:

- 91.1 specifying additional information requirements (if any) that must be included in the application form to initiate bargaining for an FPA;
- 91.2 specifying the content and form requirements of one or more of the FPA terms;
- 91.3 specifying any additional information that must be provided by an entity when applying to become a bargaining party;
- 91.4 specifying any additional information that must be provided by a bargaining party when wishing to cease being a bargaining party;
- 91.5 specifying who the employee default bargaining party and the employer default bargaining party are; and
- 91.6 creating any forms necessary for filing in the Authority and Employment Court for determinations for the terms of an FPA.



## Definition of Minister/department

- 92 The Fair Pay Agreements Bill will be administered by MBIE. The Bill uses “department” as it is currently defined in the *Legislation Act 2019*. The *Legislation Act 2019* defines “department” as the department of State that, with the authority of the Prime Minister is responsible for the administration of the Act.
- 93 The Bill defines “chief executive” as the chief executive of the department. This definition has been included in the Bill because of the specific functions given to the chief executive of MBIE relating to approving applications of FPA initiations, publicly notifying initiations, notification to bargaining parties for changes in the bargaining process (regarding bargaining representatives and coverage overlaps), consolidation of different FPA bargaining, and approving a finalised FPA.

## Commencement of legislation

- 94 The Bill will come into force one month after the date of Royal Assent. If the Bill passes by the end of October 2022 as I am currently expecting, commencement could occur in December 2022. This date will be kept under review during the legislative period as implementation planning progresses.

## Parliamentary stages

- 95 I intend to introduce the Fair Pay Agreements Bill on 28 March 2022 and depending on the availability of House time, will move first reading on 5 April 2022.
- 96 I propose the Bill be referred to the Education and Workforce Committee for a period of six months.
- 97 If Cabinet agrees to the proposals in my paper *Fair Pay Agreements: Backstop where one side is not represented*, I intend to inform the chair of the select committee about those decisions. I will invite the select committee to seek public submissions on the policy in those decisions, while officials are drafting an SOP to give effect to them. The SOP will then be provided to the select committee to consider for inclusion in the version of the Bill they report back to the House.
- 98 I propose the Bill should be passed no later than the end of October 2022, which allows one month for the remaining legislation stages after the select committee reports back to the House. The approach outlined in the previous paragraph, using a SOP, is necessary to be able to pass the Bill on this timeframe.

## Proactive release

- 99 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of decisions being confirmed by Cabinet

## Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **note** that the Fair Pay Agreements Bill holds a category 2 priority on the 2022 Legislation Programme (to be passed within the year);
- 2 **note** that the Fair Pay Agreements Bill will provide a legal framework for an occupation- or industry-wide collective bargaining system, to operate alongside the current employment relations system;
- 3 **approve** the Fair Pay Agreements Bill for introduction, subject to paragraph 4 below and the final approval of the Government caucus and sufficient support in the House of Representatives;
- 4 **agree** that Parliamentary Counsel Office can make the following changes to the Bill up until the Bill is provided to Cabinet for approval for introduction:
  - 4.1 insertion of the clause by clause analysis
  - 4.2 editorial changes to incorporate feedback from PCO proof reading and quality control processes
  - 4.3 restructuring (e.g. merging of certain Parts) to improve the readability of the Bill
  - 4.4 substantive changes to settle drafting in the particular areas listed on the front of the Bill, in line with previous policy decisions
- 5 **agree** that minor consequential changes can be made to the *Departmental Disclosure Statement: Fair Pay Agreements Bill* to ensure consistency with changes made to the Fair Pay Agreements Bill up until introduction;
- 6 **agree** that the Bill be introduced on 28 March 2022;
- 7 **agree** that the Government propose that the Bill be:
  - 7.1 referred to the Education and Workforce Committee for consideration for a period of six months; and
  - 7.2 enacted by the end of October 2022;
- 8 **note** the Minister for Workplace Relations and Safety will provide a Supplementary Order Paper to the Education and Workforce Committee giving effect to the decisions in the companion paper titled "*Fair Pay Agreements: Backstop where one side is not represented*";

*Decisions relating to advance drafting approved by the Attorney-General*

- 9 **note** there is a need to expand the Labour Inspectorate's powers under the Fair Pay Agreements Bill so they can effectively determine if an employee is covered by a Fair Pay Agreement;

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- 10 **agree** the following changes to the Labour Inspectorate's powers or related processes for the purposes of determining if an employee is covered by a Fair Pay Agreement:
- 10.1 extend the concept of 'employer' to include a 'controlling third party' when the Labour Inspectorate reasonably believes the party has information relevant to determining coverage of a Fair Pay Agreement, which would allow the Labour Inspectorate to question a party or require them to provide documents;
  - 10.2 enable the Labour Inspectorate to interview, with their consent, employees of a business which holds a contract with the employer that is subject to the coverage determination, if the Labour Inspectorate reasonably believes the information would be important to determining coverage;
  - 10.3 enable the Labour Inspectorate to conduct any interviews with employees within its powers at any location, including online, so long as the interview proposed is at a reasonable time and the employee has agreed to the time and location of the interview;
  - 10.4 clarify that when the Labour Inspectorate requires documents be provided, this includes information stored electronically;
  - 10.5 allow appeals from Labour Inspector decisions to the Employment Relations Authority within 28 days;
- 11 **note** the Attorney-General has approved drafting of the matters in paragraphs 10, and they are therefore reflected in the Fair Pay Agreements Bill proposed for introduction;

*Labour Inspectorate can seek a penalty for failing to provide required documents*

- 12 **agree** that if the employer or controlling third party fail, without reasonable cause, to provide the relevant information as requested by the Labour Inspectorate, the Labour Inspectorate may bring an action in the Authority and the employer or controlling third party could be liable to a penalty of up to \$10,000 in the case of an individual, or \$20,000 in the case of a company or other corporation;

*Financial implications*

- 13 Confidential advice to Government [Redacted]

[Redacted]

■ Confidential advice to Government [Redacted]

■ Confidential advice to Government [Redacted]

*Decisions made under delegated authority*

- 16 **note** Cabinet authorised the Minister for Workplace Relations and Safety to make decisions on issues that arise during the drafting process [CAB-21-MIN-0126], and these decisions are summarised in Annex 1;
- 17 **note** some of the decisions made by the Minister for Workplace Relations and Safety supersede previous Cabinet decisions [CAB-21-MIN-0126], and were made in response to issues that arose during the drafting process;
- 18 **endorse** decisions taken by the Minister for Workplace Relations and Safety as described in Annex 2.

## **Annex 1: Summary of decisions made by the Minister for Workplace Relations and Safety during drafting**

- 1 In April 2021, Cabinet authorised me to [CAB-21-MIN-0126]:
  - 1.1 make policy decisions regarding the eligibility requirements in relation to the structure/form and representativeness of employer bargaining representatives, and level of government oversight on the selection of employer bargaining representatives;
  - 1.2 decide any process the Employment Relations Authority (the Authority) must follow when making a determination to fix terms, including any factors that the Authority must take into account in making its determination;
  - 1.3 decide whether, and how, the Labour Inspectorate can decide if an employee is covered by an Fair Pay Agreement (FPA) and take enforcement action based on that decision; and
  - 1.4 make decisions, consistent with the policy framework in the paper under CAB-21-SUB-0126, on any issues that arise during the drafting process, including transitional provisions, how exemptions from FPAs apply, record keeping requirements for employers, and how to vary and renew FPAs.
- 2 This annex summarises significant decisions I have made during drafting of the Fair Pay Agreements Bill about the above matters. I have described in paragraph 34 in the body of this paper my decision that the Labour Inspectorate will be able to decide whether an employee is covered by an FPA.

### **Bargaining parties**

#### *Employer representation*

- 3 Employer associations can only be a bargaining party if they have at least one member (employer) in coverage of the proposed FPA. They also need to be an incorporated society that meets requirements which mirror those for union registration under the *Employment Relations Act 2000*. This is to ensure they have the necessary legal form, constitution and rules to effectively carry out bargaining and represent affected parties.

#### *Specified employer bargaining parties*

- 4 The public sector has distinct delegation and consultation mechanisms for collective bargaining in the public service, education service and District Health Boards (DHBs).

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- 5 The Public Service Commissioner will represent public service and education service employers in bargaining. The Chief Executive of Health New Zealand (Health NZ) will be the bargaining representative for the public health service.
- 6 The Pae Ora (Healthy Futures) Bill (which will establish Health NZ) is not expected to pass before the Fair Pay Agreements Bill is introduced. Therefore, the Fair Pay Agreements Bill reflects the following interim arrangements for bargaining representation for DHBs, which will then be replaced with references to Health NZ when established. The Director-General of Health will:
  - 6.1 be the employer bargaining party for DHBs for FPA purposes;
  - 6.2 be able to delegate this function to the Chief Executive of Health NZ;
  - 6.3 not have any obligations to represent any other employers within coverage (and likewise, other employer bargaining parties will not be required to represent DHBs); and
  - 6.4 be required to consult DHBs when undertaking employer bargaining party functions.
- 7 The New Zealand Defence Force, Parliamentary Counsel Office and New Zealand Police will be able to represent themselves directly in bargaining or request the Public Service Commissioner to represent them.
- 8 Other state services are subject to the status quo representation requirements (ie they cannot represent themselves and will need to be represented by an incorporated society), but can instead request the Public Service Commissioner to represent them in bargaining.
- 9 Where specified employer bargaining parties (ie those able to represent state service agencies, as outlined above) are part of the bargaining side for an FPA, they will not have any bargaining obligations to other employers within coverage, and likewise the bargaining party representing other employers would not have any bargaining obligations to represent those state service employers.

*Ongoing role of bargaining parties*

- 10 Bargaining parties can only withdraw from being a bargaining party if all other parties on that side agree, in accordance with any process set out the bargaining process agreement. Alternatively, they can withdraw if they are the final remaining bargaining party (other than any specified employer bargaining parties). Bargaining parties must notify Ministry of Business Innovation and Employment (MBIE) if they have decided to stop being a bargaining party.
- 11 If all the bargaining parties on the initiating side (including the party that initiated bargaining for the FPA) cease to be a bargaining party, the relevant default bargaining party will have the option to step in. If they decide not to,

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then development of the FPA will cease. This is the only situation where a FPA will not result following successful initiation.

- 12 I have also further clarified the role of default bargaining parties in the system (noting paragraphs 12.3 and 12.4 will be impacted by the decisions in relation to the new backstop considered by Cabinet in a separate paper). In particular:
- 12.1 The Council of Trade Unions will be the default bargaining party for employees.
  - 12.2 If all bargaining parties on the *initiating* side cease to be bargaining parties, the relevant default bargaining party will have discretion as to whether they step in to bargain the FPA.
  - 12.3 If all bargaining parties on the *non-initiating* side cease to be bargaining parties, the relevant default bargaining party will be required to step in to bargain the FPA.
  - 12.4 Once a default bargaining party has stepped in, they must remain a bargaining party until the FPA is concluded. Other eligible organisations can still join and bargain alongside them. The one exception is if the default stepped in as a bargaining party following initiation. In that situation, if an eligible organisation is approved to be a bargaining party, then the default must step out.

### **Communication during bargaining**

#### *Communication between bargaining sides*

- 13 For collective bargaining under the *Employment Relations Act 2000*, there is a process by which an independent reviewer assesses information requested by a bargaining party if the party providing the information considers it confidential. The same process will apply in the Fair Pay Agreement Bill, with one change: that parties can access dispute resolution services if they do not agree on the appointment of an independent reviewer.

#### *Communication between employers and their bargaining representatives*

- 14 It will be up to employers to voluntarily provide information to the employer bargaining side (ie the employer associations representing them) to inform bargaining.

#### *Communicating with non-union employees and allowing workplace access to relevant unions once an FPA is in force*

- 15 I have clarified that the purpose of collecting non-union employee contact information is FPA-related communication during bargaining and throughout the duration of that FPA. For non-union employees who do not opt out of sharing their contact details with union bargaining parties, the unions will be

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able to communicate during bargaining and the life of the FPA for FPA related purposes.

- 16 I have also clarified that unions can only access workplaces for purposes related to an FPA without employer consent if those unions are parties to FPA bargaining. This access right continues while the FPA is in force.

### **Bargaining support person**

- 17 During FPA bargaining, a support person will be available to support bargaining sides throughout FPA bargaining. I have decided that the chief executive for MBIE will have the discretion to decide how to provide bargaining support services.

### **Variations**

- 18 When negotiating an FPA, bargaining sides must agree a process for varying the FPA. This process must include that bargaining for a variation can only take place with both bargaining sides' agreement. This process must also allow for ratification by both employees and employers.
- 19 As bargaining for a variation requires the agreement of both sides, bargaining will cease if one side decides to withdraw.
- 20 The rules that apply during bargaining of a variation are the same as for normal FPA bargaining, with the following amendments:
- 20.1 employers will be required to allow employees to attend a single two-hour paid meeting relating to variations during the lifespan of an FPA. Even if an FPA is varied more than once, the entitlement is only to a single two-hour meeting; and
- 20.2 the Authority cannot fix terms during bargaining for a variation. However, the Authority can make a recommendation on terms if both parties agree to request it.

### **Process for fixing FPA terms**

- 21 When fixing terms in an FPA (or making a recommendation on FPA terms), the Authority must consider the following factors:
- 21.1 the terms that bargaining sides have agreed (ie that they have negotiated so far);
- 21.2 relevant industry or occupational practices and norms;
- 21.3 the likely impact on employees within coverage, and in particular, on employees who are low-paid and vulnerable;
- 21.4 the likely impact on employers within coverage; and

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- 21.5 relativities within the proposed FPA, and between the proposed FPA and other relevant employment terms and conditions, in particular, national minimum standards and relevant collective agreements.
- 22 The Authority can also consider any other matter it considers relevant. In particular, it may have regard to any likely impacts on New Zealand's broader economic or social wellbeing when fixing terms.
- 23 The Authority can request independent expert advice when making decisions on FPA terms.

### Renewals

- 24 The same initiation requirements apply when renewing an FPA, with the following amendments:
- 24.1 for an application from an employer association, the representation test would require support from one or more employers who, between them, employ at least 10 percent of employees or 1,000 employees within coverage; and
- 24.2 if the original FPA was initiated by the public interest test, and the applicant again seeks to initiate bargaining through the public interest test, they can either demonstrate the criteria for the test are met, or that the criteria for the test would be met but for the FPA being in force.
- 25 The process (including any obligations and requirements) for renewing an FPA is consistent with the process for bargaining the initial FPA, with the following amendments:
- 25.1 coverage should be at least the same as the coverage of the previous FPA; and
- 25.2 either a union or employer association that meets the requirements to be a bargaining party can initiate bargaining for a renewal (with a union able to do this 180 days before expiry, and employer associations able to do this 160 days before expiry).
- 25.3 If bargaining for a renewal is initiated before the existing FPA expires, the existing FPA will continue to be in force until the renewal comes into force.

### Judicial review

- 26 A similar approach to judicial review will be taken as in the *Employment Relations Act 2000*. This means:
- 26.1 appeal rights must be exhausted before an application for judicial review can be made;
- 26.2 judicial review will be performed by the Employment Court; and

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- 26.3 judicial review of Authority decisions is limited to situations where the Authority lacked jurisdiction.

## **Annex 2: Amendments to previous decisions made during drafting**

- 1 A number of issues arose during the drafting of the Bill that required amending or superseding decisions taken by Cabinet in April 2021. This annex details decisions agreed to by Cabinet in April [CAB-21-MIN-0126] that have been varied in a significant way or rescinded.

### *Labour Inspectorate may issue an infringement fee where an employer fails to keep the required records*

- 2 In April 2021 Cabinet agreed, where a Fair Pay Agreement applies, to require employers to keep records which may include the days of the week and times of the day that employees within coverage worked, to enable it to be enforced [CAB-21-MIN-0126 paragraph 76]. This is an additional requirement to the wage and time records or holiday and leave records that are required to be kept under the Employment Relations Act 2000.
- 3 Cabinet also agreed that the Labour Inspectorate would be able to use their compliance tools under the Employment Relations Act 2000 in relation to obligations specified in the FPA legislation [CAB-21-MIN-0126 at paragraph 79].
- 4 I would like to make it expressed that a consequence of those decisions, is that if an employer fails to keep the required records, they would be committing an infringement offence and may be subject to an infringement fee of \$1000 per offence.

### *Duration and commencement of an FPA*

- 5 Last year, Cabinet agreed that one of the mandatory terms to include in a FPA would be the duration of the FPA [CAB-21-MIN-0126 at paragraph 38]. For clarity, I have since decided to split this into two terms: one about the FPA's commencement date (ie when all terms in the FPA will come into force), and one about its expiry. The duration of an FPA will be between three and five years.

### *Exemptions*

- 6 Cabinet agreed that bargaining sides would be able to include an exemption from the terms of an FPA for up to 12 months for employers in significant financial hardship [CAB-MIN-0126 at paragraph 41].
- 7 I have decided the exemption process (ie allowing specified employers to have delayed commencement of certain FPA terms) is to be managed by bargaining sides. If bargaining sides agree to run an exemptions process, it will occur after bargaining sides have agreed the terms of the FPA, but before the FPA is vetted and ratified. Employers that are approved to receive delayed commencement will be named in the FPA.
- 8 I have decided that the threshold for an exemption is as follows, to provide more clarity on what is 'significant financial hardship':

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- 8.1 immediate compliance with particular terms of the FPA would result in a worse outcome for the employer's employees; and
- 8.2 delaying commencement for that employer would allow them to arrange their business so that the FPA will no longer result in a worse outcome for their employees.

*Additional penalty: Undue influence*

- 9 Cabinet agreed that certain acts or omissions within the FPA system would make a party liable for a penalty under the Fair Pay Agreement Bill [CAB-21-MIN-0126 at paragraph 69].
- 10 In addition to the breaches agreed by Cabinet, I have decided that exerting undue influence on a person in relation to their membership, or otherwise, of a union or employer association will be a breach for which a penalty is available. This mirrors a similar prohibition on undue influence in the *Employment Relations Act 2000*.

*Expanded penalty: Not complying with notification requirements for a variation*

- 11 Cabinet agreed that the Fair Pay Agreements Bill should include a penalty if an employer "intentionally or recklessly fails to comply with the requirements to notify affected employees of the initiation, ratification or renewal" of an FPA [CAB-21-MIN-0126 at paragraph 69.2]. I have decided this penalty should also be available where notification requirements are not met for a variation of an FPA.

*Expanded penalty: Penalty for providing inaccurate information during initiation application will also apply if an employer representative applies to initiate a renewal*

- 12 Cabinet agreed that the Fair Pay Agreements Bill should include a penalty if "a union intentionally or recklessly provides inaccurate information as part of the application to initiate a FPA" [CAB-21-MIN-0126 paragraph 69.7]. My intention was that this would also apply during renewals.
- 13 I have subsequently decided that employer associations or specified employer bargaining parties can initiate a renewal and therefore this penalty would need to cover these parties. I propose to amend this decision to change 'a union' to 'a party' to ensure this penalty applies to any party who is able to initiate a FPA or a renewal process.

*Expanded penalty: Where an employee bargaining party breaches the requirements in relation to workplace access`*

- 14 Cabinet agreed that the Fair Pay Agreements Bill should include a penalty if "an employer unreasonably withholds consent in relation to a request by a union representative to enter a workplace; or refuses to permit entry for, or obstructs, a union representative who is entitled to enter a workplace." [CAB-21-MIN-0126 paragraph 69.5].

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- 15 I have subsequently realised that the penalty should also apply if the employee bargaining parties do not comply with their obligations when accessing a workplace. I, therefore, propose to amend this decision [CAB-21-MIN-0126 paragraph 69.5] to include that the penalty also apply when “an employee bargaining party wilfully fails to comply with the conditions relating to workplace access”.

*Amended penalty: Workplace access*

- 16 Cabinet agreed that an employer who “unreasonably withholds consent in relation to a request by a union representative to enter a workplace; or refuses to permit entry for, or obstructs, a union representative who is entitled to enter a workplace” during development of an FPA [CAB-21-MIN-0126 at paragraph 69.5].
- 17 I have since decided there will be no specific workplace access provisions in the Fair Pay Agreements Bill for situations where employer consent is required. The first element of this penalty relating to withholding consent is therefore not required.

*Labour Inspectorate powers relating to flexible work terms in an FPA*

- 18 Cabinet agreed that the Labour Inspectorate would have a role in deciding how to apply the terms of an FPA to flexible working arrangements. This would be consistent with approach under the *Employment Relations Act 2000* [CAB-21-MIN-0126 at paragraph 79 and Annex A of CAB-21-SUB-0126].
- 19 During drafting, it became clear that this approach would create a high degree of complexity. I have therefore decided that the Labour Inspectorate will not have a role in interpreting or enforcing flexible work terms in an FPA. This means any disputes between employers and employees about this issue will need to be resolved through the usual employment dispute resolution processes.

### **Annex 3: Aspects of the Bill which may need finalisation**

- 1 The aspects of the Bill which may need substantive changes to settle drafting before the updated Bill is provided for approval are:
  - 1.1 Updating the General Policy Statement;
  - 1.2 Refinement of the parameters around regulation making provisions;
  - 1.3 Refining information sharing provisions to protect the privacy of individuals to address feedback from the Office of the Privacy Commissioner;
  - 1.4 Ensuring obligations around passing on information in forms approved by the CE are accurately captured;
  - 1.5 Ensuring obligations on different parties are correctly captured throughout the different stages of bargaining;
  - 1.6 Ensuring the correct applications of the Authority's jurisdiction in relation to FPA matters; and
  - 1.7 Ensuring obligations, rights and powers that fall on default bargaining parties and specified employer bargaining parties are properly captured, along with their interrelationship.
  - 1.8 Ensuring that the new powers of the Labour Inspectorate interact accurately with their powers and jurisdiction under the Employment Relations Act 2000.