MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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COVERSHEET

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Information redacted **YES**

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- Confidential advice to government
- Maintain legal professional privilege

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Development Committee

Fair Pay Agreements Bill: Policy changes for Departmental Report

Proposal

1 This paper seeks agreement to policy changes to the Fair Pay Agreements Bill (the Bill) for issues that have been identified by officials and raised by submitters during public consultation since the Bill was introduced on 29 March 2022.

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 Fair Pay Agreement (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 amend several of Cabinet's previous policy decisions made in April 2021 and in March 2022. These changes have arisen following further policy work undertaken by officials and an analysis of issues raised by submitters during public consultation and oral hearings. The proposed changes in this paper will ensure the Bill is more workable.

4 The Bill received just under 1,800 submissions. The majority supported the Bill, reflective of the number of individual submissions linked to E tū. The Education and Workforce Select Committee (the Committee) also heard approximately 29 hours of oral hearings of evidence from submitters.

5 Submitters who supported the Bill noted that it would improve labour market outcomes and help address current systemic failures. Many individual employees saw it was a way to achieve minimum standards, improve working conditions, improve inequality, and ensure better recognition for work.

6 The submitters who did not support the Bill noted reasons such as the compulsory nature of FPAs, the complexity of the processes set out in the Bill, perceived litigation risk, lack of representation of employers and potential impacts on business costs, productivity, and inflation. Many of these submitters also did not see the need for the Bill.

7 The proposals in this paper address issues with the Bill identified by my officials and some of the issues and concerns raised by submitters on the Bill.

Specifically, this paper seeks agreement to the following policy changes to be reflected in the Bill:

7.1 Limiting judicial review on bargaining parties' decisions in the FPA system

7.2 Clarifying how an FPA should apply when it only covers a portion of the employee's work

7.3 Defining coverage of an FPA via regulations

7.4 Expanding the Bill's purpose to include the backstop process and broader policy intent

7.5 Requiring 'low pay' to be demonstrated for all successful public interest test applications

7.6 A two-stage approach for providing personal information for an FPA initiation, renewal, or replacement via the representation test

7.7 Setting a timeframe for the Ministry of Business Innovation and Employment's (MBIE's) assessment of applications

7.8 Including terms for 'arrangements relating to training and development' and 'leave entitlements' as mandatory content for each FPA

7.9 Removing the requirement to specify whether superannuation is included in stated FPA base wage rates from mandatory content for each FPA

7.10 Clarifying the obligation for an initiating union to notify other unions and employers

7.11 Expanding the obligation to update to include local authorities, and clarifying that the obligation only applies if the funder is known

7.12 Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details

7.13 Adding new alternative criteria to the threshold for fixing the term of an FPA

7.14 Amending the requirement for Employment Relations Authority (the Authority) to consider certain matters when it recommends or fixes terms

7.15 Including a regulation making power to set a fees framework for fees that will be paid to experts who provide evidence sought by the Authority.

8 Subject to Cabinet's agreement of these amendments, I seek approval to include the proposed policy changes as recommendations to amend the Bill in

MBIE's Departmental Report to the Committee, due for submission on 8 August 2022. The Committee will report back to Parliament on the Bill by 5 October 2022.

Background

9 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].

10 On 28 March 2022, Cabinet agreed that the Government introduce the draft 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.

11 On 6 April 2022, the Committee called for public submissions on the Bill and associated backstop parliamentary paper, with submissions closing on 19 May 2022. The Committee's oral hearings of evidence from submitters concluded on 29 June 2022.

Limiting judicial review on bargaining parties' decisions in the FPA system

12 Many decisions of bargaining parties in the FPA system are likely to be judicially reviewable because they involve a 'statutory power of decision' (decision).

13 Judicial review safeguards a person's right to access justice if they have been adversely affected by a decision or consider it was made improperly. Any option that limits a person's right to bring judicial review proceedings will engage section 27(2) of the New Zealand Bill of Rights, which must be demonstrably justified in a free and democratic society.

14 I propose to limit the grounds for judicial review of bargaining parties' decisions to only situations where:

14.1 all alternative avenues have firstly been 'exhausted',[1] namely, dispute resolution and a compliance order have been sought, if available, to resolve a breach of obligation; and

14.2 the complaint is that the decision-maker was not authorised under the FPA legislation to make the decision in question or did not act in good faith in making the decision.

15 The Bill contains a range of dispute resolution mechanisms, such as mediation and compliance orders. Those tools are a faster, more direct and more accessible mechanism for parties to resolve disputes. The above proposal incentivises parties to use those available mechanisms first – for example, it requires a party to show the court that they have applied for mediation when applying for judicial review. However, this is balanced with

[1] PCO would decide how to draft the term 'exhaust' to give effect to the policy intent.

still retaining rights to judicial review where those mechanisms have not corrected alleged breaches of obligations.

16 A bargaining party or side in the FPA system who exercises a statutory power of decision becomes a party to any resulting judicial review proceedings. Entities may therefore be disincentivised or otherwise unwilling to become a bargaining party due to the perception that it might expose them to the associated costs, legal liabilities, time, and resourcing implications. This could undermine the policy intention that an initiated FPA should result in a bargained outcome where possible. If this risk is realised, it may result in many or most FPAs being referred to the Authority to fix the terms, which would have a major impact on the workability of the system.

17 The workability of the system may also be affected if judicial review of bargaining parties' decisions is used tactically to frustrate or delay the bargaining process. Both social partners acknowledge the potentially significant amount and impact of litigation on the FPA system. This may stall the process for improving employees' terms and conditions, introduces uncertainty for covered employees and employers, and impacts on the finality of the proposed FPA.

18 This proposal reduces those risks, enabling improved outcomes for covered employees by reducing the number and impact of judicial review claims while still retaining judicial review rights.

19 maintain legal professional privilege

20 I believe the proposed limitations on judicial review of bargaining parties' decisions to be demonstrably justified under the Bill of Rights.

Clarifying how an FPA should apply when it only covers a portion of the employee's work

21 Submitters raised concerns about how FPAs would apply to an employment relationship where an FPA only covered a portion of the employee's work, or where multiple FPAs applied to an employee's work. The Bill currently is not clear about what happens in these situations.

22 Due to the complexity that could be caused where multiple FPAs apply to a person's work, I consider that the Bill should be clear that only one FPA can apply to an employment relationship at a time. In addition, any FPA that applies should apply to the entire employment relationship.

23 I propose that where at least 25 percent of an employee's work is covered by an FPA, that FPA must apply to the employment relationship. I consider that this strikes the right balance between ensuring employees receive the protections of an FPA where they do the work covered, with the practicalities of mitigating risks from FPAs applying regardless of how small the portion of work the employee is that is covered by an FPA.

24 I propose that if two or more FPAs each meet the 25 percent threshold, the FPA that covers the largest portion of the employee's work should prevail. This ensures the employee receives the terms of the FPA that reflects the largest portion of their work.

25 I propose that the assessment be required to take into account the work done within a reasonable period prior to the date of the assessment. What is reasonable will depend on the employee's particular circumstances.

26 An employer and an employee will need to assess whether and which FPA applies to the employee's work with this 25 percent threshold and the overall rule in mind: only one FPA applies at a time, and when it does, it applies to the whole employment relationship. Where the parties are unable to determine which FPA should apply, or where there is a dispute, there are provisions in the Bill currently that enable an employee or employer to apply to the Labour Inspectorate or to the Authority to get a determination about whether an employee is covered by an FPA. There will be no express limits on how often an employee or employer may apply to the Labour Inspectorate or the Authority to seek a determination about coverage. This is because placing such limitations may arbitrarily prevent an employee or employer from seeking a determination where the employee's work has changed and a fresh determination may be warranted.

27 As a necessary consequence of the above, the Bill will also need to be amended to ensure that the Labour Inspectorate and the Authority have the jurisdiction to determine whether an FPA, or which FPA, should apply to enable them to determine coverage based on the proposals in paragraphs 22-25 above.

Defining coverage of an FPA via regulations

28 At present, the Bill requires an initiating party to propose coverage, which must be sufficiently clear to ensure initiation tests can be assessed by the regulator, and so that potentially covered employers and employees can easily know they are within coverage. If the regulator approves the application for bargaining to be initiated, bargaining sides can alter coverage during the bargaining process.

29 Submitters on the Bill said the rules for defining coverage were too vague and unworkable. The regulator may also have difficulty assessing whether the relevant initiation test is satisfied (eg deciding what 10 percent of covered employees or employers amounts to) if coverage was defined in a way that did not reflect how labour market statistics were collected for occupations or industries.

30 I propose amending the Bill to state that coverage of an FPA must be articulated in accordance with regulations, if any.

31 I also propose that regulations be made that require parties to define coverage according to ANZSCO[2] codes for occupation-based FPAs and according to both ANZSCO and ANZSIC[3] codes for industry-based FPAs, unless there is a good reason not to. If the initiating party considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, then the initiating party must describe that occupation and industry with sufficient detail for MBIE to understand how the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry.

32 The use of ANZSCO would not prevent the bargaining parties from agreeing how to describe the tasks of the occupation when negotiating coverage for the FPA. Rather, the purpose is to ensure the bargaining parties are using commonly defined groups so that employees and employers can understand they are within coverage and so that the regulator can more easily assess the initiation tests.

33 I intend to implement several regulations by the time the Bill commences to support the initiation of FPAs. I will seek LEG and Cabinet's approval for the finalised regulations for articulating FPA coverage within the first tranche of regulations in the final quarter of 2022. This is so that they will be ready as soon as possible after the commencement of the FPA legislation.

34 I also consider that coverage of an FPA should not be able to be constructed in a manner that only includes one employer. In that instance, the FPA system could be used to avoid firm-level bargaining under the Employment Relations Act. Therefore, I propose that the Bill be amended to state that the Chief Executive (CE) of MBIE must reject an application to initiate bargaining for an FPA or reject a change in coverage during bargaining that only covers one employer.

Expanding the Bill's purpose to include the backstop process and broader policy intent

35 Under the delegated authority provided by Cabinet, I finalised the purpose statement of the Bill referred to select committee to be: "the purpose of this Act is to provide a framework for collective bargaining for fair pay agreements that specify industry-wide or occupation wide minimum employment terms".

36 I propose changing the Bill's purpose to the following to incorporate the backstop process and broader policy intent:

36.1 The purpose of this Act is to enable certain minimum employment terms for employees to be improved by providing –

[2] ANZSCO is the Australian and New Zealand Standard Classification of Occupations.
[3] ANZSIC is the Australian and New Zealand Standard Industrial Classification

a) a framework that enables bargaining for fair pay agreements that specify certain industry-wide and occupation-wide minimum employment terms; or

b) in certain circumstances, for the Authority to determine those minimum employment terms.

37 With the addition of the backstop, there is now another path for the creation of an FPA which may not involve collective bargaining. I consider that the proposal purpose statement above now reflects this new path where the current purpose in the Bill does not. This proposed purpose statement would still be subject to refinement with the Parliamentary Counsel Office's (PCO's) input, to be reflected in the final version of the Bill reported back to Parliament by the select committee.

38 There was a range of feedback from submissions on the Bill's purpose statement. Some submitters, particularly unions, wanted to see the purpose more accurately reflect the Bill's policy objective, including explicitly mentioning economic and labour outcomes, as well as certain groups over-represented in lower paying jobs, such as Māori, young people, and people with disabilities. Those submitters want to ensure that that policy intent can guide the courts in litigation.

39 After weighing Legislation Design and Advisory Committee's guidance with submitters' feedback to include more of the Bill's policy objective, I believe this new purpose statement strikes the right balance between improving the purpose to include the backstop process and a broader policy intent without over committing the Bill's ability to produce certain outcomes (as terms of an FPA are decided through bargaining parties).

Requiring 'low pay' to be demonstrated for all successful public interest test applications

40 Clause 29(4) of the Bill identifies that the public interest test can be applied to initiate an FPA if the employees within the coverage of the proposed FPA:

40.1 receive low pay for their work; or

40.2 have little bargaining power in their employment; or

40.3 have a lack of pay progression in their employment (for example, pay rates only increase to comply with minimum wage requirements); or

40.4 are not adequately paid, taking into account factors such as—

(i) working long or unsocial hours (for example, working weekends, night shifts, or split shifts):

(ii) contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis.

41 I propose that this criteria set is amended in the Bill so that the public interest test can only be applied if the employees within the coverage of the proposed FPA receive low pay for their work **plus one or more** of the other three criteria noted above. This is to ensure that high-paying workforces with other labour market issues cannot use the public interest test to initiate an FPA and instead must use the representation test.

42 The openness and subjectivity of the public interest test criteria was raised in written and oral submissions, particularly from employer associations. A key concern was that unions would be able to meet the public interest by simply being able to say that the industry they were applying for was a 'low paid industry'.

A two-stage approach for providing personal information for an FPA initiation, renewal, or replacement via the representation test

43 I want to ensure that the types of personal information that are required to demonstrate support for an initiation application are set out clearly and are only limited to what is necessary. To do this, I propose a two-stage approach to requiring this information with stage one requirements identified in the Bill and stage two requirements prescribed in regulations.

The two-stage approach to requiring personal information for when a union initiates for a proposed FPA, renewal or replacement via the representation test

44 For initiations applying through the representation test, I propose that personal information is required to show evidence that employees support the FPA at the threshold required in the Bill in the following two stages[4]:

44.1 **At stage one, defined in the Bill:**

44.1.1 An initiating union must provide the names of employees, their occupations, and names of the employers of those employees who support the application. The application would also be required to provide the date that the employee(s) provided their support for the initiation, which could be either individually or by group depending on how the support was gathered. This is to ensure the date is not more than 12 months from the date the union applied.

44.1.2 If the application is for an industry FPA, the regulations would also require the initiating union to state which industry the employee works in. For the 10 percent representation test, the initiating union would also be required to provide evidence of the total number of employees within proposed coverage (in addition to the list of employee names and occupations that support initiating the FPA).

[4] The Bill at cl 30(1)(g) provides the power for regulations to require the initiating union to provide further information as part of the initiation application.

44.2 **At stage two, prescribed in regulations:** MBIE may request the contact details of listed employees (as required), to verify the evidence provided by the union. For example, MBIE may decide to spot check 50 employees, and ask for the contact details from the union about those 50 named employees as part of verifying that those employees support the application to initiate an FPA.

Process for when an employer association initiates for a proposed renewal or replacement

45 Likewise, where an employer association initiates for a proposed renewal or replacement under the representation test, we propose the below:

45.1 **At stage one, defined in the Bill:**

45.1.1 The employer association must provide evidence of each supporting employer within proposed coverage, the date they supported the application, the total number of employees that employer has within coverage and their occupations.

45.1.2 If the application relates to an industry FPA, the application will also need to state which industry the supporting employer is in. For the 10 percent representation test, the employer association would also be required to provide evidence of the total number of employees within proposed coverage of the FPA.

45.2 **At stage two, prescribed in regulations:** MBIE may request the contact details of the supporting employers to verify the evidence provided by the initiating employer association.

Setting a timeframe for MBIE's assessment of applications

46 The Bill requires the CE of MBIE to assess an application for an FPA "as soon as practicable" after receiving an application (clause 32(1)). The Bill does not include a specific timeframe for the assessment to happen. Submitters on the Bill raised a concern that there was no maximum timeframe and suggested that one be included to provide more certainty for all parties.

47 I propose amending the Bill to introduce a maximum timeframe of 30 working days for the CE of MBIE to assess an application for an FPA, which can be extended to 45 working days at the discretion of the CE of MBIE. I propose that this provision comes into force six months after the main parts of the Act, to prevent putting undue pressure on the FPA system in its initial stages when parties are gaining experience with the new system.

48 I also intend to clarify that the timeframe applies once MBIE has received all the information it requires to assess the application, and that any public submission period is not included within the assessment timeframe.

Including terms for 'arrangements relating to training and development' and 'leave entitlements' as mandatory content for each FPA

49 The Bill specifies mandatory content for each fair pay agreement (clause 114) and topics bargaining sides must discuss (clause 115).

50 A significant number of submitters commented on the mandatory content required for FPAs. The majority of these were individual employees and employee associations/unions who requested additional 'mandatory content' be specified in the Bill. These provisions were seen as important issues for working people and often these are the crucial aspects of their employment that need addressing.

51 In particular, submitters wanted the following 'topics' added to the mandatory content, either shifting from 'topics to discuss' or completely new: health and safety; training and development; leave entitlements; objectives of the FPAs; redundancy; workload and work measurement systems; flexible work arrangements; and change management.

52 Taking into consideration submitters' views, I propose removing the following topics from the topics that bargaining sides must discuss category (clause 115) and instead making them mandatory content for each FPA (clause 114):

52.1 arrangements relating to training and development; and

52.2 leave entitlements.

53 Unlike the topics noted in clause 114 of the current Bill, the topic 'arrangements relating to training and development' will not be a minimum entitlement provision for the purposes of the Employment Relations Act 2000.

Removing the requirement to specify whether superannuation is included in stated FPA base wage rates from mandatory content for each FPA

54 The Bill includes mandatory content for each FPA of whether superannuation contributions are included in base wage rates (clause 114). This topic was not included in the list recommended by the Fair Pay Agreements Working Group, but was subsequently added in 2019.

55 I propose removing this topic from the mandatory content for each FPA category.

56 Current law enables employer KiwiSaver contributions to be on top or out of an employee's pay package. The KiwiSaver Act 2009 specifies that compulsory employer contributions must be paid on top of gross salary or wages except to extent that employers and employees negotiate and agree otherwise.

57 If the contribution is coming from out of an employee's pay package, there must be a 'total remuneration' clause in the employment agreement. Employers cannot include a 'total remuneration' clause if their employees are

on the minimum wage as this would place the employee's pay rate under the minimum wage and be inconsistent with the Minimum Wage Act 1983 (MWA).

58 The MWA prescribes different rates for different classes of workers, and cannot be contracted out of under section 6[5]. An employee must receive payment for work at no less than that minimum prescribed rate.

59 Clause 119(3) of the Bill provides that, where the FPA provides a minimum base wage rate higher than the minimum wage prescribed under the MWA, the FPA minimum base rate becomes the rate prescribed under the MWA. Where an FPA details different classes of minimum base wage rates (ie adult/starting/training, differential terms), these specified wage rates in the FPA will also be treated as minimum wage rates under the MWA.

60 Due to the FPA minimum base wage applying as if it were the minimum wage rate prescribed under the MWA, KiwiSaver compulsory employer contributions cannot be deducted from a FPA minimum base wage under the FPA system.

61 Unions and employers, who submitted on this topic, queried that the Bill implies that compulsory employer contributions for KiwiSaver can be listed as inclusive within the minimum pay rate, which submitters believed is contrary to what the KiwiSaver legislation states. Submitters identified that this creates confusion of how superannuation, in particular KiwiSaver, would function within the FPA system.

62 This confusion could lead to bargaining sides agreeing terms which would be inconsistent with the MWA. Bargaining timeframes would be prolonged if illegal terms were present in their agreement at the time they submit for vetting. Removing the topic would mean normal superannuation-related legislation would apply and negate the possibility of bargaining sides agreeing to terms that would breach the MWA.

Clarifying the obligation for an initiating union to notify other unions and employers

63 The Bill requires an initiating union to identify other unions and employers that are likely to fall within coverage and to notify them that the initiating union has received approval to initiate bargaining (clause 36). This must be carried out within 15 working days of approval to initiate. The purpose is to help ensure that as many parties as possible are made aware of the opportunity to participate in an FPA.

64 Submitters raised concerns about the practicalities of the "monumental" task of identifying and notifying all likely covered employers within that timeframe, especially in sectors with large numbers of employees and employers.

[5] Section 6 of the Minimum Wage Act 1983 states that notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

65 I propose three amendments to the Bill to improve the workability of this provision by requiring the initiating union to:

65.1 Make 'best efforts' to identify other unions and employers; and

65.2 Notify all known parties; and

65.3 As part of those 'best efforts' to include a notice both on a public and free internet site and in the daily newspapers circulating in Auckland, Tauranga, Hamilton, Wellington, Christchurch, and Dunedin.

66 These requirements on the initiating union are in addition to the requirement already in the Bill for MBIE to publicly notify when approval is given to initiate bargaining. MBIE will also use its channels to inform employers of the opportunity to participate in the FPA process. This will help ensure as many parties as possible are made aware of an FPA.

Expanding the obligation to update to include local authorities, and clarifying that the obligation only applies if the funder is known

67 Clause 46(2)(f) requires that “if a proposed FPA covers employees of a private sector employer and the employer bargaining party is aware that the private sector employer regularly receives government funding to deliver public services, (the employer bargaining party must) provide regular updates about bargaining to the department responsible for that funding”.

68 A submission identified that, under this clause, there is no obligation for the employer bargaining party to provide regular updates to local government entities, which may provide funding to private employers covered by a proposed FPA.

69 I propose expanding the “regular updates” obligation in clause 46(2)(f) to include local government entities alongside government departments. This will enable these entities to engage with those employers to discuss the implications if the employers have not been engaging with them during bargaining. This could help inform the employers’ feedback to their bargaining parties.

70 No obligations or onus would be placed on local government entities, if this clause included them, in the same way that no onus is placed on government departments, via this clause, besides receiving information.

Clarifying that the obligation to update funders only applies if the funder is known

71 This expansion would increase the burden on employer bargaining parties as they may have to provide regular updates to an increased number of affected parties. Particularly, it may be that the funding relationships between employers and government departments are more easily identifiable than the funding relationships between employers and local government entities.

72 Therefore, I also propose that clause 46 is amended to only require the employer bargaining party to provide regular updates if they are aware of

which department, or local government entity, a private employer receives funding from. This is practical, as it recognises the obligation can only be met if those two facts are known, and mitigates the extra difficulty described above.

Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details

73 The Bill requires employers to provide the contact details of employees within coverage to the employee bargaining side. Clauses 40 and 41 specify requirements for the use and storage of the employee contact details provided. The inclusion of these requirements is intended to ensure that the employee contact details are treated appropriately and in a manner that is consistent with the Privacy Act 2020. These clauses do not limit the obligations specified under the Privacy Act, including an individual's right to complain under Part 5 of the Privacy Act (as specified in clause 23).

74 I propose including a penalty for intentional or recklessness failures to comply with obligations relating to the use and storage of employee contact details, as specified in clauses 40 and 41 of the Bill.

75 As this type of breach would generally occur during bargaining, clause 196 "Penalty for non-compliance with obligations during bargaining" would apply. This sets a maximum penalty level of $20,000 for an individual or $40,000 for any other person (i.e. for a company or other corporation).

76 This penalty will highlight the importance of the employee bargaining side meeting these obligations, which may incentivise more immediate and consistent compliance.

77 During consultation on this proposal, Office of the Privacy Commissioner (OPC) indicated they support the inclusion of a penalty in relation to the use and storage obligations for employee contact details as be useful for supporting enhanced privacy outcomes. The inclusion of a penalty wouldn't impact the Privacy Commission's enforcement powers as the Bill already includes a provision (clause 23(2)) that specifies that nothing in the Bill limits the rights of an individual under the Privacy Act.

Adding new alternative criteria to the threshold for fixing the term of an FPA

78 The Bill enables the terms of an FPA to be fixed where there is a bargaining stalemate or if the FPA has failed to be ratified twice. Submitters raised concerns that the threshold for fixing terms is too high. A particular concern raised was that the requirement for both sides to have taken action to resolve a bargaining stalemate would mean the criteria could not be achieved if one side was not engaging in the process.

79 I propose adding new alternative criteria to the threshold for fixing the terms of an FPA to enable the Authority to fix the terms of an FPA where one bargaining side breaches the duty of good faith, and the breach(es) are either:

79.1 deliberate, sufficiently serious and sustained, or

79.2 involves behaviour that had the effect of undermining the process of bargaining (exact wording to confirmed during drafting).

80 This would address the potential gap in the current thresholds and ensure there is a mechanism for finalising an FPA if one bargaining side is not engaging in the bargaining process.

81 The proposed criteria are intended to capture situations where one bargaining side is either not engaging in bargaining, or only engaging in surface level bargaining over a period. It is not intended to capture situations where there are legitimate issues impacting the timing of bargaining meetings or reaching agreement.

82 Including this additional threshold would increase the situations in which an FPA can be fixed. However, its inclusion is intended to provide an incentive to bargaining sides to actively engage in bargaining. This balances the need to ensure there is a mechanism for finalising an FPA if this is unable to be achieved via bargaining (ie the threshold is not inaccessible) while ensuring the threshold does not undermine the intention that FPAs are bargained where possible.

Amending the requirement for the Authority to consider certain matters when it recommends or fixes terms

83 I propose that clause 220(a) in the Bill is amended so that the Authority ‘may’ consider the list of matters noted in clause 220(a)(i)-(vii), rather than ‘must’ consider those matters as is proposed in the current Bill.

84 This change will provide the Authority with more discretion over its approach to considering these matters. It will also reduce the legal risk that its decisions in relation to this clause will be challenged, which could potentially affect the timeframes for finalising and implementing an FPA.

Including a regulation making power to set a fees framework for fees that will be paid to experts who provide evidence sought by the Authority

85 The Bill enables the Authority to call for evidence and information from any person when performing its functions under the Bill. This includes the Authority being able to seek its own independent expert advice. While the Authority could summon an independent expert to provide information or evidence (and pay them at the witness fee rate), there is insufficient incentive for experts to willingly appear as witnesses and advise the Authority as the current witness rates are much lower than the market rates for expert advice.

86 I consider that, where the Authority seeks independent advice from an expert, the expert should be able to be remunerated at the appropriate market rates.

87 I propose including an empowering provision in the Bill that enables independent expert witnesses to be paid a specified fee, where their advice has been requested by the Authority, and the fee is set via a fees framework

specified in new FPA regulations. This would enable the Employment Relations Authority to have the discretion to choose the expert witnesses.

88 The budget allocation for the FPA system, including for the backstop determination function, includes funds for paying experts at market rates for the forecast number of FPAs to be initiated.

Financial Implications

89 In Budget 2021, $35.8m was approved over four years as tagged operating contingency funding to implement four FPAs per year.

90 In Budget 2022, $6.3 million was approved in Budget 2022 over four years for implementing two additional FPAs per year.

confidential advice to government

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

Legislative Implications

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

93 If Parliament passes the Bill through third reading, 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 2022 as I am currently expecting, commencement could occur in December 2022.

94 The Bill, including the amendments proposed in this paper, will be binding on the Crown.

Impact Analysis

Regulatory Impact Statement

95 The Treasury's Regulatory Impact Analysis Team has determined that the policy changes in this paper listed below 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).

95.1 Clarifying how an FPA should apply when it only covers a portion of the employee’s work

95.2 Defining coverage of an FPA in accordance with regulations

95.3 Expanding the Bill's purpose

95.4 Making minor changes to the timeframes in the Bill

95.5 Amending the timeframe for the chief executive of MBIE to complete an assessment of an application to within 30 working days (extendable to 45)

95.6 Amending the criteria set so that the public interest test can only be applied if the employees within the coverage receive low pay for their work plus one or more of the other three criteria

95.7 Amending requirements for providing personal information via the representation test, with stage one requirements identified in the Bill and stage two requirements prescribed in regulations

95.8 Including 'arrangements relating to 'training and development' and 'leave entitlements' as mandatory content for each FPA

95.9 Removing the requirement to specify whether superannuation is included in stated FPA base wage rates from mandatory content for each FPA

95.10 Clarifying the obligation on the initiating union to use public notification (similar to other statutory processes) as part of their best efforts to identify other unions and employers

95.11 Expanding the obligation on an employer bargaining party to provide regular updates during bargaining to known government departments and local authorities that fund private employers

95.12 Including a penalty (within the existing penalty regime) on the employee bargaining party for intentionally or recklessly failing to comply with obligations relating to the use and storage of employee contact details

95.13 Adding a new alternative criterion to the threshold for the Authority to fix the terms of an FPA

95.14 Amending clause 220(a) so that the Authority 'may' consider the list of matters when recommending or fixing terms, rather than 'must' consider those matters

95.15 Including a regulation making power to set a fees framework for fees that will be paid to experts who provide evidence sought by the Authority.

96 An addendum to the RIS has further been produced to reflect the judicial review policy changes. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE (Annex One). 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

97 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

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

99 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.

100 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 ensure Māori are effectively represented in bargaining, and to consider Māori interests and views.

101 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.

102 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

103 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.

104 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.

105 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 changes will make the FPA system more workable and will further support this by ensuring FPAs will be concluded in an efficient and timely manner.

Human Rights

106 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]

107 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-0126 refers]. The key rights engaged relate to the right to strike[7] and to the principle of voluntary bargaining.[8]

108 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.

109 In addition, the FPA system was recently considered by the International Labour Organisation (ILO's) 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.

110 In this Cabinet paper, I have proposed a limitation on judicial review of bargaining parties' statutory powers of decision (see paragraphs 12 – 20). This may engage section 27(2) of NZBORA, however as described above I consider such limitation is demonstrably justified by the benefits it brings, ie

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

[7] This stems from the International Labour Organization's (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.

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

significantly reducing risks of delays and disincentives to participate in bargaining.

Consultation

111 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 of Justice, Ministry for Pacific Peoples, Ministry for Women, 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.

112 The Office of Privacy Commissioner has requested that the following comment is included in this paper:

"The Privacy Commissioner supports a two staged approach for the provision of personal information, which is consistent with a data minimisation approach. Additionally, the Commissioner supports the introduction of a pecuniary penalty to ensure employee information is used and stored for the purposes it was collected. However, to ensure there is regulatory coherence between the FPA Bill and the Privacy Act 2020, the Commissioner recommends that the criteria of 'intentional or recklessness failures' is removed from the penalty for a failure to comply."

Communications

113 Communications to support the legislative steps are being led by the Minister for Workplace Relations and Safety with support from the MBIE officials. Proactive plans are being developed to communicate the system to stakeholders who will likely be participating. Key elements include regular stakeholder briefings, key messages and Q+A, web content including system tools and guidance and social media presence.

Proactive Release

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

Recommendations

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

1 **note** in April 2021, Cabinet agreed to key features of the Fair Pay Agreement (FPA) system [CAB-21-MIN-0126 refers];

2 **note** on 28 March 2022, Cabinet agreed that the Government introduce the draft Fair Pay Agreements (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;

Limiting judicial review on bargaining parties' decisions in the FPA system

3 **agree** that the Bill limits judicial review of bargaining parties' exercise of statutory powers of decisions in the FPA system to only situations where:

3.1 all alternative avenues have firstly been 'exhausted', namely, dispute resolution and a compliance order have been sought, if available, to resolve a breach of obligation; and

3.2 the complaint is that the decision-maker was not authorised under the FPA legislation to make the decision in question or did not act in good faith in making the decision.

Clarifying how an FPA should apply when it only covers a portion of the employee's work

4 **agree** to clarify that only one FPA can apply at a time to an employment relationship, and that FPA should apply to the entire relationship.

5 **agree** that for an FPA to apply to the employment relationship, it must cover at least 25 percent of an employee's work;

6 **agree** that if two or more FPAs each cover 25 percent or more of an employee's work, the FPA that covers the largest portion of the employee's work should apply.

7 **agree** that when assessing whether or which FPA applies to an employee, this should be based on work done within a reasonable period of the date of the assessment, considering the particular circumstances of the employee subject to the assessment;

8 **agree** to clarify that the Labour Inspectorate and the Employment Relations Authority have the jurisdiction to determine whether an FPA, or which FPA, applies to an employment relationship to enable them to determine coverage based on recommendations 4-7 above.

Defining coverage of an FPA via regulations

9 **agree** that the Bill be amended to require parties to define coverage of an FPA in accordance with regulations (if any)

10 **agree** that regulations require parties to define coverage:

10.1 according to ANZSCO codes for occupational FPAs, and

10.2 according to ANZSCO codes and ANZSIC codes for industry FPAs, unless

10.3 the initiating party (or bargaining parties) considers that there isn't an appropriate occupation or industry classification that accurately reflects the occupations or industry in question, in which case the party/parties must describe that occupation and industry with sufficient detail for MBIE to understand how the occupation or industry relates to the classifications and why it cannot be appropriately covered by an existing occupation or industry.

11 **agree** that the CE of MBIE must reject an application to initiate bargaining for an FPA or reject a change in coverage during bargaining if the proposed coverage will only cover one employer.

Expanding the Bill's purpose to include the backstop process and broader policy intent

12 **agree** to amend the purpose to the following to incorporate the backstop process and broader policy intent:

The purpose of this Act is to enable certain minimum employment terms for employees to be improved by providing –

a) a framework that enables bargaining for fair pay agreements that specify certain industry-wide and occupation-wide minimum employment terms; or

b) in certain circumstances, for the Authority to determine those minimum employment terms.

13 **note** the inclusion of a reference to the backstop process in the purpose of the Bill is subject to the Select Committee accepting the backstop Slip of Amendment (Slip), which will be submitted to Select Committee in late July 2022;

Requiring 'low pay' to be demonstrated for all successful public interest test applications

14 **agree** to amend that clause 29(4) so the public interest test can be applied to initiate an FPA if the employees within the coverage of the proposed FPA:

14.1 receive low pay for their work; **plus, one or more of the following**:

14.2 have little bargaining power in their employment; or

14.3 have a lack of pay progression in their employment (for example, pay rates only increase to comply with minimum wage requirements); or

14.4 are not adequately paid, taking into account factors such as—

(i) working long or unsocial hours (for example, working weekends, night shifts, or split shifts); or

(ii) contractual uncertainty, including performing short-term seasonal work or working on an intermittent or irregular basis.

A two-stage approach for providing personal information for an FPA initiation, renewal, or replacement via the representation test

15 **agree** to set out that an initiating union must provide, as part of its application to initiate a proposed FPA, renewal or replacement under the representation test:

15.1 the supporting employee's name and occupation

15.2 the supporting employee's employer's name

15.3 the date the employee(s) agreed to support the initiation (may be by individual or by group depending on how the support was collected)

15.4 if the application relates to an industry FPA, the industry that the supporting employee is in, and

15.5 if the application is made under the 10 percent threshold, the total number of employees within proposed coverage of the FPA

16 **agree** that the regulations specify that MBIE may request the contact details of employees to verify the evidence provided by the union as part of their application to initiate bargaining under the representation test

17 **agree** to set out that an initiating employer association must provide, as part of its application to initiate a renewal or replacement FPA under the representation test:

17.1 the name of each supporting employer within proposed coverage, the total number of employees within coverage that the employer has and the occupations of those employees;

17.2 the date the employer(s) agreed to support the initiation (may be by individual or by group depending on how the support was collected);

17.3 if the application relates to an industry FPA, the industry that the supporting employer is in, and

17.4 if the application is made under the 10 percent threshold, the total number of employees within proposed coverage of the FPA.

18 **agree** that the regulations specify that MBIE may request the contact details of supporting employers to verify the evidence provided by the initiating employer association as part of their application to initiate bargaining under the representation test for a renewal or replacement FPA;

Setting a timeframe for MBIE's assessment of applications

19 **agree** to require that the CE of MBIE has a maximum timeframe of 30 working days to assess an application for an FPA, which can be extended to 45 working days at the discretion of the CE of MBIE;

20 **agree** that this provision comes into force six months after the main part of the Act;

21 **note** that the timeframe in recommendation 19 above applies once MBIE has received all the information it requires to assess the application, and that any public submission period is not included within the assessment timeframe;

Including 'arrangements relating to training and development' and 'leave entitlements' as mandatory content for each fair pay agreement

22 **agree** to make 'arrangements relating to training and development' mandatory content for each fair pay agreement;

23 **note** that the topic 'arrangements relating to training and development' will not be a minimum entitlement provision for the purposes of the Employment Relations Act 2000;

24 **agree** to make 'leave entitlements' mandatory content for each fair pay agreement;

Removing the requirement to specify whether superannuation is included in stated FPA base wage rates from mandatory content for each FPA

25 **agree** to remove the mandatory content for each fair pay agreement 'whether the minimum base wage rates included or exclude the employer's contribution for superannuation (if any)' from the Bill;

Clarifying the obligation for an initiating union to notify other unions and employers

26 **agree** to amend the obligation in clause 36 of the Bill so that the initiating union must make best efforts to identify other unions and employers, and to notify all known parties;

27 **agree** to include in clause 36 an obligation for the initiating union to place a notice on a public and free internet site and in the daily newspapers circulating in Auckland, Tauranga, Hamilton, Wellington, Christchurch, and Dunedin;

Expanding the obligation to update in funded sectors to include local authorities, and clarifying that the obligation only applies if the funder is known

28 **agree** to amend the obligation in clause 46(2)(f) to specify that the obligation to provide regular updates to a government department only applies if the employer bargaining party knows which government department is responsible for funding the private employer;

29 **agree** to expand the obligation in clause 46(2)(f) to include that, if the proposed FPA covers employees of a private sector employer and the employer bargaining party knows that the private sector employer receives funding from a 'local authority', and knows which local authority, the employer bargaining party must provide regular updates about bargaining to the local authority responsible for that funding;

Including a penalty for a failure to comply with obligations relating to the use and storage of employee contact details

30 **agree** to include a penalty for an employee bargaining party intentionally or recklessly failing to comply with obligations relating to the use and storage of employee contact details, as specified in clauses 40 and 41 of the Bill;

31 **agree** that, for this type of breach, clause 196 "penalty for non-compliance with obligations during bargaining" would apply and the maximum penalty level would be $20,000 for an individual or $40,000 for any other person (i.e. a company or other corporation);

Adding new alternative criteria to the threshold for fixing the term of an FPA

32 **agree** to include new alternative criteria to the threshold for fixing the terms of an FPA, enabling the Employment Relations Authority to fix the terms of an FPA where one bargaining side breaches the duty of good faith, and the breach(es) are either:

32.1 deliberate, sufficiently serious and sustained, or

32.2 involves behaviour that had the effect of undermining the process of bargaining (exact wording to confirmed during drafting);

Amending the requirement for the Authority to consider certain matters when it recommends or fixes terms

33 **agree** to amend clause 220(a) so that the Employment Relations Authority 'may' consider the list of matters noted in clause 220(a)(i)-(vii), rather than 'must' consider those matters;

Including a regulation making power to set a fees framework for fees that will be paid to experts who provide evidence sought by the Authority.

34 **agree** to include an empowering provision to set a fees framework in regulations for fees that will be paid to people that give expert evidence before the Employment Relations Authority, where their advice has been requested by the Authority as part of undertaking it functions under the Bill;

Approve for inclusion of these decisions as recommendations in official's Departmental Report to the Select Committee considering the Bill

35 **invite** the Minister for Workplace Relations and Safety to direct officials to include the decisions that result from this paper as recommendations for

inclusion in the Bill in MBIE's Departmental Report to be considered by the Education and Workforce Committee;

36 **authorise** the Minister for Workplace Relations and Safety to make decisions on minor amendments to the Bill for inclusion in the Departmental Report that are within the policy intent of the Bill and previous Cabinet decisions made in relation to the Bill;

37 **note** that the Parliamentary Counsel Office will decide how to draft the proposals in this paper and to make any other amendments necessary to give effect to the policy intent;

38 **note** that the Education and Workforce Committee will report back to Parliament on the Bill by 5 October 2022;

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

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety

Annex One: Fair Pay Agreements Regulatory Impact Assessment update on limiting judicial review of bargaining parties' decisions

maintain legal professional privilege