



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
Title of Cabinet paper	Fair Pay Agreements: Approval to draft	Date to be published	7 May 2021

List of documents that have been proactively released		
Date	Title	Author
19 April 2021	<i>Cabinet Paper: Fair Pay Agreements: Approval to draft</i>	<i>Office of the Minister for Workplace Relations and Safety</i>
19 April 2021	<i>Cabinet Minute: Fair Pay Agreements: Policy Approval</i>	<i>Cabinet Office</i>

Information redacted

YES

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- Confidential advice to Government

Budget Sensitive

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Development Committee

Fair Pay Agreements: Approval to draft

Proposal

- 1 This paper seeks agreement to the key features of the Fair Pay Agreement (FPA) system, which would enable employees and employers in an industry or occupation to bargain new minimum standards. This paper also seeks approval to begin drafting legislation to give effect to the FPA system.

Relation to government priorities

- 2 The proposals in this paper support the Government's priority to provide an inclusive economy where economic growth is shared by all. Implementing FPAs was a manifesto commitment and included in the Speech from the Throne as a policy that will contribute to accelerating the recovery in response to the Covid-19 pandemic.
- 3 Creating a system for FPA bargaining will enable employers and workers in an occupation or industry to bargain an FPA that will create new minimum standards that will bind the whole industry or occupation – setting what they agree are fair standards.

Executive Summary

- 4 In May 2018, Cabinet agreed in principle to establish a system so that employers and workers could bargain for FPAs. Cabinet's in-principle agreement was subject to the policy being further considered by Cabinet once the FPA Working Group (FPAWG) had reported back on the scope and design of the system. Cabinet also specified no industrial action would be permitted under the FPA system. The FPAWG, comprised of employer representatives, worker representatives, academics and community representatives, submitted their recommendations on 20 December 2018, and I have based my design on its approach.
- 5 In October and November 2019, the Ministry of Business, Innovation and Employment (MBIE) consulted the public on the design features of an FPA system. I have since received advice about the FPAWG's recommended model and feedback from public consultation.
- 6 I now propose that we introduce an FPA system that largely reflects the model recommended by the FPAWG. My objective for the FPA system is to improve labour market outcomes by enabling employers and employees¹ to collectively bargain minimum employment terms that will be binding on an industry or occupation.

¹ While the system will only cover employees in the first instance, I plan to expand the FPA system to cover some types of contractors in the next phase of policy work.

- 7 One key feature of the FPAWG's model that I propose in this paper, is that any union can initiate bargaining for an FPA if they meet either:
 - 7.1 The representation test, of 1,000 employees or 10% of the employees in proposed coverage (whichever is lower); or
 - 7.2 A public interest test that builds on the criteria proposed by the FPAWG.
- 8 When an FPA has been finalised, all employers within coverage will be bound by it, regardless of whether they participate in the FPA bargaining process. Likewise, all employees within coverage will receive the benefits of the new minimum employment terms set by the FPA for their industry or occupation. This will improve outcomes for employees across the labour market.
- 9 A key aim of the FPA legislation is to drive an enduring, system-wide change. To embed and support this change I consider that, over the longer-term, a new regulatory institution is needed to undertake the broader functions and responsibilities proposed in this paper, and I have asked officials to explore the creation of this. In the interim, these functions and responsibilities can be performed by existing parts of the Employment Relations and Employment Standards (ERES) regulatory system.
- 10 I am now seeking agreement on the design features of the FPA system, and approval to begin drafting legislation. In addition I am seeking delegated authority to decide some remaining policy matters.

Background

New Zealand's labour market has systemic weaknesses

- 11 New Zealand's labour market has overall strengths in creating jobs, ensuring high rates of participation, and delivering some elements of job quality (eg work flexibility and autonomy). Our workforce is also relatively skilled and qualified.
- 12 However, this masks a number of entrenched weaknesses in the labour market, such as:
 - 12.1 A significant prevalence of low-quality jobs (ie those that offer working conditions, pay levels and opportunities for advancement below what many consider acceptable standards),
 - 12.2 Low real wages,
 - 12.3 Low labour productivity despite relatively long hours worked,
 - 12.4 Wage increases not keeping up with productivity increases in many industries and occupations,
 - 12.5 Persistently poor outcomes for particular populations (Māori, Pacific peoples, young people, disabled people, recent migrants) and regions, with pockets of serious distress and exploitation within these groups,

- 12.6 Many employees are not in a union or covered by a collective agreement, with collective agreement coverage at around 17% for the last two decades, and
- 12.7 Ongoing skills supply and matching problems at the individual and aggregate levels.
- 13 As a nation, we need to lift real wage growth, and reduce employee harm, vulnerability and disparities. While some of the above weaknesses have drivers outside the labour market, the way we regulate employment plays a key role in addressing these longer-term issues.

Our employment regulatory landscape lacks a key feature

- 14 The ERES system aims to promote employment relationships that are productive, flexible, and which benefit employees and employers. The system provides for legislated national minimum standards to set a floor for terms (eg the minimum wage) and provides for individual or collective bargaining above these minimum terms.
- 15 The Directorate for Employment, Labour & Social Affairs at the Organisation for Economic Cooperation and Development (OECD) recommends labour markets contain a mix of sector and enterprise collective bargaining. It states that this mixture of collective bargaining levels is associated with reduced inequality, employee vulnerability and unemployment.
- 16 In New Zealand, collective bargaining can only take place at the enterprise level (ie between individual employers and unions, with the possibility for collective agreements to apply across multiple employers). This means our ERES system does not have an effective mechanism for parties to bargain or to coordinate bargaining across an occupation or industry.
- 17 Collective bargaining rates are low in New Zealand by OECD standards, particularly in the private sector.² In fact, most bargaining happens between individual employers and individual employees. This is a concern, as individual bargaining is unlikely to be sufficient to improve working terms for employees with low bargaining power.
- 18 In some industries or occupations, low rates of collective bargaining and the lack of sector bargaining enables a “race to the bottom”, where businesses undercut their competitors through low wages or shift risks onto employees. For example, businesses may submit low tenders that are costed based on paying their staff low wages, which in turn encourages other businesses to undercut that rate. I have heard from the cleaning, security and bus driving industries that this form of competition makes it difficult for employees and individual employers to negotiate improved terms.
- 19 Employees can also be disadvantaged by how work is structured. Where demand is variable, businesses or customers may gain value from expecting employees to do split shifts or casual working hours, which transfers costs and risks to employees. The employees that suffer most from such arrangements are those with low bargaining

² Collective coverage rates in New Zealand dropped from approximately 65% in 1985 to approximately 16% in 2016. This compares to coverage in OECD countries from 45% in 1985 to 33% in 2013.

power, who cannot negotiate appropriate compensation, alternative terms or find alternative work.

Sector-level bargaining would strengthen the labour market

- 20 An FPA system would create a new bargaining mechanism to set binding minimum terms at the industry or occupation level. This would improve outcomes for employees with low bargaining power. As a tool to increase bargaining coordination, FPAs would bridge the gap between economy-wide minimum standards and the limited form of collective bargaining that currently occurs.
- 21 FPAs will also go further towards improving labour market outcomes than other initiatives, both within the Workplace Relations and Safety portfolio and more generally. These other initiatives include increases to the minimum wage, reforms to vocational education and training, refocussing industry policy, investment through the Provincial Growth Fund, and deepening early stage capital markets.
- 22 Within the ERES system, the Government has introduced, or is introducing, a number of changes that seek to improve the terms of workers in particular circumstances or sectors. These include the Employment Relations Amendment Act 2018, the Equal Pay Amendment Act 2020, the Screen Industry Workers Bill (SIWB) and extending the additional employment protections in Part 6A of the Employment Relations Act (ER Act) to security officers.
- 23 While each of the above play a useful role, these are focussed on specific situations or sectors. They would not enable a general ability for employers and employees to improve outcomes by bargaining together to set binding minimum terms for their occupation or industry. This is why FPAs are a crucial, missing element of our ERES system at present.

The FPAWG recommended an approach to developing an FPA system

- 24 In May 2018, Cabinet agreed in principle to establish a system so that employers and workers could bargain for FPAs that set minimum employment terms across an industry or occupation [DEV-18-MIN-0100]. Cabinet's in-principle agreement was subject to the policy being further considered by Cabinet once the FPAWG had reported back on the scope and design of the system.
- 25 In December 2018, the FPAWG recommended, at a high-level, an approach for an FPA system in New Zealand. The FPAWG reviewed sector bargaining models in other countries, but determined that it was not possible to simply "lift and shift" those models to New Zealand, because of our particular labour market circumstances and history.
- 26 When establishing the FPAWG, Cabinet agreed that two policy parameters should apply to any FPA system: industrial action would not be permitted as part of FPA bargaining; and it would be up to workers and employers in each industry or occupation to decide if they wanted to use the system, rather than the Government 'picking winners' (by setting out which industry or occupation could use the system). The FPAWG designed its model in light of these requirements.
- 27 The system recommended by the FPAWG included the following core elements:

- 27.1 Workers could initiate FPA bargaining if they met a threshold of 10% or 1,000 workers (whichever is lower) in the nominated sector or occupation, or a public interest test was met (ie harmful labour market conditions are evidenced which warrant an FPA).
 - 27.2 The occupation or sector to be covered by an FPA would be defined and negotiated by the parties, but it should include all workers in that occupation or sector (not just employees).
 - 27.3 Once agreed, FPAs would bind all employers and workers in the relevant sector or occupation to the new minimum standard. In some circumstances, it may be appropriate for time-limited exemptions from FPAs to apply.
 - 27.4 If parties could not reach agreement during bargaining they should access dispute resolution services. Where mediation was not successful, parties could seek a binding decision from a body such as the Employment Relations Authority (ER Authority) or Employment Court.
 - 27.5 When parties reached agreement, an FPA should take effect if ratified by a simple majority of both employers and workers.
- 28 Employer representatives on the FPAWG disagreed with the rest of the FPAWG about the nature of the system for employers. They instead preferred a system based on voluntary participation for employers at the outset of bargaining, with employers able to opt out of the process or resulting agreement later on (subject to having reasonable grounds for doing so).

MBIE consulted on potential design features of a Fair Pay Agreement system

- 29 In September 2019, Cabinet agreed to consult on a proposed FPA model broadly consistent with the FPAWG's model, and to release the discussion paper, 'Designing a Fair Pay Agreements System' [DEV-19-MIN-0266].
- 30 Public consultation occurred from 17 October to 27 November 2019. Overall, 648 submissions were received. A large number of submitters expressed views in support or opposition to an FPA system in general. Workers and unions generally supported FPAs and supported design features that made FPAs more accessible, while employers generally opposed FPAs and supported design features that limited FPAs.

I have formed a view on the design of the system that is based on the approach recommended by the FPAWG

- 31 Officials have advised me about the detailed features of the FPA system. The FPA system I propose largely aligns with the one recommended by the FPAWG, except for two parts:
 - 31.1 The system will initially only apply to employees, and not all workers. Contractors will be included in the system as soon as possible, at a future date.
 - 31.2 I have narrowed the mandatory terms of an FPA to those which are critical to achieving the objectives of the system, including base wages, hours of work,

overtime and penalty rates. All other terms will be either be mandatory for bargaining sides to discuss, or ones they may decide whether to discuss.

- 32 I seek agreement to the policy for the FPA system, and authorisation to issue drafting instructions.
- 33 The following sections outline the proposed policy settings for the FPA system. Annex A provides further technical detail on how the system will work in practice.

Objective of the system

- 34 The objective of the FPA system is to improve labour market outcomes by enabling employers and employees to collectively bargain industry- or occupation-wide minimum employment terms.

Initiation

Union(s) have two pathways to initiate FPA bargaining

- 35 I propose that a union with at least one member within coverage could initiate FPA bargaining by satisfying one of the following tests:
- 35.1 A representation test, that would require at least 10% of the covered workforce or 1,000 employees in coverage to support initiation (whichever is lower), or
- 35.2 A public interest test, that would require evidencing that an industry or occupation faces certain labour market issues, such that an FPA would be in the public interest.
- 36 MBIE will assess applications based on either test. MBIE will have powers to call for evidence and information from the initiator if further evidence is required for the assessment.
- 37 As part of the assessment process for the public interest test, MBIE will invite submissions from interested parties within a specified time frame. For an FPA to be in the public interest, MBIE must be satisfied that at least one of the four conditions below are present within an industry or occupation:
- 37.1 Low pay,
- 37.2 Low bargaining power,
- 37.3 Lack of pay progression, or
- 37.4 Long or unsocial hours, or contractual uncertainty, that is not adequately compensated.
- 38 In addition, MBIE will be able to take into account specified indicators when assessing whether the above conditions exist for an occupation or industry. These indicators are listed in Annex A. The exact wording of the conditions and indicators will be further refined during drafting.

Coverage

The initiator must describe the boundaries of an FPA as either an Occupational FPA or an Industry FPA

- 39 It will be important to make sure that the boundaries of an FPA support the objective of the system, are logical, clear and do not create undue complexity and uncertainty for employers and employees. To do this, I propose that an FPA must be defined by the initiator as either an:
- 39.1 Occupational FPA, where the initiator would be required to describe the occupation, including a description of the work, that the FPA is proposed to apply to; or
- 39.2 Industry FPA, where the initiator would be required to describe the industry, and each occupation, including a description of the work, that the FPA is proposed to apply to.
- 40 All employers and employees within the proposed coverage would, by default, be covered by the FPA.
- 41 Annex A outlines further procedural details on how coverage is set for an FPA, consolidation requirements and what happens when there is overlapping coverage between FPAs.

Employers who misclassify employees as contractors to avoid an FPA will be penalised

- 42 Initially, contractors will not be covered of the FPA system. I intend to bring policy proposals back to Cabinet to include them at a later stage. There is a risk that some employers may misclassify employees as contractors to avoid the terms of the FPA. As an interim measure, I propose introducing a penalty for misclassifying an employee as a contractor to avoid the terms of the FPA.
- 43 The employee would, as is currently the case under the ERES system, need to establish that they have been misclassified as a contractor. Once they have established that, I propose that the onus of proof shift to the employer to need to prove that they were not deliberately attempting to avoid the worker in question being covered by an FPA. I consider diverting from the principles of natural justice to be justified and necessary as it would be very difficult, if not impossible, for the employee to prove what the employer's intention was. Where there has been a successful case establishing misclassification relating to an individual, the Labour Inspectorate can issue an improvement notice in relation to other similar workers in that employer's workplace.

Representation

- 44 Both employers and employees will need to be represented in bargaining by a bargaining side.³

Unions will represent employees in bargaining

- 45 Employees will be represented in bargaining by registered unions. Other than the union that applies to initiate FPA bargaining, other unions (with members within coverage) will be able to decide whether they want to be a bargaining party to that FPA. Union bargaining parties will also have an obligation to represent non-union members within coverage.

Employers will similarly be represented in bargaining by an organisation of some form

- 46 Collective bargaining requires parties on two sides: employees and employers. In bargaining under the ER Act, unions represent employees in bargaining, and bargain directly with employers. In sector-level bargaining systems overseas, employers are generally represented by a representative organisation in bargaining, similar to how employees are represented by unions.⁴
- 47 This means once bargaining for an FPA has been initiated, an employer bargaining representative side is required so that bargaining can begin. Without a bargaining party representing employers, this process would stall.
- 48 During consultation, employers and employer representative groups raised concerns that the expertise and infrastructure needed for employers to coordinate and bargain FPAs had significantly reduced since the end of the awards system and in some sectors no organisation may exist with the willingness and ability to represent employers in FPA bargaining.
- 49 BusinessNZ has agreed to assist industries or occupations where an FPA has been initiated to find a suitable employer bargaining representative(s) and if one cannot be found, to be the default employer representative.
- 50 This obligation reflects BusinessNZ's role as the peak body for employers in New Zealand and as the employer social partner in the tripartite relationship with the government and New Zealand Council of Trade Unions (NZCTU).
- 51 In addition, further work will be done during drafting on the requirements for the employer bargaining side. Capacity issues will be taken into account, while ensuring that all employers are adequately and appropriately represented in bargaining. Where employers are represented by an industry body, it should have at least one member within coverage of the proposed FPA.
- 52 I therefore seek a delegated authority to make decisions on any requirements for employer bargaining representatives (eg their structure/form, degree of

³ A 'bargaining party' refers to a union or an employer representative involved in bargaining for an FPA. A 'bargaining side' refers to the group of bargaining parties that collectively represent either employees (ie unions that are bargaining parties for the same FPA) or employers (ie employer representatives that are bargaining parties for the same FPA).

representativeness, and government oversight in their selection). Some of these may also need to be mirrored for union bargaining parties. To make sure bargaining sides are balanced and support efficient bargaining this may include limits on bargaining side size (which would apply on both bargaining sides).

Notification and communication requirements

- 53 There will be notification and communication requirements on unions and impacted employers when FPA bargaining is initiated and at critical stages throughout the FPA process. For further detail about the obligations see Annex A at paragraphs 24 to 40.

Employers must pass on contact details of employees within coverage to union bargaining representatives unless employees opt out

- 54 It is important to the workability of the system that employee bargaining representatives can communicate both with union members and non-union members. To facilitate this, I propose employers be required to pass on the contact details of each employee within coverage of the proposed FPA in their workplace to union bargaining parties within a specified timeframe, unless the worker opts out of having their contact details passed on. Non-members' contact information can only be used by unions for FPA-related communication. However, so long as the primary purpose of the communication was FPA-related, this would not prevent unions from including other messages in communications.
- 55 It is important to balance system workability with employees' privacy rights. Giving employees the opportunity to choose not to have their details passed on to the union bargaining parties' strikes the right balance.

Employers must allow workers two, two-hour paid meetings for FPA purposes

- 56 Under the ER Act, an employer must allow union members to attend at least two union meetings (each of a maximum of two hours) in each calendar year.
- 57 In addition to those paid meetings under the ER Act, I propose to require employers to allow employees within coverage of a proposed FPA to attend up to two, two-hour paid meetings throughout the duration of FPA bargaining (applying to both union and non-union employees), with two additional paid hours if an FPA is voted down at the first ratification process. The primary purpose of the paid meeting must be FPA-related.
- 58 There should also be protections similar to the protections in the ER Act to make sure an employer's business is not unduly disrupted as a result of the workforce attending the paid meetings.

Unions will be able to access the workplace if there are employees in coverage and the visit relates primarily to FPA matters

- 59 The approach to workplace access during collective bargaining in the ER Act will apply to FPA bargaining. This means that a union (as a bargaining party to an FPA) would not need consent to enter the workplace if the workplace has employees within the proposed coverage of the initiated FPA. The primary purpose of the union representative accessing the workplace must relate to the FPA.

- 60 Once an FPA is in force, relevant unions will be entitled to access workplaces (whether there are employees within coverage, regardless of whether they are union members) without employer consent, so long as the primary purpose of the visit is related to the FPA.
- 61 Existing safeguards under the ER Act will continue to apply, including conditions on unions' access (eg accessing the workplace at reasonable times with regard to normal business operations).

Bargaining process

There will be obligations on bargaining parties and sides to support efficient and constructive bargaining

- 62 Bargaining obligations will be placed both on bargaining parties within a bargaining side (eg between unions) and between bargaining sides (eg between unions and employer representatives). These are intended to support efficient bargaining that is constructive and focused on finalising an FPA in a timely manner. These will be based on the duty of good faith obligations within the ER Act, with adjustments where appropriate (for more detail refer to the table at paragraph 41 in Annex A).
- 63 In addition, each bargaining side will have a duty to:
- 63.1 Use best endeavours to represent affected parties within coverage (including non-members),
 - 63.2 Ensure Māori are effectively represented and Māori interests and views are sought and considered, and
 - 63.3 Inform the relevant government agency of the progress of the FPA bargaining, if bargaining is occurring in an industry or occupation that receives government funding for a public service.

Bargaining costs will generally lie where they fall, but Government will provide some funding

- 64 While I do not consider the FPA system warrants the government funding all bargaining costs, I consider some financial support should be provided to bargaining sides to reduce the impact of these costs on them. I therefore propose:
- 64.1 Bargaining parties and sides are responsible for meeting their own costs.
 - 64.2 To provide a one-off contribution of \$50,000 to each bargaining side (ie the union bargaining side and employer bargaining side) for each FPA initiated. This is a low cost, efficient mechanism to provide some support to bargaining sides, while continuing to incentivise them to keep costs low. However, if the number of FPA initiations exceeds the number budgeted for, there may need to be decisions about how to prioritise how this one-off contribution is allocated.
 - 64.3 To provide additional funding of up to \$25,000 to each bargaining side if less than 20% of those in coverage on their side is a member of a union or industry

BUDGET SENSITIVE

group (as relevant). This will provide targeted support to bargaining sides that have the least existing infrastructure and less access to support and expertise from representative bodies.

- 65 I do not consider bargaining fees or levies are feasible. Both would be complex to administer with significant transaction costs, which would be too high compared to the probably relatively low amount collected from each industry participant. I do, however, propose that bargaining sides can agree to include a preferential payment in the FPA for union members within the coverage of the FPA. This is intended to level the playing field, given that union members contribute financially to the FPA bargaining process but non-members do not. This preferential payment (which could be a one-off or regular payment over the life of the FPA) could not exceed the level of a union member's membership fees.
- 66 The decision to provide some funding to each bargaining side creates an inconsistency with the Screen Industry Workers Bill (SIWB). The SIWB and FPA systems are similar, as both allow for sector-wide collective bargaining. The message from government to industry in relation to SIWB to date has been that the government does not pay for parties' bargaining costs.
- 67 For the sake of consistency, I propose amending the previous decision made in relation to the SIWB and instead offer the same bargaining support funding of \$50,000 to each bargaining side (and additional funding of up to \$25,000 to each bargaining side if less than 20% of those in coverage on their side is a member of a union or industry group) for occupational-level collective contracts under the SIWB.

Support will be provided to facilitate bargaining and build bargaining capability and capacity

- 68 For each FPA, a government funded neutral expert facilitator (a 'bargaining support person') would be available to help both bargaining sides to understand and navigate the process and content requirements of the FPA system. They will also support constructive and efficient bargaining.
- 69 Government support would also be provided to support the FPA bargaining participants to build their bargaining capability and capacity. This would include the provision of:
- 69.1 Bargaining capability training: this will be provided by MBIE's Employment Services and will be available to bargaining sides once an FPA has been initiated.
- 69.2 A funding grant to NZCTU and BusinessNZ to build their capacity to support FPAs: NZCTU and BusinessNZ will each receive \$250,000 per year for three years, starting once the FPA system comes into force. This funding reflects their special role as social partners in the tripartite context and the role they are expected to play as the peak bodies for employees and employers covered by FPAs (regardless of which workforces initiate an FPA). The funding would be tied to conditions (eg awareness raising and supporting bargaining sides) (outlined in Annex A, paragraph 46).

There are some terms that must be included in FPAs and some terms that bargaining sides must discuss

70 The FPAWG recommended that legislation should set out the topics that must be included in each FPA. I agree that the topics identified by the FPAWG are important, but do not consider they would all be relevant and appropriate for every occupation or industry. Instead, I consider there should be two categories of FPA terms (also see Table 1 below):

70.1 ‘Mandatory to agree’ topics: this is the minimum content that any FPA must include. This can include agreeing a process, calculation or a particular outcome, and may include agreeing to maintain the pre-existing minimum.

70.2 ‘Mandatory to discuss’ topics: these topics must be discussed during the bargaining, however, bargaining sides can decide whether or not to include them in the FPA. If bargaining sides cannot agree, one side can apply to the ER Authority to fix a ‘mandatory to discuss’ topic (see paragraph 86.2).

71 Table 1: ‘Mandatory to agree’ and ‘Mandatory to discuss’ topics

Mandatory to agree	Mandatory to discuss
Base wage rates	Redundancy
How wage rates will be adjusted during the term of an FPA.	Leave requirements
Whether employer superannuation contributions are included in base wage rates	Objectives of the FPA
Ordinary hours, overtime, penalty rates (rates that apply when working overtime or shifts etc.)	Skills and training
Coverage	Health and safety
Duration of FPA	Flexible working
Governance arrangements (such as what, if any, ongoing responsibilities bargaining parties have)	

72 Bargaining sides would be able, but not required, to discuss and include any other employment-related topics they consider to be relevant. This approach provides certainty that all FPAs will cover key topics, while allowing flexibility for bargaining sides to consider and negotiate the inclusion of other terms.

73 FPAs will only be able to contain employment-related terms. This reduces the risk that an FPA includes terms that would be prohibited under the Commerce Act 1986, for example if they amounted to cartel provisions. The Commerce Act generally does not apply to employment terms.

- 74 Bargaining sides will also be able to agree:
- 74.1 Exemptions from the terms of the specific FPA for up to 12 months for employers in significant financial hardship. This provides flexibility to avoid undue negative impacts (such as an employer going out of business) by giving employers who need it more time before they must comply with the terms of the FPA. I am seeking authorisation from Cabinet to make further policy decisions on how exemptions from FPAs will apply.
 - 74.2 Regional differences (but not region-specific FPAs). Bargaining sides will be able to agree different terms to apply in different regions, specified using Territorial Authority definitions, which can be enforced by the Labour Inspectorate (when they cover minimum entitlement provisions). If a worker works in more than one region, the region where they perform the majority of their work will prevail in determining their minimum employment entitlements. In allowing regional differences I recognise that labour markets can vary significantly across New Zealand.
 - 74.3 Other differential terms (eg based on qualification or skills) as long as they are not based on any characteristics that would amount to a breach of the Human Rights Act 1993 or breach minimum employment standards. The base wage rate in an FPA for young people and those in training can be set below the base wage rate for adult workers, as this is consistent with the Minimum Wage Act. Any minimum wage exemption permits for people with disabilities under the Minimum Wage Act will apply and override any new minimum wage rates agreed under the FPA system (noting, that the permit system is being phased out).

Dispute resolution

Dispute resolution for FPAs would be based on existing processes under the ER Act

- 75 The dispute resolution process for the FPA system largely builds on existing processes under the ER Act, with additions or simplification where appropriate. While policy work is undertaken towards a new institution, utilising this existing scheme is the most cost-effective and efficient approach.
- 76 After initiation, disputes over coverage may be determined by the ER Authority (without requiring mediation in the first instance).
- 77 When disputes arise during bargaining, bargaining parties or sides would go to mediation in the first instance (unless the dispute is about coverage). The mediator would be independent from the bargaining process to date (ie not the bargaining support person).
- 78 If bargaining sides cannot come to agreement on a subset of terms following mediation, one side may apply to the ER Authority for a non-binding recommendation on that term(s). Bargaining sides will then have the opportunity to consider the recommended term and agree the full package of FPA terms for ratification.

- 79 If bargaining sides cannot resolve their dispute, either side may apply to the ER Authority for a binding determination, including one that fixes the terms of the FPA. The ER Authority must first consider what attempts bargaining parties or sides have made to resolve the dispute. It may direct bargaining parties or sides to attempt mediation, further mediation, or another process to try to resolve the dispute (including making a non-binding recommendation on disputed terms).
- 80 The ER Authority will be able to, where reasonably necessary, seek independent expert advice. Where the ER Authority has fixed the terms of an FPA, appeal rights would be limited to whether the legal criteria for a determination to fix the terms of an FPA had been met. As such, a party cannot appeal the substantive determination (ie the terms of the FPA). This is intended to avoid costly and lengthy litigation processes. In other circumstances, the usual challenge and appeal rights would apply. The appellate courts will decide appeals (Employment Court, Court of Appeal and Supreme Court).
- 81 Once an FPA is in force, a modified version of the current dispute resolution process (including mediation in the first instance) would apply.

The ER Authority will be able fix FPA terms if specified criteria are met

- 82 Once bargaining for an FPA has been initiated, an FPA must result, either through successful ratification, or by the ER Authority fixing the terms of the FPA.
- 83 When bargaining sides cannot agree the terms of an FPA, one bargaining side can apply to the ER Authority for a determination to fix the terms of the FPA. The ER Authority must first consider what attempts bargaining parties or sides have made to resolve the dispute. It may direct bargaining parties or sides to attempt mediation, further mediation, or another process to try to resolve the dispute (including making a non-binding recommendation on disputed terms). The ER Authority would only be able to fix terms on the application of a bargaining side, if:
- 83.1 the bargaining sides have first tried to resolve the difficulties by mediation or by any other process recommended by the ER Authority; and
 - 83.2 the ER Authority is satisfied that:
 - 83.2.1 all other reasonable alternatives for settling the dispute have been exhausted; or
 - 83.2.2 a reasonable time period has elapsed within which the bargaining sides have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude a fair pay agreement.
- 84 This threshold is intended to encourage bargaining sides to work through issues to achieve a bargained outcome, while mitigating the risk of one side intentionally dragging out the bargaining process.
- 85 The terms of an FPA must also be fixed by the ER Authority where an FPA has been put to ratification twice and has failed both times. The criteria in paragraph 83 above would not apply in such a case.

- 86 When fixing terms, the ER Authority:
- 86.1 Must make a binding determination to fix the terms of ‘mandatory to agree’ topics – as these are the minimum topics that an FPA should cover.
 - 86.2 May make a binding determination to fix the terms of ‘mandatory to discuss’ topics – one side will be able to apply for a determination on ‘mandatory to discuss’ topics. The ER Authority would then be able to decide whether it is appropriate for the FPA to include a term for this topic. In making this decision, the ER Authority would consider the relevance and significance of the topic in question to the industry or occupation. I will consider whether any further guidance might be required for the Authority.
 - 86.3 If both bargaining sides request it, may make a binding determination to fix the terms for any other topics.
- 87 When the terms of an entire FPA are fixed by determination the decision will be made by a panel of ER Authority members. This will promote a consistent approach and allow these decisions to be based on the wider range of expertise.
- 88 I am doing further work on what process the ER Authority must follow in making its determination. I am seeking delegated authority from Cabinet to set what this process must be, including any factors that the ER Authority must take into account in making its determination. As part of this, I intend to require that the Authority, when considering whether a ‘mandatory to discuss’ topic should be included in an FPA, should give weight to the fact that a bargaining party had applied for a determination on a ‘mandatory to discuss’ topic.

Vetting

- 89 After bargaining, I propose an FPA be vetted by the ER Authority to ensure it contains all required terms, and does not contain any unlawful terms. The ER Authority will have a positive obligation to approve an FPA unless it does not comply with the FPA legislation, minimum employment standards or is otherwise contrary to law. If the FPA passes vetting, it proceeds to a ratification vote.
- 90 Vetting would not be needed if the terms of an FPA are fixed entirely by the ER Authority, as the FPA would be final upon determination.

Ratification

Employees and employers within coverage will have the opportunity to vote on an FPA

- 91 Employees and employers within coverage of an FPA will be able to ratify it. I propose that an FPA be ratified where a simple majority of both employers and employees in coverage who participate in a vote, vote in favour of the FPA. Where an FPA fails twice to be ratified, the FPA will go to the ER Authority for its terms to be fixed.
- 92 I consider the bargaining sides (ie unions and employer bargaining representatives) to be the most appropriate bodies to run employee and employer ratification. The ratification process must meet minimum statutory requirements, the detail of which is

set out in Annex A. Ratification should be completed as soon as reasonably practicable.

A key consideration is how the votes are weighted

- 93 On the employee side, each employee in coverage should be eligible to vote and all votes should have equal weight.
- 94 On the employer side I propose that each employer with at least one employee in coverage be eligible to vote, and that an employer receives one vote per employee in coverage. In addition, I propose weighted votes in favour of small and medium employers. This would mean an employer with one employee receives two votes, an employer with two employees receives 1.95 votes for each employee, an employer with three employees receives 1.9 votes for each employee and so on until the weighting levels out to 1 vote per employee. A table outlining how employers' votes will be weighted is at Annex B.

MBIE to check ratification process and results before the FPA is set in secondary legislation

- 95 Allowing bargaining sides to decide their ratification process may limit the level of transparency during the process, therefore, MBIE will conduct a verification check. This will include verifying the ratification process (including the compliance with minimum statutory requirements) and the ratification results which must be reported by the bargaining sides within a reasonable timeframe.
- 96 To support a robust verification process:
- 96.1 MBIE will have the power to call for further information from the relevant bargaining side only. This does not impact on the ability to judicially review MBIE's decision.
- 96.2 Bargaining sides responsible for holding the ratification vote will be required to keep a record of the process undertaken and the votes collected.

Finalising FPAs

- 97 I propose that FPAs should be finalised and brought into force by the Secretary for Business, Innovation and Employment making secondary legislation (empowered by the primary legislation). Bargaining sides will not necessarily have any contractual relationship with those they represent, and cannot bind them without a statutory basis.
- 98 The Secretary for Business, Innovation and Employment would not have any discretion about whether to bring the FPA into force, apart from needing to be satisfied that procedural steps in the process had been followed (eg the FPA had been vetted and then ratified or fixed by the ER Authority).
- 99 A subset of important terms should be translated into legislative language (including coverage and the duration of the agreement), with remaining terms attached verbatim from the finalised FPA. This ensures legal clarity about who the FPA applies to and other important 'metadata' for the agreement, while carefully maintaining the parties' exact agreement for the rest of the terms.

Compliance and enforcement

Parties will be able to resolve compliance issues through the employment dispute resolution system

- 100 If an employer does not comply with a duty or requirement in the FPA system, an employee can seek a remedy through the employment dispute resolution system (eg reimbursement of wages owed or lost).
- 101 As in the ER Act, the ER Authority will be able to:
- 101.1 Order compliance with any duties or requirements within the FPA system.
 - 101.2 Apply financial penalties in response to non-compliance with duties or requirements that are critical to the development and implementation of an FPA (listed in recommendations 69–70).
- 102 I consider there is a case for higher penalties for breaches during the development of an FPA. This is because such behaviour can negatively affect FPA bargaining and employees' ability to participate in the FPA process. Examples of such breaches are, if an employer fails to comply with the requirements to notify affected employees of the initiation, ratification or renewal of an FPA. As such, I am recommending introducing penalties of up to \$20,000 for an individual or \$40,000 for a company or other corporation where parties fail to meet their duties or obligations during the development of an FPA. These are listed in recommendation 69.
- 103 Once an FPA is in force, the penalties for breaches will be consistent with those in the ER Act, which is up to \$10,000 for an individual or \$20,000 for a company or other corporation. These are listed in recommendation 70. I considered increasing the penalties that can apply once an FPA is in force, but this would create significant inconsistencies between the related systems that create obligations in relation to employment terms. For example, it would mean that an employer that did not comply with the terms set by an FPA could be subject to a greater penalty than an employer who did not comply with minimum wage entitlements.
- 104 Serious breaches of an FPA by an employer could still be subject to higher penalties through either the cumulative impact where penalties apply per employee, or as part of the Labour Inspectorate's compliance tools (discussed below).

The Labour Inspectorate will have a role in enforcing FPAs

- 105 In effect, an FPA will set new minimum employment standards (which cannot be below the current minimum employment standards) for the occupation or industry covered. I propose that the following terms of an FPA will form new 'minimum entitlement provisions' that the Labour Inspectorate can enforce in accordance with the ER Act:
- 105.1 the hourly base wage(s) and adjustments to the hourly base wage across the lifetime of the FPA,
 - 105.2 increases to minimum leave entitlements (as specified under the Holidays Act),

105.3 the hourly overtime rate, and

105.4 the hourly penalty rate.

- 106 To make sure that these terms are sufficiently consistent with existing minimum entitlement provisions and are thus enforceable, I propose that where these terms are included in an FPA by bargaining sides, they must be written in a prescribed format and include any details as prescribed in secondary legislation.
- 107 If an FPA includes a regional difference in relation to a minimum entitlement then the Labour Inspectorate should enforce the relevant minimum entitlements for that region. The Labour Inspectorate also would be able to enforce minimum entitlements for each occupation or role, if these are agreed in the FPA.
- 108 The Labour Inspectorate would require additional information and powers to be able to enforce the new minimum entitlements. This includes requiring that employers where an FPA applies, keep necessary records for example: the days of the week and times that employees work so the Labour Inspectorate can enforce overtime and penalty rates; and where an employee works, if the FPA includes regional variations for minimum entitlements. The exact wording of the record keeping requirements will be further refined during drafting.

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Further work

- 111 I anticipate further policy decisions will be required during the drafting process, including transitional provisions, how exemptions from FPAs apply, and how to vary and renew FPAs. I seek Cabinet authorisation to make such decisions, consistent with the policy framework in this paper.

Over the longer term, a new regulatory institution will be required to undertake the wider breadth of function and responsibilities proposed under the FPA system

- 112 I consider that, over the longer term, a new regulatory institution will be required to undertake the wider breadth of functions and responsibilities that is proposed in this paper and those functions that already exist throughout the Employment Relations and Employment Standards (ERES) system. I intend to establish a new institution to meet

the anticipated demands on the system in the future. I have asked officials to begin work on this after the FPA system is introduced.

Role of the Public Service Commissioner in bargaining FPAs in the public sector

- 113 The public sector (including the public service, education service and district health board (DHB) sector) has well established systems and processes for the negotiation of employment agreements that are enabled by legislation. The aims of these arrangements are to:
- 113.1 Ensure that the negotiation of employment agreements in the public sector is consistent with the Government objectives and priorities on employment relations
 - 113.2 Enable Ministers to be informed about the progress of bargaining and any system implications for the public sector, including fiscal implications.
- 114 To assist in achieving these aims, the Public Service Commissioner is responsible for the negotiation of collective agreements in the Public Service⁵ and Education Service⁶ as if the Commissioner were the employer. In practice, the Commissioner delegates these functions and powers to Public Service chief executives and to the Secretary for Education with conditions attached to the delegation. In the DHB Sector, collective agreements must not be finalised without first consulting with the Director-General of Health.⁷
- 115 It is proposed to adopt these arrangements for FPA bargaining in the public sector. I propose that the Public Service Commissioner:
- 115.1 is responsible for FPA bargaining that covers employees in the Public Service and Education Service as if the Commissioner were the employer.
 - 115.2 can choose whether to delegate these functions and powers to Public Service chief executives and the Secretary for Education, respectively, with conditions.
- 116 The role of the Commissioner can be supported by a Government Workforce Policy Statement issued under the Public Service Act 2020. These statements can be issued to promote the effective management of employment relations generally in the agencies they apply to, including DHBs and schools which lie outside the Public Service. For example, a statement could provide an oversight framework for FPA bargaining in all the state services as well as tertiary education institutions.
- 117 No changes are proposed for the role of the Director-General of Health, who shall continue to be consulted on matters related to terms and conditions of employment, in this case with regard to those contained within potential Fair Pay Agreements.

⁵ Public Service Act 2020, sections 78–80.

⁶ Education and Training Act 2020, Subpart 4.

⁷ New Zealand Public Health and Disability Act 2000.

Possible risks associated with Fair Pay Agreements

Economic and labour market impacts

- 118 By setting a new floor for employment terms and conditions in some occupations/industries, I expect FPAs will likely raise some employees' entitlements.⁸ A consequence of this is that employers covered by FPAs will likely experience an increase in labour costs.
- 119 It is hard to estimate the scale of any increase in returns to employees, or change to employers' labour costs. This will depend on:
- 119.1 How many occupations/industries use the FPA system,
 - 119.2 How broadly FPAs apply across those occupations/industries, and
 - 119.3 What terms are agreed and how they relate to the existing terms and conditions that are offered (including the degree of differentiation within FPAs, which will determine how many employees' terms and conditions of work are lifted by FPAs. Impacts will be larger for employers offering lower current terms and conditions).
- 120 Assuming that FPAs will improve employment terms and conditions, this could have the following flow-on impacts in the labour market:
- 120.1 Employers may take steps to reduce their wage costs, such as by reducing hours, changing the number/scope of roles, or compressing their wage ladders above FPA-set minima.⁹ This is particularly the case for small, rural or regional businesses, for whom FPA terms may be harder to comply with.
 - 120.2 Employers may be incentivised to restructure their business from an employment model to a contracting model. Where the nature of the work is genuinely contracting, the employer would not be penalised under the FPA system.
 - 120.3 Employers may seek productivity enhancements to offset increases in labour costs, such as through investing in capital. Some productivity enhancements may reduce labour needs in the long run.
 - 120.4 Businesses may exit the market if they cannot operate within new parameters set by an FPA, and do not consider any provision of exemptions sufficient.

⁸ As with increases in the statutory minimum wage, some employees may receive a much lower increase in overall income from an increase in market income achieved via an FPA because of the abatement of income support.

⁹ The OECD's Economic Division has noted centralising and coordinating negotiations over wages and working conditions has a tendency to compress pay differences among employees. As a result, it can weaken the link between individual performance, wages and working conditions, and could negatively impact productivity growth. In its economic survey of New Zealand, the OECD noted that there may be particular risks if the FPA model does not retain significant freedom to determine terms at the firm level.

BUDGET SENSITIVE

- 120.5 New Zealand businesses may also face higher costs than offshore businesses against which they compete.
- 121 FPA's could also have the following effects in consumer markets:
- 121.1 FPA's could indirectly increase the price of goods and services, if increased labour costs are passed on to consumers.
- 121.2 The range and supply of goods and services available to consumers could be reduced if employers exit the market due to an FPA. This may also be the case if the terms of an FPA raise barriers to entry for new firms.
- 122 Ultimately, FPA's will represent a large shift for the employment regulatory landscape in New Zealand, and it is hard to predict their exact effect. That is because the FPA system is a framework, and how parties choose to use this framework will determine the ultimate effects of FPA's. The implementation and outcomes of FPA's will be kept under review, to ensure the settings for the FPA system do not undermine our employment (and broader wellbeing) objectives.
- 123 I consider these risks are outweighed by the intended benefits of FPA's including better standards of living for workers, improved productivity and a fairer distribution of the benefits of productivity, and better engagement between employers and workers. The Directorate for Employment, Labour & Social Affairs of the OECD recommends there is a mix of both enterprise and sector bargaining which is associated with reduced inequality, vulnerability of workers, and increases in employment. Systems of sector wide bargaining are relatively common overseas but are not a feature of the New Zealand employment framework. FPA's will provide New Zealand with a tool for encouraging sector bargaining. This could mean better wages and employment conditions for workers; companies being able to improve wages and conditions without being undercut on labour costs; improved productivity by incentivising increased investment in training, capital and innovation; and better sector wide coordination.

International and Treaty of Waitangi obligations

- 124 While the system will allow parties to bargain for new minimum standards, the Crown cannot delegate its responsibilities under the Treaty of Waitangi. This means the Crown could be challenged, under its Treaty obligations, in relation to outcomes of FPA bargaining. Although the proposals require parties to actively consider Māori representation, the system does not mandate Māori representation.
- 125 International obligations are discussed as part of the Human Rights section below.

System risks

- 126 The FPA system has been designed with a low initiation threshold to ensure that occupations or industries that could benefit from the system are able to use it. However, there is a risk that the low initiation threshold will result in significantly more initiations than expected and budgeted for. Given that the representation test will be easiest to meet for highly unionised occupations or industries, it is likely that they will be the first to initiate. There is a risk that initiations from less co-ordinated occupations/industries will happen later and be delayed as a result of capacity

constraints in the system. It is likely that I will need to ration bargaining support funding

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127 Subject to Cabinet agreement, funding will be provided to implement the establishment and ongoing costs of the FPA system on the assumption that four FPAs will be initiated per year. If more than four FPAs are initiated per year, there is likely to be a reduction in the timeliness of service provision.

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128 Other system risks were identified during the development of the system. A description of the risks and how I've chosen to mitigate those risks through specific design features are described in Annex C.

Risks to government as employer

129 Confidential advice to Government
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Interface with other initiatives

130 The current system for bargaining enterprise-level collective agreements and individual employment agreements under the ER Act will continue (as FPAs are a separate system). Any terms agreed in a collective agreement or individual employment agreement must be equal to or higher than those in an FPA that covers the same employees.

131 The Screen Industry Workers Bill (SIWB) is currently awaiting second reading. It introduces a workplace relations system for contractors in the screen industry, based on unanimous recommendations from industry. An element of this is a collective bargaining framework allowing occupation-wide collective contracts to be negotiated in the screen industry. The SIWB reflects the unique position of contractors doing screen production work—who cannot challenge their employment status as a means of accessing employment rights—that this Government has committed to addressing. The SIWB also contains elements, like new contracting duties and a system to resolve contracting disputes. The SIWB will still be needed, even when the FPA system is available.

132 A legislated pay equity process has been introduced through the Equal Pay Amendment Act 2020 for employees performing work that is female-dominated where remuneration has been subject to systemic sex-based undervaluation. Employees and unions can raise pay equity claims with their employer or unions can raise claims across multiple employers if they have union members present in those

workplaces. If a claim is accepted as arguable, the parties undertake an assessment to identify whether there is a pay equity issue to be addressed and, if so, bargain for a change to remuneration that addresses that issue. Any settlement reached only applies to the employees and employers who were parties to the claim.

- 133 The pay equity and FPA processes are addressing different issues and use different processes for achieving their aims. It is possible that parallel pay equity and FPA bargaining occurs at the same time if an FPA covers a female dominated occupation/s. It is also possible that a union that reaches a pay equity settlement with an employer or group of employers, will initiate an FPA more widely across the occupation in the expectation that they can bargain a similar outcome across all employers in coverage of an FPA. The existence of an FPA will not impact on the ability for people working in female-dominated occupations to raise pay equity claims. Though any increases in remuneration as a result of an FPA may affect the determination as to whether a pay equity claim is arguable (which is required before parties can proceed to the assessment and bargaining phase) or the calculation of any sex-based under-valuation relative to the remuneration of the work of comparators.
- 134 The approaches taken under the SIWB and Equal Pay Amendment Act 2020 have been considered when developing the detailed design of the FPA in order to identify where they include appropriate solutions for issues that are common between the systems.
- 135 The government is also considering options for improving rights and protections for contractors. This includes ensuring all employees receive their statutory minimum rights and entitlements and reducing the imbalance of bargaining power between firms and vulnerable contractors. There are also inter-dependencies between this work stream and any decisions about the treatment of contractors in the FPA system. Officials will continue to work together as these two initiatives progress to ensure that a consistent approach is taken.

Financial Implications

- 136 It is difficult to estimate the scale of financial impacts of the FPA system, given there is no way to establish which occupational groups or industries may be covered by an FPA, or what changes in employment terms may be agreed upon. Greater certainty around the fiscal and economic impacts will be provided through ongoing monitoring and evaluation of the FPA system.

Fiscal implications – system costs

- 137 The FPA system represents a significant expansion of the ERES regulatory system, including the introduction of new activities and increasing demand on existing services. FPA system costs include bargaining support and capability building, awareness raising, dispute resolution, verification and compliance, a repository, and monitoring and evaluation.

- 138 Confidential advice to Government

Confidential advice to Government

- 139 There will be consequential fiscal impacts from tax and welfare eligibility changes, but it is not possible to estimate these with any degree of accuracy. I consider that a better functioning labour market could reduce the need for transfer payments. There may also be positive fiscal impacts from tax on higher incomes for employees.

Fiscal implications – government as employer / funder

- 140 The FPA system is also likely to have fiscal implications for the Government as employer and funder. It is not possible to quantify these given the uncertainty as to which FPAs will be initiated, their coverage, and the timing of initiation and settlement. The NZCTU has signalled cleaners, security guards, supermarket employees and bus drivers as early priorities. Other unions may also initiate bargaining for any other industry or occupation where Government is employer or funder. We therefore expect several FPAs will impact on the funded sector.

Economic implications

- 141 I consider the FPA system will help correct a current distortion in the labour market where low wages are supplemented through the transfers system. The level playing field provided by FPAs will support firms to improve wages and conditions without fear of being undercut on labour costs by competitors, and create incentives to increase profitability or market share through increased investment in training, capital and innovation. Over the longer term this has the potential to increase New Zealand's economic productivity and support a more equitable distribution of the benefits of increased labour productivity.
- 142 The increase in labour costs for employers could have disemployment effects, such as laying off employees, hiring fewer employees, or reducing hours. I consider that when properly managed, wage increases should not result in displacement at any large scale. Observations of minimum wage increases do not show predicted disemployment effects occurring.
- 143 Increased labour costs may result in higher product or service prices, resulting in reduced real income for consumers. However, for workers covered by the FPA or affected by spill-over impacts, increased wages may mean they are still better off overall.

Legislative Implications

- 144 Legislation will be required to implement the FPA system, which will provide for secondary legislation. Confidential advice to Government [REDACTED] The FPA system represents a substantial change to the ERES system and would not be able to be achieved through amendments to existing Acts without creating undue complexity, workability and clarity concerns.
- 145 Consequential amendments to the ER Act will be required, including provisions about the functions of employment institutions, so that they can properly perform their proposed roles in the FPA model. Consequential amendments to other Acts may be required to give effect to the policy intent. Secondary legislation will also be needed to give effect to the policy intent.
- 146 The proposed Act will bind the Crown.

Impact Analysis

Regulatory Impact Statement

- 147 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

- 148 The Ministry for the Environment has been consulted and confirmed that the CIPA requirements do not apply to proposals relating to the design of an FPA system as the threshold for significance is not met.

Te Tiriti o Waitangi

- 149 As FPA bargaining will be enabled by legislation, and the resulting agreements enacted by secondary legislation, the Crown has an obligation to design the FPA system in a way that ensures there is effective representation and participation of Māori during bargaining. Māori, and especially wāhine Māori, are overrepresented in jobs where liveable pay rates, job security, health and safety and upskilling are lacking. I have considered the Crown's Te Tiriti o Waitangi obligations in the FPA system in relation to representation and bargaining obligations to ensure that Māori are effectively represented.

Population Implications

- 150 The factors correlated with earning a low wage include: being a woman, being aged between 16–29 years old and being non-European. In addition, women, Māori, Pacific people, and young people are more likely than other groups to earn the minimum wage. Disabled people experience significant disadvantage in the labour market, which includes earning less than non-disabled employees. The median income for disabled people was \$402 per week (inclusive of Government transfers) compared to

\$713 for non-disabled people.¹⁰ People who fall within more than one of these groups (eg disabled young Māori women) are more likely to experience poor labour market outcomes as the different forms of discrimination/bias intersect and compound.

- 151 Submissions from representative groups outlined concerns about the poorer working conditions experienced by the populations they represent. In particular:
- 151.1 NZCTU Women’s Council described problems faced by women in the labour market which could be addressed by FPAs, including the inability to access flexible working hours or paid parental leave, inappropriate staffing levels in occupations where isolated women are more vulnerable (eg security), and access to toilets and toilet stops (eg in the transport sector).
 - 151.2 NZCTU Rūnanga indicated that Māori are overrepresented in jobs where liveable pay rates, job security, health and safety, and upskilling are lacking.
 - 151.3 NZCTU Komiti Pasefika supports the FPA system and noted the disproportionate number of Pacific peoples in industries or occupations with poor outcomes and the importance of having Pacific voices and representation within the bargaining process.
 - 151.4 NZCTU’s youth branch, StandUp, raised a particular issue around the prevalence of unpaid internships. They believed that FPAs could include training rates and career opportunities (such as qualifications).
- 152 As part of the cross-government Crown response to the Mana Wāhine Kaupapa claim, MBIE has undertaken to engage early with claimants in the development of policy that relates to issues raised in the claims. A key theme identified across a number of claimant submissions to the Waitangi Tribunal is labour market inequities for wāhine Māori, which include: the gender pay gap, high unemployment, engagement in multiple employment (part time, casual and low paid), unsafe working conditions, and minimal job security. Wāhine Māori are more likely to be earning the minimum wage compared to wāhine non-Māori (3.9% compared to 3.4%) and tāne Māori (3.9% compared to 2.8%).¹¹ Similarly, wāhine Māori are more likely to be on a low wage compared to wāhine non-Māori (43.5% compared to 32.6%) and tāne Māori (43.5% compared to 32.7%).¹² If FPAs occur in sectors that involve a high proportion of wāhine Māori then it may assist in addressing some of the labour market inequities identified in the claims to the Tribunal.
- 153 Given these populations are disproportionately represented in workforces where there are poorer working conditions, they are likely to disproportionately benefit from any

¹⁰ Household Labour Force Survey, June 2020

¹¹ Household Labour Force Survey – Income Supplement, June Quarter 2020. Access to the data used in this study was provided by Stats NZ under conditions designed to give effect to the security and confidentiality provisions of the Statistics Act 1975. The results presented in this study are the work of the author, not Stats NZ or individual data suppliers.

¹² Household Labour Force Survey – Income Supplement, June Quarter 2020. ‘Low wage’ is defined as those paid less than paid less than \$22.68 (120% of the minimum wage rate of \$18.90) per hour during the June quarter of 2020.

improved terms obtained by an FPA if one was concluded in that industry or occupation.

- 154 It is possible that FPAs could lead to employers choosing to hire fewer people or reducing hours of work. Any disemployment effects could also disproportionately impact these population groups. On the other hand, FPAs may mean employers who offer good conditions or seek to employ members of population groups are no longer being undercut by competitors.
- 155 Some small rural/regional employers might find providing the improved terms set by an FPA difficult, if they were already struggling financially. This could be mitigated to some degree by allowing FPAs to include regional differences (where bargaining sides agree) in response to geographical differences in labour and product markets.

Human Rights

- 156 Overall, I consider the FPA system as a whole contributes towards New Zealand's obligation to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and worker' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements."¹³
- 157 The FPA system will be a key addition to our collective bargaining landscape, and I believe it will improve working conditions over time. This contributes to New Zealand's obligations to ensure all workers have just and favourable working conditions.¹⁴ If FPA bargaining is initiated in industries/occupations which are highly-fragmented and where there is low union membership, FPAs are likely to lift terms of employment, and allow employees who have not been able to access collective bargaining to benefit from sector-wide minimum terms. This is particularly so for employees who are not union members at present—unionisation rates in the private sector are particularly low in New Zealand.¹⁵
- 158 However, several elements of the FPA system are likely to engage domestic human rights law¹⁶ and international human rights obligations.¹⁷ During drafting, the aim will be to minimise any inconsistencies with domestic human rights law and international human rights obligations, or adverse impacts on our international reputation.

¹³ This obligation stems from article 4 of the International Labour Organization's (ILO) Right to Organise and Collective Bargaining Convention 1949 (Convention No. 98). New Zealand has ratified this convention.

¹⁴ These obligations stem from article 7 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which New Zealand has ratified.

¹⁵ While FPAs may increase the proportion of employees whose employment terms and conditions are set through collective bargaining, they will not necessarily increase union membership over time. The ability for employees to be covered by an FPA without having to be union members may weaken union membership. Conversely, it could increase union membership if more employees join unions to be able to participate more actively in FPA bargaining.

¹⁶ Relevant domestic law is the Bill of Rights Act 1990. The Privacy Act 2020 may also be relevant depending on the specific drafting of this proposed legislation.

¹⁷ Relevant international human rights obligations are from the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87); the ILO's Convention No. 98; article 22 of the International Covenant on Civil and Political Rights 1966 (ICCPR); and article 8 of ICESCR. New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO.

Ban on industrial action

- 159 Cabinet previously decided (CAB-18-MIN-0100 refers) that industrial action would be prohibited within the FPA system. This aspect of any FPA legislation will engage the **right to strike** and be inconsistent with ILO Convention 87.
- 160 While industrial action is an important corollary of collective bargaining, I believe social licence for the FPA system will be eroded if parties are allowed to take industrial action at the occupation or industry level during bargaining. Instead of resorting to industrial action to resolve an impasse in bargaining, parties will be more easily able to access dispute resolution services compared to bargaining under the ER Act, including recommendations from the ER Authority and the fixing of terms. The prohibition on industrial action as part of FPA bargaining also does not prevent all industrial action in New Zealand in that parties will still be able to take industrial action during collective bargaining under the ER Act.

Universal coverage of FPAs

- 161 Once in force, FPAs will apply to all employees and employers within coverage (ie in a particular occupation or industry). This means there will likely be employers and employees bound by the terms of an FPA negotiated by unions or employer organisations they are not affiliated with. This aspect of the FPA system will engage rights and obligations related to **freedom of association**.
- 162 I consider universal coverage of FPAs necessary to achieve the objective of setting minimum terms for work done in particular industries or occupations. Absent this feature, FPAs would be indistinguishable from existing enterprise-level collective bargaining under the ER Act, which only binds stated employers and their employees within coverage. Universal coverage is a common feature of sector-level collective bargaining regimes in other countries.
- 163 There are also two other features of the FPA system which mitigate the universal coverage of FPAs:
- 163.1 For bargaining to be initiated, a union must demonstrate that it is in the public interest for a particular industry/occupation to have an FPA, or that there is some support from employees to initiate bargaining. This means bargaining will only be initiated in situations of genuine need, or where there is at least some desire for an FPA from employees in an industry/occupation. In these situations, I consider it justifiable for all employees and employers within coverage to be bound by a resulting FPA.
- 163.2 Employers will also be able to seek time-bound exemptions from FPA terms in circumstances of significant financial hardship. This will serve as a pressure valve on universal coverage, giving employers' temporary reprieve from the terms of an FPA where compliance could otherwise threaten their business.

Absence of representativeness requirements for bargaining sides

- 164 The FPA system does not require bargaining sides to demonstrate their ability to represent employers and employees within coverage, beyond having at least one member within coverage of the proposed FPA. This engages rights and obligations

related to **freedom of association**. Employees are required to be represented by unions, even if they are not a member or if they would prefer a different entity to represent them, or to represent themselves.

- 165 The ILO requires “most representative organisations” to negotiate collective agreements before they can be extended across an entire sector. FPAs can be distinguished because they are bargained with universal coverage from the outset, as opposed to extending the coverage of an existing collective agreement. I am concerned that tightly construing representativeness requirements for bargaining sides could frustrate the entire FPA system, if sufficiently representative parties do not exist. In addition, the FPA system also does not prevent parties from joining bargaining if they have members within coverage of a proposed FPA (noting this may be affected by subsequent decisions about requirements for employer bargaining representatives).

FPA must result once bargaining has been initiated

- 166 Once FPA bargaining has been initiated, the intention is that an FPA will result, either through successful ratification, or by having its terms fixed by the ER Authority. Initiation also only requires assent from employees—employers do not have a say. These aspects could challenge the **principle of voluntary collective bargaining**. However, I consider these features essential to ensure that enforceable minimum terms are produced at the end of FPA bargaining. For example, if employer consent in some form was required to initiate FPA bargaining, I believe this would significantly reduce the instances of successful initiations. Also, without the ability for the ER Authority to fix terms if bargaining sides cannot agree/successfully complete ratification, bargaining sides could invest significant time and resources in bargaining, without it amounting to any actual change. The absence of these two features would frustrate the reason for creating an FPA system in the first place: improving labour market outcomes at the industry/occupation level.

Ability for the ER Authority to fix some or all FPA terms

- 167 The FPA system allows the ER Authority to fix FPA terms if bargaining sides cannot agree, with a significantly lower threshold for triggering this than exists under the ER Act. This could be seen to amount to **compulsory arbitration**. I consider this feature necessary to prevent bargaining from being stalled, because parties do not have recourse to industrial action. The ER Authority can seek advice from a panel of experts when fixing terms, which will help it determine appropriate terms.

Consultation

Public consultation on FPA model

- 168 The FPAWG was convened in 2018 to advise on the scope and design of the FPA system. It comprised union and business representatives, academics and community leaders. The Group’s recommendations have formed the basis of my proposals.
- 169 Public consultation on the FPA model occurred from 17 October to 27 November 2019. The Ministry of Business, Innovation and Employment received 648 submissions.

- 170 The feedback provided by submitters on particular design aspects of the model have been considered in relation to the core features of the system and informed the development of the detailed design of the FPA system.

Agency consultation on this paper

- 171 The following agencies were consulted on this paper: the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury, Te Kawa Mataaho Public Service Commission, Te Puni Kōkiri, the Ministries of Justice, Transport, Health, Education, and Social Development, Ministries for Women and Pacific Peoples, Department of Corrections and Inland Revenue Department.

Treasury comment

- 172 This policy proposal is significant: Fair Pay Agreements may make substantial structural changes to the economy and if not well implemented, the policy risks widespread negative effects on employment and – as outlined in the Regulatory Impact Statement (RIS) – uncertain implications for productivity. For the Government as an employer and funder of workforces, the proposed system represents a reduction in its ability to bargain and manage employment costs, terms and conditions. Furthermore, the RIS acknowledges there is minimal empirical evidence for the problem or policy response. Given the significance of the proposal, we recommend including system features that will allow for the prioritising and targeting of vulnerable and low paid workforces, in order to increase the likelihood of delivering successful FPAs and better control fiscal costs.
- 173 In particular, Treasury recommends the following policy changes:
- 173.1 prioritise FPAs for workforces which are widely considered to be deserving of better terms and conditions,
 - 173.2 limit the number of FPAs that can be progressed at any one time,
 - 173.3 require that FPA bargaining accounts for different worker and employer perspectives (particularly from small businesses, from regional and rural locations, and from key industries and occupations within coverage of an FPA),
 - 173.4 require a monitoring and reporting approach so that Cabinet can be kept appraised of the progress of FPA implementation and embed into the labour market landscape, and
 - 173.5 require a market impacts assessment be undertaken prior to finalising an FPA agreement.

Response from Minister for Workplace Relations and Safety to Treasury comment

- 174 In relation to the suggestions to limit the number of FPAs and prioritise certain workforces, I prefer the option to create a system with open access, to enable a wide range of workers to make use of FPA bargaining. Given the subjective considerations involved a process of prioritisation would likely need to be done by Ministers. This would create a risk that FPAs may be criticised as not legitimate because they have

been hand chosen by Ministers or potentially provide a way for future Ministers to frustrate the FPA process by declining to progress any FPAs. The system I am proposing aligns with the FPAWG recommendation.

- 175 There is no way to definitively limit the number of FPAs progressed at a given time without significantly delaying the initiation of FPAs by having something like an annual prioritisation process. If there was a limit, the option of first in first served is not desirable in the FPA context because it risks low priority or inappropriate FPAs being progressed over more significant ones. The bargaining support proposed to be provided for FPAs is fixed to a number of FPAs. This means it will need to be rationed in the case of a greater number of FPAs being triggered. This will place an incentive on the union movement to coordinate to initiate only the number of FPAs that will receive bargaining support per year. However, it is possible unions with significant resources or aiming to progress only a small agreement may trigger despite not receiving bargaining support from the Crown, if this were to occur they would still have the right to access the ER Authority and MBIE services associated with bargaining an FPA.
- 176 The issue of accounting for different perspectives is addressed by placing the onus on bargaining sides to ensure they represent affected parties within coverage, including an obligation to consider whether there are particular population groups or interests within coverage that should be recognised and reflected (see the table below paragraph 41 in Annex A). I consider this is a better option than prescribing exact requirements which may not be needed or appropriate in all situations. I have also proposed during ratification an additional weighting for small businesses to ensure their views are taken into account.
- 177 In relation to monitoring: in the funding I have sought for the FPA system I have factored in resources for monitoring and evaluation. I intend this will comprise a shorter term implementation evaluation and a longer term impact evaluation. I intend to bring further proposals to Cabinet in relation to including contractors in the FPA system and creating a new institution. As part of those Cabinet papers I expect to update Cabinet on progress in implementing the FPA system.
- 178 In relation to a market impacts assessment, most submitters to the public consultation in 2019 were opposed to this idea. Concerns related to the feasibility and complexity of the test, the time and resources required, and interference from a third party in collective bargaining. Instead of a market impact test I have proposed a light touch vetting process, to ensure an FPA is legally compliant. I consider that bargaining sides will factor in the impacts of the terms they agree so a further assessment is unnecessary.

Te Kawa Mataaho Public Service Commission comment

- 179 Confidential advice to Government
[Redacted text block]

180 The FPA system seeks to address poor labour market outcomes for some workers resulting from a “race to the bottom” and low bargaining power. Aspects of the proposed system design may result in FPAs for workforces that are already privileged and secure. We recommend targeting the design of the system towards low paid and vulnerable workforces so that resulting FPAs effectively improve labour market outcomes for these workers.

Office of the Privacy Commissioner comment

181 The Privacy Commissioner was consulted on the Fair Pay Agreements System and supports the opt-out model for employees. However, the Privacy Commissioner recommends that unions should use and retain non-union employee contact details only for the intended purpose and unions should not keep non-union employee contact information for any longer than the need to ensure compliance with the non-union employee’s authorisation.

Communications

182 I intend to announce the Government’s intention to establish an FPA system and the proposed approach. I expect there will be high levels of interest in this work from both employee and employer representatives.

Proactive Release

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

Recommendations

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

- 1 note in May 2018 Cabinet agreed in principle, subject to a report from the Fair Pay Agreement Working Group, 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 (DEV-18-MIN-0100);
- 2 note Cabinet also agreed to establish the a Fair Pay Agreement Working Group, to make recommendations on the scope and design of the system, within set parameters including that the system would not permit industrial action (DEV-18-MIN-0100).
- 3 note the Fair Pay Agreement Working Group submitted its report in December 2018.
- 4 note in October to November 2019, the public were consulted on the design of a Fair Pay Agreement system and that feedback from the consultation has informed particular design features.
- 5 note contractors have not been included in the initial design of the system as this would have substantially delayed the development and implementation of the Fair Pay Agreement system.
- 6 agree that the Fair Pay Agreement system will only apply to employees initially.

BUDGET SENSITIVE

- 7 note that the Minister for Workplace Relations and Safety is beginning work towards including some types of contractors in the Fair Pay Agreement system.
- 8 invite the Minister for Workplace Relations and Safety to report back on progress on the inclusion of some types of contractors in the Fair Pay Agreement system by the end of 2021.
- 9 note the Minister for Workplace Relations and Safety intends to create a new institution to oversee and implement (where appropriate) the Fair Pay Agreement system.
- 10 invite the Minister for Workplace Relations and Safety to report back to Cabinet on a new institution to oversee the Fair Pay Agreement system when options have been developed.

Objective of the FPA system

- 11 agree that the objective of the Fair Pay Agreement system is to improve labour market outcomes by enabling employers and employees to collectively bargain industry- or occupation-wide minimum employment terms.

Initiation

- 12 agree that to initiate bargaining for a Fair Pay Agreement, a union with at least one member within coverage will be required to apply to the Ministry of Business, Innovation and Employment and meet one of the following tests:
 - 12.1 a representation test that would require either 10% or 1,000 employees (whichever is lower) of the employees within proposed coverage to support initiation of a Fair Pay Agreement; or
 - 12.2 a public interest test based on at least one of the following criteria:
 - 12.2.1 low pay;
 - 12.2.2 low bargaining power;
 - 12.2.3 lack of pay progression;
 - 12.2.4 long or unsocial hours, or contractual uncertainty, that is not adequately compensated.
- 13 agree that when assessing whether the public interest test has been met the Ministry of Business, Innovation and Employment may take into account the indicators listed in paragraph 1 in Annex A.
- 14 agree that the Ministry of Business, Innovation and Employment will have powers to call for evidence and information from the initiator if further evidence is required for its assessment.

Coverage

- 15 agree that coverage of a Fair Pay Agreement must be defined by the initiator as either an:
- 15.1 Occupational Fair Pay Agreement, where the initiator would be required to describe the occupation, including a description of the work, that the Fair Pay Agreement is proposed to apply to; or
 - 15.2 Industry Fair Pay Agreement, where the initiator would be required to describe the industry that the Fair Pay Agreement is proposed to apply to, and each occupation, including a description of the work, that the Fair Pay Agreement is proposed to apply to.
- 16 agree that all employers and employees within the proposed coverage would, by default, be covered by the Fair Pay Agreement.

Representation

- 17 agree that only registered unions with at least one member in coverage can represent employees (union and non-union members) in bargaining for a Fair Pay Agreement.
- 18 authorise the Minister for Workplace Relations and Safety to make policy decisions regarding the eligibility requirements in relation to the structure/form and representativeness of employer bargaining representatives, and level of government oversight on the selection of employer bargaining representatives.
- 19 agree that BusinessNZ will be the default representative for employers (where there is no willing and suitable representative) and that it will be required to:
- 19.1 use its best endeavours to find a willing and suitable employer bargaining representative(s) once Fair Pay Agreement bargaining has been initiated, and
 - 19.2 be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months.
- 20 note that this paper refers to the collective group of representatives for either employees or employers in bargaining for a Fair Pay Agreement as a ‘bargaining side’.
- 21 agree that any representative organisation that is part of a bargaining side, either a registered union or employer organisation, should have at least one member within coverage of the Fair Pay Agreement being bargained.

Notifications and communication

- 22 agree that there will be notification and communication requirements on the initiating union(s) and on employers with employees within coverage when Fair Pay Agreement bargaining is initiated and at critical stages throughout the process (Further detail is set out in Annex A, paragraphs 24 to 40).
- 23 agree that employers are required to pass on the contact details of each employee within coverage of the proposed Fair Pay Agreement to the union bargaining side

BUDGET SENSITIVE

within a specified timeframe, unless the employee opts out of having their contact details passed on.

Paid meetings

- 24 agree that employers must provide up to two, two-hour paid meetings for each employee within coverage of a proposed Fair Pay Agreement during bargaining (applying to both union and non-union employees), with two additional paid hours if a Fair Pay Agreement is voted down at the first ratification process.

Union access to workplaces

- 25 agree that the approach to union workplace access during collective bargaining in the Employment Relations Act 2000 would be applied to Fair Pay Agreement bargaining and that union(s) may access a workplace with workers within coverage without the employer's consent when a Fair Pay Agreement is being bargained, if the primary reason for their visit relates to the Fair Pay Agreement.
- 26 agree that once a Fair Pay Agreement is in force and there are workplaces with employees in coverage of the agreement (even if they are not union members) relevant unions will be entitled to access workplaces without the employer's consent if the primary purpose of the visit is related to the Fair Pay Agreement.

Bargaining obligations

- 27 agree that the duty of good faith provided in the Employment Relations Act 2000 will apply to parties in employment relationships covered by a Fair Pay Agreement (including between bargaining parties on the same bargaining side and those on different bargaining sides) with appropriate amendments reflecting the differences between the Fair Pay Agreements system and collective bargaining (outlined in Annex A in the table below paragraph 41).
- 28 agree that each bargaining side must:
- 28.1 use their best endeavours to represent affected parties within coverage (including non-union members or employers not affiliated with the representative parties) on their side
 - 28.2 use their best endeavours to ensure Māori are effectively represented by seeking and considering their feedback and considering whether there should be a Māori representative including in the bargaining side
 - 28.3 inform the relevant government agency of the progress of Fair Pay Agreement bargaining, if it is occurring in an industry or occupation that receives Government funding to deliver public services.

Support to build bargaining capability and capacity during bargaining

- 29 agree that bargaining costs will lie where they fall.
- 30 agree that once a Fair Pay Agreement has been initiated each bargaining side (on the employee and employer side) is offered from the Government the following support for bargaining:

BUDGET SENSITIVE

- 30.1 bargaining training, and
- 30.2 a one-off contribution of \$50,000 to each bargaining side, and
- 30.3 an additional contribution of up to \$25,000 to each bargaining side if less than 20% of those in coverage on their side is a member of a union or industry group (as relevant).

- 31 note that the Screen Industry Workers Bill and Fair Pay Agreement systems are similar, as both allow for sector-wide bargaining, and a decision to provide some funding to Fair Pay Agreement system would create an inconsistency between them.
- 32 agree that a one-off bargaining support of \$50,000 is offered to each bargaining side, on initiation of bargaining for occupational-level collective contracts under the Screen Industry Workers Bill.
- 33 agree that an additional contribution of up to \$25,000 is offered to each bargaining side, on initiation of bargaining for occupational-level collective contracts under the Screen Industry Workers Bill, if less than 20% of those in coverage on their side is a member of a union or industry group (as relevant).
- 34 note that if the number of Fair Pay Agreement initiations exceeds the number budgeted for, some form of rationing for the monetary contributions may be necessary.
- 35 agree that a Government funded bargaining support person, provided by Employment Services, be available to support bargaining sides throughout Fair Pay Agreement bargaining.
- 36 agree that peak bodies New Zealand Council of Trade Unions and BusinessNZ are given \$250,000 each per year, for three years, with funding conditions attached (listed in Annex A paragraph 46), once the Fair Pay Agreement system comes into force.

Scope of an FPA

- 37 agree that the terms that can be included in a Fair Pay Agreement are limited to employment-related terms.
- 38 agree that some topics will be ‘mandatory to agree’ and some will be ‘mandatory to discuss’ in Fair Pay Agreement bargaining, as described in the table below:

Mandatory to agree	Mandatory to discuss
Base wage rates	Redundancy
How wage rates will be adjusted	Leave entitlements
Whether superannuation contributions are included in base wage rates	Objectives of the Fair Pay Agreement
Ordinary hours, overtime, penalty rates	Skills and training

B U D G E T S E N S I T I V E

Coverage	Health and safety
Duration of Fair Pay Agreement	Flexible working
Governance agreements	

- 39 agree that bargaining sides may agree or discuss any other lawful employment-related terms (not included in recommendation 38) in Fair Pay Agreement bargaining.
- 40 agree that bargaining sides can agree a process or calculation that employers must use to set an employment term, as an alternative to specifying the exact term.
- 41 agree that bargaining sides can agree to include an exemption from the terms of the Fair Pay Agreement for up to 12 months for employers in significant financial hardship.
- 42 agree that bargaining sides can agree to include regional differences, using specified regional definitions, in a Fair Pay Agreement.
- 43 agree that bargaining sides can agree to include a preferential payment for union members within coverage of a Fair Pay Agreement, as long as it is no greater than a union member’s membership fees.
- 44 agree that bargaining sides can agree differential terms within a Fair Pay Agreement based on any characteristic, as long as they do not breach the Human Rights Act 1993 or minimum employment standards.

Dispute resolution

- 45 note that the Fair Pay Agreement Working Group recommended that the dispute resolution system for Fair Pay Agreements should maintain, as far as possible, the existing processes under the Employment Relations Act, with additions or simplification as necessary for industry-wide bargaining.
- 46 agree that the existing actors within the employment dispute resolution system will perform the dispute resolution functions in the Fair Pay Agreement system:
 - 46.1 Employment Mediation Services will do mediation.
 - 46.2 The Employment Relations Authority will determine disputes between parties and may fix the terms of the Fair Pay Agreement when the required threshold has been met.
 - 46.3 The appellate courts will decide appeals (Employment Court, Court of Appeal and Supreme Court).
- 47 agree that disputes about coverage following initiation can be determined by Employment Relations Authority and will not require mediation in the first instance.
- 48 agree that where there is a dispute between the bargaining parties or sides, that a bargaining party or side may use mediation to try to resolve the matter.

B U D G E T S E N S I T I V E

- 49 agree that where mediation has not been successful in resolving the matter, a bargaining party or side can apply to the Employment Relations Authority for a binding determination.
- 50 agree that the Employment Relations Authority must consider, before making a binding determination, whether to direct parties to use mediation, further mediation, or recommend another process to resolve the matter.
- 51 agree that where bargaining sides have agreed some topics, the Employment Relations Authority may make a recommendation(s) on the subset of disputed topics at the request of one bargaining side.
- 52 agree that when a bargaining side applies for a determination to fix the terms of a Fair Pay Agreement, the Employment Relations Authority must only make a binding determination to fix mandatory terms (and may make a determination to fix mandatory to discuss terms; and may fix other employment-related terms if both bargaining sides agree) if it is satisfied that:
- 52.1 the bargaining sides have first tried to resolve the difficulties by mediation or by other processes recommended by the Employment Relations Authority; and
 - 52.2 either:
 - 52.2.1 all other reasonable alternatives for settling the dispute have been exhausted; or
 - 52.2.2 a reasonable period has elapsed within which the bargaining sides have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude a Fair Pay Agreement.
- 53 agree that following a:
- 53.1 first failed attempt to ratify a Fair Pay Agreement, the parties would return to bargaining
 - 53.2 second failed attempt to ratify a Fair Pay Agreement, the matter would be referred to the Employment Relations Authority to fix the terms of the Fair Pay Agreement.
- 54 authorise the Minister for Workplace Relations and Safety to decide any process the Employment Relations Authority must follow when making a determination to fix terms, including any factors that the Employment Relations Authority must take into account in making its determination.
- 55 agree that when the terms of a Fair Pay Agreement are fixed by determination, the decision is made by a panel of Employment Relations Authority members.
- 56 agree that the Employment Relations Authority, where reasonably necessary, may seek independent expert advice.

BUDGET SENSITIVE

- 57 agree that where the Employment Relations Authority has fixed the terms of the Fair Pay Agreement by determination that the right to appeal this decision is limited to appeals on questions of law.
- 58 agree that once a Fair Pay Agreement is finalised, employers and employees within coverage will be able to enforce their rights and obligations through the dispute resolution processes set out in the Employment Relations Act 2000.

Vetting

- 59 agree that unless it has been set by determination, a Fair Pay Agreement is vetted by the Employment Relations Authority to check that it is compliant with the Fair Pay Agreement legislation, minimum employment standards, and is not otherwise unlawful, before it is finalised.

Ratification

- 60 agree that a Fair Pay Agreement will be ratified if a simple majority, of those within coverage who vote from both employee and employer sides, vote in favour of it.
- 61 agree that bargaining sides will decide their ratification processes, but that the processes must meet legislated minimum requirements set out in Annex A at paragraphs 49-50.
- 62 agree that all employees within coverage will each receive one vote of equal value.
- 63 agree that all employers will receive at least one vote per employee within coverage, with weighted votes for employers with 20 employees or less as outlined in the table at Annex B.
- 64 agree that before a ratified Fair Pay Agreement is finalised, the Ministry of Business, Innovation and Employment will conduct a verification check of the ratification process and the ratification results reported by the bargaining sides within a reasonable timeframe.
- 65 agree that the Ministry of Business, Innovation and Employment will have the power to call for further information in relation to ratification processes and results from bargaining parties only.
- 66 agree that bargaining sides responsible for holding the ratification vote will be required to keep a record of the process undertaken and the votes collected.

Legal mechanism for finalising FPAs

- 67 agree that the resultant Fair Pay Agreement as ratified or determined must be put into secondary legislation by the Secretary for Business, Innovation and Employment, once the Secretary is satisfied that the proper process has been followed.

Employment Relations Authority compliance tools

- 68 agree to enable the Employment Relations Authority to order compliance with any duties or requirements within the Fair Pay Agreement system.

B U D G E T S E N S I T I V E

- 69 agree that the Employment Relations Authority can apply a penalty of up to \$20,000 for an individual and \$40,000 for a company or other corporation, for the following breaches (which could occur during development of a Fair Pay Agreement):
- 69.1 an employer breaches its duty of good faith duty by doing anything with intention of inducing an employee not to be involved in initiation, bargaining or the ratification vote for a Fair Pay Agreement.
 - 69.2 an employer intentionally or recklessly fails to comply with the requirements to notify affected employees of the initiation, ratification or renewal of a Fair Pay Agreement.
 - 69.3 an employer intentionally or recklessly fails to provide the contact details of employees within coverage to the union bargaining side.
 - 69.4 there is a breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is deliberate, serious, and sustained; or intended to undermine Fair Pay Agreement bargaining.
 - 69.5 an employer unreasonably withholds consent in relation to a request by a union representative to enter a workplace; or refuses to permit entry for, or obstructs, a union representative who is entitled to enter a workplace.
 - 69.6 an employer fails to allow an affected employee to attend the minimum paid meetings they are eligible for in relation to Fair Pay Agreement bargaining.
 - 69.7 a union intentionally or recklessly provides inaccurate information as part of the application to initiate a Fair Pay Agreement.
 - 69.8 a union, employer bargaining representative, or employer intentionally or recklessly provides inaccurate information as part of the ratification evidence.
- 70 agree that the Employment Relations Authority can apply a penalty of up to \$10,000 for an individual and \$20,000 for a company or other corporation for the following breaches (which could occur when a Fair Pay Agreement is in force):
- 70.1 there has been a breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is intended to undermine a Fair Pay Agreement.
 - 70.2 a party does not comply with a Fair Pay Agreement once it is in force.
 - 70.3 an employer misclassifies an employment relationship as a contractor arrangement to avoid coverage of a Fair Pay Agreement.
 - 70.4 a party obstructs or delays an Employment Relations Authority investigation or process that it is mandated to perform in the Fair Pay Agreement system (noting, this can also apply for disputes that occur during bargaining).
- 71 agree that the onus of proof be reversed for the offence of misclassifying an employment relationship as a contractor arrangement to avoid Fair Pay Agreement

coverage and that, to avoid being penalised, an employer would need to prove that they took the action for reasons other than to avoid coverage.

Enforcement by the Labour Inspectorate

- 72 agree that the Fair Pay Agreement system be added to the laws that come within the Labour Inspectorate’s jurisdiction.
- 73 agree that the hourly base wage(s), adjustments to the hourly base wage across the lifetime of the Fair Pay Agreement, increases to the minimum leave entitlements, the hourly overtime rate, and the hourly penalty rate set in a Fair Pay Agreement will form new minimum entitlement provisions that the Labour Inspectorate can enforce in accordance with the Employment Relations Act 2000.
- 74 agree that the Labour Inspectorate should enforce the minimum entitlement provisions specified per occupation or role and per region (where these are agreed in the Fair Pay Agreement).
- 75 agree that when the new minimum entitlement provisions described in recommendation 73 are included in the Fair Pay Agreement, they must be written in a prescribed format and include details as prescribed in secondary legislation.
- 76 agree, where a Fair Pay Agreement applies, to require employers to keep records to enable it to be enforced, which may include the days of the week and times of the day that employees within coverage worked; and where they worked (if the Fair Pay Agreement includes regional differences).
- 77 Confidential advice to Government

Role of the Public Service Commissioner in bargaining FPAs in the public sector

- 78 agree that the Public Service Commissioner is responsible for Fair Pay Agreement bargaining that covers employees in the Public Service and Education Service as if the Commissioner were the employer, and that the Commissioner can choose whether to delegate these functions and powers to Public Service chief executives and the Secretary for Education, respectively, with conditions.

Detailed design

- 79 agree that, in addition to the core design features covered in recommendations 12–77, the Fair Pay Agreement system include the detailed design features as outlined in Annex A.

Financial Impacts

- 80 Confidential advice to Government
- 81

Confidential advice to Government

82

83

84

Confidential advice to Government

Approve drafting of legislation

85

Confidential advice to Government

86

invite the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office giving effect to the policy decisions in this paper.

87

authorise the Minister for Workplace Relations and Safety to make decisions, consistent with the policy framework in this paper, on any issues that arise during the drafting process, including transitional provisions, how exemptions from Fair Pay Agreements apply, record keeping requirements for employers, and how to vary and renew Fair Pay Agreements.

88

authorise the Minister for Workplace Relations and Safety to consult with New Zealand Council of Trade Unions and BusinessNZ on draft legislation giving effect to the policy decisions in this paper.

89

agree that legislation drafted to give effect to the policy decisions in this paper will bind the Crown.

Publicity

- 90 note the Minister for Workplace Relations and Safety intends to announce the core design features of the proposed Fair Pay Agreement system.

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety

Annex A: Additional detailed design of the FPA system

Initiation

MBIE may take into account specified indicators when assessing the public interest test

1 The FPAWG recommended criteria for the public interest test. I propose to use some of these as indicators which MBIE could take into account when forming its view of whether the conditions (at paragraph 37 in the Cabinet paper) exist, indicating that it would be in the public interest test for an FPA to be initiated in that occupation or industry. The exact wording would need to be considered by PCO during drafting, but an example of the broader list of indicators is directly below.

- A high proportion of migrant employees
- Evidence of systematic migrant exploitation
- High proportion of temporary work
- Evidence of systematic non-compliance with minimum standards
- High proportion of small firms
- Evidence of systematic health and safety issues

Coverage

2 The description of the occupations and industries proposed to be in coverage by the initiator (or proposed by bargaining sides, where coverage is substantially expanded in bargaining) is checked by MBIE, for clarity.

3 MBIE would work with the initiator to ensure that the described boundaries of the FPA are sufficiently clear for impacted parties to identify whether they are in coverage. Once MBIE is satisfied that the boundaries are sufficiently clear, and the representation or public interest thresholds have been met, the process for initiating an FPA would be satisfied and the notification process could commence.

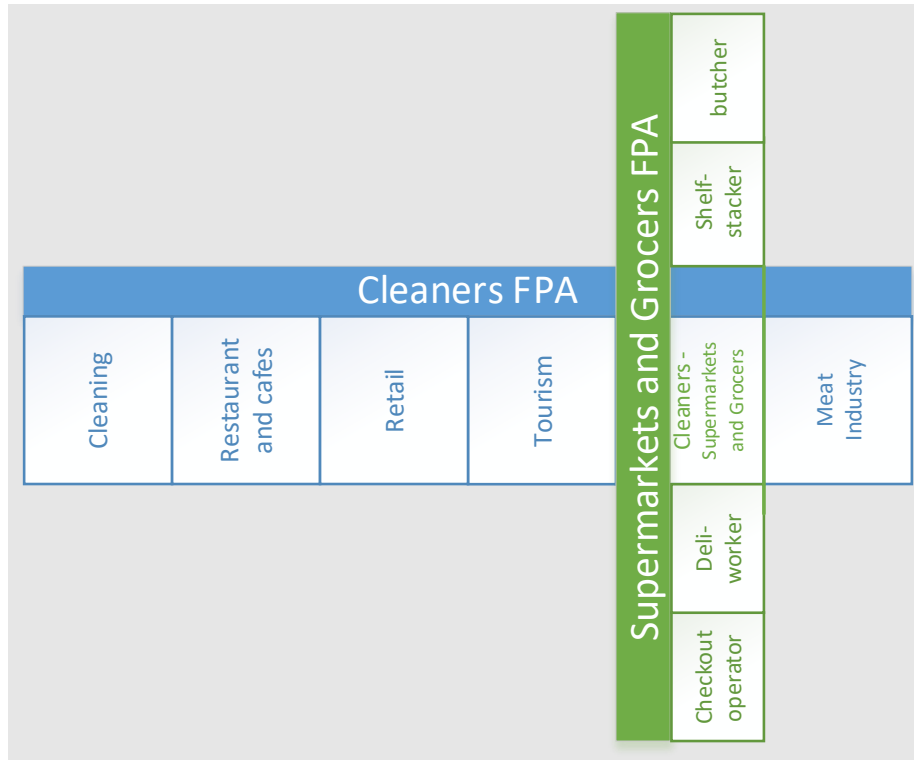
4 MBIE will inform the bargaining sides when it becomes aware that there are other FPAs, or bargaining underway for an FPA, that it thinks may overlap with the proposed FPA. This could be done at the outset (when the FPA is initiated by the union) or during bargaining (eg if an overlapping FPA is initiated).

5 Bargaining sides can bargain to change coverage. If coverage is substantially expanded during bargaining, for example by including another occupation, the initiation tests must be retested with the newly defined coverage grouping. This would not apply for the representation test of 1,000 employees, as the test would have already been met for that defined group, even if expanded.

Where a proposed FPA overlaps with an existing FPA, the earlier FPA will apply unless the later one has better terms overall for the affected group of employees

- 6 There will be the potential for overlapping FPAs where an occupational FPA crosses over with an industry FPA. A hypothetical example is illustrated in Figure 1 below.

Figure 1 - Overlapping Industry and Occupational FPAs



- 7 The first FPA will apply to the subgroup that is subject to the overlap, unless a second FPA proposes terms that are better off overall for those employees subject to the overlap.
- 8 The ER Authority, as the vetting body, would check the bargained terms in the second FPA at the vetting stage and establish whether the terms are better off overall for those employees than the original terms. If the ER Authority determines that the second FPA applies to the group of employees subject to the overlap, then, if that agreement is ratified and made into secondary legislation, MBIE will make a subsequent amendment to the first FPA to remove those employees from coverage.

If another FPA is subsequently initiated for the same industry during a specified time period, bargaining must be consolidated

- 9 It will be possible for another union to initiate bargaining for an FPA that is already being bargained. For example, a union may have initiated for checkout operators and shelf-stackers in a Supermarket and Grocers Industry FPA and subsequently, another union may initiate for deli-employees and butchers in the same industry.
- 10 This could result in multiple FPAs covering the same industry, leading to fragmented and inefficient bargaining.

- 11 As such, bargaining will be required to be consolidated if another FPA is initiated for the same industry within a specified period (for example six months) of the first FPA being initiated. After this point bargaining may be consolidated if the existing bargaining sides agree.
- 12 Where there is a subsequent initiation after the specified period for an additional occupation to be added to an Industry FPA, and the existing bargaining sides do not agree to consolidate, I propose that the new bargaining parties would be required to bargain a Schedule to the Industry FPA. Only the parties to the Schedule would be required to ratify the change, however, and no substantive changes could be made to the other terms of the FPA.
- 13 The FPA, and its Schedules, would expire at the same time, so that when the FPA is renegotiated all the occupations already within it will be bargained at once.
- 14 MBIE will inform an initiator or bargaining parties (as the case may be)
- when it becomes aware that the newly proposed FPA will overlap with an existing FPA or overlap with another proposed FPA that is currently being bargained.
 - if the proposed coverage impacts on bargaining that is already underway and of the requirement to consolidate (if within the six-month time limit) or the requirement to bargain the terms as a Schedule to the FPA (where the time limit has passed or where there is already an agreed FPA).
- 15 There may be disputes about whether the subsequent FPA is within the bounds of coverage of an existing FPA or proposed FPA. The ER Authority should determine any disputes from an initiator about whether a subsequent initiation for an FPA is proposing coverage that is substantively the same as an Industry FPA that already has bargaining underway or has been agreed. If the ER Authority determines that it is substantially similar, it must notify the parties of the requirement to consolidate or that the parties will be bargaining a Schedule to an FPA (where an FPA for that industry or occupation already exists).

Representation

- 16 As mentioned in paragraphs 44–52 of the Cabinet paper, unions and employer bargaining representatives will bargain on behalf of employees and employers.

Other interests can be represented during bargaining

- 17 Each bargaining side will be able to include representatives from particular interests or populations where they consider this to be appropriate (noting, this may be affected by subsequent decisions about requirements for employer bargaining representatives).
- 18 In addition, other interests (eg particular population groups) can be represented during bargaining negotiations by mutual agreement of the bargaining sides (noting, they would not be a bargaining party).
- 19 I am not proposing specific seats be set aside for other interests (either within each bargaining side or as an additional perspective during bargaining), as this would not

be applicable in all every industry or occupation and would require individuals/organisations willing to participate. In reaching this conclusion I have noted that unions commonly have established mechanisms to incorporate views of women, Māori, Pacific peoples and others into bargaining.

- 20 In recognition of the Crown's Te Tiriti o Waitangi obligations, it is important that system ensures Māori interests and views as appropriately considered. However, I think this is more appropriately addressed through the bargaining obligations that apply to bargaining sides, rather than requiring specific Māori seats at the bargaining table for all FPAs.

Coordination role of national level social partners

- 21 Given the wide coverage of FPAs, it will be important that all unions and employer representatives are aware of any initiated FPA that affects their members and are given the opportunity to consider whether they would like to be a bargaining representative.
- 22 As part of their role as the peak bodies for employees and businesses, I consider NZCTU and Business NZ should have a role ensuring relevant representative organisations have an opportunity to consider whether they would like to be a bargaining representative and in assisting them to coordinate their bargaining side if there are a number of bargaining representatives involved.
- 23 I am not proposing that this be a statutory requirement, but could be a condition of the funding provided to NZCTU and BusinessNZ to build their capacity to support FPAs (discussed further at paragraph 69 in the Cabinet paper).

Notification and communication

Obligation on the initiator to notify employers and unions when an FPA has been initiated

- 24 It will be critical to the success of the system that affected employers and unions are notified when an FPA is initiated so that parties can choose to participate in the bargaining process and understand their rights and obligations.
- 25 The initiating union(s) must notify those employers that the union is aware of who have employees within coverage of the proposed FPA once they have confirmation that they have met the initiation test.
- 26 In addition to notifying employers, the initiating union(s) must identify (where possible) and inform other unions who will likely have employees in coverage of the FPA, that an FPA has been initiated. Those newly informed unions would then have an obligation to notify employers, with whom they have current collective agreements with, of the proposed FPA.
- 27 To help to ensure that all unions are notified, employers who are aware of another union (different from the union that initiated the FPA) within their workplace must notify that union of the proposed FPA.
- 28 MBIE, as the ERES regulator, will also be required to publish a notice of the initiation of FPA negotiations as soon as reasonably practicable.

Obligation on employers to inform employees of critical stages of the FPA

29 It will be important that employees are notified about the FPA and kept informed about its progress so that they are able to participate if they choose. I propose that employers must notify employees within coverage of the proposed FPA when:

- An FPA has been initiated that impacts on the employee,
- When there is a proposed FPA and a date for ratification that the employee may choose to participate in,
- When the FPA is set to be renegotiated or renewed.

Employers will have an obligation to pass on contact details of employees within coverage to the union bargaining representative, but employee may opt out

30 As mentioned above, employers are required to pass on the contact details of each employee within coverage of the proposed FPA to the bargaining representative for the unions within a specified timeframe, unless the employee opts out of having their contact details passed on.

31 To facilitate this I propose that employers must, while notifying impacted employees that bargaining for an FPA has been initiated and prior to ratification, provide a form that gives the employee the opportunity to opt out of their contact details being passed on to their bargaining representative and the consequences of this. It would be a breach of the duty of good faith if an employer did anything with the intention of inducing an employee not to be involved in bargaining. This would include an employer attempting to influence an employee to opt out of union communications.

32 If the employee does not opt out (either by doing nothing or indicating no intention to opt out through the form) the contact details of the employee will be passed on to the bargaining representative.

33 Employees who opt out of union communications will still be notified at the point that a ratification vote is imminent, and must be given a second opportunity to opt out from receiving union communications. This will enable employees who do not wish to receive union updates throughout bargaining, to still participate in the ratification vote.

34 There will be situations where employees start a role halfway through FPA bargaining, or employees leave before bargaining is completed. New starters should have the opportunity to participate in the FPA bargaining process, including the opportunity to vote.

35 In order to facilitate this, employers must also notify employees that are newly within coverage of a proposed FPA and provide the opt out form within a specified timeframe if:

- A significant change to coverage is notified; or
- A new employee starts who is within the proposed coverage of an FPA.

- 36 An employer must pass on the details of those newly within coverage to the union bargaining representative periodically as specified (for example, each 90 days).
- 37 A union must only use and retain non-union employee contact details for the intended purpose and unions should not keep the non-union employee contact information for any longer than the non-union employee has authorised the union to use it for. However, so long as the primary purpose of communications from unions is FPA-related, unions will be able to include other content.

Employers must communicate the critical stages of the FPA process

- 38 In addition to the specific notification requirements listed above which are to be sent to each employee, I propose that employers should have an obligation to provide updates to employees more broadly through mass communication. These communications will, at a minimum, be required at the following stages:
- When an FPA has been initiated,
 - When coverage has been finalised (and the proposed description of this),
 - When a ratification vote is imminent,
 - When the FPA is finalised,
 - When the FPA comes into force.
- 39 The communications must provide details about the union bargaining representatives and how to opt in to communications. This will provide another avenue for employees, including those who may have opted out of partial or full communication with the union, to be updated about the FPA process.

Employer must provide employees two, two-hour paid meetings for FPA purposes

- 40 As mentioned in paragraphs 56 to 58 of the Cabinet paper, there will be paid meetings for employees for FPA purposes. There should also be protections similar to the ER Act to ensure an employer's business is not unduly disrupted as a result of the workforce attending the paid meetings. At a minimum these will include:
- the bargaining representatives give employers reasonable notice (such as 14 days) of the date and time of any meeting for employees, and
 - the bargaining representatives must make arrangements with employers to ensure business can be maintained including – where appropriate – an arrangement for sufficient employees to remain available during the meeting to enable employers' operations to continue.

Bargaining

Bargaining obligations

41 The following obligations would apply:

Who	What obligation
Parties in employment relationships covered by an FPA being bargained or in force	<ul style="list-style-type: none"> • The duty of good faith as set out in section 4 of the ER Act. • This includes employment relationships between: <ul style="list-style-type: none"> ○ An employer and employee ○ A representative organisation (eg union) and its members ○ The bargaining parties on the same bargaining side ○ The two bargaining sides.
Between bargaining parties on the same side	<ul style="list-style-type: none"> • In addition to the duty of good faith, to enter into an agreement on how they will progress, and make decisions for, FPA bargaining, within a specified timeframe (eg 20 working days). • Appoint a lead advocate to chair the bargaining side and act as the primary spokesperson.
Between bargaining sides (ie representing workers and employers)	<ul style="list-style-type: none"> • The duty of good faith in collective bargaining set out in sections 32–33 of the ER Act will also apply with the following modifications: <ul style="list-style-type: none"> ○ Excluding the restriction on individual or collective bargaining (which requires the approval of the bargaining representatives) (s32(d)(ii)). This will ensure FPA bargaining does not impact on employers’ and employees’ ability to enter into individual and collective agreements while the FPA is being bargained. ○ Replacing the duty to conclude (unless reasonable grounds exist not to) (s33) with a requirement for bargaining sides to use their best endeavours to come to agreement on the terms of the FPA in an orderly, timely, and efficient manner. • The same requirements in relation to the provision of information during collective bargaining as are in the ER Act (s34), with any necessary modifications required to reflect the nature of the FPA system.

BUDGET SENSITIVE

<p>Each bargaining side</p>	<ul style="list-style-type: none"> • To use their best endeavours to represent affected parties within coverage (including non-members) on their side by doing at least the following things: <ul style="list-style-type: none"> ○ Providing regular updates ○ Providing an avenue for feedback and take any feedback received into active consideration during bargaining (for example, by incorporating views where feasible) ○ Informing those in in coverage of the ratification vote ○ Considering whether there are particular population groups or interests (including those who may be at risk of being overlooked) within the FPA coverage that should be recognised and reflected during bargaining (eg Pacific peoples, small businesses). <p>This tailored obligation differs from the duty of good faith in the ER Act, as requiring each bargaining side to establish and maintain a productive relationship with all the employees or employers in coverage would be a significant burden.</p>
	<p>In recognition of the Crown’s Te Tiriti o Waitangi obligations, ensure Māori are effectively represented by:</p> <ul style="list-style-type: none"> • Using their best endeavours to seek, consider and reflect feedback from relevant Māori employee or employer representatives • Considering whether there should be a Māori representative included in the bargaining side.
	<p>To ensure relevant government agencies are aware of the progress of bargaining in order to appropriately manage the potential implications for delivery of public services:</p> <ul style="list-style-type: none"> • When an FPA covers private sector organisations that receive government funding for the delivery of public services, inform the relevant government agency of the progress of the FPA bargaining.

Bargaining support person

42 The bargaining support person’s role would include:

- Helping bargaining parties and sides understand how bargaining will work under the new system
- Assisting with establishing a bargaining process agreement

- Ensuring bargaining parties and sides are aware of the procedural and content requirements of FPAs
 - Supporting bargaining discussions
 - De-escalating conflict where possible.
- 43 The type of support the bargaining support person can provide is consistent with the education and support functions that MBIE's Employment Mediation Services is set up to provide under the ER Act. From a legislative perspective, the functions, requirements and protections for a bargaining support person should be the same as those set out for mediation services in the ER Act. This will allow flexibility for the bargaining support person's role to evolve, as needed, as the system develops.
- 44 The only exception is that bargaining support people would not be able to make recommendations to bargaining sides or binding decisions (even at the request of both bargaining sides) as this could negatively impact their ongoing relationship with bargaining parties¹⁸.
- 45 It will be up to bargaining sides to decide whether they utilise the support provided by a bargaining support person. Bargaining sides could also agree to an alternative bargaining support person at their own cost. If bargaining parties or sides disagree on whether to have a bargaining support person they can assess dispute resolution services to resolve the issue.

Funding for peak bodies to support industries and occupations

- 46 The core funding conditions for peak bodies should include requirements to:
- Use their networks to raise awareness of the FPA process
 - Assist industries and occupations to identify and coordinate bargaining representatives
 - Communicate with and offer support to bargaining parties and sides as needed and as is reasonable, and
 - Submit to MBIE a short report detailing how the funding contribution was used, at the end of each financial year.

Vetting

- 47 The broad scope that bargaining sides have to agree the terms of an FPA mean there is a risk that they could agree terms which fall outside of the Commerce Act exemption for employment-related terms. Unlawful terms could also potentially result in legal challenges to the validity of the FPA's terms or the whole FPA.

¹⁸ The ER Act enables mediation services to make non-binding recommendations to parties, or binding decisions, at the request and agreement of both parties (although they cannot make binding decisions that would fix the terms of a collective agreement, as collective agreements require the ratification by union members before the union can agree to it).

- 48 I have proposed the ER Authority undertake a light touch vet because of the legal certainty the ER Authority would provide, ahead of the Secretary for Business, Innovation and Employment making the FPA into law through secondary legislation. If the ER Authority identifies an issue during vetting, it should refer the FPA back to the bargaining sides to resolve and resubmit it. The ER Authority must undertake the vetting in a timely manner.

Ratification

Minimum process requirements will be set for ratification

- 49 Union(s) and employer bargaining representatives are the most appropriate bodies to run employee and employer ratification. Each bargaining side should have the freedom to agree their ratification process, which will support the workability of the system. However, as a safeguard, the process must meet statutory minimum requirements, which will balance flexibility with ensuring key elements essential to transparency and legitimacy are present.
- 50 The minimum process requirements would be that unions and employer bargaining representatives must ensure:
- each known and eligible employee/employer in coverage of the FPA is entitled to vote
 - all those who vote are eligible to vote
 - all employees will receive one vote and each vote has equal weight
 - all employers will receive at least one vote per employee within coverage of the FPA, with weighted votes for employers with 20 or fewer employees
 - each known employee/employer in coverage has access to a copy of the proposed FPA and a plain English summary of the FPA within a reasonable time before voting starts
 - each known employee/employer in coverage of the FPA is given reasonable notice in writing (no shorter than a specified time period (for example, 10 working days) before the ratification is set to take place) –
 - that they are entitled to vote
 - of the final date by which their vote must be cast
 - of the method by which votes may be cast, which must include at least one avenue to vote from a distance eg online or proxy voting
 - of the consequences of the union/employer bargaining representative finalising the FPA

Enforcement by the Labour Inspectorate

- 51 In the body of the Cabinet paper at paragraphs 105–110, I proposed that the hourly wage and any adjustments across the lifetime of the FPA, minimum leave entitlements, the hourly overtime rate and the hourly penalty rate be enforceable by the Labour Inspectorate as minimum entitlement provisions. By making these ‘minimum entitlement provisions’ the Labour Inspectorate would be able to apply to the Employment Court where there are serious breaches of these terms that could attract severe consequences including a:
- pecuniary penalty of up to \$50,000 for an individual or \$100,000 for a body corporate;
 - compensation order to recompense impacted employees;
 - banning order that bans an employer from the labour market for up to 10 years.
- 52 Enforcement of these terms would create a strong signalling effect that these core elements of the FPA must be abided by or else risk enforcement consequences. This mitigates some of the risk that there will be many workplaces that do not have a union presence to monitor compliance with FPAs.
- 53 Where these terms are included in an FPA by bargaining sides, they must be written in a prescribed format and include details as prescribed. The proposed wording in a draft FPA would then be checked by the ER Authority as the vetting body to ensure it is written in the prescribed format. The bargaining sides would be required to agree wording that complies with the prescribed format before the FPA could proceed to the ratification stage.
- 54 The Labour Inspectorate has a general role in enforcing compliance with the obligations specified in legislation within its jurisdiction. The Labour Inspectorate will be able to use their compliance tools in relation to obligations specified in the FPA legislation, but not those terms agreed by the bargaining sides that fall outside of the base wage (and adjustments), minimum leave entitlements, overtime and penalty rates. The other terms of the FPA would be able to be personally enforced by employees and employers and their representatives who are within coverage of the FPA.
- 55 The Labour Inspectorate should have a role where a process has been agreed to determine flexible working arrangements or short-term flexible work provisions under the FPA and this role should be consistent with the existing approach to short-term flexible work under the ER Act.

Annex B: Weighting for employers' ratification vote

Employees	Weighting	Votes
1	2	2
2	1.95	3.9
3	1.9	5.7
4	1.85	7.4
5	1.8	9
6	1.75	10.5
7	1.7	11.9
8	1.65	13.2
9	1.6	14.4
10	1.55	15.5
11	1.5	16.5
12	1.45	17.4
13	1.4	18.2
14	1.35	18.9
15	1.3	19.5
16	1.25	20
17	1.2	20.4
18	1.15	20.7
19	1.1	20.9
20	1.05	21
21	1	21

Annex C: System risks

During policy development, the following risks related to the operation of the FPA system were identified. I have attempted to mitigate these risks through various design features of the system, as described in the table below.

<i>Potential system risk</i>	<i>Mitigation</i>
Employers and employees may not participate due to transaction/bargaining costs or lack of knowledge	<ul style="list-style-type: none"> • Bargaining sides will receive some funding from government. • Communication and notification requirements will ensure as many employees and employers within coverage are informed about bargaining and ratification. These are unlikely to ensure that every single employee and employer within coverage is notified, but that would be impossible to achieve without a national register or employees and employers in various sectors. • Bargaining sides will have obligations to represent non-member views in bargaining.
Coverage of an FPA may be hard for employers and employees to understand	<ul style="list-style-type: none"> • MBIE will check the proposed coverage of an FPA at initiation to ensure it is as clear as possible. • Bargaining parties are likely to play a role in fielding queries from employees and employers about whether they are within coverage, both during bargaining and over the course of an FPA being in force. • The Labour Inspectorate may also have a role in determining whether specific employees are within coverage.
Particular interests of population groups and interested groups may not be reflected in bargaining or in the terms of an FPA	<ul style="list-style-type: none"> • There will be duties on bargaining sides to consider whether there are particular population groups or interests (including those who may be at risk of being overlooked) within the FPA coverage that should be recognised and reflected during bargaining (eg Pacific peoples, small businesses). Employees and employers will be able to form representative organisations (eg unions) and join bargaining, if they do not consider existing bargaining parties to be sufficiently representative. For example, a group of small employers may be able to form their own representative organisation if they want to ensure their views are heard in bargaining (noting this may be affected by subsequent decisions about requirements for employer bargaining representatives).
Bargaining sides may lack the capacity to initiate, bargain and finalise FPAs	<ul style="list-style-type: none"> • Bargaining sides will receive some funding from government. • Peak bodies (NZCTU and BusinessNZ) will also be funded to build capacity and capability for FPA bargaining among unions and employer organisations.
Lack of incentive for employers to participate (because initiation is decided by employees)	<ul style="list-style-type: none"> • Because an FPA must result once bargaining is initiated, I consider employers would be more likely to participate in the system than face having minimum terms for their sector set entirely by the Authority.
FPAs could disincentivise union membership and weaken enterprise-level bargaining	<ul style="list-style-type: none"> • Unions will be able to seek different terms for union members, such as a one off or annual payment up to the value of a union membership.

BUDGET SENSITIVE

	<ul style="list-style-type: none"> • FPAs are unlikely to be as comprehensive as collective agreements negotiated under the ER Act, meaning there will still be a case for enterprise-level bargaining.
Terms in an FPA may be hard to understand or enforce	<ul style="list-style-type: none"> • Secondary legislation can be used to prescribe the format for minimum entitlement provisions in an FPA (eg base wage rates). • Bargaining parties, having direct relationships to the employees and employers within coverage, are well-placed to understand the clarity and workability of FPA terms.
FPA system costs may outweigh net benefit to employees (and employers)	<ul style="list-style-type: none"> • There is an unquantifiable benefit to the ERES system from adding a component we are currently missing (ie sector-level bargaining).
Use of the FPA system will exceed institutional capacity to support bargaining	<ul style="list-style-type: none"> • This will depend on how the level of funding equates with the actual use of the system. If the system has a higher take-up than anticipated, this may put pressure on the existing ERES functions that may slow response times to mediation, the ER Authority and Labour Inspectorate. • Impacts on employment institutions through implementation of the FPA system will be monitored and more funding sought if required.