MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

AIDE MEMOIRE

Fair Pay Agreements: Initial summary of submissions

Date:	7 July 2022	**Priority:**	Medium
Security classification:	In Confidence	**Tracking number:**	2122-4944

Information for Minister(s)
Hon Michael Wood **Minister for Workplace Relations and Safety**

Contact for telephone discussion (if required)

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The following departments/agencies have been consulted
N/A

Minister's office to complete:

- ☐ Approved
- ☐ Noted
- ☐ Seen
- ☐ See Minister's Notes
- ☐ Declined
- ☐ Needs change
- ☐ Overtaken by Events
- ☐ Withdrawn

Comments

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Purpose

This aide memoire provides you with an initial summary of the submissions received on the Fair Pay Agreements Bill (the Bill) for your information.

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

7 / 07 / 2022

Background

1. On 19 May 2022, formal submissions on the Bill closed and subsequently oral hearings have concluded on 29 June 2022.

2. Officials are now working through the submissions and policy responses for the Departmental Report, which we anticipate will be due on 8 August 2022, subject to Select Committee confirmation.

An initial summary of submissions

3. **Annex One** provides you with an initial summary of submissions including information on submitters, high-level themes across submissions and comments received on specific provisions within the Bill.

4. The Bill received 1,796 submissions. The majority of these were from employees.

5. The majority of submitters supported the Bill (predominantly employees and employee associations/unions) and saw the case for change. Reasons for support included, but were not limited to, the need for improved working conditions, addressing long standing inequality, the need for better recognition for work and improved communication, and the need for minimum standards.

6. Those who did not support the Bill (predominantly employers and employer associations) raised a number of concerns. These included, but were not limited to, the compulsory nature of Fair Pay Agreements, the complexity of the processes set out in the Bill, perceived

litigation risk, lack of representation of employers and potential impacts on business costs, productivity and inflation. Many of these submitters also did not see the need for change.

7. The overall submission number is lower than initially predicated. This is because the New Zealand Council of Trade Unions member's submissions have been combined into one individual submission. This has resulted in a reduction of just over 300 submissions.

Next steps

8. A more detailed analysis of submissions will be included in the Departmental Report.

9. A draft of the Departmental Report will be provided to your office by Thursday 28 July 2022, with a final version to follow on 4 August 2022. The Ministry of Business, Innovation and Employment intends to forward the final Report to the Education and Workforce Select Committee by midday on Monday 8 August 2022.

Annexes

Annex One: Initial summary of submissions

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1. The Bill has received 1796 submissions. These included:

    a. around 170 submitters who provided 'form' submissions – these were mainly employers and included a BusinessNZ form and forms from the transport, construction, hospitality, and tourism sectors

    b. around 1000 individual E tū submitters

    c. over 100 early childhood education employee submitters.

2. The remaining submitters provided unique submissions.

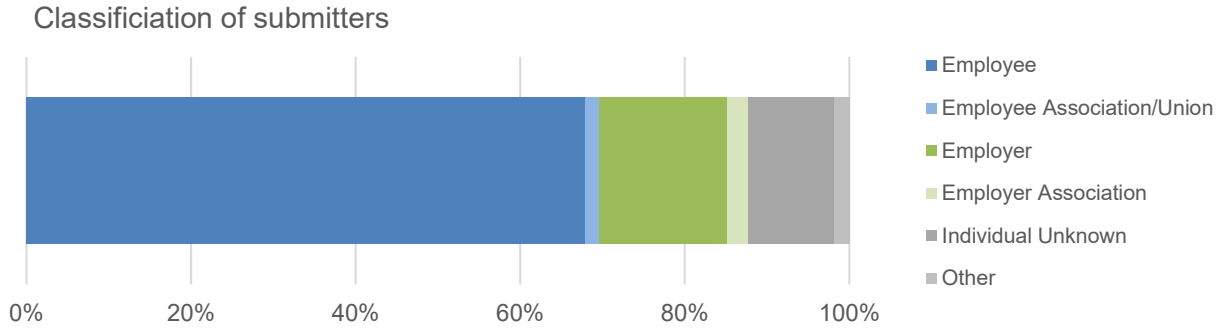
3. Some submissions included a range of perspectives and views. New Zealand Council of Trade Unions (NZCTU) provided one individual submission that included approximately 300 individual stories and Simpson Grierson's submission included a survey across 78 employers.

Who are the submitters?

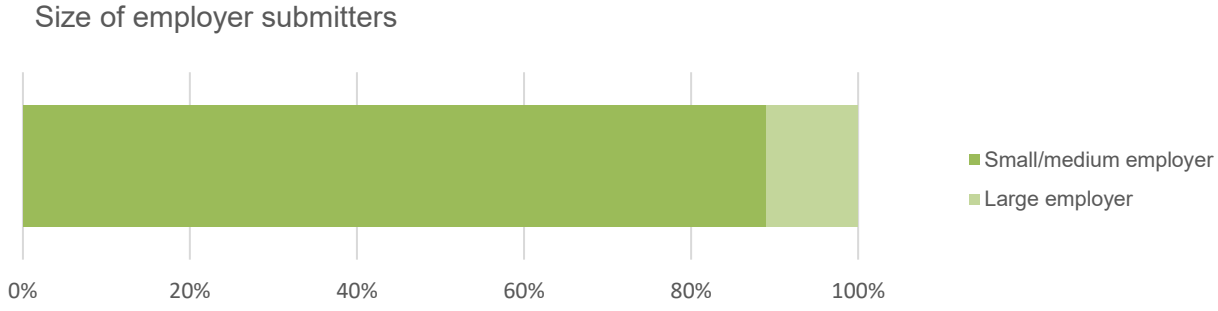
4. Submitters spanned across numerous classifications and sectors. The vast majority of submitters were individual employees, with employers second. Employer associations and employee associations/unions were represented equally. The Bill also received a range of other submissions from law firms, academics, and special interest groups.

5. Around 180 individuals also provided submissions but did not specify their status.

6. The figure below provides a breakdown of submitters.

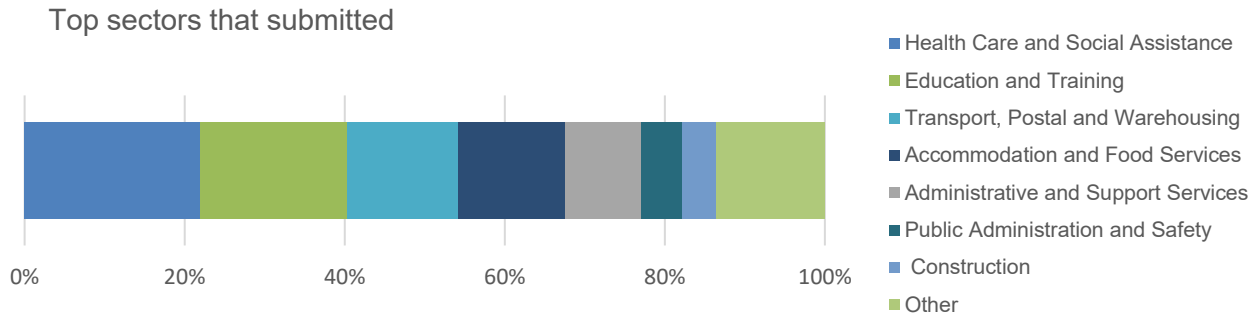


7. Of the employers who submitted, the majority were small/medium sized employers.



8. While around half of the submitters did not specify which sector they were from, those that did specify were predominantly in health care and social assistance; education and training; transport, postal and warehousing; and accommodation and food services. Of these, many of the employee submissions came from health care and social assistance, education and training, and administrative and support service. Many of the employer submissions came from transport, postal and warehousing, accommodation and food services and construction. This breakdown reflects the 'form' submissions received, as mentioned above.

9. The table below provides a breakdown of the sectors that were specified by submitters, noting that over half of submitters did not specify the sector they were from.



Main themes across submissions

10. There were several high-level themes that came up across submissions that were not specific to any one provision in the Bill. These are described in the section below.

Overall support

11. Around 1300 submitters supported the Bill. These were predominantly from individual employees and employee associations/unions. The main reasons for supporting the Bill included submitters seeing Fair Pay Agreements (FPAs) as a way to fix current labour market problems. Submitters commented they considered that the Bill would:

    a. improve the conditions of employees' workplace and ensure pay reflects the work that is done

    b. help ensure employees can survive rising costs of living

    c. undo some of the damage that has led to worsening inequality

    d. ensure good employers will not be undercut by bad employers

    e. provide opportunities for staff to upskill and progress in their careers

    f. ensure employees have dignity and to help rebalance the power between employers and employees.

12. Many submitters commented on the importance of the Bill in lifting minimum standards. Aotearoa Legal Workers' Union for example stated that "the ability to negotiate for and implement fair pay agreements across the legal sector will be instrumental in ensuring minimum standards across all legal employers in Aotearoa". This sentiment was shared by Raise the Bar Hospitality who explained that the Bill "is a once in a life-time opportunity to transform [the] industry by giving workers and unions the tools to lift minimum standards".

13. Hundreds of employees saw FPAs as a way to "give employers and workers the flexibility to create minimum standards best suited to the industry". One employee stated, FPAs will "help

stop the race to the bottom by raising minimum wage and conditions that all employers must level up to".

14. CTU Komiti Pasefika also commented how important FPAs will be for Pacific Peoples. They noted that they will "have a disproportionately positive impact on Pacific people because [they] are over-represented in industries where workers have lost the most under the current system. These industries are also where FPAs will see the greatest gains from sector bargaining".

15. Around 350 submitters did not support the Bill, these were predominantly from employers and employer associations. Over 150 submitters (through the sector form submission) commented that they do not consider FPAs will improve labour market outcomes.

16. The reasons for a lack of support across submitters often included concern that the Bill:

    a. is a step backwards and too similar to the National Awards System

    b. assumes employers and industries are mistreating their employees

    c. is overly complex

    d. is not the right solution to the problem and that there are more effective ways to address the problems within the employment legislative and regulatory system.

17. Submitters also commented on the political nature of the Bill and the possibility of it being repealed by future governments. There was also concern around the timing of the Bill being unfair, given the costs to business over the last few years.

18. A handful of submitters, all individual employees, considered that the Bill did not go far enough. For example, one submitter suggested the need for education at high school to ensure children are literate of their worker rights.

19. A number of submitters expressed that they supported another submission made by representative groups/associations, particularly:

    a. BusinessNZ's submission

    b. NZCTU's submission

    c. E tū's submission.

The need for change

20. Hundreds of submitters noted that there were problems in the current system and that there was a need for change. The majority of these were E tū submitters who raised concerns about current working conditions, wages, health and safety, and training. These submissions often told emotive personal stories about their own working conditions. NZCTU also provided a submission that outlined similar concerns and stories across over 300 members.

21. As one submitter commented, "I have to work over 100 [hours] per fortnight in order to cover expenses and provide food on the table". Another noted that in their sector they have witnessed "people being told not to log their overtime, understaffing and excessive use of temp agencies, lack of proper training, outright disregard of and dismissal of health and safety concerns, and abuse and harassment". One employee expressed that they "not looked after or protected" in their work.

22. Some employers also acknowledged there were problems with New Zealand's labour market. For example, the New Zealand Construction Industry Council noted that they "acknowledge there is a low skilled and/or casualised portion of the workforce that need greater protection in New Zealand's labour market". However, many still did not support FPAs as being a solution.

23. Submitters, mainly employers/employer associations, commented on whether there was a problem to begin with. New Zealand Shipping Federation for example explained that "the

proposed regime is not akin to applying a sledgehammer to crack a walnut. In this case, the Government has not been able to prove the walnut even exists". Many others expressed a similar sentiment and did not see rationale for change in their industries. Retail NZ noted, "While there may be some businesses or industries where workers are not paid fairly, it is not true to say this applies across the economy, and it is not true of the retail sector". New Zealand Initiative also expressed strong concerns submitting that "the Government should be very cautious before altering labour market settings that are working very well for workers and overall wellbeing".

24. Many of these submitters commented that there are current laws in place already to mitigate some of this risk, and/or that the Government has already introduced a raft of new interventions that address these issues (i.e. immigration changes, modern slavery changes, pay parity, increasing minimum wage). New Zealand Shipping Federation stated that "we can (and mostly already do) deal with unfair employment practices and outcomes through minimum wage, minimum statutory conditions, and a generally robust employment system". This sentiment was shared by both large employers (such as McDonald's Restaurants, ANZCO Foods and Ryman Health Care) and small employees (such as Oamaru Licensing Trust, Wilson Haulage and Super Liquor Hornby). Many of these submitters also believed existing settings could be better strengthened (such as stronger enforcement), rather than introducing FPAs.

Additional costs to businesses and the system

25. Submitters expressed concern about additional cost being created for employers – a large proportion of these were employers/employer associations, of whom most also opposed the Bill.

Costs to employers

26. Submitters were concerned that FPAs would add cost to employers, increase unemployment and force businesses (particularly SMEs) to shut down. Many of these were employers who expressed that the costs put onto them by FPAs would affect their bottom line and for many would diminish their ability to hire staff or provide non-salary-based incentives. Alongside increased unemployment, the additional costs of the system would force many to close their business.

27. Several submitters expressed that the increased costs within an FPA-covered industry or occupation would present a barrier to entry for new businesses and start-up companies. Business Central for example stated that "with smaller firms exiting, and new firms entering the market, our market competition will be reduced, further limiting our innovation, and concentrating market share among larger businesses. The changes were argued to have a perverse effect on productivity and shrink, rather than grow New Zealand's economy."

28. Submitters also expressed concern over the timing of FPAs being introduced. Submitters were worried that the business community have only just begun recuperating from COVID-19 and that the introduction of the FPA system would only stifle recovery. South Canterbury Chamber of Commerce noted that employers are only just recovering from "two minimum wage increases, accelerating inflation, COVID-19 related compliance costs, lockdowns, increased sick leave obligations, increased statutory holiday obligations (Matariki)".

29. Many of the submitters, who thought that FPAs would push too much additional cost on employers, also expressed concern that FPAs would constrain the flexibility for individual negotiations. These submitters thought a decrease of flexibility for individual negotiations would directly increase costs for employers and decrease their ability to offer custom employment packages or address the flexible needs of employees.

30. For some businesses, there is a strong emphasis on non-pay benefits being part of their employment agreements (free travel to and from work, discounted sales for products, free doctor visits). There was a fear from some submitters that an FPA would mandate a generic

employment agreement led by base pay rates, removing their ability to offer these non-pay benefits. For a number of employees, additional benefits/compensation were considered important and an unaddressed issue in their workplaces.

Macro impacts – inflation, productivity, and unemployment

31. A range of submitters mentioned that the proposed FPA system would increase inflation and reduce productivity. Submitters who commented on inflation stated that the costs put on employers by the system would be passed on to consumers to ensure their business stays afloat. It was noted that employees are also consumers, meaning workers would face inflationary repercussions of the same system that was meant to support them.

32. A range of employers such as the Warehouse Group, Safe Business Solutions, and Business Events Industry Aotearoa expressed apprehension around their global competitiveness and the potential for headwinds that could be created. For example, Safe Business Solutions commented that "many New Zealand businesses export products and services to the global market… the addition of FPAs will further diminish New Zealand's ability to compete in global markets".

Litigation risk and complexity

33. A range of submitters commented that the process set out in the Bill is slow, cumbersome, and inflexible. For example, Fletcher Building noted they were "concerned with the overarching complexity of not only the proposed Bill, but the FPA System. It is suggested, given the complexity that will be faced by bargaining parties, the Bill may not achieve the intended purpose".

34. Submitters also raised concerns about increases in disputes and litigation due to the complexity of FPAs, many of these being employers/employer associations such as Federated Farmers New Zealand, FoodStuffs and Sealord Group, as well as law firms. These risks were raised throughout different aspects of the Bill, including:

    a. public interest test

    b. notification requirement

    c. ratification processes

    d. the considerations when the Employment Relations Authority (ER Authority) is fixing terms.

35. A range of submitters also raised concerns with the lack of ability to challenge the substantive terms set by the ER Authority.

Judicial review risk for bargaining parties

36. Some submitters also raised concerns about legal risk of bargaining party decisions and the potential for perverse outcomes in the system. For example, submitters commented on there being increased risk that an FPA would not be bargained and instead would be fixed via the ER Authority due to a lack of employer representation.

37. NZCTU noted that the "the actions of union and employer bargaining sides and parties may also be judicially reviewable to a greater degree than what is permissible under the processes of the Employment Relations Act". They considered that the possibility that unions and employer bargaining sides may be subject to judicial review as a potential significant risk to the FPA process.

Timeframes

38. Submitters commented on the timeframes in the Bill. Some submitters wanted to see shorter, and more defined, timeframes across the Bill to ensure timely processes. For example,

NZCTU noted that there should be an overarching time frame for the creation of an FPA as it would provide certainty. They suggested that this should be “12 months for an FPA to come into force as a minimum standard”.

39. Others, such as Ia Ara Aotearoa Transporting New Zealand (Ia Ara Transporting), noted concern over the drawn-out timelines, and the impact this will have on employees and employers as circumstances can change.

40. There were also a mixed range of submissions that focussed on specific timeframes across the Bill. For example, the 20 working days to agree an inter-party side agreement was seen as too short (Russell McVeigh, NZCTU and Law Society), whereas the 20 working days to replace a lead advocate was seen as too long (NZCTU).

Flexibility

41. Submitters discussed flexibility within the FPA system. On one side, submitters expressed concern that the Bill impedes flexibility of individual negotiations. A large majority of these submitters were employers/employer associations. Submitters (through sector form submissions) noted that FPAs will “take a much more ‘one size fits all’ approach to the employer/employee relationship” without understanding the intricacies of individual businesses. It was considered that FPAs would “hamper businesses” ability to do things differently, making it harder to innovate or be more productive and competitive”. Simpson Grierson noted that “once a FPA is in place, it will constrain the flexibility of both employees and employers to agree to terms and conditions that best suit their particular circumstances”.

42. As mentioned above, employers/employer associations also raised concerns about being able to offer other flexible arrangements for their staff, with demand for flexibility growing due to COVID-19. For example, Harvey Norman noted that their staff can “choose higher base rate and no commission or lower base rate and competitive commission. FPAs will remove this structure and remove the ability for employees to choose a model that best suits them”.

43. On the other hand, around 800 submitters (all E tū submitters) stated that they considered that “FPAs will give employers and workers the flexibility to create minimum standards best suited for the industry.”

International obligations

44. Submitters commented on human rights and international obligations, with the majority raising concerns about these obligations being breached.

Freedom of association

45. Comments on freedom of association predominantly came from employers/employer associations, however a few law firms also raised concerns. Fletcher Building noted that they are “uncomfortable with the notion that non-union members, the majority of our workforce, and the New Zealand workforce, would have their freedom of association curtailed if they are bound by an agreement negotiated by an employee organisation representative, they chose not to be a part of, and do not wish to be associated with”. Through a form submission, many employers also noted that while the regime would technically not amount to compulsory unionism, in real terms it would “make New Zealand workers beholden to trade unions”, expressing concern that this would seriously erode New Zealand workers’ right to freedom of association.

46. A few law firms noted that, while the Bill does state that no employee or employer should be required to join a union or employer association, this does not entirely deal with the principle of freedom of association due to forced union representation.

47. On the other hand, there were submitters that supported how the Bill addressed these concerns. The Human Rights Commission noted that while the “bargaining and ratification process under the Bill raises the questions of whether these processes breach international

rights obligations or not, they are satisfied that the Bill does not violate international law obligations in terms of industrial action and the voluntariness of collective bargaining". They also commented that "the passing of the Bill would be a step towards realisation of other obligations under the previously cited ILO Constitution, Conventions and under the ICESCR" (International Covenant on Economic, Social and Cultural Rights).

Right to strike

48. A number of submitters commented on the right to strike, predominantly employee associations and unions. There was broad concern that the right to strike is an absolute right of workers to express concerns over the breakdown of negotiations and that the Bill should not remove this right. As stated by the New Zealand Nurses Organisation (NZNO), "a salient feature of this framework for collective bargaining is that any strike action in support of an FPA is deemed unlawful. NZNO reinforces the right to strike in support of FPAs and the Bill should support this".

Compulsory nature of FPAs

49. Submitters expressed concern over the compulsory nature of the FPA system. Many (through a sector form submission) did not consider it "fair to impose an arrangement on employers and employees that they did not agree to" and noted that FPAs "take away the freedom of businesses and employees to make an agreement for themselves".

50. Others such as the Canterbury Employers Chamber of Commerce stated that the Bill should "remove compulsion and allow individual employers and employees to opt out of any collective bargaining should they choose to do so", essentially becoming a voluntary system. This sentiment was shared by the Wellington Justice Project who suggested the ability to opt out, as well as Hospitality New Zealand who submitted that "removing compulsion would also resolve the fundamental moral objection that many New Zealanders have to the Bill". The Federated Farmers of New Zealand also noted "if the Bill must proceed, it should be replaced by a system of voluntary collective bargaining and interventions on poor employers that can be targeted where they are needed and can be tailored for each specific industry to meet the needs of that sector."

51. These comments reflect the concerns about how the Bill might breach international obligations. As Business New Zealand explains, "the negative economic impacts of FPAs stem predominantly from their compulsory and all-encompassing nature. The employer members of the FPAWG [Fair Pay Agreements Working Group] suggested a voluntary alternative to the approach taken … [which] would be more responsive to areas of need and more consistent with New Zealand's obligations under international law".

Alternative recommendations

52. A number of submitters suggested alternative policy options instead of FPAs. Submitters noted that there were issues with the capacity and capability of enforcement within the current system. It was recommended that there should be a focus on strengthening the capability and capacity of the Labour Inspectorate to better monitor and enforce employment standards. Horticulture New Zealand suggested, the government should "Tackle 'bad' employers by increasing enforcement and prosecuting those who break the law".

53. It was also suggested that the Government should target specific industries or those identified as vulnerable workers instead of pursuing FPAs. Suggestions included developing industry standards and increased enforcement. The Otago University Students Association commented that "in the place of a FPAs system, OUSA also recommends instead identifying sectors facing wage challenges through market testing, and if there are issues in a particular sector, that there should be steps or processes in place to rectify them."

Feedback on provisions of the Bill

54. This section provides an initial summary of feedback received on various components of the Bill.

Purpose of the Bill

55. There were a range of comments from submitters on the purpose statement of the Bill. Predominantly, submitters considered that the purpose statement needed to be strengthened and reflect the failures the Bill is addressing. For example, NZCTU commented that the purpose "makes no reference to the systemic failures identified in the explanatory note" while noting the critical importance of clause 3.

56. E tū suggested an alternative purpose statement: "to address systemic weaknesses in NZ's labour market including: the significant prevalence of jobs with inadequate working conditions; low wages; low labour productivity, low job security; poor health and safety protections; and a lack of opportunities for upskilling and advancement – including, for example, in the employment of Māori and Pacific Peoples, young people, and people with disabilities. It will provide a framework for collective bargaining for FPAs that specify industry-wide or occupation-wide minimum employment terms that improve the outcomes for workers and deliver decent work. Further, it will acknowledge and address the inherent inequality of power in employment relations".

57. This sentiment was supported by hundreds of individual E tū submitters who suggested that the purpose of the law should be to "improve labour market outcomes through collective bargaining for FPAs that deliver decent work".

Te Tiriti

58. The Human Rights Commission stated that "the Bill as currently drafted does not incorporate the need to recognise and respect the Crown's obligations under Te Tiriti o Waitangi" and suggested that the Bill "include a clause on Te Tiriti o Waitangi which recognises and respects the Crown's obligation to give effect to Te Tiriti o Waitangi".

59. Te Rūnanga o Ngā Toa Āwhina also raised concerns that the Bill needs to give better effect to the Crown's Te Tiriti obligations and better reflect tikanga Māori. They suggested that the purpose statement "include reference to 'provide for an employment relations and employment standards regulatory system that better gives effect to the Crown's obligations as a Treaty partner of partnership and participation'".

Initiating bargaining for a proposed FPA

Representation test

60. A range of submitters commented on the tests for initiating bargaining, particular the representation test. The vast majority of these were businesses and employer associations who thought the test was too low and unrepresentative, with minority voices potentially being able to dictate employment standards to a majority. Many noted that this could be 'undemocratic' and not a true reflection of an industry. The construction industry was mentioned several times as an example where the "threshold could be met with only 0.5% of covered employees advising that they wanted bargaining to be initiated".

61. Many of the submitters who were concerned about the threshold were also worried about the compulsory nature of FPAs and saw higher thresholds as a form of mitigation. For example, Fletcher Building commented that they "recognise that the threshold should not create an unrealistic barrier, however we suggest this needs to be balanced against the binding impact an FPA will have not only for businesses but also other workers within the occupation/

industry". Concerns were also raised around the low threshold given the complex and time-consuming nature of FPAs.

62. Submitters asked questions about how seasonal and part-time workers would be counted in this test. For example, Seeka stated that "in the low season there may be only 9,000 employees employed in the kiwifruit industry. They may initiate the 10 per cent threshold… requiring only 900 covered employees to agree to initiate bargaining. But had bargaining initiated during peak season, this would have required 2,400 covered employees to agree". This was also raised by Horticulture New Zealand and the Meat Industry Association of New Zealand.

63. A number of submitters suggested that the test be either be removed or the threshold be raised to 50% or over. Alternative threshold suggestions included 50%, 60% and 75%, with the majority supporting a 50% threshold.

64. On the other side, other submitters supported the current threshold given that workers in many of the sectors with poor wages and conditions are already systematically and practically excluded from union coverage. It was also noted that a higher threshold would be challenging. For example, FIRST Union noted that "the idea that a union should be forced to engage with more than half of an entire industry's workforce to initiate bargaining would make the initiation of these agreements practically unachievable most of the time".

65. NZCTU did not support that the Bill does not allow for unions to rely on union membership numbers to meet the representation thresholds and suggested that union membership should be counted as support for initiation. They commented that this will "simplify the process and allow unions to focus their attention on obtaining active support from un-unionised workers".

Public interest test

66. Some concern was raised about the subjectivity of the public interest test. Building Service Contractors of New Zealand Inc for example noted concerns of the "misconception that the general public has of [their] industry. How can the general public have a true, realistic and educated view of a whole industry?".

67. Others noted that the public interest test threshold is too low by only needing one perceived public interest issue to be identified. Presbyterian Support Southland explained that it is "especially troubling that no evidence is required to justify or prove that a public interest issue exists".

68. Specific concerns in relation to the public interest criteria included:

    a. a disagreement that sectors that provide unskilled, unexperienced, and seasonal work have an inherent labour market problem

    b. a suggestion to remove the criteria of significant skills shortages as a public interest test measure.

69. Some submitters commented that the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) should be required to consult on any FPA application based on the public interest test, as this is a public interest issue.

70. Auckland District Law Society (ADLS) suggested the inclusion of a 'income-based bright line test' to ensure that FPAs serve the public interest and target the most vulnerable workers and "screen out high-income groups of employees and better target resources for FPAs". There were also suggestions made that both the representation test and public interest test should be applied together if the Bill was to proceed (even with higher thresholds).

Coverage

71. Submitters raised a range of issues with the complexity and difficulties in defining coverage within a potential FPA. BusinessNZ and Hospitality NZ raised the issues that Australia has had for several years on how to define occupations within their own system.

72. Submitters also commented on the practicalities of 'coverage' in terms of being able to identify and contact employers whose employees are within proposed coverage of an FPA and ensuring everyone who is eligible is part of the process. As noted by NZCTU, due to the complexity, unions may not be best placed to notify all 'likely' employers of approval to initiate bargaining and that MBIE may be better placed to notify likely employers. A similar sentiment was shared by others who raise concerns about notification timeframes, and the need for MBIE to facilitate this notification by providing initiated unions with contact details of employers likely to be covered employers.

73. Submitters also commented about important differences across their sectors and how difficult it may be to define coverage for everyone. For example, FoodStuffs noted that "it is ironic that the Bill uses butchers in the supermarket industry as an example of the potential scope of an industry-based FPA when the two main competitors in the supermarket sector adopt very different operating models for processing and selling meat, with different skill requirements."

74. There was also concern over small businesses being 'lumped' with larger businesses. As Copenhagen Bakery noted, "SME boutique and bespoke family businesses like ours will need to compete with large corporate industries with a similar scope of employment- i.e.: instore bakeries in supermarkets such as New World and Countdown, with their own trained bakers and front of house retail staff".

75. Others noted the risk of creating disparities between employees. For example, HRTookit noted that "if one group are covered by a FPA, but other staff members are not… the likely outcome is that those covered by the FPA will end up with a disproportionally higher pay rate". On the other side, Aotearoa New Zealand Association of Social Workers considered that the breadth within the coverage provisions will help reduce disparities within industries.

76. There were also concerns raised with 'overlap', particularly between industry based and occupation based FPAs. Ia Ara Transporting commented that "no recognition has been given to the fact that no occupation is completely confined to one industry or sector. Nurses, for instance, are found in hospitals, schools, and factories, and so are carpenters and electricians". Seeka similarly commented that their "truck drivers may be employed across both the kiwifruit and avocado industries, and their role could be defined in relation to their on-orchard role or the role they provide in delivering post-harvest".

77. Due to this lack of clarity, submitters like Dentons Kensington Swan raised concerns around potential litigation and dispute issues. Some saw further guidance as necessary to help mitigate potential litigation and dispute issues.

Bargaining parties

Employee bargaining parties

78. The majority of submitters who commented on employee bargaining parties were employers/employer associations who were concerned about unions representing 'non-union' members (linked to the section above on international obligations). They commented on the removal of the right of choice of individuals to decide who represents them, and the potential for "forced unionism".

79. There was also specific concern that unions cannot effectively represent some industries. For example, submitters such as Willsbrook Orchards mentioned that their particular sector has very limited union membership and that there is no current union. Similarly, the University of Auckland explained that "less than 20% of the New Zealand workforce is

unionised and this is less than 10% in the private sector. Therefore, a vast majority of workers will be represented by unions that have no prior connection with them".

80. A range of submitters (through a BusinessNZ form submission) mentioned potential for "demarcation disputes between unions over which workers they represent". Business New Zealand notes that over time FPAs "will almost certainly create tensions between the boundaries of FPA coverage and the unions that negotiate them, recreating demarcation as an issue".

81. Further, one employer noted that "Matauranga Māori is a value that Māori employees bring to our workplace and no external negotiator would be able to fairly determine that value to a Māori employer".

82. Other submitters agreed that unions should retain a primary role in initiating bargaining and representing employees as proposed in the Bill. Aotearoa New Zealand Association of Social Workers expressed a similar sentiment noting that "given they hold existing skills in negotiating with employers and advocating for employees' rights".

Employer bargaining parties

83. Submitters raised concerns about the lack of employer associations in many industries and the limited experience and capability that existing associations have in negotiations. There was also concern that many employers are not associated with or potentially covered by any current eligible organisations. Many were worried about one association being able to properly put forward the position of all employers in the sector and were worried about "not having a seat at or adequate voice at the bargaining table".

84. Some employer associations were also particularly concerned about their own roles. For example, the New Zealand Construction Industry noted that "industry associations are not resourced to negotiate FPAs and will also be representing non-affiliated businesses".

85. ADLS also suggested that "covered employers should be provided with an opportunity to form an employer bargaining side made up of a covered employer or group of covered employers (without the need for an employer association)".

Representation obligations

86. Submitters expressed concerns over the practicalities of the obligations to represent covered employers. As an individual submitter stated, "an employee bargaining party will not necessarily know what the collective interest of all covered employees are". There were also a range of comments on representation of Māori employees, expressing that Māori employees should not be treated differently or that there is a need for better guidance to identify and represent Māori employees.

87. Submitters also commented on the practicalities of the obligations to represent covered employers and understanding the intricacies of different sectors and businesses. There was apprehension expressed about one lead advocate being able to properly put forward the position of others.

88. The Law Society, Simpson Grierson and New Zealand Shipping Federation recommended that 'Māori employer' be defined to ensure they are identified. In particular, DTI Lawyers suggested "it would be better placed by adding a reference to acting consistently with Te Tiriti principles in good faith or by amending existing employment legislation to explicitly cover this". On the other hand, a few submitters expressed concern about treating employers differently based on race, explaining that "to explicitly include reference to the requirement to represent one group, Māori, is discrimination".

FPA meetings and union access to workplaces

Access to FPA meetings

89. There was concern raised about the cost of paid meetings. For example, Dentons Kensington Swan stated that "employers are likely going to be forced to unfairly bear the costs of their employees attending paid meetings for FPA purposes… For some employers, this could create issues of staff availability and financial hardship".

90. Others raised concerns about the potential disruptive nature of the meetings. For example, Horticulture New Zealand explained that this is a "significant amount of time and could lead to disruptions in service to suppliers and customers and wasted or disturbed fresh produce". It was also mentioned that these meetings could deprive the economy of local labour for the duration of a meeting.

91. Travel costs and feasibility of rural/remote workers' ability to attend FPA meetings was also mentioned with concern about meetings being held in centralised locations that employees had to travel to. Others also presented similar comments and recommended that the Bill requires meetings to be held virtually if they cannot be held in an approximate location or that a reasonable limitation be placed on the amount of travel time during which an employee can be absent from work.

92. On the other hand, some submitters such as FIRST Union considered that these allowances are too restrictive, particularly during the early period of the legislation when the regime is being embedded. FIRST Union also suggested that employees should be allowed to attend an additional meeting.

Employee bargaining party may access workplaces

93. Only a handful of submitters commented on the access to workplaces. Some were supportive of the clause, with NZCTU commenting "robust access provisions for union representatives to enter worksites and talk to workers under the FPA scheme… are essential for ensuring that unions can represent the collective interests of workers who are covered by a proposed FPA and carry out effective bargaining". However, E tū did note that the current drafting implies that meetings will be one-on-one and that it should be clearer that representatives can meet with groups of workers.

94. Others were worried that there needed to be consent and advanced notice for visits. Some employers were worried about health and safety requirements on site, with Fletcher Building suggesting that "bargaining representatives provide a minimum of five days' prior to entering the workplace". Tranzit Group did not agree with unions having greater access to workplaces than that already available to them under the Employment Relations Act and stated concern that "union representatives who are employed at competing workplaces are able to have even greater access to our workplaces".

95. The Law Society noted that while these provisions are largely consistent with the union access provisions under the Employment Relations Act, they invite the Committee to consider whether a notice requirement would be of practical assistance and a duty should be placed on the employer to convey any relevant information regarding its business operations and on the employee bargaining party to comply with any health and safety induction requirements.

Content of FPAs

96. A large number of submitters commented on the mandatory content required for FPAs. The majority of these were individual employees and employee associations/unions who requested additional 'mandatory content to agree' be specified in the Bill. As noted by NZCTU, "mandatory 'to agree' terms are very important, however many of the issues that unions have hoped FPAs will directly address are not listed in this category". They explained

that many of these topics were ‘mandatory to discuss topics’ and that they were “all deeply significant issues for working people and, in certain areas of work, these issues are in vital need for occupational or industry-wide regulation”.

97. A large number of submitters commented that health and safety be included as mandatory content. E tū commented that “by not making this mandatory, any FPA may be missing this level of protection, as the employer can choose not to agree to include it. Many workers on individual agreements know what this means when they are forced to work in unsafe conditions, knowing they may lose their job should they challenge the employers”. This sentiment was echoed by employees who described the poor health and safety at their place of work.

98. Education and training were also commonly suggested as being included as mandatory content as well. E tū stated that “Workers need to keep learning while they work to grow their skills and adapt to a changing environment… if we don’t make it mandatory that the parties must agree to an education and training process, then this ability for equitable access will be lost”.

99. Workload and work measurement, and redundancy were also suggested to be added to the mandatory content to agree, distinct from health and safety. NZCTU noted that “without the effective management of workloads, industry or occupation wide standards of pay, penalty rates, overtime and the like will be ineffective in halting the ‘race to the bottom’ in the competition for contracts for services or other forms of commercial competition”.

100. On the other hand, concern was raised about ‘normal hours of work’ by many employers and associations such as McDonalds Restaurants, the Warehouse Group and Fletcher Building. Many commented that the list did not take into account varying operational requirements, does not allow for flexibility in remuneration structure, nor does it recognise the growing desire for flexible working. Hours of work was of particular concern in seasonal industries.

101. Some submitters also recommended that clause 115 (Mandatory content for each FPA) and clause 114 (Topics that bargaining parties must discuss) be amalgamated. E tū considered that without the amalgamation, the two-tier system reduces the status of those areas included in clause 114 and makes it more difficult to include essential topics without agreement.

102. A large number of submitters also commented on regional differentiation. Submitters (including individual E tū submitters) wanted to see minimum pay and conditions consistent across the whole country, without district variations. As E tū explained, “by allowing regional rates you are saying that someone is not worth as much even though they are doing the same work. The Government sets only one minimum wage rate for the whole of Aotearoa New Zealand”. NZCTU raised concerns that this approach would be “open to abuse as some employers may seek to improperly exclude workers from more favourable FPA terms by defining them or restricting them to a certain district”. On the other side, submitters (many through sector form submissions) stated that while they acknowledge that the proposed regime says that there can be differences between employees located in different regions, the regime will not adequately recognise the need for important and major differences between regions.

103. It was also suggested that clause 114(1)(d)(ii) which enables agreement to be reached around whether superannuation should be included as part of the minimum wage, be deleted as they strongly disagree with the inclusion of KiwiSaver in the wage rate. This was supported by an individual employee who requested that “KiwiSaver and other superannuation contributions should only be in addition to the base rate”. Other submitters also raised concerns with this provision as it seems to be contradictory to KiwiSaver legislation provisions.

Finalisation of proposed agreement

Ratification

104. Concern was raised about the need to ensure all covered employers and employees are notified of the proposed FPA and have an opportunity to fairly vote. This feedback was often intertwined with feedback on the compulsory nature of the enterprise level bargaining.

105. Submitters from small businesses expressed concern that the system is open to manipulation by larger employers who see an opportunity to lobby for conditions that will make smaller employers unsustainable. Some questioned why the system was not "one person one vote". Even with the weighting system, Dentons Kensington Swan explained that "large corporations will have a disproportionately large vote in the ratification process considering the number of votes available to employers under clause 144 of the Bill".

106. Questions were also asked about seasonal workers and contractors. Meat Industry Association and Ovation New Zealand noted that as a seasonal industry, numbers increase significantly at the peak of the season and could skew results. The same concern was raised by Horticulture NZ.

Penalties and enforcement

107. A couple of submitters commented that penalties in the Bill were "excessive". DTI Lawyers commented that the $40,000 penalty for breaches of good faith were a significant penalty for a "breach where the employer may not be in control of the process being followed by employer association". Simpson Grierson noted that "the penalty amount for non-compliance with good faith obligations during bargaining should be reduced to the same amount in clause 197 (which is consistent with the [ER Authority])".

108. On the other hand, concerns were raised around the fairness of penalties. Expol explained that "For a small employer a $20,000 [penalty] will be sufficient deterrent to them not adhering to the terms of an FPA. However, for a large organisation who employs 1,000 covered staff but refuses to apply (for example) a $1 per hour pay increase conferred by the FPA, they will recoup the value of that fine within 2.5 days, so there is no incentive for them to abide by the terms".

109. Concern was also raised that it will be almost impossible to comply with the obligations as there is no infrastructure to support national level communication amongst all employees or all employers who are not connected to a union or employer organisation.

Fixing terms

110. A range of submitters commented on the use of a 'fixing mechanism' and the ability of the ER Authority to fix terms. On one side, submitters supported the provisions that FPAs must be settled – either by negotiation or by determination by the ER Authority. As noted by NZCTU, a "fixing mechanism is vitally important to the functioning of the scheme. Where bargaining sides are not able to resort to traditional industrial tactics (namely, strikes and lockouts) it is the fixing mechanism that is tasked with resolving impasses in bargaining".

111. Some of these submitters also considered the thresholds for fixing were too high. NZCTU suggested that it should be "simplified to make access to the fixing mechanism when an impasse has occurred more attainable". FIRST Union was particularly concerned that bargaining parties could attempt to avoid fixing by failing to engage in bargaining properly and suggested a fixed time period by which the ER Authority is required to accept a fixing application.

112. On the other side, many submitters opposed the use (and threshold) of the fixing mechanism and this role of the ER Authority. Dentons Kensington Swan were "concerned about the

ability of the ER Authority to set binding terms of employment, particularly where there is no right to appeal the terms fixed".

113. Concern was also raised about independence of the ER Authority. Bapcor Services New Zealand explained that the Bill provides the ER Authority with the power to set industry conditions as well as being the mediator in employment problems, eroding independence and current trust from businesses. General capacity and capability concerns were also raised with regard to the ER Authority. There was concern that the workload will be unmanageable for the ER Authority, and that they would be unable to appropriately consider the nuances of individual businesses or industries.

Factors to consider when fixing terms

114. Concern was raised by a number of submitters on the considerations the ER Authority must consider when fixing terms. Submitters such as New Zealand Public Service Association, BusinessNZ and the Law Society thought the factors were too complex and broad, and in particular:

    a. 'impacts on NZ economy or society'

    b. 'likely impact of terms on covered employer'

    c. 'any other relevant considerations'.

115. The main concerns were that the ER Authority does not have the expertise to determine and apply the criteria. Other submitters, such as E tū, suggested the need to add more factors including the statement "taking into consideration the need to improve labour market outcomes and deliver decent work".

116. The Law Society also raised concerns that "a significant amount of evidence may be required under this clause and result in lengthy hearing times and delays". They suggested it could be appropriate to amend this clause to provide that the Authority 'may consider' these types of evidence rather than 'must consider'.

Backstop policy proposal

117. Only a handful of submitters commented on the backstop, with mixed support. Those who supported the backstop noted that it would mitigate the risk of bargaining not occurring. As Age Concern New Zealand noted, "this is important or FPAs are likely to get stalled for lack of a willing bargaining representative".

118. Those who did not support the backstop raised concerns around a lack of representation for employers if triggered, and the exclusion of employer voice. Specific industries such as meat and horticulture were concerned about their industry being properly represented by the ER Authority negotiating on their behalf. As the Meat Industry Association of New Zealand expressed, "the Authority would have no knowledge of the operating and nuances of the sector".

119. Given the significance of the backstop, Ngā Tamariki Puāwai ō Tāmaki - The Auckland Kindergarten Association recommended that "sufficient time be given so that all covered employers are able understand the bargaining processes for the FPA, consider if they wish to be an employer bargaining party and understand the consequences of not having a bargaining side".