COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
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Information redacted **YES**

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In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Development Committee

Fair Pay Agreements Bill: Approval for public interest test criteria details and delegated authority for key regulations

Proposal

1 This paper seeks agreement to proposed details in regulations for satisfying the Fair Pay Agreements (FPA) public interest test criteria and seeks delegated authority for the Minister for Workplace Relations and Safety to approve the two additional regulations that are required shortly after the FPA Bill (the Bill) commences.

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 the FPA system 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.

Executive Summary

3 This paper seeks agreement to proposed details to be included in regulations for satisfying the public interest test criteria. Currently, the public interest test is set in the Bill using high-level and subjective criteria such as 'low pay' and 'little bargaining power'. These criteria alone are not sufficient to support the judgement and decisions of the Chief Executive of MBIE (CE) on public interest test applications.

4 The proposed details on how to satisfy each of the four public interest test criteria in clause 29(4) of the Bill are specified in paragraphs 16, 20, 22, 23 and 25. Clause 29(5) lists evidence that can be submitted in support of a public interest test application and proposed additional details of what the evidence can include are specified in **Annex 1**.

5 This paper also seeks delegated authority for me as the Minister for Workplace Relations and Safety to approve the details of regulations needed for the FPA system so that they can proceed straight to drafting once I have approved the policy. These regulations are essential for supporting the bargaining and ratification stages of the process and must be enacted by April 2023 (ie in time for the first FPA bargaining). These regulations consist of the following:

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5.1 The prescribed form for specific FPA terms. This includes the FPA Minimum Entitlements Provisions (MEP) which require a specific formulation in the FPA so they can be enforced by the Labour Inspectorate; and

5.2 New forms needed when applying to institutions for new roles during the FPA process. This includes forms required for parties to file with the Employment Relations Authority to fix terms of an FPA and for parties to file with the Employment Court for a stay of proceedings.

Background

6 On 19 April 2021, Cabinet agreed to the key features of the FPA system and to begin drafting legislation to give effect to these decisions [CAB-21-MIN-0126].

7 On 28 March 2022, Cabinet agreed to introduce the draft FPA Bill to Parliament [CAB-22-MIN-0095 refers], which referred the Bill to the Education and Workforce Committee (the Committee) following its first reading on 5 April 2022. The Committee will report back by 5 October 2022, and it is expected the Bill will pass its remaining legislative stages in the following weeks.

Commencement date

8 The substantive provisions in the Bill will come into force one month after the date of Royal Assent. If the Bill passes by late October or November 2022, I expect the Bill's commencement to occur in December 2022. This is when the FPA system must be ready to accept the first applications to initiate bargaining for proposed FPAs.

9 Because of the short time between Royal Assent and commencement date, I have prioritised work on the regulations alongside the Bill. This is necessary because there are several key provisions in the Bill which must be implemented via the regulations at the commencement of the Bill or shortly after.

Details on how to satisfy the public interest test criteria

10 The public interest test is one of two tests (alongside the representation test) that allows applicants to initiate bargaining for an FPA. Clause 29(4) sets out the four criteria of the public interest test that the CE must use for assessing applications. These are: '*low pay*', '*little bargaining power*', '*lack of pay progression*', or '*long or unsocial hours or contractual uncertainty, that is not adequately compensated*'. It also contains a list of matters which a union can provide evidence of, to support its public interest test application. The Bill contains powers (in clause 29(6)) to make regulations containing further detail about both how to satisfy those criteria and what evidence may be included.

11 Cabinet agreed on 1 August 2022 [CAB-22-MIN-0291 refers] to amend the public interest test criteria in the Bill so that an application must meet the 'low pay' criteria plus one or more of the other three criteria noted above.

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Therefore, if an occupation doesn't meet the 'low pay' criteria, they will have to meet the representation test to initiate an FPA.

12 Because the criteria in the Bill are high-level only, I anticipate judicial review to be a significant risk for the CE's decisions on public interest test applications. Since the criteria are highly subjective, parties could challenge decisions made by the CE via judicial review and argue that the CE did not apply the criteria correctly. This has the potential to delay or frustrate the FPA initiation process and impact the overall resourcing of the FPA system.

13 I propose specifying additional details in regulations on how to satisfy the public interest test criteria. These details will guide and support the CE's decision-making to avoid perceived, or actual, equity or fairness issues for how applications will be assessed. Furthermore, these details provide some clarity on the severity of issues which could enable an occupation or industry to qualify for initiating an FPA through the public interest test.

14 Without additional details on how to meet the criteria, there is a risk that the CE will not have clarity of the legal grounds to make and defend decisions made on public interest test applications. The proposed details will mitigate against the risk of successful judicial reviews of these decisions, ie they may not prevent judicial reviews being raised, but they could reduce the probability of them being successful.

Proposed policy details for how to satisfy the criteria in regulations

Low pay

15 For describing '*low pay*' (clause 29(4)(a)) in the regulations, I propose using the hourly minimum wage and the median wage to provide lower and upper parameters on what occupations or industries the CE could reasonably consider to be low paid, but allows flexibility within the parameters.

16 I propose that '*low pay*' within a proposed occupation or industry is evidenced where:

16.1 A significant proportion of employees are receiving an hourly rate of pay that is equal or close to the hourly minimum wage; and

16.2 A very small proportion of employees are receiving an hourly rate of pay that is close to the hourly median wage or higher.

17 I propose that any description could allow the CE the discretion to determine what certain terms mean in practice, which could be developed through precedent over time. However, anchoring the proposals to the minimum and median wage provides significant direction and focus for the CE's decision making to help achieve consistency.

18 The intent of these parameters is to capture occupations that predominantly have a distribution of wages between the statutory minimum wage (currently

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$21.20) and the median wage (currently $27.76)[1], with most of that distribution close to the minimum wage. I considered the minimum wage to be a useful reference point as it is a statutory wage floor for all paid work performed by adults. It is also desirable to provide avenues to lift the wages of employees that may not have benefited from increases to the minimum wage, but still experience relatively low wages. These are wage rates that lie between the minimum and median wage, which FPAs could assist in increasing.

Little bargaining power

19 I consider that '*little bargaining power*' is intended to capture situations where there is a significant imbalance of power between employers and employees – especially situations where employees may not be able to bargain collectively for better terms. For this reason, and for the sake of simplicity, I consider '*little bargaining power*' is best defined from the perspective of union density and collective employment agreement coverage.

20 For describing '*little bargaining power*' (clause 29(4)(b)) in the regulations, I propose using a description that captures situations where employees within a proposed covered industry or occupation experience difficulty in being able to collectively bargain for employment terms and conditions. This may be evidenced by one or more of the following:

20.1 Low union representation or coverage; or

20.2 Low collective employment agreement coverage; or

20.3 Examples of unsuccessful attempts to initiate collective bargaining.

21 Because union density and collective employment agreement coverage, especially in the private sector, is low across New Zealand, many workforces could likely be deemed as meeting the criteria for '*little bargaining power*'. The CE will need to carefully consider this on a case-by-case basis, including considering the historical changes in union density within an industry or occupation. In contrast, highly unionised workforces such as teachers and nurses would likely not meet this criterion.

Lack of pay progression

22 For describing '*lack of pay progression*' (clause 29(4)(c)) in the regulations, I propose using a description that captures situations where a significant number of employees within a proposed covered industry or occupation are experiencing no, or minimal, increases in wages over time, despite attainment of job-related training, skills, or experience.

[1] The median wage is used to determine whether a migrant meets the wage threshold for the Accredited Employer Work Visa and is currently specified as $27.76 per hour reported by Statistics New Zealand. This is a useful proxy for the kind of work that may not be considered in the public interest to initiate an FPA without the representation test. This leaves the public interest test focused on occupations or industries which may not be able to garner support from 1000 employees and predominantly pay between $21.20 and $27.76 per hour currently.

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23 I propose that '*lack of pay progression'* is evidenced where there is a low difference in pay between recently hired employees and employees who have been in the same role or occupation for a relatively long time. This accounts for limitations in the available data for identifying pay progression issues and is the only way that this criterion can be realistically measured.

Long or unsocial hours, or contractual uncertainty, that is not adequately compensated

24 For describing clause 29(4)(d)[2] in the regulations, I intend for the description to address inappropriate transfers of business risk from employers to employees without this transfer being compensated for. This includes situations where employees work long or unsocial hours, or split shifts to manage peaks in demand, or experience ongoing contractual uncertainty that is not adequately compensated for.

25 I propose that the description should capture situations where a significant number of employees within an industry or occupation proposed for coverage are experiencing one or more of the below without it being reflected in the rate of pay or compensation:

25.1 Working more than 40 hours in a week and the majority of hours or days worked are outside of standard business hours or days; or

25.2 Receiving variable levels of income from work on a weekly or fortnightly basis; or

25.3 High use of casual or temporary employment contracts.

26 To address the long or unsocial hours component of the criterion, I propose that the description captures situations where employees work more than 40 hours a week and that the majority of those hours worked are outside of standard business hours or days (ie 9am to 5pm Monday to Friday). While this criterion may disproportionately capture certain industries such as the restaurant industry, it is only intended to capture the most severe situations since it is targeted at employees working the equivalent of full-time hours and where most of those hours fall at unsocial times.

27 To capture income insecurity (which often is the result of short-term seasonal work or working on an intermittent or irregular basis), I propose that the description should capture situations where employees receive variable income on a weekly or fortnightly basis from work. This could also be reflected through variable hours worked; however, there is only data available at a sufficiently granular level to capture variability in earnings.

[2] Clause 29(4)(d) relates to where employees are "*not adequately paid, taking into account factors such as:*
- *working long or unsocial hours (for example, working weekends, night shifts, or split shifts)*
- *contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis*."

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28 To capture the contractual uncertainty component of the criterion, I propose the description should capture where there is high use of casual or temporary employment agreements. These types of agreements transfer business risk to employees since they do not provide for stable long-term employment, therefore some compensation should be provided to employees to reflect this.

Proposed details of the types of evidence that can be used to support an application

29 Clause 29(5) of the Bill lists six types of evidence that a union may use in support of an FPA application that relies on the public interest test criteria. These are (emphasis added):

29.1 a high proportion of migrant employees;

29.2 *systemic exploitation of migrant workers* who are or would be covered employees;

29.3 most employees are employed on a temporary basis;

29.4 *systemic failure to comply with minimum employment standards*;

29.5 high proportion of small-to-medium-sized employers; and

29.6 evidence of *systemic health and safety issues*.

30 I have assessed these terms for describing the types of evidence that a union can use to support a FPA application through the public interest test and have determined that three of them require further details in the regulations.[3] These are *'systemic exploitation of migrant workers'*, *'systemic failure to comply with minimum standards'* and *'systemic health and safety issues'.*

31 To reduce ambiguity for the CE and potential applicants, I intend that further details on the above key pieces of evidence be specified in regulations. I propose that the regulations will capture the intent of indicative descriptions listed in **Annex 1**. As well as providing greater clarity for what these types of evidence entail, these details will also mitigate the risk of parties being able to successfully challenge how the CE assesses the evidence via judicial review.

32 I propose that the intent of the description for '*systemic exploitation of migrant workers*' leverages off the minimum employment standards regime and employer breaches of the Immigration Act 2009 in relation to the employment of migrant workers. Doing this captures both the immigration and employment aspects in relation to how harmful practices associated with exploiting migrant workers could be evidenced.

[3] Matters such as the proportion of workers who are 'migrant workers' or are 'employed on a temporary basis' will be reasonably easy to measure based on visa type or contract type (eg temporary or casual contract). 'Small-to-medium-sized employer' is already defined in clause 29(7) of the Bill.

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33 For '*systemic health and safety issues'*, I propose that the intent of the description be based around existing reporting regime and mechanisms associated with the Health and Safety at Work Act 2015 (including actions taken by WorkSafe against employers) and work-related ACC injuries. Doing this can capture evidence of incidents where harm could have happened (notifiable incidents), where it did (through ACC data) and where employers have shown to be remiss in some fashion (formal actions).

34 For '*systemic failure to comply with minimum employment standards*', I propose that the intent of the description leverages off the definition for minimum employment standards from section 5 of the Employment Relations Act 2000 (ER Act). This definition sets the scope for the types of breaches that the CE can assess, which goes further than MEPs to include matters such as failing to provide rest and meal break entitlements, failure to provide an employment agreement and unlawful discrimination under the Equal Pay Act 1972.

Alternative approaches considered for the public interest test criteria

35 I considered the possibility of setting numeric thresholds in the criteria (eg setting a numeric value for '*low pay*'), but discounted this since the risks outweighed the benefits. Setting hard numeric thresholds could reduce CE discretion but has several issues which inadvertently increases risk of successful judicial review. MBIE is limited to the extent it can accurately demarcate employee coverage in the data, which is an essential prerequisite for being able to perform calculations on the datasets without being challenged.

36 I did not consider removing the public interest test to be a feasible option. While removing it significantly reduces judicial review opportunities, it could prevent occupations that are experiencing poor labour marker outcomes and cannot meet the representation test from initiating an FPA.

Delegated authority for Tranche 2 regulations

37 Further regulations are needed to complete the set of minimum regulations required for the FPA system. These regulations are required around the time that bargaining for the first FPA commences. These are:

37.1 Content and form requirements for FPA terms, and

37.2 New forms required for the FPA system which fall under the purview of the ER Act (ie Employment Relations Authority Regulations 2000 and Employment Court Regulations 2000).

38 There will be a significant amount of technical policy work required for these regulations, in particular, the regulation specifying the content and form of FPAs. To ensure that this work can be completed by early 2023, in time for when FPA bargaining commences, I seek delegated authority to approve the policy work for the two regulations.

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39 I consider this an appropriate use of delegated authority since it is limited to implementing policy that is already prescribed in the Bill.

Content and form requirements for FPA terms

40 The Bill includes regulation making powers in clauses 114(5), 115(3) and 118(c) specifying that certain FPA terms must be in a prescribed format (in accordance with the regulations). This implements the policy intent of Part 6 of the Bill, which specifies the terms that must be included in an FPA and the terms which must be discussed by bargaining parties but do not need to be in a finalised FPA. This includes the new FPA MEPs that will be enforced by the Labour Inspectorate under the ER Act.

41 This regulation will specify the format of the following FPA terms that the Bill requires to be in a prescribed form:

41.1 **Dates that the agreement comes into force and expires -** this is required to show how long the agreement applies.

41.2 **Coverage -** this is required to describe the scope of the agreement in terms of occupation or industry and occupation(s) and classes of employees.

41.3 **Normal hours of work for each class of employees covered by the agreement -** this is required to show when overtime and penalty rates do not apply.

41.4 **Minimum base wage rates and when the rates apply -** this should model the wording of the Minimum Wage Order (which is empowered by sections 4, 4A and 4B of the Minimum Wage Act 1983).

41.5 **Rates of payment for any overtime worked and when they apply -** this will act as a new MEP for covered workers and will set out how overtime rates will apply outside of normal hours (eg as set rates or a percentage on top of the standard wage rate).

41.6 **Penalty rates and when they apply -** this will act as a new MEP for covered workers and will set out how penalty rate will apply outside of normal hours.

41.7 **The specified amount, or calculation, that can be applied to adjust the minimum base wage rates, overtime rates, and penalty rates -** this will set out the method by which the rates can be adjusted (eg as an annual calculation).

41.8 **Leave entitlement provisions which are direct increases to the minimum entitlements provided under the Holidays Act 2003, including payment for any increases -** this will set out how to specify any agreed increases to leave entitlements specified in Part 2 of the Holidays Act.

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41.9 **Training and development arrangements -** this provides an opportunity for bargaining parties to outline any training and development opportunities that covered workers will receive (for example, this may be a simple free-text box in the form for bargaining parties to fill out).

41.10 **Governance arrangements -** this provides an opportunity for bargaining parties to outline roles and responsibilities to administer and honour the agreement (for example, this may be a simple free-text box in the form for bargaining parties to fill out).

41.11 **The process for each bargaining side to engage with the other bargaining side if one requests to bargain for a proposed variation or if bargaining to vary the agreement** - this provides an opportunity for bargaining parties to outline how they will manage and cooperate with a request by one side to vary the FPA (for example, this may be a simple free-text box in the form for bargaining parties to fill out).

42 The above terms, which must use the prescribed form, consist of all the 'mandatory to include' FPA terms. As part of the suite of changes to the Bill, Cabinet agreed to move the '*training and development arrangements*' and '*leave entitlements*' topics from the 'mandatory to discuss' terms to the 'mandatory to include' terms [CAB-22-MIN-0291 refers]. This means there needs to be an additional prescribed format for *'training and development arrangements'*. Although this term does not have a specified formulation, it needs to be in a prescribed form so that the CE knows that bargaining parties have actively agreed that the term satisfies the requirement to include a term on that topic.

FPA terms that act as MEPs

43 A subset of the terms specified in paragraph 41 (41.4 to 44.8) will act as MEPs for covered workers which will require a specific formulation.[4] A MEP in an FPA may be higher than what is provided for in other legislation but cannot be lower. The format for these terms should model the relevant provisions from existing statute, such as Minimum Wage Act 1983 and the Holidays Act 2003. This is so they can be enforced by the Labour Inspectorate in the way that MEPs in the ER Act are currently enforced. In addition, the format must also allow for permitted differentiation specified in the Bill.

Forms required in the ER Act regulations for FPA system

44 Many new forms must be created to support the FPA system. Most of these forms can be approved by the CE under the Bill. However, some relate to the ability for parties to file with employment institutions that are governed under

[4] The current statutory MEPs are defined as follows in the ER Act: a. Minimum entitlements and payment for those under the Holidays Act 2003, and b. Minimum entitlements under the Minimum Wage Act 1983, and c. Provisions of the Wages Protection Act 1983.

the ER Act: the Employment Relations Authority (the Authority) and the Employment Court. Both institutions are governed by the ER Act, but parties will need to use them for FPA related purposes. The required forms need to be established through an amendment to the Employment Relations Authority Regulations and the Employment Court Regulations.

45 I seek delegated authority to approve the design of the forms required for the FPA system which fall within the purview of regulations enabled under the ER Act. This will consist of the following forms:

45.1 **Application to Authority for compliance assessment** (Employment Relations Authority Regulations) - When bargaining is complete, each bargaining side must jointly submit the proposed agreement to the Authority for a compliance assessment to check that the proposed FPA complies with the Bill and other Acts. The Authority will also check for coverage overlap and for the better-off overall test.

45.2 **Application to Authority to make binding determination to fix terms of FPA** (Employment Relations Authority Regulations) - If bargaining sides cannot agree to one or more terms, or ratification of a proposed FPA fails twice, a bargaining side can apply to the Authority to fix the terms of the FPA.

45.3 **Application to the Authority to fix terms of FPA under backstop option** (Employment Relations Authority Regulations) - If no organisation from the non-initiating bargaining side is willing or able to step into bargaining after three months, and the voluntary default has not stepped in, then the initiating side can apply to the Authority to fix the terms of the FPA.

45.4 **Application to the Employment Court to issue a stay of proceedings** (Employment Court Regulations) - Parties who successfully attain a judicial review of a decision by the Authority to fix terms, may apply to the Employment Court for a stay of proceedings to halt the FPA from being put into secondary legislation. This requires amending the current form (Form 14) in the regulations relating to the stay of proceedings and also a corresponding change to the substantive provisions of the regulations.

46 **Annex 2** sets out the type of information that each of the above forms will request.

Financial Implications

47 The FPA system has been funded through Budget 21 and 22 to support the implementation of up to six FPAs per year.

48 The proposals in this paper do not have any additional financial implications.

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Legislative Implications

49 Legislation is required to implement the FPA system, which will also provide for the ability to make secondary legislation. The FPA Bill is currently being considered by the Education and Workforce Select Committee, which is due to report back to Parliament on 5 October 2022.

50 The substantive provisions of the Bill will come into force one month after the date of Royal Assent. The Bill is a category 2 on the 2022 Legislation Programme (to be passed this year). If the Bill passes by the end of October or early November 2022 as I am currently expecting, commencement could occur in December 2022.

51 The FPA Bill, including the regulations proposed in this paper, will be binding on the Crown.

Sequencing of FPA regulations

52 For the necessary regulations to come into force at the same time as the Act, I propose that the essential FPA regulations are implemented in tranches. The first tranche of regulations must be enacted before the commencement date for the Bill's substantive provisions, as those regulations will support the initiation of FPAs. In particular, the details in regulations on how to satisfy the public interest test criteria need to be implemented before the substantive provisions take effect, so that the CE can immediately accept and assess applications from unions. MBIE has recommended an amendment to set these commencement stages in the Bill via technical changes in the Departmental Report to the Select Committee.

53 The second tranche consists of the minimum additional regulations required for the system to support the bargaining, finalisation, and determination of FPAs. These regulations are required around the time that bargaining for the first FPA begins, which could be around four months after the FPA system commences.

54 **Annex 3** sets out the specific FPA regulations that comprise the Tranche 1 and 2 packages. Also specified in Annex 3 are the three additional regulations to be implemented in Tranche 1 alongside the public interest test details which Cabinet has already agreed to.

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57 The empowering provisions for the regulations will need to commence on the day after Royal Assent. This will enable the regulations to be approved by Cabinet between the Governor General granting Royal Assent and commencement of the rest of the Act. Confidential advice to Government

Impact Analysis

Regulatory Impact Statement

58 The Treasury's Regulatory Impact Analysis Team has determined that the details in regulations for satisfying the public interest test criteria are exempt from providing a Regulatory Impact Statement (RIS) on the grounds that they have no or only minor impacts on businesses, individuals and not-for-profit entities, in the context of the broader set of policy changes supported by the previous RIS: ("Impact Statement: Fair Pay Agreements"; CAB-21-MIN-0126 refers).

Climate Implications of Policy Assessment

59 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Te Tiriti o Waitangi

60 While the FPA system will allow parties to bargain for new minimum standards, the Crown cannot delegate its responsibilities under the Treaty of Waitangi.

61 Māori, and especially wāhine Māori, are overrepresented in jobs where liveable pay rates, job security, health and safety and upskilling are lacking. Labour market outcomes for Māori may be improved if FPAs are settled in these sectors with poorer working conditions.

62 Both employers and employees will be represented in FPA bargaining by bargaining parties, collectively known as a bargaining side (eg when several unions are negotiating together on behalf of employees). The Bill does not mandate Māori representation in bargaining, and traditional bargaining practices may not support inclusive partnership, which risks locking out Māori. The mitigation is the Bill’s requirement for each bargaining party to use their best endeavours to ensure that Māori are effectively represented in bargaining, and to consider Māori interests and views.

63 Although there was engagement with the CTU Rūnanga, the FPA system is modelled on sector-level bargaining frameworks, and was not designed with tikanga Māori in mind.

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64 There is work underway to ensure implementation of the FPA system is designed and delivered in consultation with Māori groups. This is particularly important given the obligations on bargaining parties to ensure Māori are represented effectively in bargaining. The implementation plan is guided by Treaty principles of partnership, active participation, sovereignty, equity and options.

Population Implications

65 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, Pacific peoples, 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.

66 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.

67 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 Authority after the backstop is triggered.

68 The public interest test is intended to be available for occupations or industries which are experiencing systemic labour market issues and may not be able to meet the representation test. This may be because there are too few employees to meet the 1000 threshold, or because of a severe lack of coordination that prevents them from organising to reach the threshold. Workforces that operate in remote areas, have few employees, or where employees have little contact with one another, may especially benefit from the public interest test.

Human Rights

69 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.[5]

70 When seeking Cabinet's agreement to the details of the FPA system in April 2021, I noted that several elements of the FPA system engage domestic human rights law and international human rights obligations [CAB-21-SUB-

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

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0126 refers]. The key rights engaged relate to the right to strike[6] and to the principle of voluntary bargaining.[7]

71 At the time, I expressed my view that any limitations are justified given the importance of improving working terms and conditions and labour market outcomes more generally. The only other viable option for achieving this core objective would be for the state to directly mandate employment terms and conditions, which would provide for less input and engagement from employers and employees.

72 In addition, the FPA system was recently considered by the International Labour Organisation's (ILO) Committee on the Application of Standards (CAS). The CAS did not find the FPA system, or the backstop specifically, to be inconsistent with international labour conventions.

73 Full judicial review rights are available for all decisions made by the CE or the Authority in the process of initiating, bargaining and finalising FPAs. One of the forms in the ER Act regulations that I will approve using my delegated authority will enable parties to file with the Employment Court for a stay of proceedings against the CE finalising an FPA in secondary legislation. This form falls under the purview of regulations in ER Act and supports the exercise of judicial review rights in the FPA system.

Consultation

74 The following agencies were consulted on this paper: the Department for Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade, the Treasury, Te Puni Kōkiri, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Women, Te Kawa Mataaho Public Service Commission, Department of Corrections, Ministry of Social Development, Ministry of Education, Inland Revenue, Ministry of Transport, New Zealand Police, Oranga Tamariki, Ministry for the Environment, Office of the Privacy Commissioner, the Office for Disability Issues, New Zealand Defence Force, New Zealand Transport Authority and Ministry of Health.

Communications

75 Communications to support the legislative steps are being led by the Minister for Workplace Relations and Safety with support from MBIE. Proactive plans are being developed to communicate the system to stakeholders who will likely be participating. Key features include key messages, Q&A, web content including system tools and guidance, stakeholder engagement and meetings with key sector leaders and social media presence.

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[6] This stems from the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87). New Zealand has not ratified ILO Convention No. 87. However, because it is one of the ILO's fundamental conventions, we are expected to abide by its principles as a member state of the ILO. The right to strike is also related to freedoms of association, expression and peaceful assembly, which are part of our domestic human rights law and international obligations.

[7] This stems from the ILO's Right to Organise and Collective Bargaining Convention (Convention No. 98), which New Zealand has ratified.

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76 The regulations, including details on how to satisfy the public interest criteria, will be published on the Gazette website once confirmed and communicated by MBIE.

Proactive Release

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

Recommendations

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

1 **note** on 28 March 2022, Cabinet agreed that the Government introduce the draft FPA Bill to Parliament [CAB-22-MIN-0095 refers], which referred the Bill to the Education and Workforce Committee following its first reading on 5 April 2022

Explanations of public interest test criteria for regulations

2 **note** that regulations specifying the public interest test criteria details are necessary for day one of the FPA system to support decision making by the Chief Executive of MBIE and to reduce the risk of successful judicial review

3 **agree** to implement the intent of the following policy proposals on how to satisfy the public interest test criteria (set in clause 29(4)) into the regulations, subject to Parliamentary Counsel Office drafting to give effect to the policy intent;

3.1 **'low pay'** (clause 29(4)(a)) being where within a proposed covered occupation or industry:

3.1.1 a significant proportion of employees are receiving an hourly rate of pay that is equal or close to the hourly minimum wage; and

3.1.2 a very small proportion of employees are receiving an hourly rate of pay that is close to the hourly median wage or higher

3.2 **'little bargaining power'** (clause 29(4)(b)) being where employees within a proposed covered industry or occupation experience difficulties in being able to bargain collectively for employment terms and conditions, evidenced by:

3.2.1 low union representation or coverage; or

3.2.2 low collective employment agreement coverage; or

3.2.3 examples of unsuccessful attempts to initiate collective; or bargaining

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3.3 **'lack of pay progression'** (clause 29(4)(c)) being where a significant number of employees within a proposed covered industry or occupation experience no, or minimal, increases in wages over time, despite attainment of job-related training, skills, or experience, which is evidenced by low difference in pay between recently hired employees and employees who have been in the same role or occupation for a relatively long time

3.4 **'long or unsocial hours, or contractual uncertainty, that is not adequately compensated'** (clause 29(4)(d)) being where the following is not reflected in the rate of pay or compensation for a significant number of employees in a proposed covered industry or occupation:

3.4.1 working more than 40 hours in a week and the majority of hours or days worked are outside of standard business hours or days; or

3.4.2 receiving variable levels of income from work on a weekly or fortnightly basis; or

3.4.3 high use of casual or temporary employment contracts

4 **agree** to implement the intent of the policy proposals listed in **Annex 1** into the regulations for the types of evidence that a union can submit in support for an FPA application through the public interest test (set in clause 29(5)), subject to Parliamentary Counsel Office drafting to give effect to the policy intent

Delegated decision-making authority for the content and form of FPAs

5 **note** that clauses 114(5), 115(3) and 118(c) of the Bill specify the FPA terms which are required to be set out in a prescribed form as required in regulations

6 **note** that extensive policy work is required for this regulation and delegating authority to the Minister for Workplace Relations and Safety can ensure the Bill's implementation timeframes are met

7 **authorise** the Minister for Workplace Relations and Safety to make decisions consistent with the FPA Bill on specifying the prescribed form in regulations for the following FPA terms:

7.1 the date on which the agreement comes into force and expires

7.2 the coverage of the agreement

7.3 the normal hours of work for each class of employees covered by the agreement

7.4 minimum base wage rates, and when the rates apply

7.5 rates of payment for any overtime worked, and when the rates apply

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7.6 penalty rates, and when the rates apply

7.7 the specified amount, or calculation, that can be applied to adjust the minimum base wage rates, overtime rates, and penalty rates

7.8 training and development requirements

7.9 governance arrangements

7.10 the process for each bargaining side to engage with the other bargaining side if a bargaining side requests agreement to bargain for a proposed variation or if bargaining to vary the agreement

7.11 leave entitlement provisions which are direct increases to the minimum entitlements provided under the Holidays Act 2003 (including payment for any increases)

Forms required in the ER Act regulations for FPA system

8 **note** there are several forms required to allow parties to file with the Employment Relations Authority (eg to seek a determination on FPA terms) and the Employment Court that must be established through an amendment to regulations empowered under the Employment Relations Act 2000 (the Employment Relations Authority Regulations 2000 and the Employment Court Regulations 2000)

9 **authorise** the Minister for Workplace Relations and Safety to make decisions consistent with the FPA Bill to approve the design of the forms required for the FPA system which fall within the purview of the regulations enabled under the Employment Relations Act 2000, including making changes to the substantive provisions of the regulations to give effect to the forms

Legislative process

10 **note** that the essential FPA regulations will be progressed in two tranches to meet the implementation timeframes for the Bill, with Tranche 1 regulations to be made following Royal Assent

11 **note** that the Tranche 1 regulations consist of the public interest test criteria details and three additional regulations which have already been approved by Cabinet [CAB-22-MIN-0291 and CAB-22-MIN-0080.02 refer]

12 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to Parliamentary Counsel Office to give effect to the above recommendations

13 **note** that the Parliamentary Counsel Office will decide how to draft the above proposals and will make any other amendments necessary to give effect to the policy intent

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14 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the proposals in these recommendations, on any issues that arise during the drafting process.

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety

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Annex 1: Proposed explanations of factors which could be used as evidence to meet the public interest test criteria

Term from criteria	Proposed policy details for the regulations
Clause 29(5)(b) – '**Systemic exploitation of migrant workers'**	This is evidenced where it can be shown that there has been a high prevalence of serious and sustained breaches of minimum employment standards and immigration requirements for migrant employees in an occupation or industry. This may be evidenced by one or more of the following: • Breaches of the Minimum Wage Act 1983 and other employment standards. • Non-payment or underpayment of wages for a sustained period or unlawful deductions from wages or charging of premiums to get or keep a job. • Evidence or claims of coercive or deceptive practices or restrictions placed on employee freedoms (eg debt bondage, passports being withheld). • Breaches of the Immigration Act (including infringement offences, convictions, etc). • Evidence or prevalence of complaints of exploitation by employers within a particular sector. • Failure of employers to meet required accreditation standards. • Failure of employers to meet other relevant immigration obligations as required by immigration instructions, including complying with any employment conditions or pastoral care-related requirements of a person's visa, or any obligations under other relevant legislation. • The number of employers placed on the stand-down list.
Clause 29(5)(d) '**Systemic failure to comply with minimum employment standards'**	This is evidenced where it can be shown that there has been a high prevalence of serious and sustained breaches of employment standards, as defined in section 5 of the Employment Relations Act 2000, for employees in an occupation or industry. This includes breaches of the Minimum Wage Act 1983 and failure to provide minimum entitlements prescribed in the Holidays Act 2003.
Clause 29(5)(f) '**Systemic health and safety issues'**	This is evidenced where it can be shown that there is an unduly high risk to the health and safety of workers in an industry or occupation by past precedent. This may be evidenced by one or more of the following: • The number of notifiable incidents annually, as defined in the Health and Safety at Work Act 2015. • The number of formal actions undertaken against employers annually by WorkSafe New Zealand and other designated agencies under the Health and Safety at Work Act 2015. • The number of work-related injuries (acute and/or gradual process) reported in Accident Compensation Corporation data annually.

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Annex 2: Forms required in regulations under the ER Act for FPA purposes

Form	Details to be included in form

Application to Authority for compliance assessment (Employment Relations Authority Regulations)	• Name of bargaining parties/sides.
	• Address for service for each bargaining side.
	• Statement of matter for consideration.
	• Evidence that both bargaining sides have agreed to the terms of the proposed agreement and that the wording of the terms in the proposed agreement is in the form prescribed in regulations.
	• Evidence that agreement is signed by the bargaining side lead advocate of each bargaining side.
	• Stage of process applicant is seeking compliance assessment
	  o Initial FPA
	  o Renewal or replacement of FPA
	  o Variation of FPA.

Application to Authority to make binding determination to fix terms of FPA (Employment Relations Authority Regulations)	• Name of bargaining parties/sides. • Address for service for each bargaining sides. • Evidence that ratification has failed for second time or parties are unable to agree to terms and have met the threshold for fixing the terms of an FPA.

Application to the Authority to fix terms of FPA under backstop option (Employment Relations Authority Regulations)	• Name of bargaining parties/sides
	• Address for service for each bargaining side
	• Evidence that:
	  o Bargaining under FPA bill was initiated
	  o CE approved initiation of bargaining
	  o No bargaining party exists on one side
	  o Voluntary default bargaining party elected not to step in

Application to the Employment Court to issue a stay of proceedings (Employment Court Regulations)	• Amend the current form (Form 14) in the regulations relating to the stay of proceedings to also reference clause 11 of Schedule 3 of the Bill.

Annex 3: List of Tranche 1 and 2 FPA regulations

Tranche 1 FPA regulations (minimum for Day One of FPA system)	**Timeframe**	**Decision sought**
Details for the public interest test criteria	Expected around early December 2022 Confidential advice to Government	Policy decisions sought for the public interest test
Who the voluntary default bargaining parties are [*CAB-22-MIN-0080.02, paragraphs 9 and 10 refer]*		
Evidence required by MBIE to satisfy the representation test *[CAB-22-MIN- 0291 refers]*		
Requirement for parties to define coverage in a specific way unless it is not feasible *[CAB-22-MIN-0291 refers]*		
Tranche 2 FPA regulations (minimum for the FPA system to function and support bargaining)	**Timeframe**	**Decision sought**
Content and form requirements for FPA terms	Expected to be implemented by late March 2023 and to commence in April 2023	Delegated authority sought to approve policy and allow officials to proceed to drafting
Forms for bargaining parties to file with Employment Relations Authority for determination (including the backstop) and compliance Form for applying to the Employment Court to issue a stay of proceedings to the CE		

Tranche 1 regulations accompanying the additional public interest test criteria details

1. Who the voluntary default bargaining parties are – Decision confirmed by Cabinet on 21 March 2022 when it approved the policy for the backstop determination process [CAB-22-MIN-0080.02, paragraphs 9 and 10 refer]. If no party from the non-initiating side steps into bargaining, BusinessNZ or the New Zealand Council of Trade Unions will have one month to decide to step in before the imitating side can apply to the authority for determination.

2. Evidence required by MBIE to satisfy the representation test – Decision confirmed by Cabinet on 1 August 2022 [CAB-22-MIN-0291 refers]. Regulations will prescribe that MBIE may request the contact details of listed employees or employers (as required), to verify the evidence provided by a union or employer association when initiating an FPA, or when an employer association initiates a proposed renewal or replacement.

3. Requirement for parties to define coverage according in a specific way unless it is not feasible – Decision confirmed by Cabinet on 1 August 2022 [CAB-22-MIN-0291 refers]. This will require parties to define coverage of an FPA in accordance with regulations (if any). It was also agreed that these regulations would specify that FPA coverage must align with the Australian and New Zealand Standard Industrial Classification (ANZSIC) system or Australian and New Zealand Standard Occupational Classification (ANZSCO) system unless this is not possible.

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