MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

# BRIEFING

## Initial summary of submissions on the Fair Pay Agreements discussion document

| | | | |
|---|---|---|---|
| **Date:** | 19 December 2019 | **Priority:** | Medium |
| **Security classification:** | In Confidence | **Tracking number:** | 1866 19-20 |

| **Action sought** | | |
|---|---|---|
| | **Action sought** | **Deadline** |
| Hon Iain Lees-Galloway<br>**Minister for Workplace Relations and Safety** | **Note** the contents of this briefing. | 31 January 2020 |

| **Contact for telephone discussion (if required)** | | | | |
|---|---|---|---|---|
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| **The following departments/agencies have been consulted** |
|---|
| |

**Minister's office to complete:**

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- ☐ Withdrawn

**Comments**

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## Purpose

To provide you with a summary of submissions received on the Fair Pay Agreements (FPA) consultation in relation to three important areas: initiation, representation and market impacts.

Annex One contains the detailed summary of submissions. In addition, Annex Two summarises the E tū form and NZCTU's Together survey formats, Annex Three summarises Business NZ's submission, and Annex Four summarises NZCTU's submission.

## Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that during the Fair Pay Agreements (FPA) consultation period, which ran from 17 October to 27 November 2019, MBIE received 648 submissions on the discussion paper, in written form and through meetings with targeted stakeholders.

*Noted*

b **Note** that in relation to initiation, generally employers wanted the initiation tests to be hard to meet, whereas unions wanted initiation to be triggered more easily.

*Noted*

c **Note** that in relation to representation, employers and unions disagreed whether unions should be able to represent all workers, and capability issues were raised in relation to employer representation.

*Noted*

d **Note** that most submitters did not support the inclusion of a market impact test at the end of the bargaining process.

*Noted*

e **Note** that in January 2020 officials will provide you with three further briefings, which will summarise submissions on the remaining topics, summarise submitters' views on whether there should be an FPA system at all, and provide initial advice on the three topics covered in this briefing.

*Noted*

f **Note** you have indicated you want to make policy decisions on the major elements of the system by the end of February 2020, working towards a DEV paper on 20 May 2020.

*Noted*

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

19/12 / 2019

Hon Iain Lees-Galloway
**Minister for Workplace Relations and Safety**

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# This briefing summarises the results of the FPA consultation

## Officials met with a number of stakeholders during the consultation

1. Public consultation on 'Designing a Fair Pay Agreements System' was open from 17 October to 27 November 2019. During this time, the Ministry for Business, Innovation and Employment (MBIE) met with a number of stakeholders, either in person or over the phone if meeting was impractical.

2. MBIE organised meetings with the New Zealand Security Association and some members; the Employers and Manufacturers Association and some members; Canterbury Chamber of Commerce; Auckland Tourism, Events and Economic Development; Building Service Contractors of NZ; Tourism Industry Aotearoa; Susan Hornsby-Geluk (Dundas St Employment Law); EssentialHR; Brook Serene; Foodstuffs; Briscoe Group; Citycare; a group of industry association chief executives; and First Security.

3. In addition, the New Zealand Council of Trade Unions (NZCTU) organised meetings with union members in Whangārei, Auckland, Tauranga, Palmerston North, Wellington and Christchurch.

4. MBIE also met with NZCTU's youth network (Stand Up), Women's Council, Rūnanga, and Komiti Pasifika.

## Overall the majority of submissions were positive

5. Overall 648 submissions were received on the discussion document, including a large number of overwhelmingly positive employee submissions provided by E tū and Together.[1] The following table breaks down the overall sentiment of submitters for or against the concept of FPAs, broken down by the type of submission. Submissions which provided opinions on design features but gave no indication of overall sentiment were designated as unclear.

| Submission | Positive | Negative | Unclear | Total |
|---|---|---|---|---|
| Standard submissions | 46 (45%) | 45 (45%) | 10 (10%) | 101 (100%) |
| Meetings<br>*Notes from meetings/phone calls with stakeholders who did not otherwise make a submission* | 4 (44.5%) | 4 (44.5%) | 1 (11%) | 9 (100%) |
| NZCTU online form submissions | 112 (75%) | 0 (0%) | 38 (25%) | 150 (100%) |
| E tū form submissions | 369 (95%) | 0 (0%) | 19 (5%) | 388 (100%) |
| **Total** | **531 (82%)** | **49 (8%)** | **68 (10%)** | **648 (100%)** |

[1] The number of total submissions has been revised since the update provided in the WRS Weekly Report on 28 November 2019. The updated figure is due to finding duplicates within the E tū submissions, and having processed notes for meetings held during the consultation period.

### Among the standard and oral submissions, views were mixed

6. There was an even mix of perspectives and sentiment across the standard and oral submissions. The following shows the sentiment across the various perspectives represented.

| Submission | Positive | Negative | Unclear | Total |
|---|---|---|---|---|
| Individual employees | 12 (86%) | 0 (0%) | 2 (14%) | 14 (100%) |
| Unions | 20 (91%) | 0 (0%) | 2 (9%) | 22 (100%) |
| Individual employers | 2 (8%) | 19 (76%) | 4 (16%) | 25 (100%) |
| Employer associations | 2 (7%) | 25 (89%) | 0 (0%) | 27 (100%) |
| Others (e.g. community groups, think tanks) | 14 (64%) | 5 (23%) | 3 (13%) | 22 (100%) |
| **Total** | **50 (45%)** | **49 (45%)** | **11 (10%)** | **110 (100%)** |

7. A full summary of sentiment towards FPAs, including key themes relating to the problem definition and potential risks, will be provided in January 2020.

8. An explanation of the format of the E tū form and the NZCTU's online Together survey submissions is provided at Annex Two.

### This summary focuses on initiation, representation, and the market impact test as they attracted the most comment

9. In this briefing we have focussed on initiation, representation and the market impact test. These were the topics which attracted most comment, and are the most significant for the design of the overall system. We will provide similar summaries on the remaining topics in January 2020.

10. In summarising submissions below we have focussed on the most important design questions on each topic, and we have not included a summary of every question. Our approach has been to omit minor questions related to the mechanics of the system. When we provide you with advice on the design of the system next year, we will incorporate a summary of submissions on these detailed questions. The detailed summary of submissions is included at Annex One.

## Overview of initiation submissions

11. Submitters were split on how the initiation tests should be designed. One group, mostly comprised of unions and workers, wanted initiation to be triggered easily (if either a public interest test or a representation test was satisfied). The other group, mostly comprised of employers and their representatives, wanted initiation to be restrictive, such as by requiring both tests be met.

12. Submitters were divided on the idea of limiting the FPA system to pre-selected occupations and sectors, with those in favour largely arguing for certainty and efficiency, and those against largely arguing for accessibility and flexibility.

13. Responses on whether the 10% representation threshold was appropriate were quite clearly polarised between worker perspectives (who supported 10%) and employer perspectives

(who wanted it raised). There was a similar divergence in relation to an absolute threshold for initiation (e.g. 1,000 workers).

14. Submitters generally did not support the suggested public interest test criteria, either because they deviated from the FPA Working Group's (FPAWG) recommendations or they failed to accurately encompass the submitter's understanding of the problem definition and objectives of FPAs.

## Overview of representation submissions

15. In terms of how employers should be represented during bargaining, employers generally believed that they should either be directly at the bargaining table or have an employer organisation represent them. There was significant concern that the capability to coordinate among employers and engage in bargaining was lacking, especially compared to unions. Unions generally endorsed the FPAWG's suggestion that employer organisations should represent employers.

16. In terms of how employees should be represented, unions and most workers submitted that unions should represent all workers, in line with the FPAWG's recommendations. In contrast, employers argued that unions did not have a mandate to represent all workers, and to have such a model would be a risk to freedom of association.

17. A minority of submissions engaged with the question of whether other interests should be represented at the bargaining table. More than half of them agreed with at least one other interest being represented, but there was wide divergence on which interests, and most did not support future market entrants being represented.

18. Finally, submitters had mixed views on whether the government should have a role in selecting bargaining representatives. Supporters of the government having a role suggested it could help ensure the right mix of bargaining representatives at the table, with some noting the government may only need to be involved as a matter of last resort. Opponents of the government having a role argued it should be up to the respective parties to decide who they want representing them, and it would be inappropriate for the government to interfere in this democratic process.

## Overview of market impact test submissions

19. A large number of submissions opposed a market impact test (MIT). Concerns related to the feasibility of the test, the complexity of the test, the time and resources required, and the interference of government/a third party in collective bargaining. Some submitters also questioned whether there was any body in government with the capability to undertake such a test.

20. The submitters who supported the MIT were overwhelmingly employers or their representatives. Few provided reasons for their support of an MIT.

21. There were a number of different interpretations of what the purpose or nature of the MIT would be, with some submitters criticising the discussion document for a lack of detail.

22. Submitters recommended other ways to consider market impact, including changing the timing of the test to the same time as the public interest test.

## Next steps

23. We will provide you with a summary of the remaining aspects of the consultation in January 2020. This will include submitters' views on coverage, the bargaining process, dispute resolution and concluding an FPA.

24. We will also provide a separate briefing in January summarising submitters' views on whether they thought there should be FPAs at all. Although we did not ask this question in the discussion document, we found that many submitters provided feedback on this, including through the NZCTU's online survey.

25. We will also provide you with our first set of policy advice in January, on the most significant topics summarised in this briefing.

26. You have indicated you want to make policy decisions on the design of the system by the end of February 2020, working towards a DEV paper on 20 May 2020. This will enable the introduction of legislation by December 2020.

27. We are available to discuss the submissions with you at your convenience.

## Annexes

Annex One: Detailed summary of submissions

Annex Two: Overview of E tū form and NZCTU online survey formats

Annex Three: Summary of the Business NZ submission

Annex Four: Summary of the NZCTU submission

# Annex One: Detailed summary of submissions

## Initiation

1. 66 submitters engaged with the initiation topic. This included 28 from the worker perspective, 29 from the employer perspective, and nine other submissions. The CTU and E tū surveys also included questions on this topic.

### Should there be a representation test, or a public interest test, or both? (Q1)

2. 59 submitters responded to issues regarding when an FPA can be initiated. The question asked: 'Do you think that either a representation or a public interest test is needed to initiate an FPA? Or do you think that applicants should need to pass both a public interest test and a representation test to initiate an FPA? If not, what would you recommend instead?'

3. Responses can roughly be grouped into five categories:

   A. Initiation may be triggered by a public interest test or representation test (25 supporters, as well as respondents to NZCTU and E tū surveys)

   B. Initiation must be triggered by both the public interest test and representation test (10 supporters)

   C. Initiation must be triggered by the public interest test (six supporters)

   D. Initiation must be triggered by the representation test (eight supporters)

   E. Neither the public interest test nor the representation test is required to trigger initiation (three supporters).

4. A minority of respondents (seven) did not address the question directly.

5. The FPAWG had previously recommended a model where bargaining can be triggered by workers if either a representation test or a public interest test is met (category A).

*Category A: Initiation may be triggered by a public interest test or representation test*

6. A majority of respondents who supported this option were union representatives or employees. Of the 25 submitters who supported this option, 20 were from a worker perspective, one was an employer body (Forest Owners Association), and two were classed in the 'Other' category (Centre for Labour, Employment and Work and the Human Rights Commission).

7. All of the respondents to the NZCTU's online survey agreed with the survey statement: "I think the initiation threshold should be via worker agreement or a public interest test as per the Working Group's recommendation. Not both."[2]

8. In the E tū survey, 89% of respondents agreed with the statement: "A simple representation trigger of either 1000 workers or 10% of the workforce on a union petition should be enough to initiate bargaining for a Fair Pay Agreement."

9. Worker responses largely referenced and supported the FPAWG recommendation, as did the Forest Owners Association. The overarching concern from workers was that the threshold for initiation needs to be sufficiently low enough for vulnerable workers to access FPA bargaining.

[2] It is not possible to tell whether submitters have addressed a topic twice, in both the CTU online survey and the free form comment section, and thus been counted twice. We have assumed they have not.

10. E tū raised this concern, saying "we oppose any proposal that applicants should have to meet two tests or triggers which may well result in the most vulnerable workers being denied the opportunity to be protected by minimum sector standards."

11. The Human Rights Commission also raised accessibility for vulnerable workers, arguing "workers should have the right to trigger an FPA through collective organising, but there also needs to be a way to trigger collective bargaining in industries or occupations where conditions for workers are harmful, and in breach of their rights."

12. Unite Union explained the scenarios why both approaches were needed: "Some of the areas where FPA's would be most effective (such as Forestry to improve health and safety) may struggle with representation. Anywhere there is significant representation should not require a public interest test."

13. The Aotearoa Legal Workers Union explained their position as it related to their own industry, and considered "this approach is appropriate to meet the needs of workers in industries like the legal industry, which is relatively small, has huge power disparity between workers and, as explained, has huge diversity in working conditions depending on workplace and levels of experience."

*Category B: Initiation must be triggered by both the public interest test and representation test*

14. Ten respondents supported this option, and most were from an employer perspective, with two exceptions. One respondent identified as a union representative from the transport sector, and the other was an individual employee in the manufacturing sector.

15. Foodstuffs raised concerns about the limitations on the rights of individuals to choose how to bargain and organise themselves, as well as concerns about freedom of association, as reasons for their support of this option. It cited International Labour Organisation (ILO) Convention 98 (Right to Organise and Collective Bargaining), s17 of the New Zealand Bill of Rights Act 1990 (Freedom of association) and Legislation Design and Advisory Committee's Guideline 4.3 (The principle of legality—the dignity of the individual and the presumption in favour of liberty). It concluded:

> *"On this basis, it is appropriate to set a very high threshold for access to FPA. There needs to be both majority support from the employers and workers affected and a public interest reason to proceed. An application for FPA should therefore be required to demonstrate both tests have been satisfied, before bargaining for an FPA can commence."*

16. The Restaurant Association raised concerns that a low threshold for initiation could have adverse economic impacts:

> *"Under the proposal, unions will likely be the party to initiate bargaining and will be able to do this with or without members in a given sector. If this is introduced it would lead to industrial unrest as many European countries are trying to move away from this due to poor economic performance."*

17. OCS Limited expanded on its support for both tests by recommending:

> *"Both tests would make sense at a minimum. However, the first qualifier for an FPA should be the lack of a MECA broadly adopted by the sector (if this was not to be included in the Public Interest test). The inability of organised labour or a collectivised employer body to bargain "normally" for whatsoever reason should be a prerequisite for the consideration of implementing and an FPA. It stands to reason that, thereafter, adequate employee or employer appetite for an FPA then needs to be gauged through some form of representation test."*

*Category C: Initiation must be triggered by the public interest test*

18. Six respondents supported this option, including four employers/employer representatives, think tank The New Zealand Initiative and employment lawyer Susan Hornsby-Geluk.

19. The New Zealand Initiative submitted:

> *"An FPA process should only be imposed on an industry or occupation under a "public interest" trigger and should only be satisfied where there is evidence of a failure in the labour market in a specific industry or occupation. In other words, where there is evidence that a better outcome could be achieved for employers and employees than from a competitive process of voluntary exchange. A corollary is that it should not be possible to impose an FPA process via a "representative trigger" (whether 10% or higher)."*

20. Retail NZ submitted:

> *"We consider that, if this proposal is to proceed, the threshold for commencing negotiations should be high, reflecting the high transaction costs and expectations of Ministers that "fair pay" agreements would only apply in a small number of situations and a small number of industries."*

21. The Meat Industry Association also recommended solely a public interest test, if FPAs were to proceed at all:

> *"Noting MIA's strong opposition to a FPA, MIA believes that to justify imposing a national agreement over the agreements and arrangements of private companies and their workers, there must be an overwhelming public interest (which we would define as widespread or systematic failure of existing labour laws or significant worker exploitation or danger). However, if there is clearly evidence of systematic exploitation or harm to workers in a particular sector, then the obvious answer would seem to look at why existing laws are not being properly enforced."*

22. Employment lawyer Susan Hornsby-Geluk suggested the government control the number of FPAs in the first instance by starting with the public interest test, building capability and then rolling FPAs out to a broader audience. The system could be opened out by an automatic mechanism built into legislation or after an assessment had been made by the government. She noted that if this approach were to be taken, the public interest test might need to be slightly broadened (if it was the only way into the system).

*Category D: Initiation must be triggered by the representation test*

23. Eight submitters supported the option of requiring a representation test only, including Business NZ, Print NZ, the Coalition for Equal Value Equal Pay (CEVEP), five from the employer side, and one employee. Much of the support for this option was associated with concerns about the public interest test.

24. Business NZ also did not support either test, but was particularly concerned about the public interest test:

> *"... While the representativeness trigger is relatively straightforward, decisions over public interest are complex, even with guiding criteria. Essentially, judicial bodies will be making decisions over the economic prospects of an entire industry or sector. This is economically unsound at best."*

25. Print NZ expressed similar sentiments to Business NZ, arguing "neither of these tests are ideal, but the public interest test is particularly inappropriate."

26. CEVEP submitted:

*"CEVEP does not support a 'public interest' test as a hurdle to initiating Fair Pay negotiations. It should be sufficient to state the policy objectives of the Fair Pay Agreements in a section of the Act. We see no need for 'public interest' or 'merit' tests or other barriers to stem a possible flood. That is, the final Agreement should meet the Objectives to qualify for application to all relevant employers, not to initiate a Fair Pay Agreement claim."*

27. The NZ Air Line Pilots Association supported the representation test, but was also concerned about the public interest test, because it added complexity to the process:

*"NZALPA is concerned that a public interest test may add unnecessary complexity to the process. Furthermore, it has not been made clear whether the outcome of any proposed public interest test will be open to appeal or judicial review and if so, by whom.*"

*Category E: Neither the public interest test nor the representation test is required to trigger initiation*

28. Three submitters were of the view that neither test was appropriate: the NZ Law Society, Taranaki Sawmills Ltd, and Ian Calder (management consultant and researcher).

29. The NZ Law Society raised concerns about both tests, relating to the practical implications and unintended consequences:

*"The public interest test may be easier to administer, as an individual or organisation would be able to make an application which would then be determined. However, without a minimum threshold test the outcome could be an FPA that covers more people than is desirable and may affect individuals and businesses who have not had the opportunity to be involved in determining whether bargaining ought to be initiated. Considering the "primary purpose of the FPA system is to correct the inherent imbalances of power in vulnerable workforces", we query whether the representation test is too high to allow the initiation of bargaining in some sectors. We appreciate, however, that this is sector and occupation specific, and that in other sectors/occupations, the threshold would be very easily met."*

## Representation threshold – measured by percentage (Q2)

30. There were 63 submissions responding to questions regarding whether 10% of affected workers was a reasonable representation threshold. 26 submissions supported the threshold, 30 submissions opposed it, and seven submissions did not fall into either category. The responses to this issue were quite clearly polarised between worker perspectives (who supported a 10% threshold) and employer perspectives (who opposed a 10% threshold).

31. The NZ Law Society expressed concern about the difficulties with measurement and proof of representation, and recommended an alternative representation test:

*"We suggest consideration is given to a mixed test which includes both a sector and occupation qualification (for example all cleaners in the manufacturing sector) to assist with clarity of coverage (both from an initiation and coverage perspective).*

*Given the purpose of an FPA, consideration could also be given to including an income threshold to exclude those with a certain level of income (for example, those working at a managerial level within a certain occupation or sector) from the FPA process. This would be fairly straightforward to implement and could be reviewed over time."*

*Generally workers supported a representation threshold of 10%*

32. Support for a 10% threshold overwhelmingly came from workers and union representatives, with a majority referencing the recommendations outlined in the FPAWG report. Other submitters in favour of the threshold include CEVEP, the Centre for Labour, Employment and Work (CLEW) and two individuals.

33. The NZCTU supported the 10% threshold, and warned against raising it:

> *"…Requiring a figure higher than 10% would encroach on the territory of enterprise or multi-employer level collective bargaining. FPA bargaining is to sit alongside and not interfere with enterprise or multi-employer level collective bargaining. It is important to distinguish between initiation and the process of negotiation and settlement to which all those covered will be encouraged and invited to participate in."*

34. The NZ Meat Workers Union was also concerned that if a threshold was set too high, it might make it difficult to reach the kinds of industries FPAs are intended to target. It argued that:

> *"requiring a figure higher than 10% would make it near impossible in the industries that FPAs are intended to target (ie those without collective bargaining). The process of initiation and reaching the proposed threshold of 10% will already require an exhaustive process involving workers and will take a lot of work and resources from unions."*

35. CEVEP said that setting a representation threshold was unusual:

> *"We note that there is no 10% representative threshold for the right to bargain collectively under the Employment Relations Act – the ILO would surely consider that unusual! However, if the Working Group has agreed that a 10% show of employee support will get everyone to the negotiating table, CEVEP supports it."*

36. E tū supported the 10% threshold, but expressed concern that it would be separated from the numerical threshold approach:

> *"By separating out the percentage and numerical number triggers, E tū is concerned that there is a movement towards these both being required before an FPA can be triggered, whereas the Working Group Report was very clear it had to be an either/or situation. Union density in the private sector is currently on 10% and in low-income industries, such as cleaning and security, is less than this. Identifying 10% or 1000 workers in a large, diverse and fragmented industry, such as cleaning, would be a challenge but would be achievable. The higher the threshold trigger the greater the disincentive to seeking the protection of an FPA for industries characterised by in-work poverty."*

37. Only two employers supported a threshold of 10%: D Anderson Contractors (who gave no further explanation), and the Forest Owners Association (who supported the FPAWG's recommendation).

*Employers believed a 10% representation threshold is too low*

38. Opposition to the 10% threshold overwhelmingly came from employers/employer bodies/sector representatives. Think tank The New Zealand Initiative, employment lawyer Susan Hornsby-Geluk, and one employee also argued that the threshold was too low.

39. Several submitters suggested alternative thresholds:

- Federated Farmers suggested the threshold be developed through a voluntary approach, rather than a blanket approach,
- The Motor Trade Association, Print NZ, OCS Ltd suggested a 25% threshold,
- A majority of Restaurant Association members supported a 30% threshold,
- First Security suggested a 40% threshold,
- The Tatua Co-operative Dairy Company Limited, Ryman Healthcare, NZ Private Surgical Hospitals Association, Meat Industry Association, Patoa Farms Limited, Building Services Contractors of NZ, Retail NZ, and an employee suggested at least a 50% threshold or 50% +1,

- The New Zealand Timber Industry Federation suggested a threshold of 50% of employers and 50% of employees in a given region, and
- The Baking Industry Association, Red Stag Timber Ltd, and Gilbert's Fine Food suggested a 75% threshold.

40. The New Zealand Initiative recommended that initiation should only proceed where a majority of workers and employers are in favour of it:

> *"an FPA process, commenced via a public interest trigger, should only proceed where a majority of workers and employers (by both firm headcount and number of employed workers) are in favour of it. (The double majority in the case of firms is needed to ensure that the interests of small firms are not swamped by the interests of major employers)."*

41. Employment lawyer Susan Hornsby-Geluk suggested that a 10% threshold was too low, and it could create resource and capacity issues (including for unions) where there is no existing infrastructure. She mentioned the Public Service Association as an example of a union already 'squeezed' doing public sector bargaining, and said it is the same or even worse in the private sector.

42. Auckland Farmers Freezing Company was concerned that the threshold would not be representative of the wants of a majority of workers:

> *"In essence, it could well be that the remaining 90% of the workforce (or a significant majority of them) do not want FPA initiation and so their decision not to agree to FPA initiation is deliberate. There may be legitimate reasons why workers may not want an FPA – prescriptive terms within an FPA can be detrimental to workers too against the status quo. Workers who do not wish to initiate FPA bargaining will potentially be subject to forced terms and conditions of employment within an FPA."*

43. Foodstuffs recommended a simple majority for both employer and worker interests: "In a situation where people's legitimate rights and freedoms are being restricted on the grounds of a representative test, majority support i.e. more than 50% support for initiating FPA, should be a minimum requirement."

44. Building Services Contractors of NZ additionally recommended that customers of a sector should be part of the initiation process:

> *"Customers that represent the private and public sector [should be part of the application to initiate], as many of the "issues" our industry is facing is based upon the purchasing decision of large corporate and government agencies. FPA's will not just affect the commercial cleaning sector, but will also affect the many other industries that purchase the services that industry supplies. Having them as part of this process will ensure that what is being suggested in a FPA is realistic when purchasing occurs."*

## Representation threshold – measured by absolute number (Q4)

45. 41 submitters answered the question regarding whether applicants should be able to trigger bargaining by gaining a set number of supporters, and if so, what the appropriate number would be. 19 submitters supported the numerical threshold, and 17 opposed.

46. Similarly to responses on the percentage threshold, responses were polarised between worker perspectives (who supported a numerical threshold) and employer perspectives (who opposed a threshold). Many submitters noted their answer to this question should be interpreted in conjunction with their response to the percentage question.

47. Though not explicitly supporting or opposing the option, the NZ Law Society discussed some of the challenges associated with this option:

> *"…this option would cause inconsistencies given the uncertainty of sector and occupation sizes and could incentivise organisers to widen the pool of people involved. In turn, this could make the bargaining process more difficult. The wider the pool of participants, the easier it will be to reach a set representation number; however, the harder it is likely to be to reach a concluded agreement.*"

*Workers tended to support bargaining triggered by gaining a set number of supporters*

48. Support for a numerical threshold largely came from union representatives/workers, and included one employer (D Anderson Contractors) and CLEW.

49. Most respondents referred to and supported the FPAWG's recommendation.

50. NZCTU commented:

> *"The FPAWG recommended that a numerical figure of 1000 workers be adopted as sufficient to indicate support to commence FPA negotiations. The set figure of 1000 workers gives certainty and avoids the burden of having to perform potentially complicated calculations in large industries, where it might be difficult pragmatically to agree on total workforce numbers and satisfy a 10% threshold."*

51. D Anderson Contractors recommended a threshold of 20 supporters.

52. The NZ Air Line Pilots Association did not specify a number, but recommended: "…to avoid confusion setting a trigger cap at a reasonable level would be helpful. The cap should be able to be moved to take account of the total working population."

*Employers opposed bargaining being triggered by gaining a set number of supporters*

53. All submissions opposing the numerical thresholds came from employers/employer bodies/sector representatives.

54. Several submitters raised concerns about proportionality. The Forest Owners Association submitted that the option would set up inconsistencies in the sector according to size. Briscoe Group said that the nature of the retail industry meant there would be disproportionate sway by larger organisations under this option. Patoa Farms said that any number chosen would be purely arbitrary, and the size of each sector could vary markedly.

55. Print NZ did not support a set number threshold, but recommended the number would need to differ for every industry.

56. The Restaurant Association raised the following concern:

> *"The issue … is that union membership numbers fluctuate frequently and therefore a set number may not accurately represent a certain proportion of the membership. The risk would be a sample size of the membership that is too small to fairly reflect the views of the wider group."*

## Ability for employers to trigger bargaining (Q5–7)

57. 39 submitters answered questions regarding whether they think employers should be able to initiate an FPA bargaining process in their sector and how employers should be counted in a representation test.

58. 11 of the submissions were from unions or workers, 24 were from employers/employer organisations and four were from others including Hutt Union & Community Health Service, CEVEP, CLEW and a management consultant.

*Employers supported a right for employers to initiate bargaining (Q5)*

59. A majority of employers supported a right for employers to initiate bargaining. They argued that if a new system is being created to bind both employers and workers then employers should also be able to use the system. OCS Limited commented: "Reciprocity is an important hallmark of fairness. Therefore, the provisions that apply to labour should also apply to the employer (with appropriate adaption)." Similarly the Baking Industry Association submitted: "For the process to be fair, it must be able to be initiated by both effected parties."

60. The Motor Trade Association supported employers being able to initiate, highlighting situations where employers could create positive change with the FPA system:

> *"There may be situations, for example, in high-skilled or risky professions, where the majority of good employers feel that their sector is being disadvantaged by a "race to the bottom" of wages and conditions by other, less reputable employers. The FPA bargaining process might be used to ensure that good businesses do not continue to be undercut by sub-standard employers."*

61. The Tatua Co-operative Dairy Company Limited suggested initiation should be open to employers, but cautioned that:

> *"…it [could] be used to restrict some employers or disadvantage a smaller employer if enhanced terms and conditions cause financial stress. Constant reference of 'race to the bottom' is negative talk – how about promoting FPA as elevating employers to be competitive in attracting employees."*

62. The Restaurant Association suggested that only employer organisations or associations should be able to initiate from the employer side.

63. A substantial proportion of employers who indicated support held concern about the sizing of the FPA and its coverage, and suggested that if employers could initiate they should either have to demonstrate significant support or it should only apply narrowly. For example, Print NZ commented: "Employers should be able to initiate bargaining for an FPA that represents a group of nominated companies, but should not be able to force all employers in an industry to participate in such agreement."

64. One anonymous employee and CEVEP also indicated support. CEVEP commented:

> *"… It seems to us unlikely that employers would in fact initiate Fair Pay Agreements if they had the right, given that Working Group employer representatives want Fair Pay Agreements to be voluntary and so many employers have imposed their preference for individual employment agreements on their employees. However, we remember with hope that it was employers who restarted multi-employer wage bargaining after the downward spiral of the 1930s Depression."*

*There was also opposition to employers being able to initiate bargaining (Q5)*

65. Unions overwhelmingly opposed employers being able to initiate an FPA. These submissions supported the FPAWG's recommendation that workers and their union representatives should be the only ones able to initiate FPAs.

66. The NZCTU commented that it: "…endorses the FPAWG recommendations which clearly state that the FPA bargaining process should be initiated by only workers and their union representatives." The other unions submitted in a similar fashion. For example, the NZ Air Line Pilots Association also opposed the idea, commenting:

> *"Collective bargaining is intended to support the rights of workers and assist them to overcome the structural disadvantages associated with employment. To allow employers to initiate an FPA process would reduce the leverage that workers have over employers and exacerbate the asymmetry of power that already exists."*

67. Other workers were concerned that if employers could initiate they will use it to "divide the workforce", or take away the voice of employees.

68. The Meat Industry Association opposed employers being able to initiate on the grounds that it could be used "as a tool to disadvantage competitors":

> *"For example, a company could use FPA negotiations to discover commercial arrangements of competitors, or to use a FPA to set conditions to disadvantage competitors (for example, requirements on manning rates for new technology, etc)..."*

69. Briscoe Group was similarly concerned that if employers could initiate it would be "essentially anti-competitive".

*There were a range of views on how employers should be counted in a representation test (Q6)*

70. Employers had differing views on this issue. 10 submitters supported a 'one vote per business' approach, whereas five submitters supported a vote based on the proportion of relevant employees a business employs. A small number of submitters suggested other approaches, such as a combination of the two approaches.

71. Employers such as Foodstuffs NZ, the Baking Industry Association and Gilbert's Fine Food argued a one vote per business approach would be the most democratic approach.

72. NZ Private Surgical Hospitals Association pointed out the risks of a proportional approach:

> *"[Under a proportional approach] smaller employers who may have less ability to pay or private sector employers will have no ability to influence the relevant FPA. If a proportional approach was taken, large public sector entities would often dominate, and this would not be a true reflection of the overall environment."*

73. The Restaurant Association cautioned against a proportional approach: "Basing the count on the proportion of employees would not be the most accurate measure, particularly for industries affected by seasonal employment factors."

74. In contrast, five submitters supported a representation test which counted employers based on the proportion of relevant employees they had. The NZ Law Society also argued this approach would be more appropriate:

> *"While this may give larger employers more power in the process (as is acknowledged by the comment in the Paper …), the impact on those employers may well be larger. In addition, other opportunities should be built into the process (both in bargaining, and by way of potential exemptions) to allow the interests of smaller employers to be appropriately recognised)."*

75. The Motor Trade Association suggested a two-prong count: "10% of businesses employing at least 25% of employees."

76. OCS Limited also presented a different option commenting: "In instances where such would be applicable, they should be counted by the number of FTEs they employ in that job category".

77. Workers made very few submissions on this topic, as the unions opposed employers being able to initiate at all. Of those who did submit, the majority supported a proportional approach.

78. An employee commented:

> *"Would suggest proportion. Up to 50 staff 1 vote – 51-100 2 votes – over 100 3 votes. MUST ensure that there is not an imbalance here. DO NOT ALLOW corporate employers to out-balance smaller employers. Smaller employers are the back bone of the economy and from diversely spread regions. We already have minimum wages and*

*compulsory employment terms and conditions. Work within that frame work and don't try to recreate the wheel. These 'rules' cover all sectors and regions of the country and job types. Perhaps some more oversight of compliance by employer where issues are evident. Allow for employees to contact a 'body' for help if problems. Employee or help lines for mediation."*

79. Finally, one anonymous submitter said that no threshold would be necessary.

## The public interest test indicators (Q10, Q12–15)

80. The discussion document suggested that a public interest test could require groups to meet two criteria:

- Current problematic outcomes for workers in the sector, and
- Potential for more sectoral coordination to be beneficial

81. 34 submitters commented on the above suggested criteria for a public interest test, the flexibility to consider factors outside of the set indicators, and whether the prescribed indicators should be weighted.

82. Submitters generally did not support the suggested criteria, either because the criteria deviated from the FPAWG or they failed to accurately encompass the submitter's understanding of the problem definition and objectives of FPAs.

*Support for the suggested criteria*

83. CLEW, the NZCTU and some of its affiliates (E tū, NZEI, NZ Meat Workers Union) primarily affirmed the criteria proposed by the FPAWG but did not object to the criteria in the discussion paper. The NZCTU stated that they "do not disagree with the proposed factors", but they "should be seen as augmenting the factors the FPAWG recommended". NZEI was "generally supportive" of the suggested criteria, and Unite Union supported the criteria.

84. The only submission from an employer perspective that explicitly supported the suggested criteria was the Motor Trade Association. It was particularly supportive of wages not matching worker productivity, working conditions (length of duty periods, breaks, provision of personal protective equipment), insecure employment, and uncertain working hours as useful indicators of where an FPA might be able to help.

*Opposition to the suggested criteria*

85. Employers and employer representatives generally disapproved of the suggested criteria. A common critique was that suggested criteria were too vague or subjective (Meat Industry Association, OCS Ltd, Patoa Farms Ltd) and therefore open to dispute (Foodstuffs NZ). This was often followed by particular arguments against certain indicators listed in the discussion document. For example:

- That wages not matching worker productivity could be reasonable if productivity has increased due to more efficient and flexible production systems and innovation (Meat Industry Association),
- That high turnover, fragmentation, or a large sector are not in themselves indications of a problem (Meat Industry Association),
- That low union density reflects the voluntary choice of workers (The Tatua Co-operative, Patoa Farms Ltd), and
- That some roles with relatively poor conditions serve as first-step employment for (often vulnerable) workers to move on to better jobs, or for students working part-time as they gain qualifications, fulfilling a valuable role in the labour market (Foodstuffs NZ, OCS Ltd, Patoa Farms Ltd).

86. Some submitters were concerned with the applicability of criteria across whole sectors or occupations. The NZ Air Pilots Association commented:

> *"these criteria will introduce unnecessary complexity that may delay or discourage initiation of FPA processes. For example, where one sector has several different types of employer it may be that a small minority of workers face serious problematic outcomes despite most workers not facing those outcomes. In such a situation a public interest test based on problematic outcomes across the whole sector would average out in such a way as to deny that disadvantaged minority the ability to use the FPA process."*

87. A similar critique of opposing sentiment was held by Print NZ, who commented: "We don't believe the public interest test should be applicable. Data for a small portion of workers can be manipulated and applied unfairly across the full sector."

88. The NZ Air Line Pilots Association also argued that the criteria presented were too subjective and therefore that the extent of legal expertise and supporting research needed to prove or disprove the public interest case would be difficult for less well-resourced unions and employer associations to manage.

*There were mixed views on whether certain indicators should have more weight than others*

89. NZCTU, E tū, and the NZ Meat Workers Union opposed any prescription of weighted criteria in statute.

90. Several submitters suggested indicators to prioritise in the public interest test, including migrant exploitation (JEM Contracting); non-compliance with minimum standards (Restaurant Association); and health and safety issues (Motor Trade Association).

91. The Motor Trade Association argued in favour of the idea that some indicators could be given more weight. It suggested that where a problem is concentrated in a region or where there are significant differences between regions, this "may provide weight to an assessment in favour of an FPA". It also identified that issues relating to "personal safety and wellbeing should be given serious consideration".

92. Briscoe Group recommended "evaluation as to other possible mechanisms to resolve issues prior to the assumption that an FPA will be the most appropriate solution." Similarly, both the Meat Industry Association and OCS Ltd argued that the existing levels of collective bargaining in their respective sectors should discount them from being considered for an FPA at all. OCS commented:

> *"The concept of FPAs appears to be to assist employees in scenarios where power is unevenly balanced. Healthy collective bargaining is sufficient evidence to illustrate that a power imbalance in not the case, and therefore should be the sole matter precluding an FPA in a sector."*

93. Rather than weighting a sole indicator, Foodstuffs NZ favoured focusing on "the compounding effects of these indicators when combined i.e. there needs to be problems across several fronts, over a period of time, and having implications for the wider economy (the public element of the public interest test)."

*Alternative criteria for the public interest test were suggested*

94. Many submitters suggested indicators not listed in the discussion document which could be taken into account during the public interest test, including:

- A steep and persistent decline in sector productivity (Foodstuffs NZ),
- Excessive reliance on migrant labour (Foodstuffs NZ),
- Widespread industrial or structural issues (Foodstuffs NZ),

- The need for redundancy and re-training in the face of upheaval [in a sector] (Motor Trade Association),
- The social structure – notably ethnicity and gender – of the sector and occupation (CEVEP),
- A lack of training to advance employees' generic skills levels (NZCTU), and
- A lack of recognition of skills shortages in pay (NZCTU).

95. Many submitters suggested that elements of a market impact test should be brought forward to the initiation stage. This included testing potential impacts of an FPA (or lack of one) on consumers in the sector (First Security, Motor Trade Association), global product market dependencies (Taranaki Sawmills Ltd), and the ability for employers to pay higher remuneration (Red Stag Timber) or to transfer labour costs onto consumers (Tatua Co-Operative). The tension between the public interest and market impact tests was identified by Patoa Farms Ltd, who commented:

> *"FPAs in highly competitive sectors need to curb competitive behaviour (at the expense of the worker) without encouraging anti-competitive behaviour (at the expense of the consumer or the market)."*

96. The Motor Trade Association cautioned against using FPAs to solve problems within the jurisdiction of existing regulatory systems, principally health and safety and immigration, instead of improving compliance within those systems themselves.

*The flexibility to take non-prescribed indicators into account was generally supported*

97. Employers (10) generally supported the decision maker being able to take account of relevant factors not listed in legislation, or a second tier of criteria (Taranaki Pine). However, the Baking Industry Association cautioned against this flexibility, asserting that it would leave the test "open to personal interpretation rather than facts and data."

98. Employees and unions generally supported the decision maker being able to take into consideration relevant factors not outlined in the list of indicators. The NZCTU suggested that this take the form of an overall statement of objectives alongside an "other relevant matters" reference in legislation.

*There were mixed views about whether the decision maker should have discretion when assessing the public interest test*

99. 31 submitters responded on whether a decision maker should have absolute discretion to decide if public interest has been met.

100. Submissions generally agreed that a decision maker should have absolute discretion to decide that the public interest test. Submitters who disagreed with that option predominantly suggested the need for review or appeal rights (12), and/or suggested checks on the decision maker's discretion; including mandatory public consultation (Foodstuffs NZ), a tripartite worker-community-employer council (Red Stag Timber), or targeted consultation with affected stakeholders (NZ Air Line Pilots Association).

## Setting a list of allowed sectors or occupations in law (Q17–19)

101. 30 submitters responded to questions regarding the availability of public interest tests and whether or not sectors should be pre-selected in law.

102. The NZCTU and some affiliate unions (E tū, NZEI, NZ Meat Workers Union) supported the FPAWG stance that the public interest test should be available on-demand to anyone. This position was also held by several employers and employer associations, including the Restaurant Association, OCS Limited, and Foodstuffs NZ. Reasons for this position included that the public interest test should be flexible to changing conditions (Foodstuffs NZ) and that there should be minimal restrictions on the ability for parties to access the system (NZCTU).

One employee submitter noted that: “it would be wrong for the Government to 'pick winners' or artificially constrain those who wish to democratically organise to improve their work rights, as is noted in the Government's own statements on the matter”.

103. Submitters in favour of a pre-selected list of eligible groups were predominantly employers and employer associations. Reasons provided for this position included the risk of unions initiating too many FPAs (Taranaki Pine Ltd), or FPAs being triggered in sectors where they are not needed. The NZ Air Line Pilots Association also favoured a pre-selected list, arguing that it would reduce uncertainty for unions and employers.

104. Some submitters who supported pre-selection stressed the high quality of evidence (Meat Industry Association) and extent of further work (NZ Air Line Pilots Association, Motor Trade Association) that would be needed to create a robust list of pre-approved occupations and sectors. The NZ Private Surgical Hospitals Association suggested that this review should be the responsibility of Parliament, WorkSafe and the Labour Inspectorate.

105. Print NZ and OCS Ltd highlighted that a list of vulnerable workers is already provided in Schedule 1A of the Employment Relations Act 2000.

106. CEVEP suggested that MBIE provide “an initial list of occupations and sectors that it has identified as needing the ‘extra help’ of a Fair Pay Agreement.” This was envisioned as “a way to make sure these are targeted for attention first – but not as a test or hurdle for raising a Fair Pay Agreement claim.”

107. Most submitters who supported the pre-selected list did not name specific occupations or sectors that they thought should be chosen. JEM Contracting Ltd did suggest beginning with the most vulnerable and working up, and D Anderson Contactors Ltd suggested excluding occupations where employees earn more than $50,000 per year.

108. Submitters who supported an on-demand public interest test did not necessarily deny the need to prioritise sectors, with the NZCTU’s prioritisation of cleaning, security and supermarkets as the clear example. The NZCTU Rūnanga supported prioritisation, explaining that bargaining the first FPAs in other clearly vulnerable sectors (particularly for Māori workers) such as kiwi fruit and forestry would be difficult due to the lack of collective bargaining capability in those sectors.

109. The NZ Law Society suggested having a pre-selected list of occupations and sectors deemed to have met the public interest test, with the option that occupations and sectors not on the list could still apply to be tested against the public interest criteria. This two-track system would “allow a balance of efficiency and flexibility, including the ability to adapt to new or changing occupations/sectors”.

## Representation

110. 86 submitters answered one or more of the questions relating to representation. The CTU Together survey also included a question on this topic.

### Who is best placed to represent employers? (Q44)

111. Most submitters agreed that employer organisations and/or *employers* would be the most appropriate bodies to negotiate FPAs. This view was wider than the question in the discussion document, which only asked if employer organisations would be the best bodies to represent employers (in line with the recommendations of the FPAWG).

112. Some submitters, such as the Meat Industry Association, argued the discussion document was misleading as it suggested employer organisations are normally involved in collective

bargaining. Submitters argued that, in reality, collective bargaining would normally be done by employers themselves.[3]

113. A small number of larger employers submitted that they would want to directly participate in bargaining, rather than to only be represented by an employer or industry organisation.

114. Employment lawyer Susan Hornsby-Geluk suggested that there should be professional advocates to represent small, medium and large employers respectively, to be appointed through a nomination and voting process.

115. The unions generally endorsed the FPAWG's recommendations that it would be appropriate for employer organisations to represent employers. It was not clear if unions were opposed to individual employers being at the bargaining table.

*Concern about resources and capacity of employer bodies*

116. Many employers and employer organisations were concerned that the expertise and infrastructure needed for employers to coordinate and bargain on FPAs was no longer present, and had been lost since the end of the awards system.

117. For example, Green Cross Health submitted that they:

> *"oppose strongly the removal of our right as an employer to be a party to determining terms and conditions for our businesses. We are highly experienced negotiators and do not believe that any other advocate has the necessary skills and understanding of the health sector and the policy drivers for health to adequately represent us."*

118. The Bus and Coach Association noted not all businesses are members of BusinessNZ so it would be inappropriate to be represented by them:

> *"Even with significant goodwill and/or intention, not all industries associated with either group would be adequately represented or understood at a level necessary to achieve good outcomes. The most knowledgeable parties to negotiate employment agreements for particular industries are already doing this, and there is no need to revisit the flawed mechanisms of the past for 'little gain and plenty of pain'.*

119. BusinessNZ submitted that employers do not have the infrastructure and resources available to coordinate and undertake collective bargaining at a sector level:

> *"Individual industry bodies will also need to develop or hire resources and capacity to fulfil their role as employer representatives in their industry. Collective bargaining skills at this level have become extremely scarce since the demise of the award system in the early 1990s. This will place many employers and industry representatives at a considerable disadvantage when compared with the experience of unions in collective bargaining."*

120. The EMA noted it would not be in a position to negotiate on behalf of employers and it had "no desire to be a bargaining agent for FPAs". It noted that despite the fact that it represents employers who employ around 20% of the workforce, it only represents a tiny fraction of the total number of businesses and has no mandate to represent everyone. It anticipated that the bargaining process will be costly and these resources may no longer be available in New Zealand.

121. The Meat Industry Association submitted that contrary to the question in the discussion document, employer organisations are voluntary and have not been involved in collective bargaining for three decades. This means they "have no capability to undertake bargaining",

[3] There are exceptions to this including the Building Service Contractors of NZ which coordinates the negotiation of the cleaning multi-employer collective agreement, and negotiations in the health sector where the government is involved and there is coordination.

and trying to gain a mandate to speak on behalf of both members and non-members would be practically difficult and disruptive. However:

> *"The alternative is that people will be covered by a FPA and not represented – a situation where unelected groups of people (employer associations and unions) negotiate an agreement about a non-members' wages and conditions and other matters without their mandate, consent or allow for their input is abhorrent in a democratic society."*

122. Some industry organisations, such as NZ Winegrowers, noted that they view themselves as working for the good of the industry (both employers and workers), and have no mandate to negotiate on employment relations matters:

> *"If we were to have a role as an "employers" organisation imposed on us, or a role to represent employers in negotiating industry labour conditions, that unity of representation would likely be broken. We anticipate our members would have divergent views on the role of collective bargaining and on whether NZW should be required to negotiate on behalf of 1400 members and their employees.*
>
> *NZW believes to do so would present a very real risk of driving a wedge into the united and collaborative approach that has been a key driver of the wine industry's success, and of changing our people's perception of whether NZW really was 'their' industry body."*

*Practical difficulties with employer representation were identified*

123. A number of employers noted it would likely be difficult to come to a common view among employers at the negotiating table.

124. Hospitality NZ noted that there may need to be a mechanism to manage situations where there is more than one industry organisation.

125. Some submitters, such as AFFCO and the NZ Private Surgical Hospitals Association, were concerned that commercially sensitive information would be required to be disclosed at the bargaining table which could be used by their competitors.

126. The Bus and Coach Association noted that if the scope of an FPA went beyond just the bus and coach industry (e.g. into taxis or other vehicle operators), then "the process would become even more complicated, and arguably, begin to impinge even further on natural human rights of association."

127. A number of submitters highlighted the risk that small employers may not have the understanding and resources to participate in FPA bargaining. For example, employer lawyer Susan Hornsby-Geluk identified a challenge in terms of ensuring proportional representation at the bargaining table. She suggested that small, medium and large employers could be represented in proportion to their share of employees in the workforce.

## Who is best placed to represent employees? (Q44)

128. Unions and union members submitted that they were the appropriate organisations to represent all workers (including non-members).

129. In contrast, a substantial number of submitters argued that it would be important to hear from non-unionised employees at the bargaining table, given they would be a substantial majority in many sectors. Some submitters noted that it would be a logistical challenge to represent non-union workers. However, one person submitted that non-unionised workers are the group that most need FPAs.

130. We received few submissions from non-unionised workers.

*Workers and unions generally believed they should represent all workers*

131. Unions supported the idea that they should represent all workers, in line with the recommendations of the FPAWG. Union organisations and union members were very concerned that the FPA system would allow private non-unions to represent workers.

132. The NZCTU submitted that worker representatives should be independent from employers, have the necessary skills, and have democratic processes – requirements that unions must meet already. The NZCTU noted that "bargaining outcomes are worse for workers where bargaining representatives are used", citing evidence from Australia. The organisation's submission was supported by its online survey, where out of 287 responses, 99.3% agreed that "unions must be the representatives of working people in Fair Pay Agreement negotiations".

133. The NZCTU's position was supported by other unions and many workers (including from those at the NZCTU-organised meetings). For example, E tū submitted that there should be no place for non-union bodies to represent employees as they are not democratic organisations and they would not have a mandate to represent an unorganised workforce.

134. The NZCTU's Rūnanga and Komiti Pasefika respectively noted that it is important for Māori and Pasifika workers to be represented at the bargaining table, and that there are already established mechanisms within unions to make sure these voices are heard. The NZCTU's Rūnanga noted that unions are not just representing workers in negotiations, but also their communities.

135. In contrast, one employee commented:

> *"I am uncomfortable with the notion that non-union members, such as myself, would have their freedom of association disrespected if they too are bound by an agreement negotiated by a employee organisation representative they chose not to be a part of."*

*Businesses opposed unions representing all workers*

136. There was significant concern – particularly among businesses – that unions do not have a mandate to represent all workers and should not have that role. Submitters such as the EMA and Ryman Healthcare noted there may be freedom of association issues associated with a minority group of employees representing everyone. A number of businesses submitted that non-union employees should have a choice about how they are represented.

137. The Warehouse Group objected to FPAs being negotiated only by unions on behalf of all employees, arguing that FPAs could "be seen as a form of compulsory unionism". It cautioned against a situation where: "Workers would be subject to an FPA, which they had little or no input into, which was bargained for by a representative not necessarily of their choice."

138. The Bus and Coach Association noted that while unions are already set up to represent their members, the majority of the employees in its industry are not represented by a single body. Therefore if unions were the only bargaining representatives, they would be representing all worker's interests without their permission. It commented that: "Such a process does not reflect the intentions and requirements of most of our industry and its occupations."

139. The Meat Industry Association argued that unions would need to seek a mandate and consent to be represented from non-members, which would be practically difficult and likely require "ongoing engagement, rounds of meetings, and votes". It suggested this would be disruptive and beyond the capability of unions.

## Should other interests be represented at the bargaining table? (Q46)

140. Only a minority of submissions engaged with the question of whether other interests should be represented in bargaining.

141. There was general opposition to the idea of potential future entrants to the market being represented at the bargaining table. A number of workers argued that if future business entrants were allowed at the bargaining table, so should future worker entrants to the sector.

142. The NZCTU endorsed the FPAWG's recommendations that there should only be unions and employer representatives at the bargaining table.

143. The Meat Industry Association was also opposed to any other interest being represented:

> *"As it is, the negotiation of a FPA is likely to require a number of different representatives just to represent the workers and employers directly covered by the FPA. To include representatives of "funders" and "future entrants to the market" risks turning the negotiations into a shambles."*

144. Some submitters argued that the bargaining parties should consult with all the relevant parties, rather than other interests being at the bargaining table directly.

145. Various submitters did agree that some other interests should be represented. For example:

- A couple of submitters emphasised that it was important for there to be a Māori and Pasifika voice at the bargaining table (as well as more broadly during the design and implementation of the system).
- One person highlighted that, in the labour-hire industry, it is the clients of the labour-hire companies who have a big influence over working conditions and that therefore it would be beneficial to have the host companies at the bargaining table.
- There was some support for funders being able to participate in bargaining, particularly where the government was a monopsony funder of services.
- The NZ Air Line Pilots Association suggested it may be helpful for regional government to be at the table.
- First Security supported key client groups being represented at the bargaining table.
- Red Stag Timber Ltd submitted that any interests which are directly affected by regulated pay rates in terms of occupation, industry or region should be able to be represented.

## How should bargaining representatives be selected, and is there a role for government? (Q47)

146. Most submitters did not answer this question directly. Among those who answered the question, opinions were somewhat split, with eight supporting a role for government and 11 opposing.

*Some submitters expressed support for the government to be involved in some way*

147. Maori Point Wines submitted that the government should have a role, particularly to ensure the representation of non-unionised workers. The Restaurant Association endorsed a role for government. Other submitters noted that the government could ensure there is the right mix of representatives at the bargaining table, including a sampling of small, medium and large sized businesses.

148. The NZ Law Society noted that the degree to which the government needed to be involved would vary: "In some sectors, the relevant representatives may fairly easily identify themselves, but in others, government involvement will be necessary."

149. Some submitters, such as the Baking Industry Association, Gilbert's Fine Food, and Patoa Farms Limited, suggested that the government should only be involved as a matter of last resort.

150. The NZ Air Line Pilots Association noted that the law might need to set out a process for employers to choose a representative, or, where there are multiple unions, how representation might be shared. It requested that the government consult further on how multiple unions should be represented.

151. The Forest Owners Association argued for a role for the government to raise a concern with the bargaining parties if they were not appropriately representative. It also suggested that if cost is a barrier to participation in bargaining then the government should cover the costs.

152. The Motor Trade Association suggested the respective parties should select who they want their bargaining representatives to be, but if parties were unhappy with a representative on the other side of the bargaining table there could be a role for the navigator to make sure the parties were acting in good faith.

*Some submitters were opposed to a role for government*

153. Among those opposing a role for government, most said it should be left to the parties to select who their bargaining representatives should be. Some submitters suggested there should be a formal nomination system to select bargaining parties.

154. The NZCTU argued that the parties should determine their bargaining representatives through their own democratic processes, including paid meetings for workers: "There should be no role for Government in interfering with such democratic processes."

155. E tū noted that it envisaged paid meetings for workers to elect their bargaining representatives and endorse a list of claims, and it did not support a role for government. CLEW also endorsed paid meetings to elect bargaining representatives.

# Market impact test

## General views of a market impact test (Q75)

156. 74 submitters responded to issues of 'anti-competitive behaviour' (Q75–85). Many submitters did not answer all questions in the section, or repeated the same answer for each question.

157. Of the 74 submitters who responded to the issue, 16 indicated support for a market impact test (MIT), while 54 indicated opposition to a MIT. The remaining four submitters responded to the issue without necessarily expressing support or opposition.

158. Additionally, the two union-led surveys included questions on the MIT:

- The E tū survey included the statement: "There should be no 'market impact test' - the impacts that a Fair Pay Agreement will have can be addressed at bargaining". Of 388 respondents, 89% agreed with that statement.
- The NZCTU's survey included the statement "I think that a market test undermines the purpose of Fair Pay Agreements." Of 287 respondents, 99% agreed with that statement.

## Support for a MIT (Q75)

159. The submitters who supported the concept of a MIT were overwhelmingly employers/employers' bodies/sector representatives, and included one employee and two submitters in the "other" category (the New Zealand Initiative and an employment lawyer).

160. Few submitters provided reasons for their support of a MIT (apart from echoing the purpose of the test), although in some cases, the potential economic risks of an FPA were addressed in other sections of the submission.

161. One employer argued that "market impact tests may be complex, burdensome and difficult to administer. There does need to be some way of assessing the environment, however, to ensure that small and/or vulnerable businesses are not disadvantaged by having to be part of a FPA." Taranaki Sawmills Limited argued that "if the claims re public interest are true then this suggest a reasonable to significant impact therefore this should be measured/interpreted. The people flagging public interest but then glossing over the impact to business can't have it both ways."

162. Foodstuffs recognised the economic risks that a MIT could mitigate:

> *"As FPA[s] are intended to increase wages in a sector, it is inevitable that there will be cost flow-on in terms of consumer pricing for goods and services, but FPA[s] might also result in less financially secure businesses leaving the market, leading to greater market concentration, reduced competition, less innovation and consumer choice."*

163. Though not necessarily endorsing a MIT, Woolworths NZ did submit that:

> *"the implementation of FPAs, and the associated cost to affected employers, has the potential to adversely impact consumers, particularly through increasing the cost for goods and services in sectors that are not subject to competition from imports…Whether a market impact test is the best approach to address any potential anti-competitive conduct is a matter for Government policy."*

## Concerns about a MIT (Q75)

164. The submitters opposed to a MIT were more mixed. Though the majority were workers (employees/union representatives), five of those opposed were employer or employer bodies, two came from an academic perspective, and one came from a legal perspective (the New Zealand Law Society).

165. Some submitters who opposed the MIT were concerned about the accuracy and feasibility of the test. Unite Union claimed "it would be highly speculative", and the NZ Air Line Pilots Association submitted they were "concerned that the resources to properly carry out such assessments are not available, and assessments will thus be contentious and susceptible to judicial review."

166. The NZ Dairy Workers Union also expressed "serious concerns that a market impact test will undermine an employer's certainty around current and future business operations because it will introduce a mechanism by which an agreed set of industry terms and conditions may be challenged and altered by other employers or third parties."

167. The Meat Industry Association noted that a MIT appeared to require a high level of government intervention:

> *"This appears to propose a Government agency that will provide ongoing economic analysis of the FPAs, so that the FPAs (setting wages and conditions for a sector) can be adjusted to maximise social outcomes (inequality, fairness, etc). MIA is surprised that such a potentially sweeping tool of Government economic and social intervention is being proposed."*

168. The NZ Law Society submitted that:

> *"there would be significant risks (in terms of wasted bargaining, wasted resources and a potential risk to the integrity of the FPA system) if agreements that had been reached between the parties (and potentially determined by a determining body) were amended through a market impact test. Consideration should be given to whether current anti-competition mechanisms (with some minor amendment if required), as well as other mechanisms proposed as part of the FPA system (such as the ability to grant exemptions from an FPA for small businesses or new entrants, potentially on a*

*mandatory basis) would be sufficient to address any risks regarding anti-competitive behaviour."*

169. The NZCTU opposed a MIT on the basis that it was outside of the scope of the FPAWG's recommendations, and was unparalleled in similar industrial relations systems internationally or in New Zealand's history. Further, it stated that "no evidence has been presented that FPAs would place a serious limit on competition, justifying such a radical change in employment law. We do not believe such evidence exists."

170. A worker commented: "…if a Fair Pay Agreement is agreed with the employer through negotiations, it should not be possible to undo this by a 'market test' – that interferes with the agreement between an employer and the employees."

171. Employers who opposed a MIT include Print NZ who argued: "This would be time consuming and costly. If it needs a market impact report then it is clearly not going to be beneficial." Maori Point Wines explained their position by saying "the impact is increased labour costs; the FPA does not need an impact test; businesses can adapt by free-market competition".

## Differing interpretations of a MIT (Q75)

172. It is evident that there have been differing interpretations of what the purpose or nature of a MIT is. The Auckland Farmers Freezing Company submitted "with respect, it is very difficult to provide any submission on this topic given the sheer absence of information and detail regarding this proposed framework."

173. Some submitters who opposed a MIT referred to a 'market interest test' rather than a 'market impact test', which may also indicate different interpretations of the nature and purpose of the test.

174. Business NZ responded to the anti-competitive behaviour section of the discussion paper by saying:

*"The need to even consider a market impact test demonstrates the sheer unworkability of the FPA concept. New Zealand's low productivity will not be lifted by a system that needs independent assessment of whether or not, or the extent to which, a proposed FPA deal would impact some or all of the economy."*

175. Other submitters who opposed the MIT gave a variety of reasons:

- *"Fair Pay Agreements should not be subject to a market test; competition should be based in workplace culture, innovation and productivity not pay rates and conditions."*
- *"I do not agree with any market test system, which seems to be a means of keeping the poor in their place."*
- *"I don't agree with any market test system, which seems unnecessary and could be used to stop cleaners getting an FPA."*
- *"The failure of the market in delivering just wages and conditions of workers is evidence that a market test should have no part in determining the validity of an FPA."*
- *"This smacks of market interference."*

## Other ways to address market impact (Q76)

176. A number of submitters emphasised the importance of considering economic impacts throughout negotiations. This theme was shared in submissions that supported and submissions that opposed a MIT. Those against a MIT argued that considering impacts during negotiations would be sufficient for mitigating economic risks, while those in support of a MIT argued that consideration of economic impacts during negotiations should be in addition to a MIT and/or other safeguards.

177. The NZ Air Line Pilots Association supported the idea of requiring parties to note and consider some publicly available indicators in relation to market impact, prior to negotiation. However, it also warned that too high a burden of evidence would be too resource intensive for most unions and employer groups.

178. A handful of submitters suggested that a MIT would be better handled as part of the public interest test at the start of bargaining. One suggestion from Foodstuffs was that "the potential impacts of a FPA should be given a "first-look" during the public interest test phase and then again more substantially via a market impact test, based on its specific terms, before it is put to employers and workers for ratification."

179. Regarding the timing of test, employment lawyer Susan Hornsby-Geluk argued that the timing of the MIT should be before the agreement is ratified, but a MIT at initiation would be too early.

180. The NZ Nurses Organisation, which opposed a MIT, proposed the following arrangement instead:

> *"a market impact assessment could be requested by bargaining parties as information available to all and to an arbitrator to help inform positions and decisions through the process, and be prepared prior to the process if required…Alternatively, an economic assessment could be part of any public interest test, where one was undertaken."*

181. CEVEP also proposed an alternative arrangement, recommending that the navigator service for FPAs could have a role in assessing market impacts or policy effectiveness.

### Re-evaluation test once the FPA is in force (Q84–85)

182. Submitters who opposed a MIT largely also opposed re-evaluation. Of the remaining submissions, 16 submitters recommended periodic testing of the outcomes of an FPA, or re-evaluating a MIT over time.

183. The New Zealand Initiative recommended FPAs:

> *"must be subject to rigorous ex ante and ex post market impact assessment to ensure they will not have/have not had detrimental effects on either the employment levels in any industry or occupation, or on competition and productivity in any industry or sector (both nationally and regionally)."*

184. Foodstuffs considered this the 'mandate' for an FPA, arguing:

> *"circumstances change and the fact that public interest and representative tests are satisfied at "a point in time" does not mean they will be satisfied "over time". The wider mandate for FPA (public interest and representative tests) must be periodically tested. We recommend re-evaluation of the mandate on a 3-year or 5-year cycle."*

185. Tourism Industry Aotearoa proposed a re-evaluation if 'fundamentals change'.

186. The Restaurant Association recommended:

> *"Conducting a market impact assessment after the agreement is put into force may provide business owners with valuable information as to whether the FPA is meeting the needs it was enacted to resolve. The post-enactment market impact assessment would likely need to be largely the same as the initial market impact assessment to provide consistent data that is able to be easily compared."*

### Specific design recommendations (Q77–83)

187. Several submitters provided specific design recommendations for the MIT, though many submitters did not engage with the design detail in the discussion document on the basis that they did not agree with a MIT in the first place.

188. The complexity of the test was an issue raised by some submitters. For example, Foodstuffs recognised that even though a MIT may be desirable in theory, there are implementation challenges:

> *"The concept of a market test is appealing but it also introduces a whole lot more complexity. Competition case law illustrates the difficulty of analysing the dynamics of markets when there is limited data to draw on, and noting the assessment needs to predict what will happen in the future."*

189. Auckland Farmers Freezing Company raised concerns about the complexity of the test, the risks of a decision-maker misapplying the test or making a wrong determination, and the risks of employers divulging commercially sensitive information:

> *"Undoubtedly, FPA's will contain a myriad of information which details an employers' commercially sensitive information, confidential business information, trade secrets, know-how and the like. This is information that can be used by sector employers against each-other, international competitors (noting some major industries are export markets) and even by competitors of other industries to their advantage. Such information could also be used by an employer's customer(s) or client(s) to deduce end unit cost (which it can factor into its price negotiations with sector employers)."*

190. We will provide more information on submitters' responses to specific design elements of a MIT when we provide our policy advice early next year.

### What potential impacts of an FPA could be considered in a market impact test? (Q78)

191. Responses to this question were sometimes vague (e.g. "measureable/tangible impacts" or "could ask the public what the impacts could be"). The following is a collection of indicators suggested by submitters, some of which were also listed in the discussion document:

| Impact of FPAs on workers | Impact of FPAs within sector/industry | Impact of FPAs on wider economy | Other |
|---|---|---|---|
| How FPAs affect the cost of living | Fairness of impacts across different employers (by region, size of business, barriers to entry) | Impact on economy as a whole | House prices |
| Impact on employment opportunities | Commercial sustainability | Impact on local spending | Access to transport |
| | Competition | Consumer prices, customer impact | Regional effects |
| | Financial impact on businesses and/or the resources required from organisations to engage in negotiations. | Labour markets | Impact on costs to the public health system |
| | | Regional economies | Fairness |
| | | Limitations for investment | |

192. Foodstuffs suggested that the indicators should be whether the FPA and its terms and conditions:

- are affordable by smaller, prudently run businesses,
- would stifle or restrict innovation in the market,
- would raise entry barriers for new market entrants,
- are likely to result in a significant lessening of competition in the market,

- are likely to result in any of the market players significantly increasing their market power, and
- is likely to result in significant prices increases for consumers, or classes of consumer, or loss or detriment to existing customer services.

193. The Motor Trade Association agreed with the key focus areas of a market impact test which were suggested, but wanted to make sure that its members who paid well were not disadvantaged, and considered that impacts on the economy as a whole should be considered.

194. The NZ Air Line Pilots Association submitted that a market impact test should not focus on short- and medium-term impacts on prices or competitiveness. Instead, it recommended:

> *"More important impacts are the extent to which an FPA increases the value of a sector employee's work that she is enabled to convert into disposable income, or the extent to which an FPA enables an employer to invest meaningfully in R&D and human capital development. These factors are best determined by the negotiating parties themselves rather than by a third party or decision-making body."*

## Who should administer a MIT?

195. An issue raised in submissions that was not directly in response to the questions asked in the discussion document was who has the capacity and should have the authority to administer a MIT.

196. The NZCTU was concerned that there is no appropriate body to administer the test:

> *"The system would effectively allow an administrative decision to override those of the executive and judiciary. Further, there is no suggestion of an appropriate body to perform the function in the public consultation document and the CTU does not consider the Ministry of Business Innovation and Employment to have the standing or expertise to perform such a function."*

197. The NZCTU also did not think the Commerce Commission would be an appropriate body, or that the functions of the Commission would be analogous with the functions of a MIT, as "the Commerce Commission is required to make application to the High Court for a determination of non-compliance with the Act on specified grounds, which may result in a penalty. This is a high evidentiary bar requiring specialist evidence and expertise to determine."

198. In contrast, Foodstuffs submitted that the Commerce Commission could undertake this work "as the process has some similarities with clearance and acquisition processes and the recently implemented market study process."

# Annex Two: Overview of E tū form and Together submission formats

## E tū form submissions

MBIE received 388 submissions via E tū. The submitters used a standard form provided by E tū which included questions about the submitter's experience at work, why the submitter believes we need Fair Pay Agreements (FPAs), and the following statements on the design detail of FPAs:

- There should be no 'market impact test' - the impacts that a Fair Pay Agreement will have can be addressed at bargaining: Agree/Disagree
- There should be no regional variations in Fair Pay Agreements: Agree/Disagree
- Workers should have the right to attend paid meetings to elect their negotiating team and endorse what they want their advocate to put up and also attend paid meetings to ratify any proposed settlement: Agree/Disagree
- A simple representation trigger of either 1000 workers or 10% of the workforce on a union petition should be enough to initiate bargaining for a Fair Pay Agreement: Agree/Disagree
- Fair Pay Agreements should only be initiated by a union, but on behalf of all workers in the industry whether union or non-union: Agree/Disagree

## Together submissions

The NZCTU coordinated submissions via its campaign website together.co.nz. Submitters provided answers to a survey and had the opportunity to provide free-form comments. MBIE received 150 submissions from these free-form comments and one submission summarising 287 responses to the survey. The majority of the free-form comments did not engage with questions asked in the discussion document beyond the topics raised in the online survey.

Survey participants were invited to respond to the following statements:

- "I think that a market test undermines the purpose of Fair Pay Agreements." Yes/No
- "I think that unions must be the representatives of working people in Fair Pay Agreement negotiations." Yes/No
- "I think the initiation threshold should be via worker agreement or a public interest test as per the Working Group's recommendation. Not both." Yes/No

# Annex Three: Summary of Business NZ's submission

## Business NZ opposed the introduction of FPAs

*"Business NZ…opposes the introduction of FPAs on the grounds that they are unnecessary, will not achieve their stated objectives and would be inconsistent with New Zealand's obligations under international labour law."*

Several submissions endorsed Business NZ's submission, including Ryman Healthcare, Road Transport Forum NZ, Hospitality NZ, Horticulture NZ, NZ Aged Care Association, New Zealand Kiwifruit Growers, Port of Tauranga Ltd, Tourism Industry Aotearoa, Simpson Grierson, Federated Farmers and DairyNZ (via Federated Farmers).

## FPAs are unnecessary

Business NZ expressed concerns about the "enormous complexity" of the system. "Almost by definition, becoming familiar with the new system will make the first attempts slow, ultimately delaying any results and possibly making them less economic as time goes on without a settlement."

## FPAs will not achieve their stated objectives

Business NZ said there is no evidence of a national appetite for FPAs, claiming "anecdotal evidence is that there is no wider interest, in the private sector at least." The Treasury's comment on the Cabinet Paper proposing the establishment of the FPAWG was also cited as evidence in support of Business NZ's argument.

## There is inconsistency with obligations under international labour law

Business NZ was concerned that the process recommended by the FPAWG "is neither free nor voluntary", and would therefore constitute a clear breach of the Right to Organise and Collective Bargaining Convention 1949 (C98) which requires bargaining systems to be consistent with the principle of free and voluntary negotiation.

Business NZ submitted that compulsory arbitration mechanisms also breach C98.

## Costs will be significant

Business NZ said "…serious consideration should be given to the very significant costs of introducing FPAs then almost certainly removing them again on an inevitable eventual change of government."

## Good faith obligations will be difficult to comply with

Business NZ submitted it will become "nearly impossible" to comply with 'good faith' obligations, particularly those relating to communication with employees about matters affecting them: "That is because there is no infrastructure to support national level communication with employees whose employers are not connected to industry bodies or employer associations. And the fact that FPAs are intended to cover workers, a much broader category than employee, means the problems will be amplified severalfold."

## Fair Pay Agreements will replicate failed aspects of the national occupational award system

Business NZ discussed the following challenges that arose under the National Awards system, and may equally arise under an FPA system:

- Establishing clear boundaries for industries and occupations

- The logistics involved with social partners coordinating industry bargaining representatives have historically been “enormous and costly”. There are also concerns about contacting and communicating with non-members of unions and employer organisations.
- Settlements are likely to be conservative to cope with negotiated or arbitrated changes. This will create pressure for extra increases through enterprise level bargaining.

### There are other risks

Business NZ raised various other risks and concerns, including:

- Unlike the Awards system, coverage would include all workers rather than just employees. “Imposing an employment model on the currently commercial approaches adopted by such groups is liable to damage if not destroy, emerging global trends towards the “gig” economy, including such things as app-based work (e.g. Uber).”
- The risk that the right to strike might be broadened to non-collective bargaining issues, and non-workplace related issues.
- FPA settlements therefore might cause relativity “ripples” to flow into sectors, industries and occupations not covered by FPAs.
- FPAs would disenfranchise unions because of demarcation disputes between unions due to strict rules about which unions covered which work.
- FPAs are a recipe for economic decline, and workers would not get the full benefits of increases because of the tax and transfer system.
- There is no means for the Government to control the rate of introduction of FPAs.

### Business NZ recommended a voluntary approach

Business NZ suggested: “Industries with clearly demonstrated undesirable labour outcomes or practices could be encouraged to develop a “code of practice” setting out an agreed view of a reasonable approach to terms and conditions of employment in that environment.”

In this model, the code of practice would be binding on the employers that opted in (effectively becoming a MECA), but would only be used as non-binding guidance by those who do not opt in.

It argued that such an approach could address ‘race to the bottom’ issues: “Over time, those employers who sign on would generate labour market pressure on wages and conditions of those who have not signed. Such pressure should dampen, if not disincentivise, the “race to the bottom” effect commented on by the FPAWG. “Non-problematic” industries or occupations would be unaffected.”

# Annex Four: Summary of NZCTU submission

## The NZCTU endorsed the FPAWG's recommendations

*"Significant work on establishing the Fair Pay Agreement policy has been undertaken by the expert tripartite FPAWG which released its report and recommendations in December 2018. Primarily the CTU endorses the position reached by the FPAWG and adopts its recommendations. There is insufficient research or analysis conducted to support the policy suggestions which depart – significantly in some respects – from the work of the FPAWG and such options should not proceed to Bill stage of development."*

We will focus our summary on the key areas of concern for the NZCTU.

## Initiation should not be restricted to ANZSCO and ANZSIC codes

The NZCTU expressed concern that the use of ANZSCO and ANZSIC codes may be too restrictive: "Initiation of an FPA should not be arbitrarily limited by the use of compulsory ANZSCO and ANZSIC codes which do not always reflect on-the-ground experience of industry and occupational coverage across New Zealand workplaces and industries." The NZCTU used the example of pay equity bargaining to illustrate the complexities and inconsistencies of applying the codes in practice. They argue that the codes could be used as interpretive guides, but they should not be compulsory.

## There should not be regional variations

The NZCTU did not support regional variations to minimum terms of FPAs, nor regional FPAs. The following reasons were given:

- An FPA would no longer be a "standard" if variations were allowed.
- They would create anomalies for those working near the border between regions, where the same job would have different pay and conditions dependent on location.
- The NZCTU "is not convinced that there are in any case large and widespread regional differentials."
- The NZCTU was also concerned about incentives, where "it would not be in the public interest to reinforce a situation where many people feel they have to leave the regions to earn a decent living."

## Power of determining body to fix mandatory and non-mandatory terms

The NZCTU argued that the determining body should have the power to fix all terms of an FPA, not just mandatory terms, because otherwise there would be insufficient incentives for the parties to reach agreement on these matters.

## Costs of bargaining

The NZCTU supported the following:

- Paid meetings for workers (including contractors paid by engagers) to elect bargaining representatives and at ratification, to be put into statute,
- Government funding for travel and accommodation to attend bargaining meetings,
- Employers/engagers to pay wages/costs for bargaining representatives, and
- Government funding for provision of sitting fee to cover indirect costs such as venue, catering and administrative burden.

### Market impact test

The NZCTU “emphatically does not support any process for a so-called ‘market interest test’ or ‘tests’" for the following reasons:

- It was not included in the FPAWG recommendations,
- It is unparalleled in like industrial relations systems internationally or in New Zealand’s history,
- Such a test “fails to take into account the context and institutional structures underpinning collective bargaining, and FPA bargaining, and radically undermines the purpose of an FPA bargaining system,
- “No evidence has been presented that FPAs would place a serious limit on competition, justifying such a radical change in employment law. We do not believe such evidence exists.”, and
- Economic and market impacts will be considered as part of the bargaining process, and will also form part of the argument and evidence in the arbitration of FPAs.

It also raised the following concerns regarding the design features and implementation of a market impact test:

- There are concerns about constitutionality if the system would allow an administrative decision (regarding the market impact test) to override decisions of the executive and judiciary. Noting the discussion document does not suggest the appropriate body for performing this function, the NZCTU “does not consider the Ministry of Business Innovation and Employment to have the standing or expertise to perform such a function.”, and
- The process is not analogous with Commerce Commission processes, which has a high evidentiary bar.