



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Fair Pay Agreements – Backstop where one side is not represented	Date to be published	2 May 2022

List of documents that have been proactively released		
Date	Title	Author
March 2022	<i>Fair Payments Agreement: Backstop where one side is not represented</i>	<i>Office of the Minister of Workplace Relations and Safety</i>
21 March 2022	<i>Fair Payments Agreement: Backstop where one side is not represented</i> <i>CAB-22-MIN-0080.02</i>	<i>Cabinet Office</i>
March 2022	<i>Fair Payments Agreement: Regulatory Impact Assessment: update for the backstop</i>	<i>MBIE</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.

Fair Pay Agreements: Regulatory Impact Assessment update for the backstop

Cover sheet and Executive Summary

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing final Cabinet decisions on revising one component of the previously agreed Cabinet decisions on Fair Pay Agreements
Advising agencies:	Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister for Workplace Relations and Safety
Date finalised:	9 March 2022
Problem Definition	
<p>The problem that this analysis is addressing is a vulnerability in the Fair Pay Agreements (FPA) system policy design that Cabinet agreed to in April 2021 (CAB-21-MIN-0126 refers). This vulnerability incurs a risk that the FPA system will not function as intended.</p> <p>The changes proposed by the Minister for Workplace Relations and Safety (the Minister) intend to address this risk and ensure that the system delivers on Cabinet’s objective to <i>‘improve labour market outcomes by enabling employers and employees to collectively bargain industry or occupation-wide minimum employment terms’</i> [CAB-21-MIN-0126 refers at paragraph 11].</p>	
Executive Summary	
<p>This document provides updated analysis to the previous Regulatory Impact Analysis (RIA) that was done by the Ministry of Business, Innovation and Employment (MBIE) on FPAs in April 2021. The analysis informs final cabinet decisions to address a gap in the FPA model that Cabinet approved. This model centred on a bargaining framework where bargaining commenced in all circumstances, whereby a particular organisation would step in to represent employers in bargaining as a last resort if no other suitable representative organisation could be found.</p> <p>Since Cabinet agreed to the FPA design features and to start drafting legislation, it became clear that relying on a single organisation to ensure bargaining commenced was a significant risk. This risk eventuated once the organisation Cabinet believed would perform the default bargaining role withdrew its consent to do it. This has left a gap in the system and increases the risk that initiated FPAs may not become finalised in a timely and effective manner.</p> <p>In addressing this risk, MBIE considered the following four key options:</p> <ol style="list-style-type: none">1. Continue with the current FPA system with a mandatory default employer bargaining party (status quo).	

2. Continue with the current FPA system **without** the default employer bargaining party and no replacement backstop mechanism.
3. Government appoints a panel of employer representatives.
4. Establish a determination backstop as a new process within the FPA system.

The option proposed by the Minister is to establish a determination backstop process as an alternative to bargaining (option 4). This is the option that MBIE recommended and supports, since it is the option which is most likely to enable the FPA system to function properly and will prevent FPAs from being held up by one side failing to participate in bargaining.

This option is not expected to introduce any external impacts on the labour market beyond the significant impacts that the FPA system will already bring, as there is no evidence that the backstop will change the balance of FPA terms for employees compared to bargained FPAs. However, it does increase the administrative costs and impacts on how employers and employees engage with the FPA system. Since there is no cost-neutral way to enable the FPA system to function properly relative to the original FPA design, the direct cost-benefit analysis is negative, with the focus being on cost-minimisation relative to achieving the 'status quo' level benefits.

Targeted consultation with key stakeholder organisations on the concept of the backstop was undertaken. For Business NZ, the introduction of the backstop reduces their obligations since they no longer have a compulsory role in the FPA system, but it does not address their wider concerns with the system. The New Zealand Council of Trade Unions (NZCTU) considered it is critical that the backstop incentivised the employer side to participate in bargaining.

Limitations and Constraints on Analysis

The analysis scope is limited to options that align with the fundamental design parameters of the FPA system. There is no mandate to reopen the policy question of FPAs or make fundamental changes to the FPA model that Cabinet agreed to, so the analysis looks at how the current FPA model can be refined to ensure it functions as intended by Cabinet.

A key question which we do not have the data to answer is whether (backstop) determined FPAs could result in superior terms for workers on average compared to bargained FPAs. There is no clear evidence or rationale that this will occur based on the policy design of the backstop, therefore it is assumed that there is no change to the monetised benefits for employees for determined FPAs (estimated at \$150 to \$600 million in the previous FPA RIA). Since FPAs represent a unique intervention for achieving sector-wide minimum employment terms, there is no direct overseas comparison to help answer this question. The answer could be obtained through ongoing monitoring an evaluation of FPAs by assessing variations in the favourability of terms between (backstop) determined FPAs and bargained FPAs.

Due to time constraints, there has not been public consultation on the backstop. Public consultation on the policy of the backstop is set to occur alongside the FPA Bill as part of the Select Committee process. Targeted consultation on the backstop concept was undertaken with key stakeholders who have been involved with the design of FPAs (ie NZCTU and BusinessNZ) and their input was valuable for the design of the backstop.

Responsible Manager(s)



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Ministry of Business, Innovation and Employment

9 March 2021

Quality Assurance (completed by QA panel)

Reviewing Agency:	MBIE
Panel Assessment & Comment:	The MBIE Quality Assurance Panel considers that the Regulatory Impact Assessment meets the Quality Assurance Criteria.

Section 1: Background

1. On 19 April 2021, Cabinet agreed to the key policy features of a new Fair Pay Agreements (FPA) system and to begin drafting legislation to implement the system [CAB-21-MIN-0126 refers]. This system will allow unions to initiate a process that requires unions and employer representatives to bargain for a set of industry or occupation-wide minimum employment terms and conditions. MBIE provided a detailed RIA alongside the Cabinet paper that analysed impacts and costs of the Government's preferred FPA model compared to alternative FPA models and other system level options.¹

Role of the default bargaining party and BusinessNZ

2. There is an inherent risk in the FPA system that an unwillingness of employer representatives to participate in bargaining could result in FPA bargaining ceasing, which would frustrate the policy intent of concluding a FPA whenever FPA bargaining is initiated. To mitigate this risk, Cabinet agreed to include an employer default bargaining role in the system to ensure bargaining could continue if employer representatives did not participate. BusinessNZ would perform this role. The assigned organisation (BusinessNZ in this case) would be required to:
 - use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated; and
 - be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months.

¹ MBIE agreed in the RIA that there was a need for additional labour market interventions to achieve improved outcomes for workers but recommended an alternative approach to the Government's preferred option for establishing minimum sector wide standards. MBIE's recommended model was a combination of enabling a government body to set targeted sector wide minimum standards and strengthening collective bargaining in the Employment Relations Act.

3. It became apparent after Cabinet decisions that the employer default bargaining role did not eliminate the risk above, as it relies on the ongoing willingness and ability of the assigned organisation to perform that role. Naming BusinessNZ for this role was based on BusinessNZ's agreement with the Minister in March 2021 that it would act as the default employer bargaining party if no other suitable organisation could be found to represent employers for a particular FPA. However, on 8 December 2021 following further clarification of what this role would involve, BusinessNZ confirmed in writing that it is not willing to perform this role.

Updated Regulatory Impact Analysis to implement a 'backstop determination function' to address the problem

4. To ensure that the FPA system can deliver the intended outcomes, we have considered alternative options to relying on the default bargaining role. This analysis complements and builds on the previous FPA RIA to assess the extent to which the options can enable the FPA system to function as Cabinet intended while minimising the additional complexity and cost.

Section 2: Problem definition and Objectives

Rationale and objectives of FPA system

5. The current Employment Regulatory and Employment Standards (ERES) system recognises that there is an inherent imbalance of bargaining power in the employment landscape. There is a broad view that additional interventions within or alongside the ERES system could be introduced to improve labour market outcomes for workers, which includes introducing sector-wide minimum standards for workers, especially for sectors which heavily compete on cost to secure contracts.
6. To establish minimum sector-wide standards, the Government decided to proceed with a FPA system that aligned with the design that the Fair Pay Agreements Working Group (FPAWG) recommended. This would enable sector or occupational-wide terms and conditions to be established through unions initiating a process to bargain with employers. This would result in setting minimum 'floor' standards for sectors and occupations to guarantee minimum levels of entitlements for employees across a range of topics. Employers would be required to coordinate and engage in bargaining (through employer representative organisations) and strikes and lockouts would be banned for the purposes of FPA bargaining.
7. The two primary issues that the FPA system intends to address are:
 - the imbalance of bargaining power between employers and employees, and
 - industry competition based on reducing terms and conditions for employees (ie a 'race to the bottom' for workers amongst businesses within a sector heavily competing on costs).
8. The key aims of the FPA system, in addressing the above issues, are to enable minimum standards to be reflective of the needs of the relevant sector, improve labour market outcomes for workers through addressing competition based on labour costs, and to improve workers' ability to collectively improve their working conditions.

Problem with the current FPA bargaining framework

9. There was an inherent risk in the FPA model approved by Cabinet: the risk arising from the FPA bargaining framework relying on a single organisation to act as the default bargaining party to progress FPA bargaining, in the absence of an eligible organisation willing to represent employers. Without an organisation to play this role, the current system design retains the risk of there being no path to conclude a FPA if no employer

representatives are willing to bargain. This risk needs to be addressed for the FPA system to deliver on its intended objectives.

10. One policy intent of the FPA system is that, where possible, all FPAs are the product of bargaining between unions and employer representatives, although terms may be fixed by Employment Relations Authority (ER Authority) determination following a second failure to ratify or following a bargaining impasse (if all reasonable alternatives have been exhausted).
11. Cabinet agreed to require in law that an entity step in to be the default bargaining party. This role was created to address the risk that in some sectors there may not be an organisation willing and able to represent employers in FPA bargaining. In this situation, the default bargaining party would step in to represent the sector in FPA negotiations. BusinessNZ, as the peak body organisation for New Zealand employers, was viewed as the most appropriate organisation to perform this role.
12. The success of the default bargaining party role relies on the ongoing willingness of the assigned organisation to participate in the system. If the default bargaining party simply fails to perform its bargaining function, then bargaining would be frustrated and the ability for FPAs to be developed in an effective and timely manner (if at all) would be compromised. This would challenge the policy intent of the FPA system, whereby after a FPA is initiated, it should end with a FPA being concluded in an efficient and effective manner. To mitigate this risk and ensure that the policy intent of the FPA system is achieved, it is necessary to refine the current FPA model to guarantee that a FPA is concluded without relying on the default bargaining party stepping in.

Objective of making policy design changes to FPA system

13. The objective is to provide for a well-functioning FPA bargaining system, by:
 - A. Ensuring that when FPA bargaining is initiated, a settled FPA results in a timely manner by providing a clear and unimpeded process which will occur when one side is not represented in bargaining² (ie one side cannot hold up the progress of an FPA for an undetermined period), and
 - B. Ensuring FPAs are bargained where possible by incentivising parties to prefer the bargained route rather than go for determination.
14. The above objectives relate to how we achieve the intended outcome of the FPA system, which is creating better labour market outcomes for workers through establishing sector-wide minimum employment terms. If the system cannot function as intended, it will not be able to deliver on its overarching objective.

Section 3: Options Identification and assessment

Assessment criteria for options

15. The below criteria have been developed to assess the four possible options for progressing the FPA system in response to no longer being able to rely on the default employer bargaining party role. These criteria assess the extent to which the four options can enable the FPA system to deliver on its policy objectives (outlined in paragraph 13 which correspond to criterion I and I) while minimising additional system

² On initiation, only the employee side can trigger backstop (as only unions can initiate the first FPA). On renewal, either side can trigger the backstop depending on which side initiated the FPA (as renewals can be initiated by both the employee or employer side). For simplicity, we have used the employer example throughout, since the most likely scenario of the backstop being required is where the employer side fails to engage in bargaining after initiation of a first FPA.

complexity and costs (criterion III) plus any additional impacts on covered employees and employers from FPA terms (criterion IV).

16. It is important to note that the FPA system will have a significant impact on the labour market, but the backstop only changes the process for *how* FPAs may come into existence. It does not change who is subject to an FPA, and it does not have an impact on the overall favourability of terms across employers and employees. The below criteria focus on the FPA system being able to deliver the same outputs and outcomes as Cabinet intended. This means the system is generating essentially *the same* external impacts as identified in the previous RIA (eg improved labour outcomes for workers but reduced flexibility for employers).
17. The impact analysis in the previous FPA RIA did not factor in an inability to rely on the employer default bargaining role. If the status quo FPA design was retained (option 1), it would change the nature of the impacts against the criteria used in that analysis. For example, the ability for FPAs to be *effective in improving outcomes for workers* (the first criteria the RIA used) would not be as strong as previously indicated because the default party may be able to find a way out of bargaining by disestablishing itself, which would weaken the bargaining framework.

Table 1: criteria for assessing options to address the lack of employer default bargaining party

Criteria	
I.	<u>Effectiveness at ensuring FPAs result in timely manner:</u> This is the extent to which the option provides certainty that all initiated FPAs will be finalised in a timely manner if one side fails to participate in bargaining, and shows how these FPAs would proceed. This criterion aligns with the objective of ensuring that there is a clear and unimpeded process for how FPAs will be concluded when one party doesn't come to the table.
II.	<u>Ability to prevent bargaining from being undermined:</u> This is the extent to which the option supports the FPA bargaining framework by steering/incentivising the employer side towards bargaining rather than the alternative. This criterion aligns with the objective that parties are incentivised to prefer the bargained route to develop FPAs.
III.	<u>Effectiveness at developing appropriate FPA terms:</u> This is the extent to which the option could materially impact the overall impacts or benefits of FPA terms compared to bargained FPAs. Where FPA terms will not result as a product of bargaining, the options must strike a balance between the needs of both employers and employees and be tailored towards needs of the particular the sector or occupation where possible.
IV.	<u>Workability and legitimacy for Government and FPA partners (including costs):</u> This is the extent to which the option introduces additional complexity and costs for parties who use the backstop and for the Government when administering it (eg additional process or compliance). It also covers the extent to which the parties/entities view the legitimacy of their role in the system (eg whether an organisation has a voluntary role or has a statutory duty without their consent).

Options identification

18. The below table outlines the available options for refining the current FPA model to deliver on the objectives in paragraph 13 and ensure that the system functions as intended.

Table 2: Potential options for an alternative backstop

Option	Description	MBIE view
<p>1. <u>Status quo: Continue with the current FPA system with mandatory default employer bargaining party</u></p>	<p>FPAs are bargained between unions and employer representative organisations and a default employer bargaining party (ie BusinessNZ) is required to step in if there is no eligible employer organisation willing to represent employers</p>	<p>This option doesn't meet either of the policy objectives. It neither ensures that all initiated FPAs will result or supports bargaining. BusinessNZ's withdrawal from the role means that relying on them, or potentially any other organisation, could frustrate bargaining and potentially risk FPAs not being concluded or left in an uncertain state. There are no other organisations that would be suitable for performing this role for all potential FPAs.</p>
<p>2. <u>Continue with the current FPA system without the default employer bargaining party and no replacement backstop mechanism³</u></p>	<p>FPAs are bargained between unions and employer representative organisations, but no obligation is placed on a default bargaining party (ie BusinessNZ) to step in if there is no eligible employer organisation willing to represent employers</p>	<p>This option doesn't meet either of the policy objectives. It leaves a gap in the system which could be exploited by employers to avoid FPAs being concluded and could disincentivise coordination amongst employers to engage in FPA bargaining. This exacerbates the risk of bargaining not commencing for an FPA. Furthermore, there is no clear process for how an FPA would proceed if bargaining fails to commence.</p>
<p>3. <u>Government appoints a panel of employer representatives</u></p>	<p>If there is no eligible employer organisation willing to represent employers, the Government appoints a panel to represent employers in FPA negotiations.</p>	<p>This option has the potential to meet the policy objectives, since it facilitates bargaining and ensures an FPA will result but has some significant implementation challenges. It would equate to government funding one side of bargaining which could result in the union side demanding the same level of support. It creates a risk that employers are incentivised to use this option as it would reduce or eliminate their bargaining costs (albeit without control of who their representatives would be). It would also be very difficult for the Government to find willing people with the right skills to take part in negotiations.</p>
<p>4. <u>Establish a determination backstop as a new process to the FPA system</u></p>	<p>A new function is given to the ER Authority to determine terms of an FPA</p>	<p>Preferred option as it adequately meets both policy objectives. It ensures that all initiations will result in a settled FPA it and supports bargaining framework by providing opportunity for the employer side to create a</p>

³ Although this option may produce a similar outcome to Option 1, it is worth considering on its own since it is the only option which does not mandate an organisation to step into bargaining, does not involve determination, and does not increase administrative costs. It tests the impacts that may occur because of making the compulsory bargaining element of FPAs more flexible (ie ensures that there is always a willing or capable participant on the employer side of bargaining if bargaining commences).

	outside of the realm of bargaining.	bargaining party. Rather than depend on a private organisation to step in when needed, there is the certainty that the ER Authority will perform its determination function since the ER Authority is set up by statute, required by statute to do all its existing roles and cannot disestablish itself.
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19. The option to re-design the FPA system or move to an alternative system, such as the one MBIE recommended in the April 2021 RIA, is out of scope. The FPA system is settled government policy, and there is no mandate to revisit that policy question or make fundamental changes to the model that Cabinet agreed.⁴ The scope of the analysis is constrained to options that address the design flaw in the system, and which emphasise or support the bargaining framework (ie FPAs should be bargained wherever possible). Therefore, revisiting alternative FPA models, such as one that would produce entirely determined FPAs, is also out of scope.

Option 4 (the backstop) is the preferred option for MBIE and Government

20. The backstop introduces a new determination function to the FPA system as an alternative to bargaining. As the current system has been based around two parties bargaining, a new process is needed to enable the ER Authority to produce a determined FPA which fits within the legislative framework of the FPA system.
21. The current system already has a determination function to fix terms where there is a bargaining dispute (and the required threshold is met), or if a bargained FPA fails the ratification process twice (ie fails to reach the 50% +1 threshold for both employers and employees twice). The key differences with the backstop determination function compared to determination following bargaining are the trigger for when it occurs and the process for obtaining input on the employer side (as this is the side where a representation gap is most likely to occur).
22. The option supports the policy intent that FPAs are bargained where possible. It does this by:
- Allowing both BusinessNZ and the New Zealand Council of Trade Unions (NZCTU) the opportunity to voluntarily agree to be the default bargaining party when there is no bargaining party(ies) on one side. This provides an opportunity for BusinessNZ to step in as a bargaining party so that the FPA can be bargained rather than proceeding to the backstop process (or ceasing if the NZCTU does not step in).
 - Allowing the ER Authority discretion about how it obtains input from employers (who are not a party to the process). If employers were a party to the backstop process, there is a risk that it might be considered a more attractive option as they would have an ensured voice in the process and not have to bear the costs of coordinating among themselves (as the costs would fall on government).
23. Relying on the ER Authority as a last resort to determine FPAs, instead of relying on a private organisation to step into bargaining, provides certainty that all initiated FPAs will be finalised. This is because ER Authority is set up by statute, required by statute to do all its existing roles and can be required by statute to perform new roles. The ER

⁴ This includes not being able to pursue MBIE's preferred option from the last RIA, which was to redesign the system to allow for a Government body to always set the employment terms for an industry or occupation, or shift to voluntary extension system in which Multi Employer collective agreements could be expanded to cover entire industries or occupation if they reach a certain coverage.

Authority also cannot disestablish itself to avoid its statutory responsibilities, unlike a private organisation.

24. Annex 1 provides further details of the key policy features of the backstop.

Why the backstop is MBIE's preferred approach

25. MBIE's view is that having the ER Authority determine FPAs (ie set the terms) as an alternative to bargaining is required to enable the FPA system to function without relying on the default employer bargaining role. This means establishing a new process to allow the ER Authority to develop FPA terms where bargaining fails to commence for an initiated FPA. This is necessary to prevent FPAs being held up by the non-initiating (employer) side and to avoid forcing any private organisation (the default party) from bargaining against their will.
26. The proposed model (option 4 – the backstop) aligns with the above approach. These changes should enable FPA system to deliver on the policy objectives outlined in paragraph 13 and achieve Cabinet's overarching outcome to *'improve labour market outcomes by enabling employers and employees to collectively bargain industry or occupation-wide minimum employment terms'* [CAB-21-MIN-0126 refers at paragraph 11].

Who is impacted by this change?

27. The backstop does not change which groups will be subject to an FPA compared to the original FPA design. This is because the backstop does not change the entry criteria. The marginal impact for affected parties would be the difference between a determined FPA versus a bargained FPA, including any potential difference in the finalised terms and the impact of the process on parties.
28. The backstop process itself will have an impact on covered employees and employers. When the backstop is triggered, both sides lose control in terms of deciding the terms of the FPA. This will be more acutely felt on the employer side because no organisation will directly represent the interests of employers while an FPA is being determined. Unions will still be able to represent employees throughout backstop proceedings and will be able to propose potential terms to the ER Authority.
29. It is difficult to assess the impact of any difference in the finalised terms, notably the potential income (or monetised benefit) transfer between employers and employees under a determined FPA versus a bargained FPA. There is no clear evidence indicating whether a determined FPA could result in superior terms for workers versus a bargained FPA since unions will have less direct influence over the terms, despite still being able to represent employees in the backstop process.

What stakeholders think

30. The only determination scenario which has been the subject of public consultation is that for failed bargaining negotiations or failure to ratify an FPA.⁵ Submitters disagreed along employee and employer lines about whether there should be a determination function and the topics it could set. Submissions from an employee perspective were generally in favour of determination for addressing bargaining deadlocks over FPA terms and for a broad range of terms to be set by the ER Authority. Submitters from an employer perspective were more likely to be against determination and only supported the "mandatory to include" topics being set by the ER Authority through determination.
31. Aspects of the backstop function were discussed with BusinessNZ during the policy design process. Throughout the development of the FPA system, BusinessNZ has not

⁵ This issue was canvassed in the October 2019 discussion paper *Designing a Fair Pay Agreements System*, which received a number of submissions from businesses and unions.
<https://www.mbie.govt.nz/dmsdocument/7041-designing-a-fair-pay-agreements-system-discussion-paper>

supported the compulsory nature of the system, especially the mandatory bargaining and coverage for businesses in scope of an FPA.

32. On the backstop, BusinessNZ indicated that it could further impede international human rights obligations regarding the ban on compulsory arbitration and International Labour Organisation (ILO) Convention 87 on Freedom of Association and Protection of the Right to Organise. The limitations on these rights are, however, necessary to ensure that enforceable minimum terms are produced in FPAs. For example, if an FPA could not be produced simply because one party refused to come to the table, this would compromise the ability of the system to improve labour market outcomes. Furthermore, FPAs contribute to fulfilling New Zealand's obligation to "*encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and worker' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements*".⁶
33. Being no longer required to perform the default bargaining party role removes BusinessNZ's obligation to step into bargaining, but does not address its fundamental critiques with the system. BusinessNZ considered that in the absence of a bargaining party on the employer side, there should be an open submissions process which would allow any affected employer to submit information to the ER Authority. Officials noted that the design of the system needed to mitigate the risk that it becomes a more attractive option than bargaining. BusinessNZ considered the idea of an advisor appointed by the Authority to assist it during the process would be workable, and was similar to the old Awards system (when the Labour Court fixed terms).
34. The concept of the backstop determination function was also discussed with the NZCTU. The NZCTU reiterated the view that the obligation to use best endeavours to come to agreement on the terms of the FPA in an orderly, timely and efficient manner should fall on employers. The NZCTU does not agree with the interpretation that this obligation applies to the bargaining parties and therefore, does not apply when no organisation has agreed to be a bargaining party on the employer side. In terms of the backstop, the NZCTU considers it is critical that the system incentivise employers to participate in bargaining and that employers will be motivated to participate in bargaining if this is the only way they can be assured of having a voice.
35. The recommended option was also discussed with the Chief of the ER Authority. His main concern was that the ER Authority would need impartial information on matters such as employment terms and the history of wage rates of the industry and occupation concerned. This could potentially be supplied to the Authority in the form of research provided by MBIE, so and Authority members would not have to rely only on the information provided by the union bargaining side or an Authority advisor. Under the proposed approach, the ER Authority would be able to seek information and expert input as it sees fit, as it currently does with other employment related disputes. The Chief was unsure about the value of the role of the Authority advisor and how the advisor would be selected, but overall was comfortable with this approach as long as the ER Authority was also able to obtain impartial contextual information.

⁶ This obligation stems from article 4 of the International Labour Organization's (ILO) Right to Organise and Collective Bargaining Convention 1949 (Convention No. 98). New Zealand has ratified this convention.

Section 4: Impact Analysis table

We have conducted a qualitative impact assessment as we have limited cost data to compare options in comparable units.

Marginal impact: How does each of the options identified in section 3 (table 1) compare with taking no action against the criteria set out in table 2?

	(1) Continue with the current FPA system with default employer bargaining party (status quo)	(2) Continue with the current FPA system without the default employer bargaining party	(3) Government appoints a panel of employer representatives	(4) Establish a determination backstop as a new process to the FPA system (<i>preferred option by MBIE and govt</i>)
Ensures FPA results in timely manner	0 overall rating This would reduce the ability for FPAs to be concluded in a timely manner. This would rely on an organisation to undertake a critical role in the FPA system which could frustrate bargaining if it simply failed to participate on behalf of employers or did not perform the role to its' best ability. There is also the risk of the organisation restructuring or disestablishing to avoid being captured by the obligation, which would mean having to find a new suitable organisation (which may not exist) to be the default.	-- overall rating This would significantly reduce the ability for FPAs to be concluded in a timely manner. It leaves a clear gap in the bargaining framework which employers/employer representatives could exploit to frustrate or delay FPAs and reduces the incentives for participation. There is no clear process for how FPAs will proceed if a suitable bargaining representative for the employer side cannot be found.	+ overall rating This option ensures that an FPA will result under all circumstances, so long as it fulfils the relevant criteria and retains the support on the employee side. It could take time to find the right people with the necessary skills to represent the employer side in negotiations, so likely to take more time to develop FPAs.	++ overall rating This option ensures that an FPA will result under all circumstances, so long as it fulfils the relevant criteria. It adds slightly more steps and time to the FPA process, but this is marginal compared to the overall time it will take for FPAs to be finalised from initiation (noting that there is no time constraints for bargaining). Overall, this option is likely to add the least amount of time to ensure that FPAs are finalised in comparison to the as the original system
Prevents bargaining being undermined	0 overall rating This option does not effectively incentivise bargaining as there is a risk that the default may simply fail to perform its role, or perform the role inadequately, or disestablish itself. It is unclear how FPAs would proceed if the default had to be penalised for not participating in bargaining, or if no organisation on the employer side steps into bargaining if the default has disestablished.	-- overall rating This option undermines the FPA bargaining framework as it provides a gap for employers to effectively opt out of bargaining. This may be done by employers not wanting to form or join employer groups or by employer representative organisations not developing their bargaining capability to equip them to engage in FPA negotiations. This would at least delay an FPA from developing and defeat the purpose of bargained FPAs. Given that there is no official default bargaining organisation in this option, the risk that the employer side fails to coordinate and participate in bargaining is higher than option 1	0 overall rating This option enables bargaining to occur for all initiated FPAs. However, there could be an incentive for the employer side to not directly participate in bargaining (or not to coordinate) knowing that their side will be supported by the Government if they fail to do so. The employee side may see it as unequal that the employer side is being supported for bargaining.	0 to + overall rating This option generally supports the FPA bargaining framework given that it provides some opportunities and incentives for the employer side to join bargaining. Employers may be concerned with the loss of control if an FPA goes to determination. However, it is inevitable that introducing any sort of determination function as an alternative to bargaining will de-emphasise the bargaining aspect of FPAs, given that bargaining is complex and costly for employers.
Ensures FPA terms are appropriate	0 overall rating This option could place the default bargaining party in a situation where it is forced to represent employers it has no contact with, who work in sectors which it has little information on. This could compromise its ability to bargain terms which reflect the interests of the employers and results in an FPA which does not strike the right balance between employer and employee interests.	- overall rating This option has the potential to reduce the benefits of FPA terms for the employee. This is because the ability for the employee side to negotiate the best terms possible could be compromised if it becomes more difficult to bring the employer side to bargaining, since some employers or sectors could opt out by not coordinating sufficiently. This could lead to a balance of FPA terms which lean more towards the employer interests (eg the starting position for employee side may have to be less ambitious to guarantee that the employer side will partake in bargaining).	0 overall rating This option is unlikely to result in a net difference in the impact of the FPA terms in comparison to a bargained FPA. It ensures that the employer side is represented in bargaining and therefore offers the most opportunity out of all the options for employers to influence the balance of terms in an FPA (other than through direct negotiations of employer representatives).	0 to + overall rating It is unlikely that the backstop will impact the preferability of terms between the employee and employer side in comparison to a bargained FPA. Employers may be concerned that they will have less influence over the terms of an FPA when it goes to determination, but there are safeguards for how the ER Authority determines terms to ensure that they are balanced between employers and employees. It may be more difficult to tailor determined FPAs for specific industries since the ER Authority panel will not have the same level of industry knowledge as the negotiating parties.
Workability and legitimacy (for govt and FPA parties including costs)	0 overall rating Significant workability issues. This would likely reduce the legitimacy of the FPA system from the perspective of the organisation being forced to perform the role (and any affiliated members). Requiring an unwilling body to be a party is inconsistent with general contract law (contract not valid if parties are forced into it), and the principle of free and voluntary bargaining in ILO Convention 98 and section 3 of the ER Act. This option avoids the costs of having to set up a new determination function, but at the cost of workability and further inconsistency with domestic rights and international obligations.	- overall rating Significant workability issues. No process for how FPAs would proceed if the employer side cannot partake in bargaining. Costs are likely to fall on the employee bargaining side from attempting to commence bargaining but achieving no progress. Potential increased cost to Government if determination is to apply in response to failures to commence negotiations. Could be viewed as more consistent with international and domestic labour rights and obligations since the compulsory bargaining element of FPAs is weaker under this option.	0 overall rating This option will raise some legitimacy questions from the employee side as the Government would be fully funding the employer side, which may be viewed as inequitable. Employers will likely be represented by people that they are unaffiliated with (more so than the default) which may leave them more removed from the FPA process. It will be difficult to find people with the right expertise to represent the employer side, and if found, compensating these people would increase the FPA system costs.	+ overall rating Overall workable, but at the expense of introducing additional complexity to the FPA system. It introduces new processes if bargaining is unable to commence. It potentially reduces bargaining costs for the employer side, but overall adds some costs to the system to administer the backstop function. The cost of the backstop is a marginal given its importance for correcting the vulnerability in the system and ensures the benefits of FPAs can be realised.
Overall assessment	This is not the preferred option.	This is not the preferred option.	This is not the preferred option.	This is the preferred option

Key: ++ much better than doing nothing/the status quo, + better than doing nothing/the status quo, 0 about the same as doing nothing/the status quo, - worse than doing nothing/the status quo, -- much worse than doing nothing/the status quo

Section 5: Costs and benefits

Benefits

36. The below table provides a summary of the marginal monetised benefits of introducing the backstop relative to the original FPA system design.

Expected benefits of introducing backstop, compared to benefits of original FPA system (per year)			
NOTE: ongoing benefits are based on <u>8 FPAs per year</u> ⁷ with 4 of these FPAs using the backstop determination function per year. ⁸			
Affected parties		Comment	Impact
Regulated parties	Employees	No change - unions still represent employees during backstop and monetised impacts of FPA terms is assumed to be the same.	Low
	Employers	Reduced bargaining and administrative costs from using the backstop ⁹	<i>Est \$0.3–\$0.8m</i>
Regulators and Government		Reduced bargaining cost contributions from not supporting employers in FPA negotiations	<i>Est \$0.2m</i>
Total Monetised Benefit		Monetised benefits are the reduced costs to employers from not having to engage in bargaining and the cost saving to the Government from funding bargaining	<i>Est \$0.5 - \$1m</i>
Non-monetised benefits		Time saved for employees from using backstop	Low

37. The primary monetised benefit is reduced bargaining cost contribution by the Government and bargaining costs incurred by the employer side (the previous RIA estimated that total bargaining costs would be \$1 to \$2 million per year). These cost savings occur if employers use the backstop for half of the available FPAs per year.
38. We are not able to determine if FPAs set by the backstop determination function will introduce overall net-tangible benefits for employees relative to bargained FPAs. The primary benefit and function of the backstop is ensuring that initiated FPAs will be finalised (with or without negotiation) so that covered workers will receive the benefits of an FPA.
39. The April 2021 RIA estimated that the monetised impact of the marginal increase to wages per year (based of eight FPAs per year) were \$150 to \$600 million (ongoing per year). This represents a direct transfer from employers to employees (therefore a cost to employers).¹⁰ There is nothing about the policy design of the backstop which

⁷ The previous RIA assumed 8 FPAs per year would be funded and we are retaining this assumption.

⁸ We are assuming that 50% of the FPAs that are initiated will have terms fixed by the determining body because of the factors that mitigate against participating (eg financial commitment and perceived litigation risk).

⁹ The total cost of bargaining without the backstop was previously estimated at \$1-2 million in the April 2021 RIA (including Government subsidy). Four less bargained FPAs halves the total cost (\$0.5-1m). Subtract the Government contribution of 4*\$50k leaves a savings for employers of \$0.3-0.8m.

¹⁰ This figure was based on one set of eight FPAs being concluded in the eight lowest wage occupations as identified in the June 2018 New Zealand Income Survey (total of 255,700 workers). Our assumption was that wages would increase by 10% for (1) a fifth of workers or (2) all workers paid under \$20 per hour respectively. A 10% wage increase roughly approximates the difference between the minimum wage and the living wage.

indicates that it will have a net impact on this cost-benefit transfer from employers to employees. This is because the ER Authority's role is to decide FPA terms based on defined criteria and must consider the impacts of any terms on employers and ensure they align with industry practices.

40. There is a risk that the panel could lack the industry expertise to make a balanced decision on certain terms which could impact employers and employees. However, because the panel will be aware of the industry information gaps between the ER Authority and negotiating parties (where they exist), it is possible they could take a conservative approach to finalising terms. Otherwise, the ER Authority can seek additional information to plug the gaps in knowledge.

Costs

41. The below table provides a summary of the marginal monetised costs of introducing the backstop relative to the original FPA system design.

Expected costs of introducing backstop, compared to costs of original FPA system (per year)			
NOTE: ongoing costs are based on <u>8 FPAs per year</u> with 4 of these FPAs using the backstop determination function per year.			
Affected parties		Comment	Impact
Regulated parties	Employees	No change - unions continue to represent employees when FPA goes to determination and the cost will be covered by the employee bargaining party and the Government contribution.	Low
	Employers	No change (reduce costs covered in benefits table above)	Low
Regulators and Government		Cost of administrating the backstop	Confidential advice to Government
Total Monetised cost		Monetised cost is represented by the additional cost of implementing the backstop	Confidential advice to Government
Non-monetised cost		Time saved for employees from using backstop	Low

42. Assuming the backstop does not change the estimated \$150 to \$600 million transfer from employers to employees, the primary cost of the backstop is the cost to Government to administer it. In the previous FPA RIA, MBIE estimated that administrating the FPA system would cost around \$10 to 12.5 million per year. Confidential advice to G

43. We estimate that the backstop will incur Confidential advice to Government. This is the net cost of administering the system minus the bargaining support savings (accounting for the estimate ranges) and represents the additional cost required to ensure the system functions as Cabinet intended. Based on the options available, it is not feasible to achieve the same FPA outcomes and benefits

as envisioned by Cabinet without an increased administration cost, therefore a net cost is expected.

Section 6: Implementation and evaluation

Implementation

44. Confidential advice to Government

[Redacted content]

Legislative requirements

- 45. The implementation date is contingent on determining the commencement date for the Bill but is will most likely occur within the first quarter of 2023. Work is being undertaken to ensure that the FPA system will be ready to accept new FPA applications, facilitate the organisation bargaining parties and allow bargaining to commence.
- 46. Drafting of the FPA bill is complete for introduction in late March 2022. Because the Bill reflects the decisions Cabinet made in April 2021, it includes the default representative role. The Minister for Workplace Relations and Safety decided that the backstop is to be introduced via a Supplementary Order Paper (SOP) to the select committee during its consideration of the FPA Bill. In addition, the Minister intends to inform the select committee of the proposed change and to ask the committee to seek submissions on the backstop policy as well as the FPA Bill as introduced. It is estimated that the SOP will be finalised for Select Committee in late July 2022, two months after submissions on the FPA Bill are projected close on a standard select committee timetable.

Monitoring and Evaluation

- 47. A full set of performance and success measures, and a monitoring plan, will be developed as part of detailed monitoring and evaluation design based on a detailed programme logic. It is intended that the evaluation plan will include two key components: a shorter-term implementation evaluation (assessing the effectiveness of MBIE supports for implementation of the legislation); and a longer-term impact evaluation, assessing the extent to which legislation has achieved its intended short-to medium term outcomes.
- 48. The intervention logic and evaluation plan, together with identification of key performance indicators, will be developed over the course of 2022. MBIE is currently developing a framework for evaluating the overall effectiveness of the Employment Relations/Employment Standards Regulatory Framework. It is intended that the evaluation of the impact of FPAs will be nested within this wider programme of work.
- 49. One of the key metrics for the backstop once the FPA system is running is its frequency of use. If most FPAs (or all) are developed using the backstop determination function, it will demonstrate that the bargaining aspect of the system is being undermined. Furthermore, the terms set by the ER Authority using the backstop

determination will be reviewed overtime to assess if it has been able to produce comparable terms to bargained FPAs.

Annex 1: Key policy features of Backstop

Table 1: Design features for backstop determination function

FPA Feature	How it applies for the backstop determination function (backstop)
Initiation	<ul style="list-style-type: none"> Same process as for a bargained FPA. An FPA can be initiated by a representation test or the public interest test. The FPA must continue to be supported by the employee side in order to go through the backstop if no employer bargaining party steps up.
Bargaining party representation	<ul style="list-style-type: none"> BusinessNZ and the NZCTU will have discretion to be the default bargaining party when there is no bargaining party(ies) on the non-initiating side. This presents a final opportunity to bargain for an FPA and avoid the backstop. If an FPA covers 'specified employers' and 'other employers' and there is no willing bargaining party for 'other employers', <i>the 'specified employers' will still not be able to represent other employers</i>. A lack of representation for 'other employers' could trigger the backstop.
Timeframes for triggering the backstop	<ul style="list-style-type: none"> Deadline for forming the bargaining side is <u>three months after initiation for an initial FPA</u> and <u>two months after initiation for a renewal</u>. If after that time, no organisation has applied to be a bargaining party, or all the bargaining parties on the non-initiating side withdraw during bargaining, the (voluntary) <u>default would have one month to decide to step in</u>. If they do not, then the initiating bargaining side <u>will have up to three months to apply to the ER Authority to trigger the backstop</u>.
Institution	<ul style="list-style-type: none"> The ER Authority will perform the backstop determination function.
Process for FPA backstop determination	<p>Representation during backstop determination</p> <ul style="list-style-type: none"> Unions which have registered as a bargaining party for that FPA will continue to represent covered employees in the backstop determination process. Once that process has been triggered, organisations can no longer apply to be a bargaining party. Where a FPA covers 'specified employers' and 'other employers', the 'specified employer' bargaining party(ies) will continue to represent 'specified employer' in the backstop process¹¹ <p>Obtaining input from the employer side</p> <ul style="list-style-type: none"> The ER Authority will have discretion on how it seeks input from/about the implications of potential FPA terms on employers, including whether to appoint an Authority advisor to provide independent input on those likely impacts MBIE will provide the Authority with a sector report outlining problems within the sector The ER Authority will have the power to call for evidence and information from the parties or from any other person
Fixing terms	<ul style="list-style-type: none"> The same requirements that the ER Authority uses when fixing terms following a bargaining dispute or two failed ratifications will be applied for the backstop determination, in particular: <ul style="list-style-type: none"> The decision will be made by a panel of members It will be required to apply the same criteria for fixing an FPA (eg consider the impact on relevant industry or occupational practices and norms) The ERA: <ul style="list-style-type: none"> must fix mandatory to agree topics can fix mandatory to discuss topics but must fix a 'mandatory to discuss' term if requested by one side, unless there is a good reason not to.

¹¹ Specified employers consist of PCO, Police and NZDF, the three non-public service departments. They can either represent themselves or be represented by the Public Service Commissioner (PSC) in bargaining and must continue to represent these organisations if an FPA which covers them (plus other employers) goes through the backstop.

	<ul style="list-style-type: none"> ○ cannot include other employment terms - as there are not two sides to 'agree' to include them. ○ cannot include exemptions - as these can only be fixed when there are two bargaining sides to both agree and run an exemptions process.
<p>Provision of employee contact details, paid meetings and unions access</p>	<ul style="list-style-type: none"> • To enable the unions that are employee bargaining parties to represent employees in this process, the same obligations and rights that apply during bargaining will apply, including: <ul style="list-style-type: none"> ○ Employers will provide details of employees newly within coverage during the process ○ Employers will provide two, two-hour paid meetings organised by union bargaining parties (not in addition to any that may have occurred after initiation but before the backstop is triggered) ○ Union bargaining parties will be able to access workplaces with employees within coverage.