



COVERSHEET

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

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

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of confidential advice to Government.

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Development Committee

Fair Pay Agreements: Backstop where one side is not represented

Proposal

- 1 This paper seeks agreement to add a backstop to the FPA system if one side is not represented in bargaining. This will allow an FPA to be fixed by an independent body, namely the Employment Relations Authority (the Authority), when there is no willing and suitable representative on one side. This paper also seeks agreement to consequentially amend decisions made by Cabinet in April 2021, particularly in relation to the mandatory role of default bargaining parties.

Relation to government priorities

- 2 The proposals in this paper support the Government's priority to provide an inclusive economy where economic growth is shared by all. Implementing FPAs was a manifesto commitment and included in the Speech from the Throne as a policy that will contribute to accelerating the recovery in response to the COVID-19 pandemic.
- 3 To help ensure the objective of the FPA system is achieved, I propose including an alternative process when there is a lack of bargaining parties on one side. This will ensure the system is better able to improve labour market outcomes by avoiding situations where an FPA cannot be negotiated or is significantly delayed through one side's unwillingness or inability to participate in bargaining.

Executive Summary

- 4 Cabinet previously recognised if there are no willing and suitable representatives to negotiate an FPA, bargaining would be frustrated and the proposed FPA would not be able to be negotiated. This challenges the intent of the FPA system [CAB-21-MIN-0126].
- 5 To alleviate this, Cabinet agreed that BusinessNZ would be the default employer representative. Correspondingly, under decision-making authority delegated by Cabinet [CAB-21-MIN-0126], I decided that the New Zealand Council of Trade Unions (CTU) would be the default employee representative. As drafting of the Fair Pay Agreement Bill (the Bill) progressed, it became clear that the risk of system intent being frustrated by non-participation if BusinessNZ or CTU were unwilling or unable to perform the default bargaining party role.
- 6 I now propose two changes to the FPA system:

- 6.1 giving the CTU and BusinessNZ discretion to be bargaining parties in the absence of willing or suitable union or employer representatives; and
 - 6.2 introducing an alternative process (referred to as a “backstop”) that will apply if there is no willing or suitable entity on one side of bargaining. In this case, the other side may apply to the Employment Relations Authority (the Authority) for a determination. That is, the backstop would be allowing the Authority to set the terms of an FPA in the absence of bargaining parties on one side.
- 7 The Fair Pay Agreements Bill is almost finalised, and I plan to seek approval to introduce from CBC on 21 March. The Bill reflects the policy agreed by Cabinet in April 2021 [CAB-21-MIN-0126], which includes the default bargaining representation role for BusinessNZ and the CTU.
- 8 Rather than delaying the introduction of the Bill to incorporate the backstop, I propose requesting the select committee considering the Bill to incorporate the backstop when reporting the Bill back to the House, specifically:
- 8.1 I intend to provide the select committee with a summary of the policy we agree today for the backstop, so that submissions can be made on the policy at the same time as the introduction version of the Bill.
 - 8.2 That will allow time for the backstop provisions to be drafted as a Supplementary Order Paper (SOP), which can then be provided to the select committee.
 - 8.3 I will request the select committee incorporate the SOP in the version of the Bill they report back to the House.
- 9 This paper seeks agreement to the key design features of the backstop which include:
- 9.1 the process by which the backstop is triggered;
 - 9.2 how the Authority will set FPA terms; and
 - 9.3 other procedural requirements.

Background

- 10 The FPA system relies on union and employer representatives to bargain collectively for minimum employment terms. Even if the threshold has been met to initiate bargaining, the absence of willing and suitable representatives on one side will frustrate bargaining. This challenges the intent of the FPA system.
- 11 Cabinet therefore decided that BusinessNZ would be the default representative for employers where there is no willing and suitable representative [CAB-21-MIN-0126]. In the absence of an employer representative, BusinessNZ would be required to:

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- 11.1 use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated; and
 - 11.2 be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable presentative within three months.
- 12 The above decision was made following BusinessNZ's agreement that it would assist industries or occupations where bargaining had been initiated to find a suitable employer bargaining representative(s), and to be the default representative if one could not be found.
- 13 At the time, I was also authorised to make decisions during drafting [CAB-21-MIN-0126]. One such decision I made was that the CTU would be the corresponding default representative for employees, in the absence of a willing and suitable representative on the employee side. This could be needed when an FPA is being renewed (ie renegotiated approaching expiry): an employer association may initiate bargaining for a renewal, and it could be that no union is willing to be a bargaining party. In that situation, the CTU would step in as a default bargaining party on the employee side.

The reliance on willing and suitable representative highlights a vulnerability in the FPA system

- 14 As drafting of the Bill progressed, it became clear that there was a risk of the system's intent being frustrated by non-participation if BusinessNZ or CTU were unwilling or unable to perform the default bargaining party role. On 8 December 2021, BusinessNZ advised that it no longer agreed to be the default employer bargaining party in all FPA bargaining. It has, however, informally indicated it may be prepared to step in on a discretionary basis.
- 15 This paper proposes to make BusinessNZ and CTU's default bargaining party role voluntary, instead of mandatory. It proposes introducing an alternative process that will apply if no eligible entity steps forward to be a bargaining party on one side, in which case, the other side may apply to the Authority to set the terms of the FPA.
- 16 I am also seeking agreement to make the changes proposed in this paper during the Select Committee process.

Key design features of the backstop process

- 17 The proposed backstop aims to strike a balance between providing a reasonable opportunity for parties to bargain without excessive delay in finalising an FPA, with the need to ensure that an FPA is produced once the initiation threshold is met.

Trigger for backstop

- 18 There are three circumstances in which the backstop can be triggered:

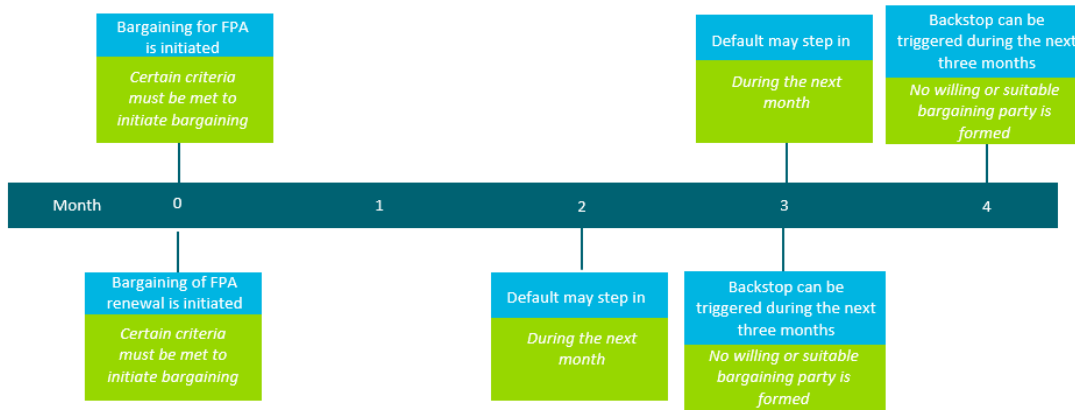
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- 18.1 Bargaining is initiated for an FPA, but there are no bargaining parties on the non-initiating (ie employer) side.¹
 - 18.2 Bargaining is initiated to replace an existing FPA, but there are no bargaining parties on the non-initiating (ie employee or employer) side.
 - 18.3 Bargaining is underway, and parties on the non-initiating side (which could be either the employee or employer side) withdraw from bargaining.
- 19 If there is no longer representation on the initiating side, the development of the FPA would cease. There is a low risk that an initiating side could withdraw from bargaining to avoid the costs associated as an FPA would still result. That would be inconsistent with the intention that FPAs are bargained where possible.
- 20 In any of the above circumstances, the relevant default bargaining party (ie CTU or BusinessNZ) may choose to step in. To ensure bargaining parties have a reasonable length of time to organise themselves and form a bargaining side without creating significant delays in the FPA process, I propose that bargaining be opened to the default bargaining parties following a set period:
- 20.1 three months from initiation of bargaining for an FPA;
 - 20.2 two months from initiation of bargaining for renewal of an existing FPA (as bargaining parties should require less time to coordinate their bargaining); or
 - 20.3 immediately from withdrawal of non-initiating side during bargaining.
- 21 Both social partners (BusinessNZ and CTU) have indicated they may be willing to perform the default role on a discretionary basis. I propose they have one month (beginning on the expiry of the relevant period in paragraph 20) to decide whether to step in as a bargaining party.
- 22 After this one-month period, a bargaining party on the represented side can trigger the backstop. There will be a three-month period during which the backstop can be triggered. If no application is made for the backstop during this period, the FPA process ends.
- 23 The backstop cannot be triggered if there is no longer representation on the side that has initiated bargaining. This means if the initiating side withdraws

¹ There is an exception to the concept of 'no bargaining parties' used throughout this paper. I have used my authorisation from Cabinet to add nuance to the employer representation rules, to take account of different accountabilities faced by the public and private sectors. In summary, state sector employers will generally be able to be represented by the Public Service Commissioner (Commissioner) (or in a few specific cases, able to represent themselves), and they will not have obligations to represent private sector employers. This means that if private *and* state sector employers are covered by the same FPA, both the Commissioner (and/or other specified State employer bargaining party) *and* a private sector bargaining party must be part of the employer bargaining side – if there is no representative from the private sector, the backstop process applies.

from bargaining and the default representative does not step in, bargaining of the FPA will cease.² This is consistent with the main FPA bargaining system.

24 The diagram below outlines the proposed sequence of events:



The backstop will operate by the Authority setting FPA terms, without bargaining

- 25 In April 2021, Cabinet [CAB-21-MIN-0126] noted my intention to create a new institution to oversee and implement (where appropriate) an FPA system. Until the new institution is established, the Authority will be the body that fixes FPA terms if there is protracted disagreement between bargaining sides.
- 26 For consistency, I propose the Authority also perform the backstop function. The concentration of like functions for the Authority will ensure efficiencies in terms of expertise, resourcing, and cost effectiveness. This function can build on the Authority’s existing role fixing terms in the FPA system and other bargaining systems, following protracted bargaining disputes.

Procedural requirements

- 27 In normal FPA bargaining, when the Authority fixes disputed terms in an FPA, it receives information from bargaining parties before making a decision about those terms. For the backstop, there needs to be a way to fill the gap caused by the absence of a bargaining party on one side so the Authority has the appropriate information to make its decision.
- 28 The only parties to backstop proceedings will be organisations that have successfully applied to bargain a particular FPA. Because the backstop is triggered when there is no representation on one side of bargaining, this means one side (either the employer or employee side) will not be a party to

² Again, there is an exception relating to a renewal initiated by bargaining parties representing specified public sector agencies). In this situation, the lack of a bargaining party representing other employers (ie those not represented the specified employer bargaining party) could also trigger the backstop.

backstop proceedings and will therefore not be able to provide direct input to the Authority's determination.³

- 29 The Authority will have discretion as to how it seeks input from/about the implications of potential FPA terms on those within coverage on that side. For example, its powers allow it to seek input from anyone it reasonably needs to. This could take the form of asking the Ministry of Business Innovation and Employment (MBIE) to provide information about the sector or industry concerned. Alternatively, the Authority could appoint an independent advisor to gather views from those within coverage.
- 30 I consider this the most workable approach. Allowing individuals or individual entities on the unrepresented side to play a direct role in backstop proceedings would likely be unwieldy. It could also end up making the backstop a more attractive option than participating in bargaining.

Requirements and powers of the Authority for fixing terms

- 31 I propose the same requirements apply to the Authority when setting an FPA through the backstop as when it fixes FPA terms following a bargaining dispute or two failed ratifications. These are the other two situations in the FPA system that involve the Authority setting FPA terms. The requirements are detailed in Annex 1, but in particular:
- 31.1 the Authority's determination should be made by a panel of Authority members (these members would not be able to determine any future disputes about that FPA;
 - 31.2 the Authority must apply the same statutory criteria; as when fixing terms in situations where there are bargaining parties on both sides; and
 - 31.3 the Authority will be required, or able, to include the same terms in the FPA (with the exception of the terms that require both sides' agreement to include).

Other aspects of the FPA system apply to the backstop

- 32 Aspects of the FPA system that are relevant in the backstop system would apply a consistent manner, with minor amendments where necessary. These are outlined in Annex 1.
- 33 I also seek authorisation to make decisions, consistent with the objective and overall design of the FPA system, on any issues that arise during drafting of the backstop SOP.

³ Again, an exception to this is if there is a bargaining party representing specified public sector agencies, it will be a party to the proceedings – but it will not represent other (private sector) employers.

Appeal rights

- 34 Consistent with previous Cabinet decisions [CAB-21-MIN-0126, paragraph 57 refers] I propose that appeal rights under the backstop be limited to questions of law only. This will avoid lengthy delays and provide certainty and finality to the parties about what terms and conditions apply.
- 35 Similar to other proceedings in courts and tribunals, only those that are party to the backstop proceedings can appeal. This means any person/entity affected by the decision who was not directly represented in the proceedings will not be able to appeal. For example, if the backstop was triggered by a lack of employer representation in bargaining, then employers and employer associations would not have a right of appeal.
- 36 As discussed below, those not party to the proceedings will nevertheless be able to seek judicial review. I believe this strikes an appropriate balance between ensuring access to justice while incentivising parties to bargain collectively.
- 37 The Employment Court is the institution that will hear appeals or challenges of the Authority's backstop determinations. For appeals, I propose requiring the Employment Court to appoint an amicus curiae to represent the unrepresented side in backstop proceedings

Judicial review

- 38 Anyone affected by the Authority's backstop determination would be able to seek judicial review, including those lacking appeal rights as described above.
- 39 In the rest of the FPA bargaining system, judicial review of the Authority's determinations is limited to situations where the Authority lacked jurisdiction. However, to safeguard natural justice rights when the backstop is triggered, it is important to allow some ability to challenge the decision made, especially as only parties to the backstop proceedings will be able to appeal. Therefore, I do not seek to carry over the existing requirement for the Authority to 'lack jurisdiction' before its backstop related decisions can be judicially reviewed. This means when the Authority sets an FPA through the backstop process, judicial review will be available once any applicable appeal rights have been exhausted.

Risks associated with the backstop

Principle of free and voluntary negotiation

- 40 I previously advised Cabinet on the risks associated with the FPA system [CAB-21-MIN-0126]. Some of these relate to International Labour Organization (ILO) conventions New Zealand has ratified and obligations which may also stem from our ILO membership more generally.

- 41 One such risk relates to the principle of free and voluntary negotiation.⁴ While the backstop means employers (or employees, as the case may be) do not need to participate in bargaining, it is designed to strongly incentivise bargaining. In this way, it could affect how 'free' and 'voluntary' parties consider their participation in the FPA system to be, given the alternative is the Authority setting terms without their input.

Natural justice

- 42 Under the backstop, the unrepresented side will be directly affected by the outcome but will not be a party to the backstop proceedings. This also means their ability to participate in the backstop will be at the Authority's discretion which could be seen as having natural justice implications, specifically relating to the 'right to be heard'. However, in undertaking their role, the Authority must comply with the principles of natural justice.⁵
- 43 It is worth reiterating that the backstop will only be triggered if there is no willing and suitable representation. In this way, any implications for the right to be heard will only be engaged following attempts to encourage participation.
- 44 As a result of there being no party to the proceedings on the unrepresented side, this also has flow on implication for appeal rights, as only those party can appeal determination. The Authority is able to consider the interests of affected parties (ie employees and employers covered by an FPA. In addition, any affected persons may seek judicial review. The absence of ability to appeal may increase the likelihood that affected persons will apply for judicial review.

Justification for limitations

- 45 I consider the limitations on the above rights to be justified. Allowing any employers and employees to participate directly in the backstop process could make it unwieldy, particularly if the Authority effectively has to consider submissions from all affected employers and employees. There is also the risk that the backstop becomes more attractive to the unrepresented side than participating in bargaining, defeating the purpose of the FPA system. This is justified as the unrepresented side will have had an opportunity to organise themselves and participate in bargaining.

The Authority needs sufficient resourcing to perform this function

- 46 There is technically a risk that the Authority sets FPA terms that neither employees nor employers are satisfied with, which could have widespread economic impacts. This risk also exists in the rest of the FPA system, given

⁴ The principle of free and voluntary negotiation is a fundamental aspect of the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87). New Zealand has not ratified convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member of state of the ILO.

⁵ See 157(2)(a) of the Employment Relations Act 2000

the Authority could potentially fix FPA terms following a bargaining dispute or two failed ratification attempts.

- 47 To mitigate this risk, the Authority must have the necessary skills, input, and capacity to make informed decisions about FPA terms. Confidential advice to Government

[Redacted]

Timing and process to incorporate the backstop process into the Bill

- 48 The Bill holds a priority 2 on the 2022 Legislation Programme. I plan to seek approval to introduce the Bill from CBC on 21 March, and to introduce it on 28 March.

- 49 Drafting of the Bill is almost complete. Because the Bill reflects the decisions Cabinet made last year, it includes the mandatory default representative role. Rather than delay the introduction of the Bill to incorporate the proposed backstop, I propose introducing the Bill with the existing default representation provisions, with the intention of introducing the backstop process as an SOP provided to the select committee during its consideration of the Bill. I also propose informing the select committee of our policy decisions on this paper and asking the select committee to seek submissions on the backstop policy together with the main Bill.

- 50 Subject to your agreement, I estimate drafting of the SOP will be finalised late July 2022, two months after submissions on the Bill are projected to close on a standard select committee timetable. I intend to ask the select committee to incorporate the backstop SOP in the version of the Bill it reports back to Parliament, without seeking public consultation on the wording of the backstop SOP. However, I will provide the select committee with the information necessary to enable public submissions on our policy decisions relating to the backstop.

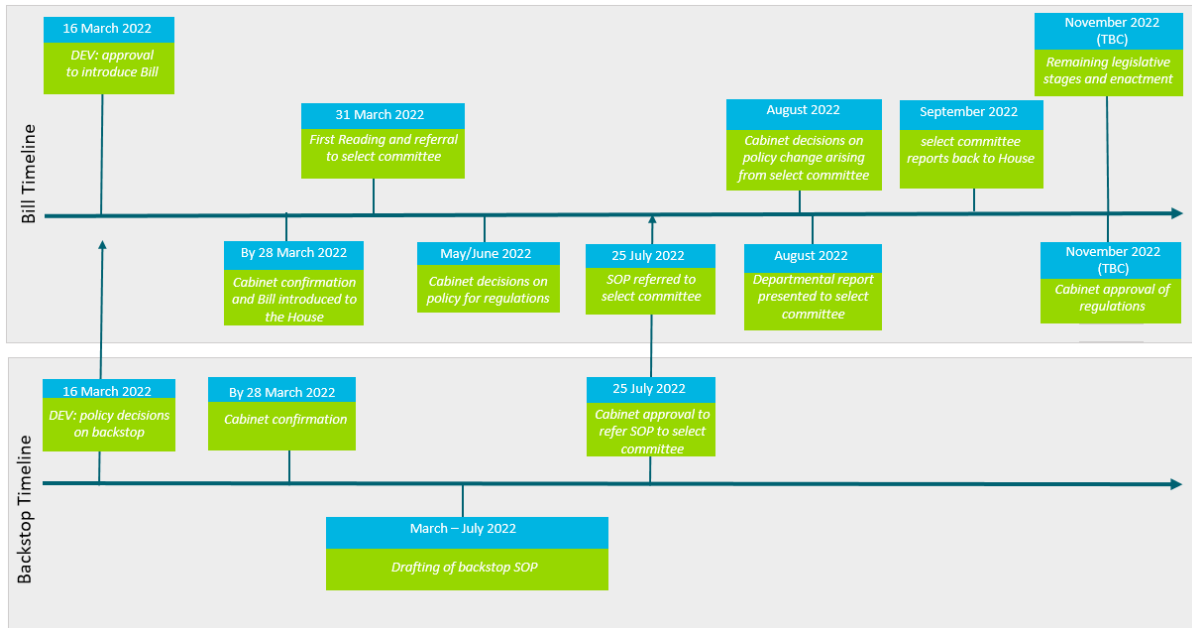
Confidential advice to Government

- Confidential advice to Government [Redacted]

- Confidential advice to Government [Redacted]

In addition, I will be requesting the select committee proactively seeks submissions on the policy of the backstop.

53 The proposed timeline for these processes is as follows:



54 I consider this approach necessary to be able to pass the Bill in 2022 as publicly signalled.

Implementation

55 MBIE has established an implementation programme for the FPA system to ensure that all operational aspects are in place once the Act commences. The implementation programme sets out the milestones that need to happen pre-commencement of the Act and early stakeholder engagement with key partners such as CTU and BusinessNZ.

Financial Implications

56 Confidential advice to Government

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Confidential advice to Government

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Legislative Implications

- 61 Legislation is required to implement the FPA system, which will also provide for the ability to make secondary legislation. The Bill is a category 2 on the 2022 Legislation Programme (to be passed this year).
- 62 As outlined above, my intention is for the backstop to be introduced as an SOP on the Bill during the select committee process.
- 63 The proposed changes to the Bill relating to the backstop will bind the Crown.

Impact Analysis

Regulatory Impact Statement

- 64 A Regulatory Impact Statement was prepared in accordance with Cabinet's impact analysis requirements and was submitted at the time Cabinet approval was originally sought for the policy relating to the relevant regulations ("Impact Statement: Fair Pay Agreements"; CAB-2021-MIN-0126 refers). Additional impact analysis on the backstop has been completed to reflect policy changes outlined in this Cabinet paper and is in Annex 3.
- 65 MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

- 66 The Ministry for the Environment has been consulted and confirmed that the Climate Implications of Policy Assessment requirements do not apply to proposals relating to the design of the backstop process in the FPA system as the threshold for significance is not met.

Te Tiriti o Waitangi

- 67 The Crown has an obligation to design the backstop and the wider FPA system in a way that ensures there is effective representation and participation of Māori. The Authority will have discretion as to how it seeks

input from those within coverage, and I expect the Authority to consider how it will give effect to the Treaty in doing so.

Population Implications

- 68 The factors correlated with earning a low wage include being a woman, being aged between 16-29 and being non-European. In addition, women, Māori, Pasifika, and young people are more likely to earn the minimum wage. Disabled people experience significant disadvantage in the labour market. People who fall within more than one of these groups are more likely to experience poor labour market outcomes as the different forms of discrimination/bias intersect and compound.
- 69 As part of the cross-government Crown response to the Mana Wāhine Kaupapa claim, a key theme identified across several claimant submissions to the Waitangi Tribunal is labour market inequalities for wāhine Māori.
- 70 Given these populations are disproportionately represented in workforces where there are poorer working conditions, they are likely to disproportionately benefit from any improved terms obtained by an FPA whether it is concluded through bargaining or set by the FPA after the backstop is triggered. The backstop will further support this by ensuring FPAs will be concluded in an efficient and timely manner, even when there is no willing and eligible representation on one side.

Human Rights

- 71 Overall, I consider the FPA system will be a key addition to our collective bargaining landscape, and I believe it will improve working conditions over time. This contributes to New Zealand's obligations to ensure all workers have just and favourable working conditions.⁶
- 72 As discussed in paragraphs 40-45, the backstop process is likely to engage international human rights obligations. Specifically, the ILO's free and voluntary negotiation principle as well as the principle of natural justice set out in section 27 of the *Bill of Rights Act 1990*. I consider this necessary to ensure that enforceable minimum terms are produced. For example, if the FPA could not be produced simply because one party refused to come to the table this would frustrate the rationale behind the FPA system, which is improving labour market outcomes.

Consultation

- 73 The following agencies were consulted on this paper: the Department for Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the Treasury. Te Puni Kōkiri, Ministry for Justice, Ministry for Pacific Peoples, Inland Revenue, Ministry for Transport, New Zealand Police, Oranga

⁶ These obligations stem from article 7 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), which New Zealand has ratified

Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, and Ministry of Health.

Communications

- 74 A proactive communication approach is being developed for the Bill. Key feature include Q&A forums with key sector leaders, social media presence, media briefings with key media to fully explain the FPA system and opinion pieces in printed publications as follow up to the introduction of the Bill. I also hope to hold a launch event (COVID-19 dependent) with key stakeholders from across diverse sectors.
- 75 I intend to table the proposed change to the Fair Pay Agreement Bill (Annex 2) as a Parliamentary Paper to inform the select committee and the public of our policy intentions.

Proactive Release

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

Recommendations

- 1 **note** in April 2021, Cabinet agreed to key features of the Fair Pay Agreement (FPA) system [CAB-21-MIN-0126];
- 2 **note** as part of the April 2021 decisions Cabinet agreed that BusinessNZ will be the default representative for employers (where there is no willing and suitable representative) and that it will be required to:
- 2.1 use its best endeavours to find a willing and suitable employer bargaining representative(s) once FPA bargaining has been initiated; and
- 2.2 be the employer bargaining representative and enter into bargaining if it cannot find a willing and suitable representative within three months [CAB-21-MIN-0126 at paragraph 19];
- 3 **note** Cabinet also delegated decision-making authority to the Minister for Workplace Relations and Safety, and under this authority, the Minister decided that the New Zealand Council of Trade Unions will be the default representative for unions (where there is no willing and suitable representative) [CAB-21-MIN-0126];
- 4 **note** there is a residual risk that the intent of the FPA system will be frustrated if either BusinessNZ or New Zealand Council of Trade Unions are unwilling or unable to fulfil their role as default employer and employee bargaining party respectively;
- 5 **agree** to rescind the decision in paragraph 19 of CAB-21-MIN-0126 (as noted in paragraph 2 above) which required BusinessNZ to be the mandatory

default representative for employers where there is no willing and suitable representative, and replace this decision with the decision in paragraph 6;

- 6 **agree** to incorporate a backstop into the FPA system to cover situations where there is no bargaining party on one side of FPA bargaining, the details of which are set out in paragraphs 7 through to 24;

Trigger for the backstop

- 7 **note** state sector employers will generally be able to be represented by the Public Service Commissioner (or in a few specific cases, able to represent themselves), and they will not have obligations to represent private sector employers or vice versa;
- 8 **note** this means there is an exception to the 'no bargaining party' concept: if private and state sector employers are covered by the same FPA, both must have representation on the employer bargaining side – so if there a bargaining party from the state sector but none from the private sector, the backstop process applies;
- 9 **agree** that if bargaining has been initiated but there are no bargaining parties on the *non-initiating* side, BusinessNZ and the New Zealand Council of Trade Unions will be offered the option of representing employers or employees respectively in FPA bargaining if the following timeframes have passed:
- 9.1 for a proposed FPA: three months from initiation;
- 9.2 for renewal of an FPA: two months from initiation; or
- 9.3 for withdrawal of non-initiating side during bargaining: immediately;
- 10 **agree** that for the purposes of paragraph 8, BusinessNZ and the New Zealand Council of Trade Unions will have one month to decide whether they wish to step in as a bargaining party;
- 11 **agree** that if the *non-initiating* side remains without a bargaining party after the one-month period referred to in paragraph 10, the other bargaining side may trigger the backstop;
- 12 **agree** that the period in which the represented bargaining side may trigger the backstop in paragraph 11 is three months, and if the backstop is not triggered during this period, development of the FPA will cease;
- 13 **agree** that if all the bargaining parties on the *initiating* side withdraw or cease to be an eligible bargaining party during bargaining, BusinessNZ or the New Zealand Council of Trade Unions (as is relevant) will have one month to decide whether to represent employers or employees respectively in FPA bargaining and that if they do not, then development of the FPA will cease;

Institution to perform backstop function

- 14 **agree** that the Employment Relations Authority will determine the terms of the FPA if a party applies for a determination through the backstop;

Process requirements

- 15 **agree** that the following will be parties to the backstop proceedings:
- 15.1 approved bargaining party(ies);
 - 15.2 approved 'state sector employer bargaining party(ies)' (if the FPA covers any state sector employers).
- 16 **note** employees and other employers covered by the FPA would not be party to the backstop proceedings;
- 17 **agree** that the Employment Relations Authority has flexibility in how it obtains input from, or information about the implications of potential FPA terms on, the side that is not represented in backstop proceedings, which could include:
- 17.1 information about the sector or industry concerned provided by the Ministry of Business Innovation and Employment; and/or
 - 17.2 appointing an independent advisor;
- 18 **agree** that when fixing terms in the backstop process, the Employment Relations Authority will have the same requirements as in the main FPA system when it fixes terms following a bargaining dispute or two failed ratifications, in particular:
- 18.1 the determination should be made by a panel of members (who would not be able to determine any future disputes about that FPA);
 - 18.2 the Employment Relations Authority must apply the same statutory criteria as when fixing terms in situations where there are bargaining parties on both sides, which are set out in Annex 1; and
 - 18.3 the Employment Relations Authority will be required, or able, to include terms on the same topics in the FPA (with the exception of the terms that require both sides' agreement to include);

Appeals and judicial review rights

- 19 **agree** that where the Employment Relations Authority sets an FPA after the backstop has been triggered:
- 19.1 only those who were a party to the backstop proceedings may appeal the determination; and
 - 19.2 appeal rights are limited to questions of law (consistent with appeal rights in the rest of the FPA system);

- 20 **agree** appeals as described in recommendation 19 will be heard by the Employment Court;
- 21 **agree** that for appeals described in recommendation 19, the Employment Court must appoint an amicus curiae to represent the side that was not party to backstop proceedings in the Employment Relations Authority;
- 22 **agree** that appeal rights as described in recommendation 19 must be exhausted before a party can seek judicial review of an FPA set through the backstop process;

Detailed design

- 23 **agree** to amend certain features of the FPA system as outlined in Annex 1 to account for the backstop;

Risks associated with the backstop

- 24 **note** the possible risks associated with the backstop process include:
 - 24.1 potential limitation on the right to free and voluntary negotiation;
 - 24.2 potential limitation on natural justice rights, specifically the right to be heard;

Financial implications

25 Confidential advice to Government



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27 Confidential advice to Government

Approve drafting of legislation

28 **note** I intend to table the proposed change to the Fair Pay Agreement Bill (Annex 2) as a Parliamentary Paper to inform the select committee and the public of our policy intentions;

29 **note** that the FPA Bill currently holds a category 2 priority on the 2022 Legislation Programme (Bill to be passed this year);

30 **note** the FPA Bill has been drafted based on Cabinet's April 2021 decisions, and will shortly be ready for introduction to the House;

31 **agree** to the proposed process to incorporate the decisions in this paper into the FPA Bill, that is:

31.1 the Minister for Workplace Relations and Safety will advise the select committee of Cabinet's decisions on this paper, attaching the Parliamentary Paper;

31.2 the Minister will ask the select committee to consult on the proposals in that paper;

31.3 the proposals in this paper will be drafted in the form of a Supplementary Order Paper (SOP), which the Minister will provide to the select committee in July;

31.4 the Minister will ask the select committee to incorporate the SOP into the version of the Bill the committee reports back to the House;

32 Confidential advice to Government

33 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office to draft an SOP to give effect to the decisions in this paper;

34 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the objective and overall design of the FPA system, on any issues that arise during drafting of the backstop SOP;

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

I N C O N F I D E N C E

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety

I N C O N F I D E N C E

Annex 1: How the backstop process interacts with the wider Fair Pay Agreement system

- 1 Where relevant, aspects of the Fair Pay Agreement (FPA) system will apply to the backstop process. However, a few minor amendments are necessary to ensure the process is workable. There is also a need to ensure those who would be affected are made aware if the backstop process is triggered.

Coverage

- 2 Once the backstop process has begun, the coverage of the FPA should not be able to change ie an applicant can't change the coverage of the proposed FPA at any point during the process and the Employment Relations Authority (the Authority) cannot amend it as part of its determination.

Consolidation

- 3 The consolidation requirements will need to be amended to consider situations where one or both FPAs is/are being fixed by determination. In particular:
 - 3.1 If an FPA (covering some occupations in that industry) is being bargained and a subsequent FPA in the same industry (covering different occupations) is initiated and lacks an employer bargaining party, the standard consolidation rules should apply.
 - 3.2 If a subsequent FPA is initiated in the same industry as one where there is no employer bargaining party, the two FPAs can only be consolidated if the first FPA has not transitioned to the backstop process and there is an employer bargaining party for the second FPA.
 - 3.3 If a second FPA is initiated for the same industry after six months from when the first FPA in that industry is initiated, and both FPAs enter the backstop process, the Authority has discretion to merge backstop processes.
- 4 Where a second FPA is initiated for the same industry as an FPA that is currently being bargained or an FPA that has been determined via the backstop, and the agreements are not required to be consolidated, the second-in-time FPA is attached as a Schedule to the first-in-time FPA. Both the FPA and the Schedule will expire at the same time (consistent with the current consolidation approach).

Notification

- 5 Additional notification requirements will be needed to ensure those affected are kept up to date with the process the FPA will be following (or if it has ceased). In particular:
 - 5.1 Where the FPA was initiated by the employee side, to require the employee bargaining parties to notify known employers and employees

in coverage and the Ministry of Business Innovation and Employment (MBIE) of its decision regarding whether to apply for the backstop process or cease development of the FPA.

5.2 Where the FPA renewal was initiated by the employer side, to require:

5.2.1 The employer bargaining parties to notify known employers and MBIE of its decision regarding whether to apply for the backstop process or cease development of the FPA.

5.2.2 Each employer, once notified, to notify employees within coverage of the proposed FPA whether the backstop process has been applied for or development of the proposed FPA has ceased.

Duty of good faith and bargaining obligations

6 Where an employment relationship still exists in the context of the backstop process, the duty of good faith applies during the backstop determination process (ie between employer and employees, unions and their members, and unions (or employer associations) that are bargaining parties for the same FPA).

7 The penalties for a breach of good faith that apply during bargaining also apply during the backstop process, therefore the Authority can apply a penalty of up to \$20,000 for an individual and \$40,000 for a company or other corporation, for the following breaches:

7.1 An employer breaches its duty of good faith duty by doing anything with the intention of inducing an employee not to be involved in the backstop process (eg by impeding their engagement with the union bargaining parties).

7.2 There is a breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is deliberate, serious, and sustained; or intended to undermine the backstop process.

8 The obligations that apply during bargaining (eg to use best endeavours to represent affected parties within coverage) should apply to the bargaining parties involved in the backstop process during the backstop process.

Provision of employee contact details, paid meetings, and unions access

9 As unions that are bargaining parties will represent employees in this process, they also need the same opportunities to obtain input from employees via:

9.1 The provision of contact details for new employees within coverage during the backstop process periodically.

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- 9.2 Employers being required to provide paid time for two, two-hour meetings for each employee within coverage of a proposed FPA during the backstop process.
- 10 Workplace access without consent to workplaces with employees within coverage during the backstop process (and once the FPA is in force).
- 11 In the case of a renewal initiated by the employer side, the employer bargaining parties would have an obligation to represent employers within coverage. As there would not be any unions that are bargaining parties, the obligations in relation to the provision of contact details, paid meetings and workplace access would not apply.
- 12 When an FPA has been fixed under this process, the requirements for variation should be the same as when a FPA is ratified or fixed following a bargaining dispute or two failed ratifications. Therefore, the FPA can only be varied if the employee bargaining side and BusinessNZ (as the default bargaining party) agree to bargain a variation and the proposed variation is supported at ratification.
- 13 The Authority must apply the same statutory criteria as when fixing terms in situations where there are bargaining parties on both sides these are:
- 13.1 any other terms that the bargaining sides have already agreed;
 - 13.2 the relevant industry or occupational practices and norms, including their evolution and development;
 - 13.3 the likely impact and potential benefits on employees within coverage and, in particular, on covered employees who are low-paid vulnerable employees;
 - 13.4 the likely impact on the business or activity with employers with employees within coverage;
 - 13.5 relativities within the proposed FPA, and between the proposed FPA and other relevant employment terms and conditions, in particular, national minimum standards and collective agreements;
 - 13.6 the need to ensure the FPA is written in plain language and can be easily understood by employers and employees within coverage; and
 - 13.7 any other matter it considers relevant.
- 14 The Authority is also enabled, but not required to have regards to any likely impacts on New Zealand's broader economic or social-wellbeing in making determinations on FPA terms.
- 15 When fixing terms in this process, the Authority must and may include the same topics as when fixing terms in the bargained process. This is intended to provide consistency between FPAs fixed under both processes, although some terms may not be appropriate to include due to the lack of two 'sides' to

agree their inclusion. Therefore, when fixing terms under the backstop, the Authority:

- 15.1 Must fix mandatory to agree topics.
- 15.2 Can fix mandatory to discuss topics but must include and fix a 'mandatory to discuss' term requested by one side, unless there is a good reason not to.
- 15.3 Can include regional variations and other differential terms for 'mandatory to agree' and 'mandatory to discuss' terms.
- 15.4 Cannot include other employment terms – as there are not two sides to 'agree' to include them.
- 15.5 Cannot include exemptions – as these can only be fixed when there are two sides to 'agree' and run an exemption process.

Annex 2: Parliamentary paper on proposed change to the Fair Pay Agreement Bill

- 1 The Government is reconsidering the mandatory default employer/employee representative function in the Fair Pay Agreement (FPA) Bill. We propose making a change during the Parliamentary process. However, we are interested in public views on the proposed policy change.

Background to the issue

- 2 The FPA system relies on union and employer representatives to bargain with each other for minimum employment terms. If there is no willing and suitable representative on one side, bargaining would be held up. This challenges one principle of the FPA system, that is, when FPA bargaining has been initiated, an FPA should result.
- 3 To ensure an FPA results, we decided that if one side does not have a willing and suitable representative, BusinessNZ or the New Zealand Council of Trade Unions (CTU) would be required to become the default representative for employers or employees, respectively.
- 4 However, as the FPA system was developed further, it became clear that there was a risk that an FPA still might not result if a default bargaining party was unwilling or unable to perform that role.

Proposed change: a new backstop

- 5 So we plan to make the default bargaining party role voluntary instead of mandatory, and add a new process (“the backstop”): if no eligible representative steps forward to be a bargaining party on one side, then the Employment Relations Authority (the Authority) will set the terms of the FPA.
- 6 The backstop aims to strike a balance between a reasonable opportunity for parties to bargain, with the need to ensure that an FPA is produced once the initiation threshold is met.
- 7 This paper outlines the key design features of the backstop.

The trigger for the backstop

- 8 There are three circumstances in which the backstop can be triggered:
 - 8.1 bargaining is initiated for an FPA by an eligible union but there are no bargaining parties on the non-initiating (ie employer) side after a set time period;
 - 8.2 bargaining is initiated to replace an existing FPA, but there are no bargaining parties on the non-initiating side after a set time period; or
 - 8.3 bargaining is underway, and parties on the non-initiating side withdraw from bargaining.

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- 9 In any of the above scenarios, the relevant default bargaining party (ie CTU or BusinessNZ) will have one month to choose whether it steps in. If it does not, the backstop can be triggered.
- 10 If all bargaining parties on the initiating side withdraw, the relevant default bargaining party (CTU or BusinessNZ) will have one month to choose whether it steps in. If it does not, development of the FPA will cease (ie the backstop will not be not triggered).

The Authority will set FPA terms without bargaining

- 11 The Authority already has a role of setting terms for an FPA if parties cannot agree. In the backstop, if no bargaining party steps in on one side, the Authority will set terms without any bargaining happening beforehand.
- 12 The side that does have a bargaining party will be able to provide input into the Authority's determination via bargaining parties that were prepared to bargain. The side without a bargaining representative will not be directly represented in the Authority proceedings.
- 13 The Authority can seek out information about a specific industry or occupation or request information from an independent advisor. This could help the Authority to know how the potential FPA terms could affect those agreeing to it.

Requirements and powers of the Authority for fixing terms

- 14 When performing the backstop function, the Authority will sit as a panel and will apply the same criteria as other situations in the FPA system where it fixes terms. The Authority will have broad discretion to decide its own processes. However, it:
 - 14.1 Must make a binding determination on mandatory to agree topics.
 - 14.2 Must include mandatory to discuss term(s) that have been requested by a bargaining side unless there is good reason not to.
 - 14.3 May include any other terms if both bargaining sides agree.

Appeal rights

- 15 Appeal rights under the backstop will be limited to questions of law only. Only those that are party to the backstop proceedings can appeal. Those not party to the proceedings will, however, be able to seek judicial review.
- 16 The Employment Court will hear any appeals or challenge of the Authority's backstop determinations. For appeals, the Employment Court must appoint a third party to represent the unrepresented side.