

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Economic Development Committee

Improving the Employment Relations and Standards System: Fair Pay Agreements

Proposal

- 1 I seek this Committee's in-principle agreement to establish a legislative system that allows employers and workers to create Fair Pay Agreements that set minimum employment terms and conditions across an industry or occupation. This in-principle agreement is subject to further consideration by Cabinet once I report back with advice from an expert advisory group on the scope and design of a Fair Pay Agreement system.

Executive Summary

- 2 The New Zealand labour market is a mixed success. The labour participation rate is as high as it has ever been, and the unemployment rate is below the OECD average. Employment has grown steadily over time.
- 3 However, other important indicators are less positive. Per capita productivity is low and has grown weakly. There are reports that indicate the growth in the economy is largely based on record rates of net migration rather than workplace productivity growth. Real wages have grown but much of this growth has been concentrated at the top and bottom of the labour market. Wages have not kept pace with labour productivity increases.
- 4 By international standards, New Zealand's system of collective bargaining is weak, particularly at the multi-employer and industry level. We have also seen a reduction in employers and workers in an industry jointly problem solving.
- 5 To address this, I seek in-principle agreement to establish a legislative system that allows employers and workers to create Fair Pay Agreements that set minimum employment terms and conditions across an industry or occupation.
- 6 Fair Pay Agreements could lift industries out of a low wage, low productivity cycle by giving firms greater incentives to invest in physical and human capital. Negotiation of Fair Pay Agreements may facilitate greater industry-wide coordination.
- 7 It could also help address the widening gap between labour productivity growth and wage growth in recent decades, and support a broader sharing of the benefits of productivity gains in the economy as reflected in the labour income share.

- 8 This in-principle agreement will be subject to further consideration by Cabinet once I report back with advice from an expert advisory group on the scope and design of a Fair Pay Agreement system
- 9 I will report back to Cabinet by the end of 2018 on the advisory group's recommendations, and to confirm Cabinet's in-principle agreement to establish a Fair Pay Agreement system.

New Zealand's labour market has structural weaknesses

- 10 Some of New Zealand's labour market indicators are strong. The participation rate is as high as it has ever been, and the unemployment rate is well below the OECD average. Employment has grown steadily over time.
- 11 However, as is well-known, New Zealand has a weak long-term productivity record compared to the OECD average and other small advanced economies. Recent economic growth is largely due to increasing volume (i.e. more people working) rather than increased productivity per capita.
- 12 We cannot continue to rely upon increasing migration in order to grow our economy. Sustainable economic growth depends on measures to lift productivity. There is a particular problem with low wages in New Zealand that may be linked to low productivity. International evidence shows that high productivity-growth countries tend to be high wage-growth ones. Research by the Productivity Commission suggests that there is an association between periods of productivity growth in New Zealand and wage growth.
- 13 New Zealand has seen a widening gap between labour productivity growth and wage growth in recent decades. Research by Bill Rosenberg found average wages rose by only a quarter of the increase in productivity from 1990-2006. This suggests workers are not experiencing the full benefits of productivity gains, which is contributing to the long-term fall in workers' share of national income. There is a role for policies to support a broader sharing of the benefits of productivity gains in the economy to achieve sustainable wage growth.
- 14 In the last two decades, we have also seen growing income inequality in New Zealand. There has been a "hollowing out" of middle-skilled workers' wages in New Zealand. Meanwhile the wages of the highest income employees (and those in the lowest decile, whose wages are heavily influenced by the minimum wage) have grown faster than those in the middle.
- 15 According to the most recent available OECD Statistics (OECDStat), New Zealand has the sixth lowest collective bargaining coverage in the OECD at 15.3%. This is less than half of the OECD average of 33.3%. Since 1980 New Zealand has experienced likely the steepest decline in collective bargaining coverage in the developed world.¹

¹ See, John Schmitt and Alexandra Mitukiewicz (2011) *Politics Matter: Changes in Unionization Rates in Rich Countries, 1960-2010* (Center for Economic and Policy Research)

- 16 This decline may be one of the major causes of New Zealand's sharp increase in income inequality during the 1980s and 1990s. International Monetary Fund researchers compared measures and causes of inequality between 1980 and 2010 in all advanced countries for which suitable data was available, including New Zealand. The researchers found that the decline in unionisation and collective bargaining coverage explains about half of the rise in the top 10 per cent income share. They estimated that the effect was greatest in New Zealand.²
- 17 To realise our vision of an economy that shares gains equally and delivers high wages and decent work conditions, the Government must pursue policies that unlock the potential productivity of the New Zealand economy.

A race to the bottom may be impairing wage and productivity growth

- 18 In some parts of the economy, slow growth in wages may reflect underlying productivity and supply and demand for certain types of workers and skills which is expected in a well-functioning labour market. These price signals create incentives for capital and labour to shift to more productive uses.
- 19 However, this is unlikely to be true in all industries or regions. There is no single unitary labour market, rather, the labour market comprises an overlapping group of markets for different types of labour in different locations. Differing market structures and dynamics mean that particular regions, occupations or industries may face significant labour market issues that suppress the price of labour. This may reduce both firms' and workers' incentives to invest in physical and human capital.
- 20 This may occur where employers have significant wage-setting power to hold down the price of labour (monopsony). This may lead to a race to the bottom, where firms compete by reducing or stagnating wages or other conditions of employment as costs of living increase.
- 21 Suppressing the relative cost of labour may lead to firms hiring more workers rather than investing to increase the productivity of their workers (for example, by investing capital in technology to assist). In the absence of any mechanism to co-ordinate minimum standards, this may create a low-wage, low-productivity equilibrium.

There is a range of other relevant interventions but a gap remains

- 22 Productivity, industry policy, industrial relations and income distribution are of central importance to the wellbeing of New Zealanders. The Government undertakes a range of interventions which touch upon these issues and further interventions are under consideration.
- 23 The Government has initiated measures to address issues in the labour market across a number of portfolios. This includes reviews of welfare and education policies (as they relate to broader labour market implications), lifting business research and development and the Provincial Growth Fund.

² Florence Jaumotte and Carolina Osario Buitron (2015) Inequality and Labor Market Institutions (International Monetary Fund, Staff Discussion Note No 15/14)

- 24 The Employment Relations Amendment Bill will go some way towards restoring collective bargaining settings on an enterprise basis. I intend to consider and report to Cabinet on what further work is needed on these settings in due course. Enterprise-based collective bargaining is unlikely to be effective where union power is weak because of poor coverage and low union density. Currently, nine per cent of New Zealand employees in private sector industries are covered by a collective agreement. Most are concentrated in the mining, manufacturing and transport, postal and warehousing industries. Enterprise-based collective bargaining is designed to address firm-specific issues, and may therefore be ineffective at addressing industry-wide issues. I remain concerned that the current system, even if reformed, fails to provide the necessary co-ordination to prevent a race to the bottom.
- 25 Increasing the minimum wage as economic conditions permit will help to lift the floor of wages and conditions in the economy. I plan to bring a paper to Cabinet soon regarding a review of the Holidays Act 2003 that may also impact on minimum standards. Economy-wide minimum employment standards cannot adequately address occupation or industry-specific issues where prevailing conditions are above minimum standards. The diversity of New Zealand industries and occupations limit the sensible ambit of minimum standards which apply to all workers. Typically, minimum standards are set by central Government rather than workers and employers in affected industries and this may limit their relevance for particular industries.
- 26 The Equal Pay Act 1972 provides a remedy for employees in female-dominated industries where rates of pay have been subject to historical undervaluation. The Care and Support Workers (Pay Equity) Settlement Act 2017 is an example of an industry-wide agreed adjustment following pay equity processes. However, pay equity claims under the Equal Pay Act 1973 are limited to female-dominated industries that have been subject to historical undervaluation. There may be industries subject to systemic problems that are not female-dominated.
- 27 The Government has significant influence in the labour market as a major purchaser or funder of labour-based services. Government procurement is a useful lever but the majority of workers are in the private sector where the Government's influence may be limited.
- 28 The Government also addresses low pay through the tax and transfer system. Working for Families, the emergency benefit and the accommodation supplement are examples of income-related support for working families. The tax and transfer system has a role in addressing low wages, poverty and inequality. However, it is subject to tax minimisation and avoidance and redistributive measures are less efficient than direct distribution.
- 29 While each of these interventions has a useful part to play, none completely address the problem of industry or occupation specific minimum terms.

The role of collective bargaining

- 30 New Zealand has ratified International Labour Organisation ('ILO') Convention 98 on Collective Bargaining and Freedom of Association. Article 4 of Convention 98 commits the Government to take appropriate measures to:

Encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

- 31 The ILO explains the significance of collective bargaining:³

Collective bargaining is a fundamental principle and right at work. Collective bargaining is also considered an enabling right. A number of benefits may arise from the effective recognition of the right to collective bargaining. Studies show that collective bargaining can contribute to improvements in wages and working conditions, as well as equality. It has also been instrumental in facilitating the adaptability of enterprises and economies during an economic crisis. When effective, collective bargaining can help build trust and mutual respect between employers, workers and their organizations, and contribute to stable and productive labour relations. ... At the same time, weak and ineffective collective bargaining may lead to a rise in labour disputes, with economic and social costs.

The effective recognition of the right to collective bargaining enables the development of a form of regulation that complements statutory regulation. Collective agreements can reinforce compliance with statutory provisions, enable parties to improve them, and provide a mechanism for addressing issues specific to certain enterprises or economic sectors. This can benefit both parties, ensuring that workers get a fair share of productivity gains while not impairing the capacity of employers to operate profitably. Where parties are well organised, collective agreements can be used to establish minimum wages and working conditions in an industry or branch of industry.

- 32 The 2017 *OECD Employment Outlook* ('the OECD') contains a review of collective bargaining systems in OECD countries and some emerging economies. Collective bargaining is described as "a key pillar of social dialogue at national level" [at 128] and the authors note that benefits of collective bargaining include:

- Ensuring adequate conditions of employment (not solely wages but also job security, working time regulation, quality of working environment and training)
- A fair share of the benefits of training, technology and productive growth
- Social peace
- Market control (reigning in wage competition or limiting monopsony power of firms which profit from workers lack of bargaining power)
- Making labour markets function more efficiently by correction market failures and reducing transaction costs involved in individual bargaining, and

³ International Labour Office, ed., *Collective Bargaining: A Policy Guide* (Geneva: International Labour Office, 2015) at 4.

- Improvement of the quality of the relationship between workers and firms leading to more efficient allocation of resources, greater motivation and ultimately productivity.

33 The OECD states [at 165]:

The last decades have shown that in many cases the alternative to collective bargaining is not individual bargaining but either state regulation or no bargaining at all, as only few employees can effectively negotiate their terms of employment with their employer. The potential consequences of the loss of relevance of collective bargaining for instance in terms of higher inequalities, higher transaction costs and increased atomisation, have yet to be fully assessed.

34 New Zealand has a system of collective bargaining at the enterprise level (and very limited multi-enterprise level) by way of the Employment Relations Act 2000. Almost no industry-wide bargaining occurs.

35 It is arguable that New Zealand's weak collective bargaining settings constitute a failure to meet our international obligation under ILO Convention 98 to *fully* develop "machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

36 There is a case that the missing piece is sectoral or industry bargaining. The OECD notes [at 137] that "collective bargaining coverage is high and stable only in countries where multiemployer agreements (mainly sectoral or national) are negotiated." The OECD also comments [at 165] that "[i]n countries where bargaining takes place predominantly at company level, collective bargaining coverage is typically below 20%."

Industry bargaining is common internationally but models are country-specific and depend on historical factors

37 Industry or sectoral bargaining is common in Europe and Australia. The mechanisms used vary significantly between countries. Annex 2 compares New Zealand to Australia and selected European countries with industry bargaining systems.

38 The most common model is known as an *erga omnes* determination where a particular agreement is extended to cover a wider group of workplaces on a regional, industry or sectoral basis. The extension mechanism varies and may be Ministerial, administrative, or judicial. The criteria used vary significantly from simple agreement of parties to the meeting of particular criteria.

39 New Zealand is in the minority of OECD countries in having no extension bargaining model. The OECD comments [at 139-140] that:

Erga omnes clauses simplify the system (since the same terms apply to all workers), increase fairness, limit rivalries and help social peace and reduce transaction costs. However, *erga omnes* clauses may also represent a disincentive for workers to become members of a union (a typical free-rider problem).

Fair Pay Agreements may support wage and productivity growth and industry coordination

- 40 An option to address industry or occupation-specific labour market failures and to promote collective bargaining is the creation of a system of industry bargaining. I have named these industry agreements Fair Pay Agreements.
- 41 In concept, a Fair Pay Agreement system is a process that allows representative employers and workers from a specific industry or occupation to negotiate, and reach agreement on, a set of generally accepted minimum terms and conditions of employment for that industry or occupation.
- 42 This would include employment conditions (such as wage rates and leave arrangements) above statutory minima. A Fair Pay Agreement would set the floor for all workers in a specified industry or occupation, whether or not they were party to the negotiation process.
- 43 Properly implemented, this system would have a range of benefits:
 - 43.1 If appropriately targeted, Fair Pay Agreements may help lift industries out of a low-wage, low-productivity cycle by giving firms greater incentives to invest in physical and human capital. A Fair Pay Agreement would in effect set industry or occupation-specific minimum terms and conditions. Higher minimum wages may support productivity growth, by:
 - 43.1.1 encouraging firms to invest in training, capital and innovation to protect their profitability; and
 - 43.1.2 encouraging resources to shift from less productive firms and industries to more productive uses.
 - 43.2 Fair Pay Agreements may also help address the widening gap between labour productivity growth and wage growth in recent decades, and support a broader sharing of the benefits of productivity gains in the economy, as reflected in the labour income share. This is most likely to occur in combination with broader policies to lift investment in skills, innovation and technology that fundamentally underpin a high productivity, high wage economy.
 - 43.3 Fair Pay Agreements may improve coordination across industries or occupations. The information asymmetries that exist both within industries (eg between groups of workers and employers) and beyond industries (eg between people who have first-hand knowledge of being in an industry and central government) can be addressed by giving industries and occupations a platform to negotiate minimum terms and conditions that are specific and relevant to their circumstances.
- 44 Overall workers may benefit from improved wages and conditions. Firms may benefit from being better able to invest in long-term productivity enhancements (with associated higher profits), a more stable employment relations environment and a level playing field with competitors who undercut them through poor employment practices and low wages and conditions.

- 45 New Zealand will also benefit from meeting our international obligations to promote the setting of terms and conditions by way of voluntary collective bargaining.
- 46 There is a wide range of detailed design questions for a Fair Pay Agreement system. Annex 1 sets out some of the key design questions, categorised into four main steps in the process: initiation, bargaining, dispute resolution and conclusion and application. In addition, there are a number of international models which may provide useful examples in Annex 2.
- 47 It may be useful to seek technical assistance from the International Labour Organisation in the design and development of the system.
- 48 Accordingly, I seek Cabinet's agreement in-principle to begin work on a system for the creation of Fair Pay Agreements to establish minimum employment conditions across an industry or an occupation which would apply to all employees and employers within that industry or occupation.

Possible risks associated with Fair Pay Agreements

- 49 Misapplication of a Fair Pay Agreement may lead to sub-optimal outcomes such as:
- 49.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
 - 49.2 a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not (this risk is particularly acute on an industry basis if Fair Pay Agreements target certain groups of workers only)
 - 49.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
 - 49.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and
 - 49.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.
- 50 As such, it is important that the design of the Fair Pay Agreement system (and other interventions) manages and where possible mitigates these risks.

An expert advisory group to provide further advice on Fair Pay Agreements

- 51 I propose the establishment of an expert advisory group (the Fair Pay Agreement Working Group) to develop the Fair Pay Agreement model further.

- 52 This group would involve business and union representatives, with legal and economic experts, to make recommendations on the scope and design of a Fair Pay Agreement system, taking on board the challenges this paper identifies. It would enable employers and workers to better understand and share their views to identify mutually acceptable solutions. It would also generate strong buy-in to any resulting agreed outcome.
- 53 The high-level objectives and parameters for this group are attached in the terms of reference at Annex 3. The key objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry-wide bargaining which supports labour productivity and wage growth by addressing labour market failures that create a race to the bottom.

Scope of Fair Pay Agreement Working Group

- 54 The terms of reference also ask the advisory group to consider a number of design questions, including:
- 54.1 *The criteria and process for initiating the bargaining:* as noted above, a critical task will be to identify, and find evidence for, the conditions under which a Fair Pay Agreement should be initiated. This will help set clear criteria to target the application of Fair Pay Agreements.
- 54.2 *Identification and selection of bargaining participants:* as Fair Pay Agreements will apply to all workers in an industry or occupation, it is important to ensure effective representation in bargaining. Effective employer representation mitigates the risk of “lock-in” whereby one section of an industry designs a system which gives an unfair competitive advantage.
- 54.3 *Determining the scope of agreement coverage:* this includes rules for demarcating the boundaries of the industry or occupation, and whether Fair Pay Agreements should apply to employees only, or a broader class of workers, given risks to creating boundary issues and incentives for regulatory arbitrage or avoidance (e.g. contracting out services previously provided by permanent employees). This would also include issues of term and variation of Fair Pay Agreements.
- 54.4 *Rules or third party intervention to assist reaching an agreement and resolve disputes:* this includes whether the third party’s role is facilitative, determinative or both. Alongside this, the system of ratification for agreements should be considered.
- 55 Any model proposed by the Fair Pay Agreement Working Group must operate effectively as a component part of the overall employment relations and standards system, including existing individual employment agreements, single- and multi-employer collective bargaining and minimum employment standards. The model should also seek to mitigate the risks identified above.
- 56 I also propose clarifying the following matters in the terms of reference:

- 56.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement. Widespread strike action is costly and disruptive to the economy. It is intended that the system will have sufficient incentives in place to encourage parties to reach agreement without the need for industrial action. This may include the use of arbitration in the absence of agreement.
- 56.2 It will be up to the workers and employers in each in each industry to make use of the system. Fair Pay Agreements are intended to create bespoke solutions for industries. The Government should not 'pick winners.'
- 57 The advisory group will report back by November 2018, at which time I will provide Cabinet with further advice on the proposals to establish a Fair Pay Agreement system.

Appointments to the Fair Pay Agreement Working Group

- 58 I intend to appoint one chairperson and nine members to the Working Group for a six-month term commencing in June 2018 and expiring in November 2018.
- 59 I intend to appoint the Rt Hon Jim Bolger to chair the Fair Pay Agreement Working Group. Jim Bolger was Prime Minister from 1990-1997 and previously held the roles of Minister of Labour and Immigration. He has held a number of roles on company boards, including KiwiRail and Kiwibank. Jim Bolger's chairing will assist the success and credibility of the Working Group.
- 60 I also intend to appoint the following individuals:

Business representatives	Kirk Hope	Mr Hope is the Chief Executive of BusinessNZ.
	Vicki Lee	Ms Lee is the Chief Executive of Hospitality NZ. Ms Lee brings the views of a diverse industry with many small businesses.
Worker representatives	Richard Wagstaff	Mr Wagstaff is the President of the New Zealand Council of Trade Unions.
	John Ryall	Mr Ryall is the Assistant National Secretary of E tū, a large union in both the private and public sector. Mr Ryall has experience working with Government on significant legislative reform.
Economist	Dr Isabelle Sin	Dr Sin is a Fellow at Motu Economic and Public Policy Research, and a Principal Investigator at Te Pūnaha Matatini Centre of Research Excellence. She is also an Adjunct Senior Lecturer at Victoria University of Wellington.

Academic	Dr Stephen Blumenfeld	Dr Blumenfeld brings significant expertise in collective bargaining frameworks and patterns in New Zealand. He is the current Director of the Centre for Labour, Employment and Work at Victoria University.
Lawyer	Steph Dyhrberg	Ms Dyhrberg is a partner at a specialist employment law practice in Wellington.
Further representatives	Antony Hargood	Mr Hargood is the Chief Executive of the Wairarapa-Bush Rugby Union.
	Caroline Mareko	Ms Mareko is the Senior Manager of Communities and Participation at He Whānau Manaaki o Tararua Free Kindergarten Association.

- 61 The members bring a range of perspectives and expertise to the Working Group covering large and small business views, worker representation, as well as expertise in employment law, labour markets and economics.
- 62 The membership is balanced to provide reasonable and credible recommendations. This is important to ensure the Fair Pay Agreement system is an enduring improvement to New Zealand employment relations.
- 63 I have given full consideration to the need to achieve appropriate gender, age, geographical and ethnic balance. The prospective appointees:
- 63.1 are six men and four women,
- 63.2 range in age from s 9(2)(a), and
- 63.3 mostly represent organisations with national membership or areas of operation.
- 64 I have sought input from our Government partners regarding the composition of the working group and have asked for nominees with practical experience who do not represent national advocacy groups. I am grateful to them for suggesting the further representatives.
- 65 All but two of the prospective appointees is Pākehā. To enable more diverse input, appointees from E tū and the Council of Trade Unions have links to their organisations' Māori and Pasifika caucuses. The secretariat to the Working Group will also undertake targeted engagement to ensure Māori and Pasifika voices are heard during the Fair Pay Agreement Working Group's processes.
- 66 The Working Group is classified as a Group 4 Governance Board under the Cabinet Fees Framework.
- 66.1 The fee for the chair is \$1062 per day, which is consistent with the Fees Framework for Group 4 Level 1.

- 66.2 The fee for members is \$800 per day, which is consistent with the Fees Framework for Group 4 Level 1.
- 67 Prospective appointees were nominated, following my approval, by officials from the Ministry of Business, Innovation and Employment. There have been no representations made to nominees that they will be appointed.
- 68 I can confirm that appropriate enquiries concerning conflicts of interest have been carried out, in accordance with the State Services Commission appointment guidelines, to identify any conflict of interest that could reasonably be identified. No conflicts of interest have been identified.

Next steps and Ministerial oversight

- 69 I will receive regular updates on the Working Group's progress. I will keep ministers with a key interest in labour market issues apprised as the Working Group reaches significant milestones.

Consultation

- 70 The Treasury, the State Services Commission, the Ministry for Women, the Ministry for Pacific Peoples, Te Puni Kōkiri, the Ministry of Transport, the Ministry of Social Development, the Ministry of Education and the Department of Prime Minister and Cabinet (Policy Advisory Group) were consulted on this paper.

Treasury comment

- 71 *The Treasury considers more departmental policy work is required ahead of Cabinet's consideration of, and agreement to, the recommendations in this paper. The policy proposal is significant: Fair Pay Agreements could make substantial structural changes to the labour market and – as referenced in this paper – misapplication of the policy could have large negative effects on productivity, worker terms and conditions, and employment. The policy is also in the early stages of development: Cabinet's in-principle agreement is being sought to an outline of the policy direction; initial work by officials has not identified an occupation or industry in which the proposed system would address wage or productivity issues; and the working group is being tasked with answering foundational policy design questions. Given the significance of the proposal, we recommend extending the departmental policy development process to enable further analysis of the causes of the wage and productivity concerns identified in the paper, options to address those concerns, and the conditions for the success of industry-level bargaining. This would enable Cabinet to make decisions with a clearer view of the purpose, scope, and impacts of the proposal, and ensure the working group's terms of reference are tied to this purpose and Government priorities.*
- 72 I share Treasury's desire for robust policy processes. However, I consider that the Working Group is an integral part of the development of this policy and that their input is needed at an early stage for three reasons. First, any solution must be workable for employers and workers. Second, the International Labour Organisation emphasises the importance of early engagement with workers and employers' organisations in the creation of laws which affect their interests. Third, for any system to be lasting, it must have strong buy in from the

participants in the system. The Working Group's findings and further policy proposals will be subject to full departmental and Cabinet consultation.

Financial implications

73 The Working Group is estimated to cost approximately \$300,000 for member fees, travel expenses, meeting venues and additional legal and economic research. This will be funded out of baselines.

74 Legislative change to implement a Fair Pay Agreement system may have financial implications if government-employed or funded workforces are an early focus for the application of Fair Pay Agreements. There may also be fiscal costs to establish, change and operate the employment institutions or other systems to support the Fair Pay Agreements system.

Human rights

75 Any human rights implications will depend on the Working Group's recommendations and the Government's response.

76 However, it is expected that Fair Pay Agreements will promote the setting of terms and conditions of employment by way of collective bargaining in accordance with ILO Convention 98 on Collective Bargaining and Freedom of Association.

77 If effectively developed, Fair Pay Agreements may have a number of positive human rights implications such as the right to "just and favourable terms and conditions of work" in accordance with article 8 of the International Covenant on Economic, Social and Cultural Rights.

Legislative implications

78 There are no immediate legislative implications. Legislation may be required to implement the proposals if the Government decides to implement a Fair Pay Agreement system. The proposal has priority of Category 5 (to be referred to a select committee in the year) on the 2018 Legislative Programme.

Regulatory impact analysis

79 A regulatory impact analysis is not required at this stage. A regulatory impact analysis will be required if Cabinet is asked to implement a legislative Fair Pay Agreement system in response to the Fair Pay Agreement Working Group's recommendations.

Gender implications

80 Any gender implications will depend on the Working Group's recommendations and the Government's response. Women are likely to be disproportionately exposed to poor outcomes arising from a 'race to the bottom': 46 per cent of women are in the bottom two income quintiles of personal income distribution. The implications will depend on the design of the Fair Pay Agreement system.

Disability perspective

- 81 I will provide further advice on the disability perspective of the Working Group's recommendations and the Government's response when reporting back to Cabinet by the end of 2018.

Publicity

- 82 If approved by Cabinet, I intend to issue a media statement announcing the establishment of the Fair Pay Agreement Working Group. I will also publish this paper, the Fair Pay Agreement Working Group's terms of reference, and related Cabinet decisions on the Ministry of Business, Innovation and Employment website. This is subject to consideration of any justified deletions if the information had been requested under the Official Information Act 1982.

Recommendations

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

- 1 note that there may be industry or occupation specific labour market issues which are not being addressed by current labour market interventions;
- 2 agree in-principle, subject to further consideration by Cabinet noted in recommendation 5 below, to introduce a legislative system that allows employers and workers to create Fair Pay Agreements that set minimum employment terms and conditions across an industry or occupation;
- 3 agree to establish a Fair Pay Agreement Working Group to make recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations;
- 4 agree to the terms of reference for the Fair Pay Agreement Working Group attached as Annex 3 which set out the objectives and membership of the Working Group;
- 5 s 9(2)(f)(iv)

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Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety

Annex 1: Detailed design questions for Fair Pay Agreements

Initiation phase

What is the trigger/criteria to initiate negotiations for a Fair Pay Agreement?

A sufficient percentage of employers or employees call for negotiations only

Combination of employers/employees calling for negotiations and criteria

Substantial evidence of issues driving a race to the bottom

- Criteria could help ensure Fair Pay Agreements are targeted at industries most at risk of problems that drive a race to the bottom. Criteria such as low pay and poor conditions may be necessary but not sufficient. For example, some declining industries or sectors may have worse outcomes which are driven by changing technology and market structures, not a race to the bottom.
- The level of coordination required for a sufficient number or percentage of employees to call for a Fair Pay Agreement may make it difficult for occupations with low union density to trigger one. Alternatively, if the threshold is set low, there are risks that the Fair Pay Agreement may not be in the interests of most workers.
- These options are not mutually exclusive and a combination of both (either as alternatives or in combination) may help target Fair Pay Agreements at the intended issues.

Who decides that Fair Pay Agreement bargaining has been initiated?

The parties, with enforcement through employment dispute mechanisms

Administrative decision from a Minister or government department

- It may be helpful to set a clear signpost to inform the industry that Fair Pay Agreement bargaining has been initiated. This will enable interested parties to be notified and participate in the negotiations.
- This could be linked to a process for determining that Fair Pay Agreement bargaining has met the necessary trigger and criteria.

Bargaining phase

Who are the participants?

All employers, unions and employees that wish to be involved (including individuals)

Unions and key employer representatives

One employer representative, one union and one government representative

- The Fair Pay Agreement system may need to provide some guidance about who may participate in bargaining to help manage the diverse of interests for employers and employees.
- It may be challenging to ensure wide representation from non-unionised employees and industries without representative employer associations.

What is the mechanism for supporting an efficient bargaining process?

Existing collective bargaining rules but no additional mechanisms (eg good faith)

Additional bargaining rules and procedures with government facilitation

Set bargaining process managed by a government agency

- Depending on the number of participants involved, it may be useful for additional guidance or oversight of the bargaining process to assist with the efficiency of the process and to promote transparency in the interests of all parties that may be affected by the Fair Pay Agreement.
- There may also need to be further guidance or rules around joining parties to the negotiations and managing any intra-employer or intra-employee decision making processes (eg ratification).
- Any system should be designed to support an efficient bargaining process, in terms of both duration and judicial involvement.

What is the scope of terms and conditions for Fair Pay Agreements?

Any terms, conditions and business practices (eg training requirements, floor space)

Employment-related terms and conditions typically included in collective agreements (eg Australia's modern awards system sets out what may and may not be included)

Set to target key issues in the sector (eg rostering practices only, wages only)

- Setting boundaries on the potential scope of Fair Pay Agreement terms and conditions may help deter parties from using them to create unreasonable barriers to entry for other employees or employers for anti-competitive purposes.
- Scope boundaries may also help target the key issues in the sector, but it may also simply shift the problem of poor terms and conditions (eg low wages) into other aspects of the employment agreement (eg fewer holidays).

Dispute resolution

What is the dispute resolution process?

Existing industrial dispute processes, including mediation, facilitation and determinations

Disputes resolved by specialised government agency (eg Fair Work Commission in Australia)

- The unique nature of Fair Pay Agreements may require additional assistance for resolving disputes (for example, intra-employer or intra-union disputes).
- There may also be a role for the Employment Relations Authority to determine terms and conditions of a Fair Pay Agreement if parties are unable to reach agreement.

Conclusion and extension

What is the legal mechanism for giving effect to a Fair Pay Agreement?

Parties agree to an enforceable contract (no additional oversight from government)

Administrative decision (eg Minister, Chief Executive of MBIE)
(eg Australia Fair Work Commission approves awards)

Legislation required to give effect to each Fair Pay Agreement

- A formal process for giving effect to Fair Pay Agreements would help ensure covered employees (and their employers) are aware of it and have an opportunity to comment before it is enforced.
- Legislation may be too costly and inflexible.
- Alongside this, it is important to consider the mechanism for renewal or variation of fair pay agreements (including any adjustments during their term).

How are Fair Pay Agreements enforced?

Self-enforcement as a contractual obligation

Risk-based approach to compliance from Labour Inspectorate supplemented by promotional activities

Labour Inspectorate enforces Fair Pay Agreement terms and conditions similar to minimum employment standards (eg Fair Work Ombudsman enforces Australian modern awards)

- The role of the Labour Inspectorate would have to be considered in relation to other enforcement priorities in industries without Fair Pay Agreements, which could have additional resourcing implications.

Annex 2: International examples of industry-wide minimum employment standards

Source: OECD, <http://www.oecd.org/els/emp/collective-bargaining.htm>.

AUSTRALIA	
Predominant level of collective bargaining¹	Company/sectoral: modern awards are industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions. A proper sector-level bargaining system does not exist in Australia.
Degree of centralisation²	Decentralised
Coordination³	No
Decision on extension and minimum requirements	The Fair Work Commission can make or vary awards that set minimum terms and conditions for particular occupations and industries. All modern awards are reviewed every four years by the Fair Work Commission. This process is regulated by the Fair Work Act 2009.
Frequency of use of extension mechanisms	Frequently used. Most employees in Australia's national workplace system are covered by a modern award. There are 122 industry and occupation modern awards operating across Australia.
Union density⁴	15% (2016)
Collective bargaining coverage⁵	54% (2014)

BELGIUM	
Predominant level of collective bargaining	Sectoral/national: strong state-imposed control. Sectoral agreements play an important role, with some room for lower-level agreements to change the standards.
Degree of centralisation	Centralised
Coordination	High: strongest coordination in OECD. Wages are indexed to increases in living costs and capped by a "wage norm" which takes into account wage developments in France, Germany and the Netherlands on top of a statutory minimum wage negotiated between social partners.

¹ OECD assessment.

² Centralisation is the degree to which terms are set at the national or sectoral level, and the scope of lower-level agreements to adjust the terms.

³ Coordination is the degree to which minor players deliberately follow what major players decide. Coordination can happen between bargaining units at different levels (for instance when sector- or firm-level agreements follow the guidelines fixed by peak-level organisations or by a social pact) or between units at the same level (for instance when some sectors or companies follow the standards set in another sector/company).

⁴ Union density is the ratio of wage and salary earners that are trade union members, divided by the total number of wage and salary earners.

⁵ Collective bargaining coverage is the ratio of employees covered by collective agreements, divided by all wage earners with right to bargaining.

Decision on extension and minimum requirements	<p>Extension of industry agreements is by royal decree. This procedure is initiated by:</p> <ul style="list-style-type: none"> • A request from a sectoral joint committee (comprising main trade unions and employer representations in a particular industry), or • By one organisation represented in industry-level joint committee. <p>As in many European countries, collective bargaining is conducted at three levels: national, industry and firm. It is hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at an upper level. Industry agreements are therefore subject to minimum terms set out in national agreements. Firm-level agreements can be more favourable than industry agreements.</p>
Frequency of use of extension mechanisms	<p>Frequently used.</p> <p>When industry collective agreements are rendered obligatory by Royal Decree, they apply compulsorily to all companies in the sector and to their workers, whether or not they are members of the signatory organisations (employers' organisations or unions).</p> <p>Overall, 75% of workers in Belgium have their wages solely determined through industry-level agreements.</p> <p>There is, however, large variation among industries in terms of the relative importance of industry-level and firm-level agreements. Belgian industries can be distinguished by degrees of centralisation:</p> <ul style="list-style-type: none"> • <i>Highly centralised industries</i>: wage increases and pay scales are solely defined at the industry level. Between zero and 40% of workers in these industries are covered by firm-level agreements. • <i>Centralised industries</i>: wage increases are determined at the industry level, but pay scales are determined at the firm level. Between 35% and 50% of workers in these industries are covered by firm-level agreements. • <i>Decentralised industries</i>: Most workers are paid above industry-agreed wages through firm-level agreements. Wage increases are set at the firm level for more workers. The percentage of workers covered by firm-collective agreements varies between 35% and 70%. • <i>Highly decentralised industries</i>: pay scales and wage increases are set entirely at the firm level. More than 75% of workers in these industries are covered by firm-level agreements.
Union density	54% (2015)
Collective bargaining coverage	96% (2016)

FINLAND	
Predominant level of collective bargaining	Sectoral/national (similar to Belgium).
Degree of centralisation	Centralised: central agreements play an important role in guiding other wage negotiations.

Coordination	High: peak level organisations either set norms
Decision on extension and minimum requirements	<p>An independent commission decides whether an agreement should be generally binding. This commission's decisions can be appealed at the Labour Court.</p> <p>Certain criteria relating to representativeness need to be met before a collective agreement is considered generally binding. Examples include:</p> <ul style="list-style-type: none"> • Whether an agreement covers more than half the employees in an industry; or • Whether an agreement is well-established.
Frequency of use of extension mechanisms	<p>Frequently used. Around 90% of private employees in Finland are covered by collective agreements.</p> <p>Negotiations in Finland also happen at the national level, rather than just the industry level. This practice appeared to be fading away until 2011, when in light of economic crisis, employers indicated they would be willing to return to national framework agreements. These national agreements set guidelines for industry-level negotiators to follow.</p>
Union density	65% (2015)
Collective bargaining coverage	87% (2015)

NETHERLANDS	
Predominant level of collective bargaining	Sectoral: sector level agreements leave significant room for lower-level agreements.
Degree of centralisation	Organised decentralisation. National or sectoral agreements define the broad framework but leave large scope for bargaining at the firm/establishment level.
Coordination	High: there is "pattern bargaining", where a sector sets targets first (usually the manufacturing sector, being exposed to international trade), and others (or at least some) follow.
Decision on extension and minimum requirements	<p>Extension is by decision of the Ministry of Social Affairs and Employment.</p> <p>The extension procedure is initiated by request from at least one signatory of an existing collective agreement. This process is regulated by the 1937 Act on Administrative Extension and Non-extension of Collective Labour Agreements.</p> <p>Criteria for extension:</p> <ul style="list-style-type: none"> • The existing collective agreement covers at least 55% of relevant employees; and • The extension is intended to apply to all employees and employers in a given sector.
Frequency of use of extension mechanisms	<p>Frequently used. Issues of representativeness are often debated because union density is low (around 20%) but collective coverage is above 80%.</p> <p>Extensions can be refused on grounds that they conflict with general interest.</p>
Union density	17% (2016)
Collective bargaining coverage	79% (2016)

SPAIN	
Predominant level of collective bargaining	Sectoral: sectoral agreements play a strong role.
Degree of centralisation	Organised decentralised (refer to the Netherlands).
Coordination	Low: some pattern bargaining (refer to the Netherlands).
Decision on extension and minimum requirements	Once signed, collective agreements apply to all workers regardless of union affiliation, and to all employers. Collective agreements can also be extended by legislation.
Frequency of use of extension mechanisms	Extension coverage is high. The main level of collective bargaining used to be at industry level, but legislative changes in the last decade have given preference to company-level agreements and allowed companies to derogate from collective agreements (eg when there is a drop in revenue or sales for six consecutive months).
Union density	14% (2015)
Collective bargaining coverage	71% (2015)

SWEDEN	
Predominant level of collective bargaining	Sectoral (similar to the Netherlands).
Degree of centralisation	Organised decentralised (refer to the Netherlands).
Coordination	High: there is pattern bargaining (refer to the Netherlands).
Decision on extension and minimum requirements	There is no bargaining extension mechanism in Sweden, whether statutory or otherwise. However, there are practices which have the effect of extension. For example, a trade union may enter into “application agreements” with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into “application agreements” with trade unions.
Frequency of use of extension mechanisms	There is no extension mechanism in Sweden, but a voluntary approach to extension is made easier due to high union membership.
Union density	67% (2015)
Collective bargaining coverage	90% (2015)

NEW ZEALAND (for comparison)	
Predominant level of collective bargaining	Company.
Degree of centralisation	Decentralised.
Coordination	None.
Decision on extension and minimum requirements	All union members, trade union and employers can agree that terms and conditions may be passed to other employees. Non-union members may pay a bargaining fee to the trade union where their work is covered by the collective agreement and it is agreed to by the employer and trade union, and agreed to in secret ballot between union members and non-union members.
Frequency of use of extension mechanisms	N/A
Union density	18% (Registrar of Unions, Union membership return report 2016)
Collective bargaining coverage	18% (2016). Private sector coverage is 9%; public sector coverage is 58% (Victoria University, Centre for Labour, Employment and Work).

Proactively Released

Annex 3: Terms of reference for the Fair Pay Agreement Working Group

Purpose

- 1 The Fair Pay Agreement Working Group has been established to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

Background

- 2 This Government has a vision for a highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity. When we lift the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- 3 The Government's vision of the employment relations framework is a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- 4 In addition, the Government intends to promote the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

Objectives

- 5 The objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining.
- 6 In achieving these objectives, it will be important to ensure that the Working Group's recommendations manage and where possible mitigate the following risks:
 - 6.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
 - 6.2 a "two-speed" labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
 - 6.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
 - 6.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and

- 6.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

Parameters and scope

- 7 The Fair Pay Agreement Working Group's recommendations must address:
 - 7.1 the process and criteria for initiating Fair Pay Agreement bargaining (including bargaining thresholds or public interest tests)
 - 7.2 identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation
 - 7.3 how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers
 - 7.4 whether Fair Pay Agreements should apply to industries or occupations, or both
 - 7.5 the scope of matters that may be included in an agreement, including whether regional variations are permitted
 - 7.6 rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both
 - 7.7 the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement
 - 7.8 how the terms of an agreement should be enforced
 - 7.9 duration and process for renewing or varying an agreement
 - 7.10 whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so
- 8 Any model proposed by the Fair Pay Agreement Working Group must:
 - 8.1 operate effectively as a component part of the overall employment relations and standards system, including existing single- and multi-employer collective bargaining and minimum employment standards, and
 - 8.2 manage and where possible mitigate the risks in paragraph 6.
- 9 The Fair Pay Agreement Working Group's recommendations must be within the following parameters:
 - 9.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement.

- 9.2 It will be up to the workers and employers in each in each industry to make use of the system to improve the productivity and working conditions in the industry.

Membership

- 10 The Fair Pay Agreement Working Group will be chaired by the Rt Hon Jim Bolger.
- 11 The Fair Pay Agreement Working Group will comprise the following members:

Dr Stephen Blumenfeld	Director of the Centre for Labour, Employment and Work at Victoria University
Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Anthony Hargood	Chief Executive of Wairarapa-Bush Rugby Union
Kirk Hope	Chief Executive of BusinessNZ
Vicki Lee	Chief Executive of Hospitality NZ
Caroline Mareko	Senior Manager Communities & Participation at He Whānau Manaaki o Tararua Free Kindergarten Association
John Ryall	National Secretary of E tū
Dr Isabelle Sin	Fellow at MOTU Economic and Public Policy Research
Richard Wagstaff	President of the New Zealand Council of Trade Unions

- 12 The chair and members of the Fair Pay Agreement Working Group will be entitled to a fee in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.
- 13 Officials from the Ministry of Business, Innovation and Employment will support the Working Group as secretariat. The Working Group will be able to seek independent advice and analysis on any matter within the scope of these terms of reference.

Timeframes

- 14 It is anticipated that the Fair Pay Agreement Working Group will:
- 14.1 commence discussions in June 2018
- 14.2 make recommendations to the Minister for Workplace Relations and Safety by November 2018.
- 15 These dates may be varied with the consent of the Minister for Workplace Relations and Safety.