

FAIR PAY AGREEMENTS

Supporting workers and firms
to drive productivity growth
and share the benefits



Recommendations from
the Fair Pay Agreement
Working Group, 2018



20 December 2018

Hon Iain Lees-Galloway
Minister for Workplace Relations and Safety

Dear Minister,

Fair Pay Agreements Working Group Report

I am pleased to enclose the Fair Pay Agreement Working Group Report.

The Group was asked to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

The Group approached this task with determination, and we had 11 substantive meetings and one small meeting over a relatively short period of time.

We believe we have designed a Fair Pay Agreements system which will be most useful in sectors or occupations where competition is driving a 'race to the bottom' in terms of wages and conditions. Fair Pay Agreements could also be useful where workers and employers identify scope to improve outcomes across a sector or occupation. In particular, I consider that workers and employers will need to work together to find innovative ways to lift productivity.

Thank you for inviting me to contribute to this process and I hope you will find the Report useful. There is not complete agreement within the Group on the appropriate design of Fair Pay Agreements, but we have attempted to agree on as much as possible and make it clear where there were differences of opinion.

It is vitally important that New Zealand tackles significant issues which are likely to affect our people's working lives in the coming years. I believe that a focus on lifting our productivity and preparing New Zealanders with the skills to thrive in the future of work is vitally important if we are to succeed as a nation. Fair Pay Agreements could be a useful tool to address these important challenges.

Yours sincerely,

Rt Hon Jim Bolger ONZ
Chair, Fair Pay Agreements Working Group





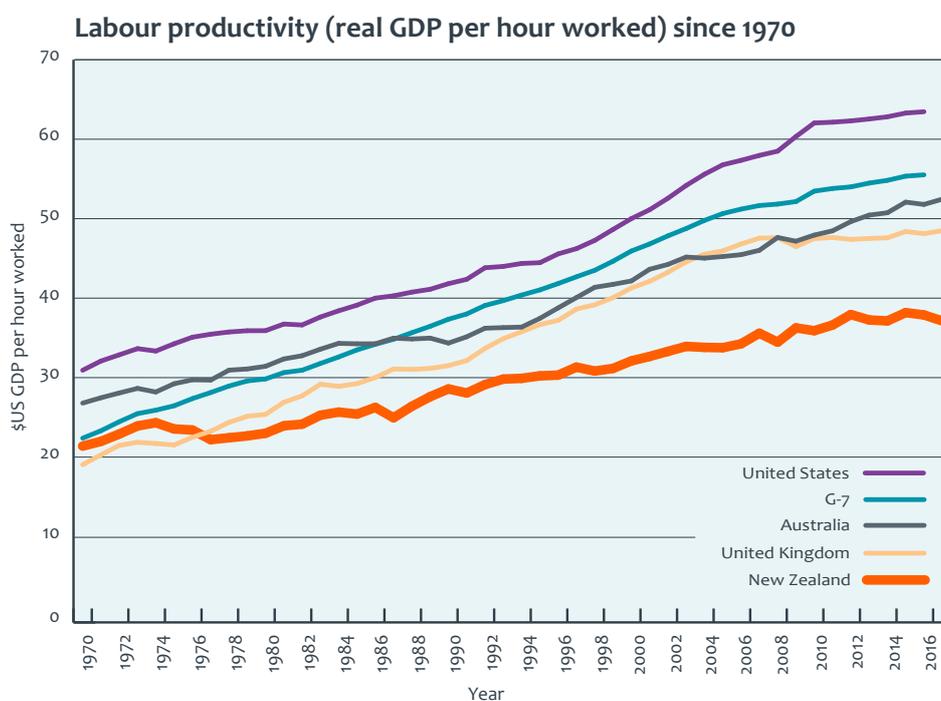
Summary

New Zealanders work longer hours and produce less per hour than in most Organisation for Economic Co-operation and Development (OECD) countries. Our productivity growth over recent decades has been poor, and our economic growth has largely been driven by increased labour force participation, rather than by labour productivity.

Wages in New Zealand have grown, but much more slowly for workers on lower incomes than those on high wages; and they have grown more slowly than labour productivity. Income inequality has been rising in many developed countries in recent decades and the OECD has warned that high inequality has a negative and statistically significant impact on economic growth.

We have both an inequality and a productivity challenge. Figure 1 shows growth in our labour productivity is lagging internationally.¹

Figure 1



The Government’s vision is to use the employment relations framework to create a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

¹ OECD, “Productivity statistics: GDP per capita and productivity growth”, <https://data.oecd.org/lprdy/gdp-per-hour-worked.htm>.





The Government asked the Fair Pay Agreement Working Group (the Group) to make independent recommendations on the scope and design of a system of sector or occupation wide bargaining to set minimum terms and conditions of employment and achieve these goals.

Many other countries, especially in Europe, use sector-wide collective agreements as part of their employment relations systems. The OECD recommends a model of combined sector and enterprise level collective bargaining, because it is associated with higher employment, lower unemployment, a better integration of vulnerable groups and less wage inequality than fully decentralised systems like ours. Some countries also link wage increases to skills and training pathways, with the aim of increasing productivity and sharing its benefits. Care needs to be taken in selecting the most appropriate pathway for a given country.

The Group considered that introducing a sector or occupational level bargaining system could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than on increasing quality or productivity. It could be useful more generally where workers and employers identify opportunity to improve outcomes across a sector or occupation. We also considered that this may not be a necessary or useful tool in some sectors or occupations.

We have therefore designed a system where workers can initiate sector- or occupation-wide collective bargaining, if they meet a representativeness threshold or a public interest test.

We all agreed that if a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems that are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process,
- parties are well represented, and
- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

We have designed this system with these principles in mind. Another fundamental design principle was to minimise cost and complexity for all parties, and this has led us to build on the existing mechanisms in the employment relations and standards system where possible.

Most of the Group agreed that to achieve the Government's objectives, all employers in the sector or occupation should be covered by a Fair Pay Agreement (FPA).

Employer representatives participated actively and constructively in the process and can agree with many of the recommendations and design features of the proposed FPA system. However, they advised the Group they cannot support the compulsory nature of the system for employers as currently drafted.





The employer representatives' preference would be a system which is based on voluntary participation for employers at the start, and for reasonable grounds for employers to opt out from the process or resulting agreement later on.

Apart from the matter of the compulsory nature of the system, on which there was not agreement, the Group agreed that if the Government decided to introduce this system, then this was the best way to design it.

Recommendations

Designing a Fair Pay Agreement System

The Group concluded that:

1. There is no international model for collective bargaining that can be applied to New Zealand, without being adapted to suit our social and economic context.
2. A FPA system cannot be designed from a blank sheet. Certain characteristics of our current state need to be considered pragmatically:
 - the existence of statutory minimum standards,
 - low levels of organisation among workers and employers, and
 - low levels of take up of voluntary approaches to sector or occupational collective bargaining in New Zealand, particularly in the private sector and among small businesses.
3. This system is intended to complement, not replace, the existing employment relations and standards system. Where possible a FPA system should be designed to build on and adapt existing provisions to minimise cost and complexity.
4. New Zealand could benefit from stronger employer- worker dialogue.
5. FPAs could be most useful in sectors or occupations where particular issues with competitive outcomes are identified. For example, they could be useful where competition is based on ever-decreasing labour costs, rather than on increased quality or productivity.
6. They could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation. However, they may not be a necessary or useful tool in some sectors or occupations.
7. Apart from the matter of the compulsory nature of the system, on which there was not agreement, the Group agreed that if the Government decided to introduce this system, then this was the best way to design it.
8. FPAs are most likely to gain real traction where:
 - they are focussed on problems which are broadly based in the sector,
 - there are real opportunities for both employers and workers to gain from the process,
 - parties are well represented, and





- agreements are connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.
9. Training and skills provisions should be a key feature of collective agreements.
 10. The Government should seek advice on the compatibility of the proposed system with New Zealand's international obligations.

Detailed design of a Fair Pay Agreement system

The Group agreed the following recommendations on how to design each of the key features of the FPA collective bargaining system.

Initiation

11. A FPA bargaining process should be initiated by only workers and their union representatives.
12. There should be two circumstances where a FPA collective bargaining process may be initiated:
 - a. *Representativeness trigger*: in any sector or occupation, workers should be able to initiate a FPA bargaining process if they can meet a minimum threshold of 1000 or 10 per cent of workers in the nominated sector or occupation, whichever is lower.
 - b. *Public interest trigger*: where the representativeness threshold is not met, a FPA may still be initiated where there are harmful labour market conditions in the nominated sector or occupation.
13. The representativeness threshold should cover both union and non-union workers.
14. The conditions to be met under the public interest trigger should be set in legislation.
15. An independent body will be needed to determine whether the trigger conditions are met.
16. The Government will need to consider how to assess and mitigate potential negative effects, including to competition.

Coverage

17. The occupation or sector to be covered by an agreement should be defined and negotiated by the parties.
18. It is important for agreements to cover all workers – not just employees – to avoid perverse incentives to define work outside of employment regulation.
19. All employers in the defined sector or occupation should, as a default, be covered by the agreement.
20. There may be a case for limited flexibility for exemptions from the agreement in some circumstances.





Scope

21. The legislation should set the minimum content that must be included in the agreement.
22. Parties should be able to bargain on additional terms to be included in the agreement.
23. Any enterprise-level collective agreement must equal or exceed the terms of the relevant FPA.

Bargaining parties

24. Parties should nominate a representative organisation to bargain on their behalf.
25. There should be a role for the national representative bodies to coordinate bargaining representatives.
26. Parties should be encouraged to coordinate.
27. Representative bodies must represent non-members in good faith.
28. Workers should be allowed to attend paid meetings to elect and instruct their representatives.
29. Costs should not fall disproportionately on the groups directly involved in bargaining.

Bargaining process rules

30. Clear timelines will be needed to prevent lengthy processes creating excessive uncertainty or cost.
31. Notification of parties will be a critical element of the process.
32. Bargaining should be supported through facilitation.

Dispute resolution during bargaining

33. The Government has stated there will be no recourse to industrial action during bargaining.
34. After initiation, disputes over coverage may be determined by the Employment Relations Authority.
35. When disputes arise during bargaining, parties should go to mediation in the first instance.
36. Where a dispute cannot be resolved through mediation, parties should be able to apply to have the matter determined.
37. Parties should only be able to challenge the determination on limited procedural grounds, with rights of appeal.
38. Once in force, any dispute over the terms of a FPA should use the standard dispute resolution process.





Conclusion, variation and renewal

39. Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers.
40. Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification.
41. The procedure for ratification must be set in law.
42. Registration of agreements should be required by law, and agreements should be publicly available.
43. Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms.

Enforcement

44. The Employment Relations Act 2000 approach to enforcement should be applied.

Support to make the bargaining process work well

45. Support to build capability and capacity of the parties and to facilitate the process will be needed.
46. Resourcing levels for support services will need to be considered.





1 Introduction: Lifting incomes and economic growth in New Zealand for the 21st century

The Government asked the Group to design a new tool to complement the collective bargaining system in New Zealand which will help transition the current employment relations framework to one which can support the transition to a 21st century economy: a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.

As a starting point, the Government asked us to make recommendations on a new tool which can support a level playing field across a sector or occupation, where good employers are not disadvantaged by offering reasonable, industry-standard wages and conditions.

Our first step was to take a holistic view of our labour market: looking backwards at how our current labour market is operating, and looking ahead to the global megatrends that will shape our labour market over the coming decades.

New Zealand's labour market has seen big changes over the last 30-40 years. Over the coming decades, technological change, globalisation, demographic change and climate change will continue to affect the demand for labour and skills.

This process is likely to be uneven, and its impact on society and our labour market is uncertain. We cannot predict exactly how these changes will manifest themselves, or when, but we know globalisation and skills-based technological change are drivers of growing inequalities world-wide.

The evidence doesn't currently show the pace of change accelerating, but New Zealand needs to prepare for a faster rate of job loss and skill obsolescence. We know that certain groups, such as young or low-skilled workers, are likely to be more at risk when these changes happen. We also recognise the challenges faced by each sector are varied as we transition to the future – with different scales of opportunity to improve productivity, sustainability, and inclusiveness.

The Group concluded a mature 21st century labour market in New Zealand will require stronger dialogue between employers and workers. There is a wide range of measures the Government has underway or which could be considered to tackle the challenge of just transition in our economy and promoting increased sector level dialogue among employers and workers. Changing our employment relations model and introducing a new way of doing collective bargaining, while maintaining the essential elements of the current system in New Zealand is only one part of this story, alongside interventions to improve coordination and incentives within other regulatory systems, such as taxation and welfare. These issues are highly related, but the subject of ongoing discussion and advice from other Working Groups.

We agreed a collective bargaining dialogue at sectoral or occupational level is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and





- it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified – for example, where competition is based on ever-decreasing labour costs rather than on increasing quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation via sectoral or occupational collective bargaining. We also considered this may not be a necessary or useful tool in some sectors or occupations.

Bringing this sector-wide dialogue into a regulated mechanism like collective bargaining creates the critical incentive of an enforceable contract binding the parties. It provides the opportunity for employers to invest and engage without the fear of being undercut by those employers engaged in a ‘race to the bottom’. There may also be mutual benefits for workers and employers through improved worker engagement, increased productivity and better workplaces.

2 The approach of the Fair Pay Agreement Working Group

The Group has held a series of eleven fortnightly meetings from July 2018 to November 2018. The Government asked the Group to report by November 2018, and this report forms the Group’s final recommendations.

The Group has discussed the employment relations and standards system and approach to collective bargaining in New Zealand over recent decades, international models, the relationship between wages and productivity, and the design of an additional sectoral or occupational approach to collective bargaining for New Zealand.

The Group was supported by the Ministry of Business, Innovation and Employment as Secretariat, who also provided information and data on a range of topics.

The Group also heard from speakers who provided their expertise from within the Working Group, and some external experts on particular issues:

- Paul Conway (Productivity Commission) on productivity in New Zealand,
- John Ryall (E tū) on the E tū experience of negotiating multi-employer collective agreements (MECAs),
- Richard Wagstaff (Council of Trade Unions) and Kirk Hope (Business New Zealand) on their experience of what does and does not work under the current model for collective bargaining in New Zealand,
- Stephen Blumenfeld (Centre for Labour, Employment and Work at Victoria University of Wellington) on data trends in collective bargaining and collective agreements,
- Doug Martin (Martin Jenkins) on a FPA system, and
- Vicki Lee (Hospitality NZ) on the small business perspective on the employment relations and standards regulatory system.





3 Context

The Group looked at the relationship between productivity growth and wage growth in recent decades in New Zealand, and their relationship with overall incomes and inequality.

3.1 Productivity and wage growth, incomes and inequality in New Zealand

Productivity growth in New Zealand

New Zealand's productivity growth over recent decades has been relatively poor. Since 1970, our GDP per hour worked has declined significantly relative to the average across the high-income countries in the Organisation for Economic Co-operation and Development (OECD): it fell from about equal to the OECD average to about 30 per cent under it.

Our productivity performance is also considerably lower than the OECD average, the G-7 and that of the small advanced economies we compare ourselves with. Figure 1 shows New Zealand's slower rate of labour productivity growth since 1970.²

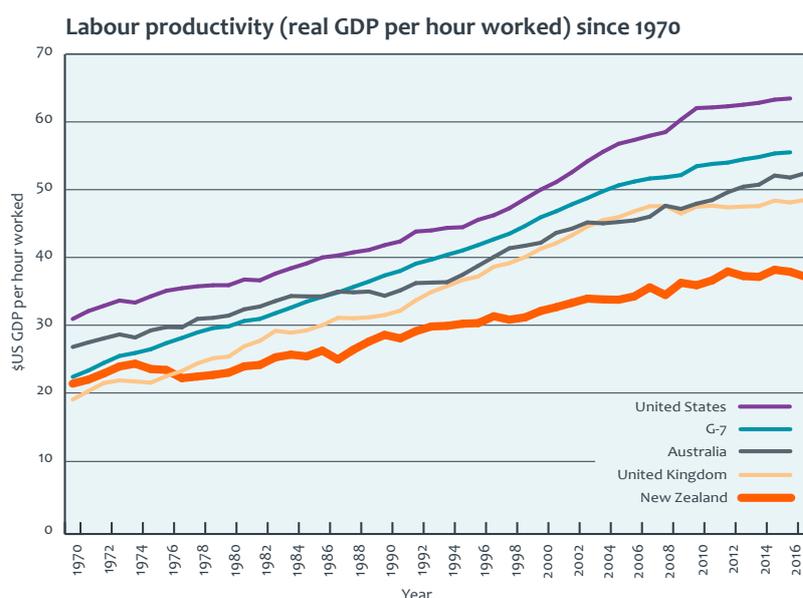
In other words, New Zealanders work for longer hours and produce less per hour worked than those in most OECD countries.

Our recent economic growth has been driven primarily by increased labour force participation rather than labour productivity growth.

Wage growth in New Zealand

Real wages in New Zealand have increased since the 1970s, but not as fast as labour productivity. Figure 2 shows this divergence between labour productivity and wage growth over the last four decades.³

Figure 1



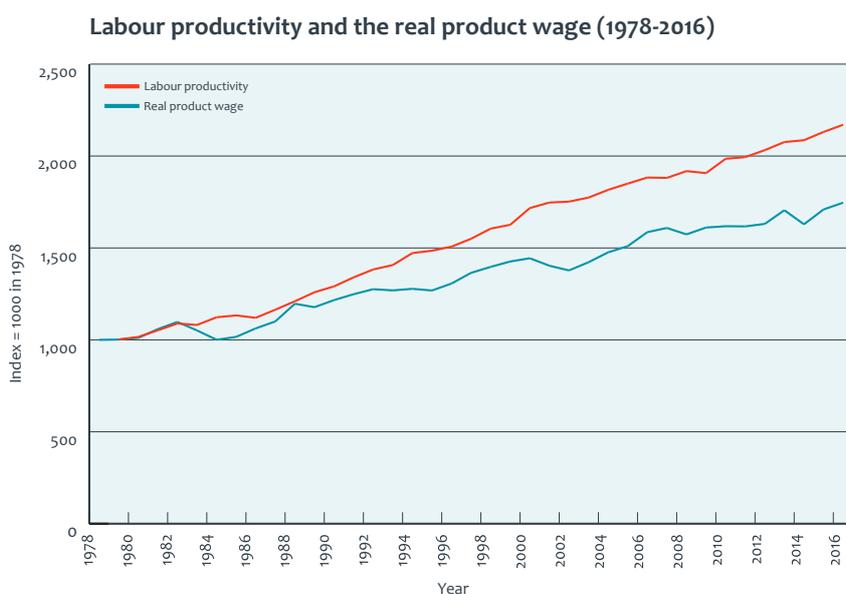
² OECD, "Productivity Statistics: GDP per capita and productivity growth", <https://data.oecd.org/lprdy/gdp-per-hour-worked.htm>.

³ Stats NZ, "Productivity Statistics".





Figure 2



Over the last two decades, wages in New Zealand have risen more slowly for employees in deciles 2 to 6 (50 per cent of employees) than for those in higher deciles. Figure 3 shows real increases in hourly wage for employees over the last two decades, broken down by decile.⁴

The exception is decile 1, where rising wages have been heavily influenced by increases to the minimum wage. This has ‘hollowed out’ the wage scale and

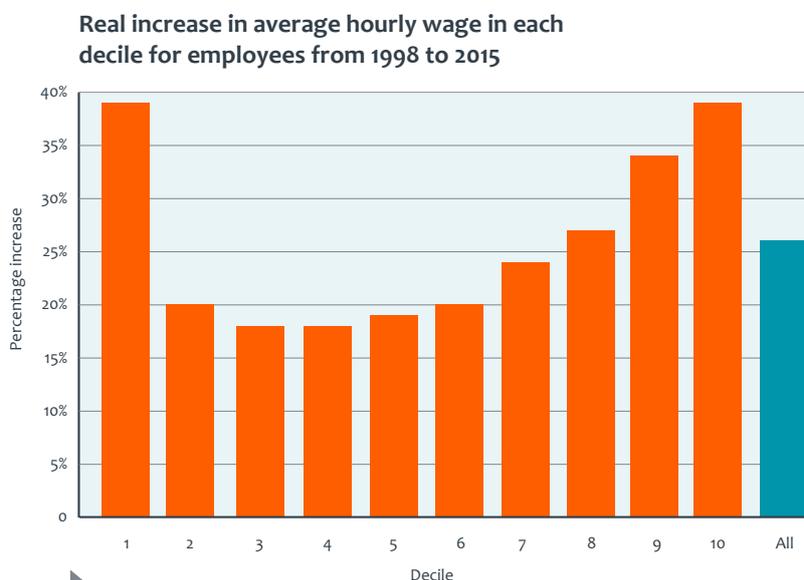
increased wage inequality among the majority of employees.

Incomes and inequality in New Zealand

Income inequality has been rising in many developed countries in recent decades. According to the OECD, the gap between rich and poor is at its highest for 30 years.⁵ As the OECD points out, the drivers of these growing income gaps are complex and reflect both economic and social changes. The evidence increasingly suggests high inequality has a negative and statistically significant impact on a country’s medium-term economic growth.

According to the OECD, New Zealand has a slightly higher degree of income inequality than the OECD average. While most OECD countries are experiencing increases in income inequality, New Zealand saw one of the largest increases in income

Figure 3



To calculate the real increase in average hourly wage, the 1998 figures have been adjusted to be in terms of June 2015 dollars.

⁴ Stats NZ, “New Zealand Income Survey”.

⁵ OECD, “Focus on Inequality and Growth”, December 2014, <http://www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf>.





Figure 4

Gini coefficients of income inequality, mid-1980s and 2011/12



Incomes refer to household disposable income, adjusted for household size. The Gini coefficient is a measure of income inequality using household disposable income. It ranges between 0 in the case of perfect equality and 1 in the case of perfect inequality.

inequality during the 1980s and 1990s, with our rate of increase in inequality exceeded only by Sweden and Finland. Figure 4 shows the change in income inequality across selected OECD countries between the 1980s and 2011/12, measured by the Gini coefficient.⁶

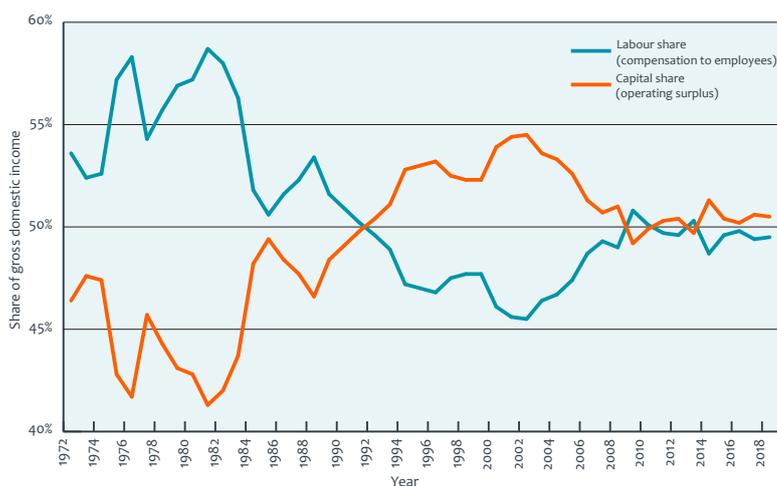
Despite wages rising in absolute terms in New Zealand, workers' share of the national income has fallen since the 1970s, with a particularly large fall in the 1980s (see Figure 5).⁷ This reflects wages growing slower than returns to capital, rather than wages falling.

There was some recovery in the 2000s, though the labour income share in New Zealand has fallen again since 2009 and is still well below levels that were seen in the 1970s.

A similar trend of a falling share of income going to workers has also been observed in many other countries worldwide, in both

Figure 5

Labour and capital share of gross domestic income in New Zealand (1972-2018)



⁶ OECD, "Focus on Inequality and Growth", December 2014, <https://www.oecd.org/social/Focus-Inequality-and-Growth-2014.pdf>.

⁷ Stats NZ, "National Accounts: GDP (Income)".



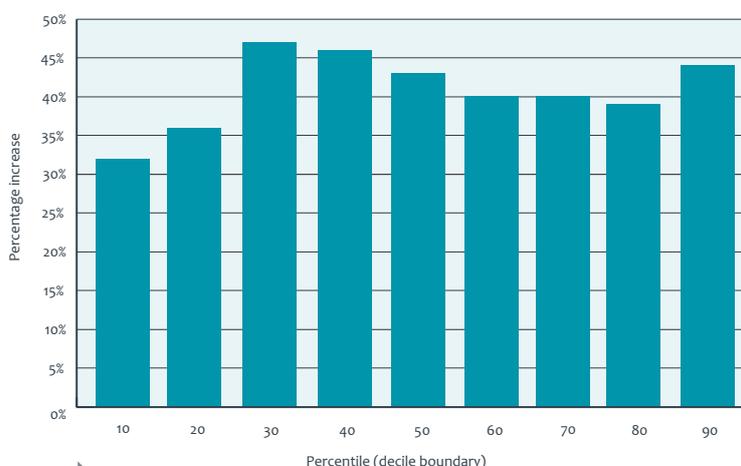


developed and emerging economies, although New Zealand remains well below the OECD median.

The reasons for their divergence are not entirely clear and are a matter of ongoing and wide debate. The Group observed that since 2004, the change in New Zealand’s labour–capital income share has been flatter than in other countries which have continued to see a fall in the labour share of national income.

Figure 6

Real increase in mean household disposable income (after tax) from 1998 to 2017



To calculate the real increase in mean household disposable income (after tax), the 1998 figures have been adjusted to be in terms of 2017 dollars.

Like many countries, our income support system in New Zealand helps to even out income increases across households through transfers from the state (taxes and benefits). Many low income earners are in high income households – for example, teenagers or students.

Figure 6 shows how the ‘hollowing out’ of wages changes when looked at as part of overall household income.⁸

The Group also looked at increases in the cost of living (inflation) relative to wage growth in New Zealand.

Figure 7

Income inequality in New Zealand (1982-2017)



The P90:P10 ratio summarises the relative distance between the 10th and 90th percentile of the household income distribution.

In plain terms, this examines whether wages are keeping up with, or exceeding, the increasing cost of living and translating into higher living standards. Wages have been rising in recent years, and for most of the last decade, wage increases have exceeded inflation, but both have been increasing modestly.

We know that incomes after housing costs are more unequal in New Zealand than before housing costs are considered, and this gap has widened since

⁸ Stats NZ, “Household Economic Survey”.





the 1980s (see Figure 7).⁹ The graph shows that before housing costs, household incomes in 2017 at the 90th percentile were about four times the level of household incomes at the 10th percentile. After housing costs, this ratio is closer to six times.

Low income earners

The Group looked at the distribution of wages within sectors and occupations across New Zealand, to identify where there was a high proportion of low-wage and low-income earners.

We examined the demographics of those working on or near the minimum wage – under \$20 per hour. Figure 8 shows the different demographic groups which are either over or under represented in this low income category compared to those same groups’ proportion of total wage earners in our economy.

Figure 8

Employees aged 16 to 64 earning less than \$20.00 per hour (June 2018)		
Demographic	% of minimum wage earners	% of total wage earners
Aged 16 – 24	38.70%	16.10%
Women	56.60%	49.00%
European/Pākehā	52.10%	62.80%
Māori	18.50%	13.30%
Pasifika	9.20%	6.20%
Working part-time	36.90%	18.10%
Total number of employees aged 16 to 64	493,479	2,068,500

The tables in Annex 2 set out the latest data available for workers in all occupations in New Zealand, ranked by highest proportion of those paid under \$20 per hour.

In addition to transfers through taxation and benefits, there are a number of interventions the Government makes to address wage and income inequality. This includes statutory mechanisms to provide basic worker protections (such as the minimum wage and conditions), as well as other interventions targeting particular problems. For example, where there is systemic undervaluation of wages based on discrimination, this is addressed through the Equal Pay Act 1972.

The Group noted the Equal Pay Act is being amended to introduce a pre-determination bargaining framework for addressing pay equity issues, which bears some similarities to FPAs. This is still being developed, but it could include referral to a determination process if bargaining

⁹ Bryan Perry (Ministry of Social Development), “Household Incomes in New Zealand: trends in indicators of inequality and hardship 1982 to 2017”, 2018, <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/monitoring/household-incomes/index.html>, page 87.





fails to reach agreement. Other changes are being considered or made to minimum standards, and the tax and benefit systems.

The Group noted as the Government develops a FPA system, it will need to carefully consider the interface between FPAs and these other developments.

3.2 Skills and productivity in New Zealand

New Zealand has a relatively high mismatch between the skills in our workforce and the jobs people do, compared to the OECD average.¹⁰ This mismatch may affect productivity, as it may make it difficult for firms to successfully adopt new ideas or technology. Addressing this skills mismatch will be a major challenge for New Zealand's skills system as our labour market – and the skills in demand – change in the future.¹¹

We noted the range of initiatives underway in New Zealand to match employers with workers with relevant skills, and to support in-work upskilling. We noted the Vocational Education and Training system is under review and suggest this review should take into consideration the fact one barrier to higher participation is the opportunity cost faced by workers and employers in prioritising training, especially where a significant time commitment is required, or where the benefits are longer term, or spread across the industry.

Training and skills provisions should be encouraged as a key feature of collective agreements

The Group saw evidence that some collective agreements (including Multi Employer Collective Agreements (MECAs)) in New Zealand explicitly provide for training pathways and corresponding wage increases, and similarly in other countries such as Singapore.

We considered this increasing reference to skills and training pathways should be encouraged, including through FPAs.

Case study: Public hospital service workers MECA

In November 2018 a new public hospital service workers MECA was agreed between the E tū union and 20 District Health Boards around New Zealand. The MECA sets the conditions for around 3,500 workers, including cleaners, laundry workers, orderlies, catering workers and security staff.

The deal is structured to encourage workers to work towards level 2 and level 3 qualifications, which will be rewarded with higher hourly rates: by the end of the MECA term, workers with a Level 3 qualification will earn \$25.58 an hour – an increase of 32.6 per cent above current rates. Workers will be supported by their employers and given access to resources for training, and will be able to do assessments and some book work on the job.

¹⁰ Ministry of Education and Ministry of Business, Innovation and Employment, “Skills at Work: Survey of Adult Skills (PIACC)”, November 2016, https://www.educationcounts.govt.nz/_data/assets/pdf_file/0007/173572/Skills-at-Work.pdf.

¹¹ Paul Conway (Productivity Commission), “Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand”, 2018, <https://www.productivity.govt.nz/news/can-the-kiwi-fly-achieving-productivity-lift-off-in-new-zealand>.





3.3 The role of collective bargaining in lifting incomes and economic growth

At the outset we note a country's employment relations system and choice of collective bargaining model are not the only factors affecting its economic performance.

In general, international research has tended to find a strong link between productivity and both wage growth and wage levels. However, while productivity growth appears to be necessary for wage growth, it is not in itself sufficient. There is also a body of research in labour economics, however, that supports the 'efficiency wage' hypothesis. These researchers argue higher wages can increase the productivity of workers (and profits of the firm) through various means, such as reducing costs associated with turnover or providing employees with incentives to work.

The OECD has warned against assuming the form of collective bargaining systems matches perfectly to economic and social outcomes. Outcomes depend on other important factors such as the wider social and economic model, including tax and welfare systems, and the quality and sophistication of social dialogue.

Making changes to a collective bargaining system without considering this wider context could have unintended consequences.

The relationship between collective bargaining and wage growth

One of the objectives of collective bargaining is typically to balance out the uneven bargaining power between parties. The OECD has found collective bargaining is associated with lower levels of inequality, for example through limiting wage increases for mid- and high-earners to allow for low-earners' incomes to rise.¹² Across the OECD, workers with an enterprise level collective agreement tend to be paid more than those without a collective agreement.

Typically most regulatory frameworks at national level rule out the possibility of enterprise-level negotiations offering worse terms than a sector level collective agreement or national statutory minimum standards. This 'favourability principle' means an individual or enterprise level collective agreement can only raise wages relative to sector level collective agreements or minimum standards.

The difference in wages found by the OECD may also signal higher productivity in companies with enterprise level bargaining than those in a context with a high degree of coverage of centralised bargaining. Where a firm is not constrained by centralised bargaining, the firm's overall performance forms the context for pay increases, and a highly productive firm could choose to pay its workers more, or to pay its highly-productive workers more. A firm offering its workers greater rewards for productivity could induce higher engagement and effort and therefore productivity among its workers.

¹² OECD, "Employment Outlook 2018", 2018, https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2018_empl_outlook-2018-en#page1, page 83.





The relationship between collective bargaining and productivity

Research globally on collective bargaining and productivity growth similarly suggests the relationship between these factors is not clear cut, and is highly dependent on wider labour market systems, and the social and economic models of individual countries.

The Group looked to other countries' experiences in introducing productivity related measures to their collective bargaining systems, in particular recent changes in Singapore to introduce a Progressive Wage Model. We observed a positive collective bargaining experience would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit the market; and lifting overall productivity of the sector.

The evidence in the research literature suggests wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role. This research tends to be based on sector level data and examination of the relationship between wages and productivity across sectors.

We note raising wage floors may make capital investments relatively more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation.

3.4 The role of collective bargaining in an inclusive and flexible labour market

The Group looked at the role of collective bargaining more generally in labour markets internationally. Collective bargaining remains the predominant model for labour negotiations world-wide. It enables employers and employees to enter into a collective dialogue to negotiate the terms for their employment relationship in the form of a collective agreement.

The International Labour Organization (ILO) names collective bargaining as a fundamental right endorsed by all Member States in the ILO Constitution¹³ and reaffirmed this in 1998 in the ILO Declaration on Fundamental Principles and Rights at Work. The ILO recognises the role of collective bargaining in improving inclusivity, equalising wage distribution, and stabilising labour relations.¹⁴

New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to “encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”

As a group we recognised there is value in the process of collective bargaining as a participatory mechanism to provide collective voices for both employers and employees. It can encourage participation and engagement by employers and employees in actively setting the terms of their relationship. In contrast to minimum standards set in legislation at the national level, which apply

¹³ New Zealand was a founding member of the ILO, has signed the 1998 Declaration, and is bound by the primary ILO Convention on collective bargaining No 98 (Right to Organise and Collective Bargaining 1949).

¹⁴ ILO “Collective Bargaining: A Policy Guide”, December 2015, https://www.ilo.org/travail/whatwedo/instructionmaterials/WCMS_425004/lang-en/index.htm.





across the entire workforce uniformly and are imposed by a third party (the Government), collective bargaining may enable the parties who know their particular circumstances best to set the terms that work for them.

We noted shared dialogue between employees and employers across a sector or occupation leads to wider benefits and other forms of collaboration between firms or workers. This is possible when bargaining involves groups of employers or unions with a common interest or shared problem to solve, although we recognise this will not always be the case.¹⁵

Parties may also save in transaction costs by working together on collective bargaining. They can access the expertise of other players in their sector and other scale benefits (for example, arranging for investment in skills or technology for the benefit of the sector).

In countries where union density is low, collective bargaining tends to be concentrated in larger employers, whether public or private sector. Small businesses can therefore find it difficult to access the potential benefits of collective bargaining in an enterprise level collective bargaining system, although that may also help them avoid unnecessary costs.

3.5 The relationship between minimum standards and collective bargaining

Despite having a century-old international labour standards framework, which provides common principles and rules binding states at a high level, the nature and extent of state encouragement for collective bargaining differs significantly between countries. We found the diagram in Figure 9 useful to describe the basic model of how employment relations systems are structured globally.

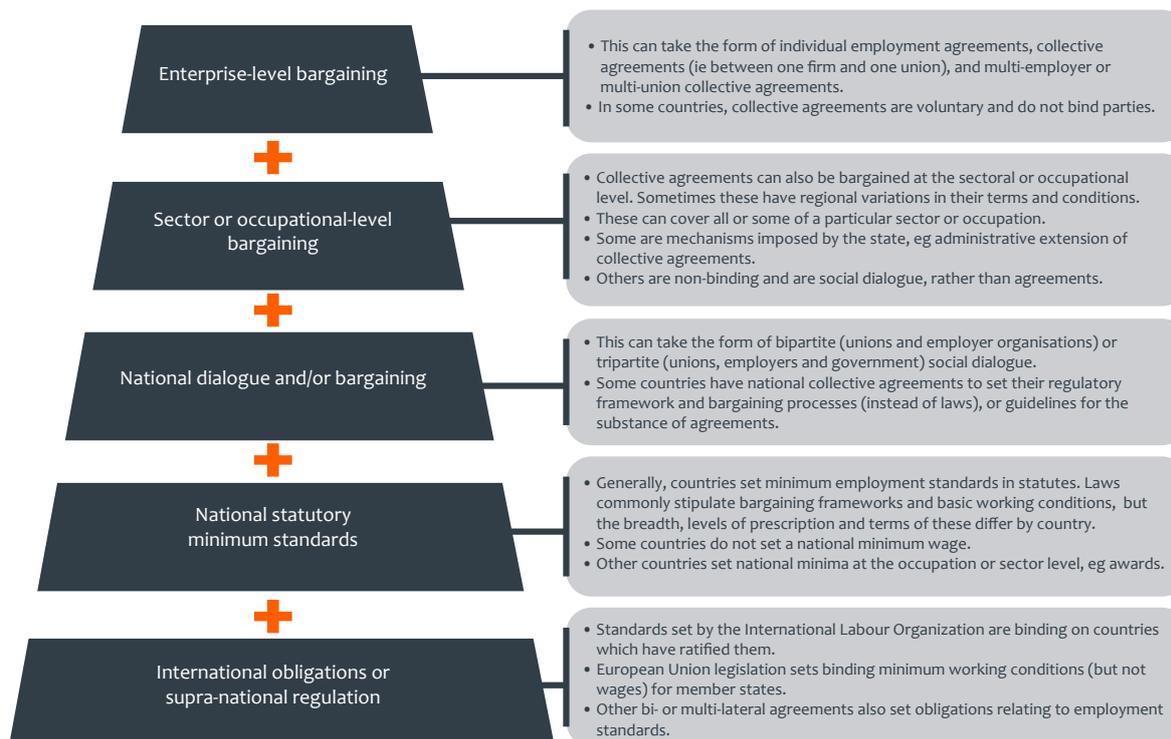
¹⁵ In New Zealand, this is known as Multi-Employer Collective Agreement (MECA) and Multi-Union Collective Agreement (MUCA) bargaining under the Employment Relations Act.





Figure 9

The general model for employment relationships globally



The sharpest delineation between different state models for collective bargaining systems is whether a country has chosen to rely on collective bargaining to provide basic floors for their employment standards (such as a minimum wage, annual leave, redundancy), or whether they rely on statutory minimum employment standards set at a national level which are then supplemented by more favourable terms offered through collective bargaining at a sector- or enterprise-level.

This choice of whether to set a country's minimum employment standards primarily through legislation or collective agreement, along with a country's legal and social traditions, result in the markedly different detailed design of countries' collective bargaining systems. This manifests in the variations in the levels at which collective bargaining takes place and in the mechanisms for determining representativeness, dispute resolution and enforcement. There is no 'one size fits all' model that can be picked up and deployed in another country without significant adaptation for local circumstances.

Variations in their employment relations and standards systems may mean some other countries:

- Have no statutory minimum wage, and often only a basic framework for minimum conditions, set in law. These countries use collective bargaining to provide the same minimum floors we presently regulate for at national level.
- Set only a framework enabling collective bargaining in the law, and allows the representative organisations for employers and employees to agree a national level collective agreement on the bargaining process rules we have set in law.
- Do not provide for collective bargaining to be binding, meaning collective agreements are voluntary and cannot be enforced in court as they can be in New Zealand and most countries.





- Provide for multiple levels of collective bargaining, with a hierarchy of agreements at national, sectoral and enterprise levels – where we only provide for enterprise level.

In New Zealand, we have an employment relations and standards system which is based on setting minimum standards for employment in statute (including a statutory minimum wage, and rights to flexible working, and leave) and a legal framework that sets the rules for collective bargaining. Agreements reached through collective bargaining may equal or add to the statutory floor, not detract from it. There is nothing in these rules that limits collective bargaining to the enterprise, multi-employer or multi-union levels. The rules allow for voluntary bargaining at a sectoral or occupational level.

Some other countries rely more heavily on collective bargaining to set these minimum standards, mainly in Europe. Under the Award system which preceded New Zealand’s current employment relations and standards system, we too relied mostly on collective bargaining and awards to set minimum standards.

3.6 International good practice in designing collective bargaining systems

We looked at how collective bargaining systems are designed internationally, and what different models we may be able to learn from.

Overall the OECD has concluded the main trade-off in designing collective bargaining systems is between inclusiveness and flexibility. In other words, collective bargaining can generate benefits for employment and inclusiveness (wage inequality is lower and employment for vulnerable groups is higher) but can also have drawbacks in reducing the flexibility for firms to adjust wages and conditions when their situation requires it.

The OECD recommends countries consider adopting a model with sector level bargaining, combined with the flexibility to undertake firm-level bargaining to tailor higher-level agreements to each workplace’s particular circumstances.

The OECD has found this model delivers

Figure 10

OECD description of collective bargaining characteristics¹



¹“Firm” in the above diagram refers to what we consider enterprise-level bargaining in New Zealand. The term “opt outs” refers to what we consider exemptions.





good employment performance, better productivity outcomes and higher wages for covered workers compared to fully decentralised systems.¹⁶

Key features of a bargaining system

The OECD characterises collective bargaining systems as set out in Figure 10,¹⁷ including the following key features:

- degree of coverage,
- level of bargaining,
- degree of flexibility, and
- coordination.

We have looked at the OECD's four characterisations, and how New Zealand compares to other OECD countries on each feature.

Degree of coverage

The degree of coverage refers to the proportion of employees who are covered by a collective agreement. This should not be confused with the proportion of employees who are members of a union. Wide collective agreement coverage can have a more sizeable macroeconomic effect—positive or negative – on employment, wages and other outcomes of interest than agreements confined to a few firms.

The share of employees across the OECD covered by collective agreements has declined significantly over the past 25 years. On average, collective bargaining coverage shrank in OECD countries from 45 per cent in 1985 to 33 per cent in 2013. As of 2016, New Zealand's collective bargaining coverage is 15.9 per cent. Figure 11 shows the most recent data from the OECD's Employment Outlook, showing the overall trend over the last three decades of decline in the percentage of workers covered by collective agreements in countries the OECD considers similar to New Zealand (these are English-speaking or have predominantly enterprise level collective bargaining).¹⁸

The evidence we saw from the OECD suggests collective bargaining coverage tends to be high and stable in countries where multi-employer agreements (either sectoral or national) are the norm – even where union density is quite low – and where employer organisations are willing to negotiate.

Some countries also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

¹⁶ OECD, "The role of collective bargaining systems for good labour market performance", *OECD Employment Outlook 2018*, https://doi.org/10.1787/empl_outlook-2018-7-en.

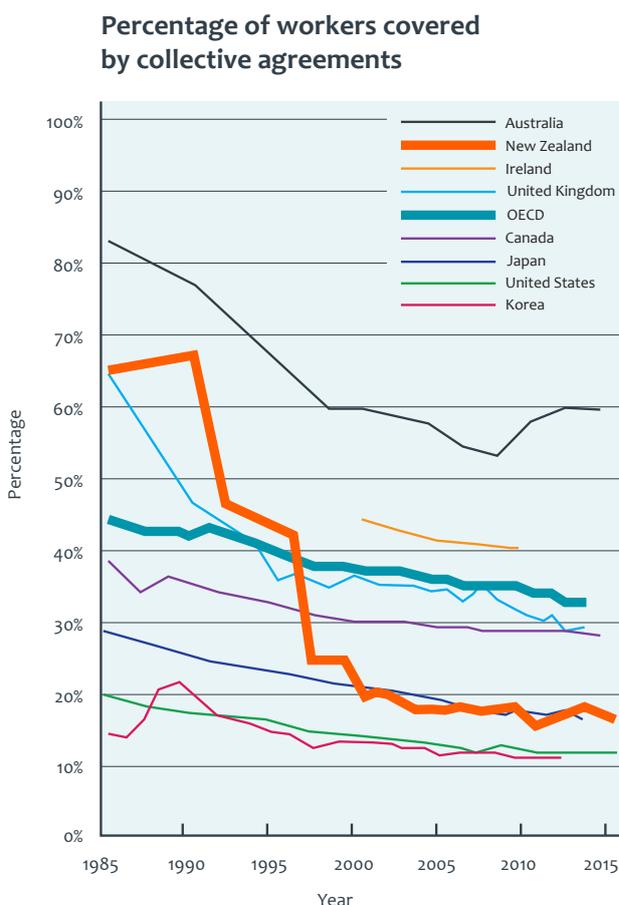
¹⁷ OECD, "The role of collective bargaining systems for good labour market performance", *OECD Employment Outlook 2018*, https://doi.org/10.1787/empl_outlook-2018-7-en, page 78.

¹⁸ OECD, "Collective bargaining in a changing world of work", *OECD Employment Outlook 2017*, https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2017_empl_outlook-2017-en, page 134.





Figure 11



In countries where collective agreements are generally at the enterprise level, coverage tends to match union density. However, it should be noted not all union members are covered by collective agreements.

Data on New Zealand union membership and collective bargaining coverage suggests a notable minority (approximately ten per cent) of those who claim to be covered by a collective agreement are not union members.¹⁹ Many collective agreements in New Zealand permit employers to offer the same terms (by agreement between the union and employer) to all or parts of the employer's non-union workforce. This is known as 'passing on' of terms. One thing which affects this is the negotiation of bargaining fees for non-union workers, although these clauses are relatively rare.²⁰

Across the OECD, about 17 per cent of employees are members of a union. This rate varies considerably across

countries. Union membership density has been declining steadily in most OECD countries over the last three decades. In 2015, New Zealand's equivalent rate was 17.9 per cent. It should be noted union density in New Zealand declined sharply from around 46 per cent to 21 per cent in the four years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time. Data on employer organisation density (that is, the percentage of firms that belong to employer organisations) is patchy, and comparisons can be difficult to draw between countries given the absence of common metrics and reliable data. Across those OECD countries that do collect this data, employer organisation density is 51 per cent on average. Although it varies considerably across countries, this figure has been quite stable in recent decades. There is no national level statistical information gathered on New Zealand's employer organisation density.

Level of bargaining

The level of bargaining refers to whether parties negotiate at the enterprise, sector or national level. Centralised bargaining systems are ones in which bargaining tends to happen at the

¹⁹ Stats NZ, "Labour market statistics: March 2018 quarter (Household labour force survey)", May 2018, <https://www.stats.govt.nz/information-releases/labour-market-statistics-march-2018-quarter>.

²⁰ Centre for Labour, Employment and Work, "Employment Agreements: Bargaining Trends & Employment Law Update 2017/2018", July 2018, pages 27 – 28.





national level, although may be supplemented by enterprise level agreements. Highly decentralised systems are ones in which collective bargaining tends to be primarily at the enterprise level.

New Zealand sits at the far end of the decentralised spectrum. Although our current system permits voluntary sector bargaining, in practice most bargaining takes place at the enterprise level, although there is some bargaining among groups of employers within a sector (through a MECA).

According to the OECD, centralised bargaining systems can be expected to have less wage inequality relative to systems with mostly enterprise level agreements. Centralised systems tend to experience smaller wage differences, within firms, across firms, or even across sectors. Enterprise level agreements, by contrast, allow more attention to be paid to enterprise-specific conditions and individual performance, and allow for more variation in wages. Figure 12 shows where different OECD countries sit on this spectrum.²¹ This graph groups countries by those which have predominantly enterprise level agreements, both enterprise and higher (sector or national) level agreements, and those countries which predominantly have only higher level agreements.

Degree of flexibility

In systems with sector or national level collective agreements, the degree of flexibility refers to the extent to which employers can modify or depart from those higher-level agreements through an enterprise level agreement or exemptions.

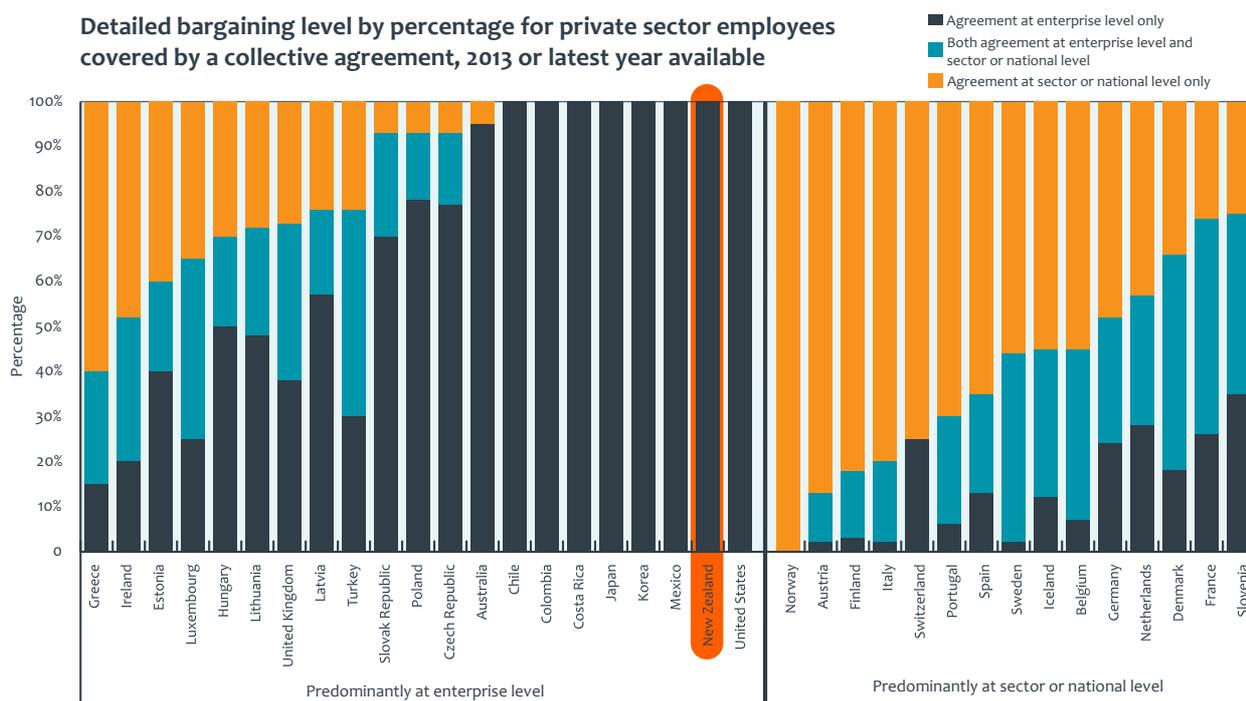
²¹ OECD, "Collective bargaining in a changing world of work", *OECD Employment Outlook 2017*, https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2017_empl_outlook-2017-en, page 148.





Figure 12

Detailed bargaining level by percentage for private sector employees covered by a collective agreement, 2013 or latest year available



The possibility of exemptions can increase the flexibility of a system and allow for a stronger link between wages and firm performance, for example in economic downturns. On the upside, this may bolster employment and productivity. On the downside, exemptions can increase wage inequality.

Like most countries, New Zealand does not allow collective agreements to offer less favourable terms than statutory minimum standards. Collective agreements, including MECAs, are binding on the parties who agreed them, but this would not be characterised as a limitation on flexibility as each party to the agreement has chosen to be bound by it.

Coordination

Coordination refers to the degree to which minor players deliberately follow what major players decide, and to which common targets (e.g. wage levels) are pursued through bargaining. Coordination can happen between bargaining units at different levels, for example when an enterprise level agreement follows guidelines fixed by peak-level organisations. Or it can happen at the same level, for example when some sectors follow terms set in another sector.

According to the OECD’s definition of coordination, and relative to other countries, our collective bargaining system in New Zealand does not feature coordination between bargaining units. This is because bargaining is typically at the enterprise level, and the Government does not exert influence beyond establishing the bargaining framework and minimum standards.

However, the Group noted we have unions that represent workers in several sectors or occupations, and this could allow similar bargaining objectives to be pursued in collective bargaining across various sectors or occupations.





3.7 Other countries' approaches to sectoral or occupational bargaining

New Zealand currently provides a voluntary mechanism for employers and employees to bargain at a sector level, through MECAs, but this mechanism is not used widely, particularly in the private sector.

We noted any FPA system design will need to be bespoke to suit New Zealand's own social and economic context, but we looked to other countries to understand how they approached the design and concept of sector level bargaining.

There are four main models of sector level bargaining we looked at:

- Australian Modern Awards system,
- The Nordic model,
- The Continental European model, and
- Singapore's Progressive Wage Model.

These models are discussed more fully below. It is worth noting the comparator countries have different societal factors that influence how they approach the question of collective bargaining. For example there is a high level of government intervention in the Singaporean Progressive Wage Model compared with a high level of social dialogue and cooperation in Nordic countries such as Denmark.

Australian Modern Awards system

In 2009, Australia introduced a system of Modern Awards: industry-wide regulations that provide a fair and relevant minimum safety net of terms and conditions such as pay, hours of work and breaks, on top of National Employment Standards.

Awards are not bargained for. They are determined by the Fair Work Commission following submissions from unions and employer representative groups. The Fair Work Commission must review all Modern Awards every four years.

A Modern Award does not apply to an employee when an enterprise level collective agreement applies to them. If the enterprise agreement ceases to exist, the appropriate Modern Award will usually apply again. Enterprise agreements cannot provide entitlements that are less than those provided by the relevant Modern Award and must meet a 'Better Off Overall Test' as determined by the Fair Work Commission.²²

Broadly speaking, the statutory minima in Australia – the National Employment Standards - coupled with Modern Awards provide the equivalent function of worker protection to New Zealand's existing national statutory minimum employment standards. However, a key difference is that in Australia the Modern Awards system provides the ability for the Government to impose differentiated minimum standards by occupation.

²² Fair Work Commission, "Awards and Agreements", September 2018, <https://www.fwc.gov.au/awards-and-agreements/agreements>





Collective bargaining in Australia is predominantly at enterprise level. Sector level bargaining does not exist in Australia in the form envisaged by the FPA system. Australian law provides for multi-enterprise collective agreements in limited circumstances. One of these circumstances is when the Fair Work Commission makes a Low-Paid Authorisation to “encourage bargaining for and making an enterprise agreement for low-paid employees who have not historically had the benefits of collective bargaining with their employers and assisting those parties through multi enterprise bargaining to identify improvements in productivity and service delivery and which also takes account of the needs of individual enterprises.”²³ The private security sector appears to be one of the more frequent users of the low-paid provisions.

The Nordic model

Under the Nordic model of collective bargaining, national legislation only provides a broad legal framework for collective bargaining. The rules are set at national level through ‘basic agreements’ between the employee and employer representative organisations. Sectoral collective agreements then define the broad framework for terms, but often leave significant scope for further bargaining at the enterprise level.

None of the Nordic countries have a statutory minimum wage. Collective agreements therefore fulfil the function of setting minimum floors for wages and conditions in each sector or occupation, rather than these being set in statute. Denmark and Sweden use collective agreements as their only mechanism for setting minimum wages, meaning there is no floor for wages for workers outside of collective agreements.

Due to the high level of union density in these countries, it is generally unusual to extend sector level collective agreements to all employees in an industry but agreements can be extended through ‘application agreements’. A union may enter into application agreements with employers who are not signatories to a collective agreement, with the effect of making that collective agreement also apply to a non-signatory company. Non-union employees can also enter into application agreements with unions.

For example, in Sweden, there is no bargaining extension mechanism in statute or otherwise. A voluntary approach to extension is also made easier due to high union membership. Finland, Iceland and Norway however have all started to use extension mechanisms to cover all employees at industry level, to provide those minimum floors.²⁴

These countries tend to have historically high levels of organisation on both the employer and employee sides, with continuing high union density and a strong social dialogue and cooperation around collective bargaining and in their wider economic model.

Countries that generally follow this model are Iceland, Denmark, Germany, the Netherlands, Norway and Sweden.

²³ Fair Work Act 2009 (Australia).

²⁴ ILO, “Minimum wages in Nordic countries”, https://www.ilo.org/global/topics/wages/minimum-wages/setting-machinery/WCMS_460934/lang-en/index.htm.





The Continental Europe model

Under the Continental model, the legal framework provides statutory minimum standards for wages and conditions, along with the rules for collective bargaining.

National or sectoral collective agreements set terms and conditions for employees but allow for improvements on these at enterprise level ('the favourability principle'), or opt outs from the sector agreement (although these derogations are usually limited).

Under this model, collective bargaining is conducted at three levels - national, industry and enterprise:

- At national level, negotiations cover a much wider range of topics than normal pay and conditions issues, including job creation measures, training and childcare provision. Pay rates are normally dealt with at sector and enterprise level, but the framework for pay increases could be set at national level.
- At sector level, negotiations are carried on by unions and employers' organisations often meeting in 'joint committees' (binding on all employers in the sectors or occupations they cover).
- At enterprise level, the union delegations together with the local union organisations negotiate with individual employers.

Collective bargaining is typically hierarchical and structured such that an agreement concluded at one level cannot be less favourable than agreements reached at a broader level. Sector agreements are therefore subject to minimum terms set out in national agreements. Enterprise level agreements can be more favourable than industry agreements. There is, however, large variation among sectors in terms of the relative importance of sector level and enterprise level agreements.

Extension mechanisms are more widely used under this model of collective bargaining. Criteria for extension can be a public interest test or often a threshold of coverage. For example in Latvia if the organisations concluding an agreement employ over 50 per cent of the employees or generates over 60 per cent of the turnover in a sector, a general agreement is binding for all employers of the relevant sector and applies to all of their employees. In Belgium or France, however, extensions are issued by Royal Decree or the Labour Ministry respectively upon a formal request from the employer and employee representative organisations that concluded the agreement. This can result in relatively high collective bargaining coverage, even if union density is not high. For example, Belgium and France have collective bargaining coverage over 90 per cent, despite union density rates of 55 per cent (Belgium) and 11 per cent (France).

Countries that generally follow this model of collective bargaining are Belgium, France, Italy, Portugal, Slovenia, Spain and Switzerland.

Singapore's Progressive Wage Model

Singapore has similar levels of collective bargaining and union density to New Zealand. The legal framework does not provide for a statutory minimum wage.





Singapore undertakes sector level bargaining in specific sectors in the form of the Progressive Wage Model (PWM) introduced in 2015. The PWM is a productivity-based wage progression pathway that helps to increase wages of workers through upgrading skills and improving productivity. It is mandatory for workers in the cleaning, security and landscape sectors which are mostly outsourced services. The PWM benefits workers by mapping out a clear career pathway for their wages to rise along with training and improvements in productivity and standards.

The PWM also offers an incentive to employers, for example, in order to get a licence a cleaning company must implement the PWM. At the same time, higher productivity improves business profits for employers.

The PWM is mandatory for Singaporeans and Singapore permanent residents in the cleaning, security and landscape sectors. It is not mandatory for foreign workers but employers are encouraged to use these principles of progressive wage for foreign cleaners, landscape workers and security officers.

3.8 New Zealand's employment relations and employment standards regulatory system

Any FPA system will need to complement and support the existing parts of New Zealand's regulatory system for employment relationships and standards. Therefore, it is worth setting out our understanding of that system.

The Employment Relations and Employment Standards (ERES) regulatory system aims to promote productive and mutually beneficial employment relationships. It incorporates mechanisms, including a framework for bargaining, that are intended to:

- support and foster benefits to society that are associated with work, labour market flexibility, and efficient markets,
- enable employees and employers to enter and leave employment relationships and to agree terms and conditions to apply in their relationships, and
- provide a means to address market failures such as inherent power imbalances and information asymmetries which can lead to exploitation of workers.

Elements of this regulatory system acknowledge conditions can arise in labour markets where asymmetries of power can exist between employers and employees. This in particular applies to minimum standards and collective bargaining components.

The system provides statutory minimum standards for a number of work related conditions and rights, many of which fulfil obligations New Zealand has agreed to meet under international labour and human rights conventions. Collective bargaining provides for agreements only to offer more favourable terms than these standards.

Employment relationships are regulated for a number of reasons:

- to establish the conditions for a market for hire and reward to operate, and for this market to be able to adjust quickly and effectively (labour market flexibility),





- to provide a minimum set of employment rights and conditions based on prevailing societal views about just treatment,
- to foster the benefits to society that relate to the special nature of work (including cohesion, stability, and well-being),
- to address the inherent inequality of bargaining power in employment relationships, and
- to reduce transaction costs associated with bargaining and dispute resolution.

The system therefore provides:

- a voluntary contracting regime for employers and employees emphasising a duty of good faith (including both individual employment agreements and collective bargaining at the enterprise level),
- minimum employment standards, including minimum hourly wage, minimum entitlements to holidays, leave (for sickness, bereavement, parenting, volunteering for military service, serving on a jury), rest and meal breaks, expectations on entering and exiting employment relationships,
- a dispute resolution framework encouraging low level intervention, and
- a risk-based approach to enforcement activity.

The system can be a key driver for innovation and growth in our labour market and wider economy

The effective use of knowledge, skills and human capital in firms is a key driver of innovation and growth. This can increase wages, lifts firms' competitiveness and profitability, and lead to better social and economic outcomes.

The ERES system sets the boundaries for the operation of a market for labour hire. The operation of this market is not simply about having an employment agreement for the exchange of goods and services; it is based on human relationships where mutual good faith, confidence and fair dealing are important.

The ERES system is also important for New Zealanders, as employment is a primary source of income that is used to purchase goods and services, and is a source of investment and insurance. There is an emphasis on these relationships being conducted in good faith, and also on effective dispute resolution.

Institutions support the functioning of this system

An important role of the ERES system is to resolve problems in employment relationships promptly. Specialised employment relationship procedures and institutions have been established to achieve this. They provide expert problem-solving support, information and assistance. The employment relations institutions are:

- Employment Mediation Services,
- the Employment Relations Authority,
- the Employment Court,
- Labour Inspectors, and
- the Registrar of Unions.





3.9 The current state of collective bargaining in New Zealand and trends over time

The legal framework for collective bargaining in New Zealand

The Employment Relations Act 2000 (ER Act) sets out the rules for engaging and, at least in its stated objectives, promotes collective bargaining in New Zealand. As in individual employment relations, the duty of good faith underpins collective bargaining in New Zealand.

The ER Act contains mechanisms for multi-employer collective bargaining but no specific mechanisms for industry or occupation-wide collective bargaining.

There are also rules around ‘passing on’ of collectively bargained terms and conditions to non-union members. While employers can’t automatically pass on terms which have been collectively bargained for, around 11 per cent of collective agreements extend coverage to all employees of the employers. Often this is done through non-union members paying a bargaining fee, or union members voting to allow terms to be passed on. Informally, many employers ‘pass on’ many collective terms through ‘mirror’ individual employment agreements.

A collective employment agreement expires on the earlier of its stated expiry date or 3 years after it takes effect, with some exceptions. Over time, collective agreements have become longer in duration. One reason for this may be the transaction costs for both sides of collective bargaining incentivising longer duration for efficiency reasons. Another explanation may be that inflation has been low and stable for an increasing length of time.

Data on collective bargaining in New Zealand

Over the last few decades, changes to our employment relations and standards system have resulted in a decrease in coverage. It should be noted collective bargaining coverage varies considerably between countries, and there has been a decline in collective bargaining coverage in most countries over that time.

New Zealand has low collective bargaining coverage compared with many OECD countries (see Figure 13).²⁵ The Group observed that some countries with low union density also provide for the extension of coverage of collective agreements beyond the initial signatories. This explains why collective bargaining coverage is higher than union density across the OECD, where sector level extensions are commonly used in two-thirds of countries.

Collective agreements are more significant in the public sector in New Zealand while private sector coverage is low, and is mainly concentrated in certain industries and large firms. The concentration of collective agreements in the public sector is consistent with many other OECD countries including Australia, the United Kingdom, United States and Canada.²⁶

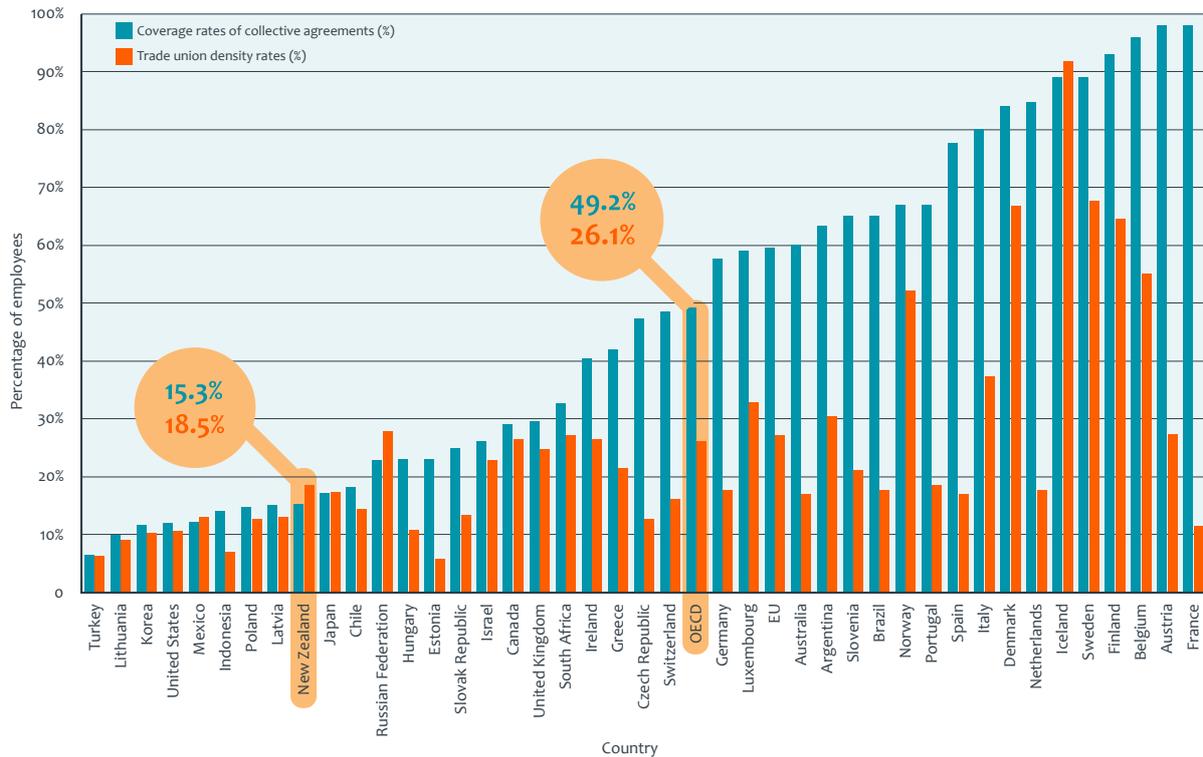
²⁵ OECD, “Economic Policy Reforms 2017: Going for Growth”, 2017, https://www.oecd-ilibrary.org/economics/economic-policy-reforms-2017/coverage-rates-of-collective-bargaining-agreements-and-trade-union-density-rates_growth-2017-graph183-en.

²⁶ Centre for Labour, Employment and Work, “Unions and Union Membership in New Zealand – report on 2016 Survey” https://www.victoria.ac.nz/_data/assets/pdf_file/0006/1235562/New-Zealand-Union-Membership-Survey-report-2016FINAL.pdf.





Figure 13
Coverage rates of collective bargaining agreements and trade union density rates (2013)

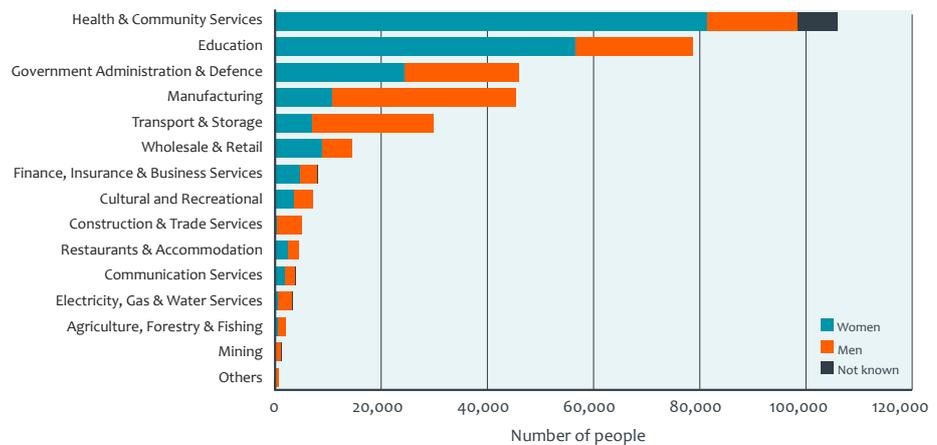


Union membership in New Zealand is voluntary. Membership and collective agreement coverage are around 17 per cent of all employees. It should be noted not all union members are covered by collective agreements. Union membership as a percentage of the workforce has declined from over 20 per cent in 2012 to 17.2 per cent in 2017 (a 6.2 per cent decline), although according to the Household Labour Force Survey, union membership numbers may have risen slightly over the past year. The majority of union members are women and are concentrated in particular sectors (see Figure 14).²⁷

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. The Group considered this was in

Figure 14

Union membership in New Zealand by gender and industry (2017)



²⁷ Companies Office, “Union membership return report 2017”, 2017, <http://www.societies.govt.nz/cms/registered-unions/annual-return-membership-reports/2017>.





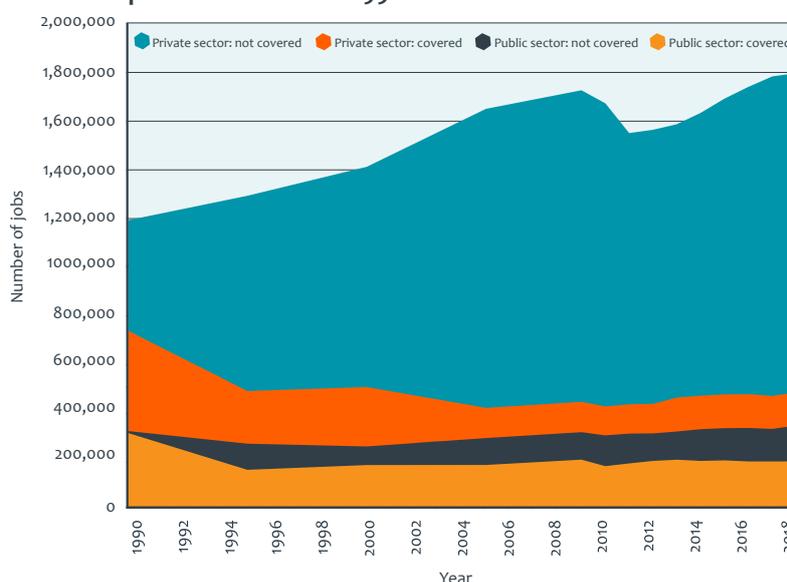
part due to the difficulties faced by workers in accessing the collective bargaining system. This means workers on small worksites being able to organise their fellow workers, finding a union that is willing to spend the extensive time to negotiate a collective agreement, and voluntarily concluding an agreement before the union members on the site have left their employment. We considered that the lack of coordination in small workplaces is another factor.

Currently in New Zealand there are 1600 collective agreements covering ten per cent of the private sector workforce. There are also 456 collective agreements covering 60 per cent of the public sector workforce. While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in Figure 15.²⁸

Coverage under MECAs is low outside the public sector, as is coverage of single employer collective agreements. MECAs are generally found in the health and education sectors (excluding tertiary education). In 2004 there were 37 private sector MECAs when the duty to conclude bargaining was added to the ER Act. In 2015 there were 37 private sector MECAs when the employer opt out was added. There are currently 72 MECAs, which is the same number as five years ago.

Figure 15

Collective agreement coverage in New Zealand’s public and private sector since 1990



MECA bargaining may be frustrated by competitive instincts between firms, as well as a general disinclination to bargain with unions or collectively. These competitive pressures do not, for the most part, exist in the public sector, where bargaining is undertaken by centralised authorities (e.g. District Health Board Shared Services and the Ministry of Education) on behalf of what are technically separate employers (e.g. the independent District Health Boards and school Boards of Trustees).

In practice, MECAs only exist where the employer parties all agree prior to the commencement of bargaining – or early thereafter – to engage together in multi-employer collective bargaining. This was the case even before 2015, when the ER Act was amended to allow employers to opt out of MECA bargaining. Salary reviews have become more prevalent, mainly in the public sector. The increase in productivity or performance payments is associated with a movement to a range of pay rates (because employers have discretion to place employees within the range). However, output can be hard to measure, especially on an individual basis. In contrast to this, specific

²⁸ Centre for Labour, Employment and Work, “Employment Agreements: Bargaining Trends & Employment Law Update 2017/2018”, July 2018, page 18.





mention of training and skill development in private sector collective agreements has decreased over time. These provisions do not tend to link pay to skills development. It appears employers move towards providing for training and skills development in company policy instead. This does not necessarily mean less training and skills development is taking place; in fact the Survey of Working Life indicates it is increasing.

It is rare to see wages being indexed to inflation in Collective Agreements. This may partly reflect parties' preference for certainty, to know exactly what wages will be. However, another factor may be that inflation has been low in the last decade and parties may feel reasonable certainty it will not exceed 3 per cent per annum, in line with the Reserve Bank's policy.

Case study: New Zealand plastics industry MECA

This agreement dates from 1992, with many of the standard conditions from the previous system of awards (e.g. hours of work, overtime rates, shift payments) carrying over from then.

The Plastics MECA moved away from multi-classification pay rates and service pay to a skill-based pay system linked to qualifications very early in its development. Training was, and has been, a central part of the Plastics MECA pay scheme, although training was not mandatory for either the employers or the employees. One of the agreed objectives of the Plastics MECA is "the improvement of productivity, efficiency and competitiveness of the industry through a commitment to qualifications."

The Metals MECA has similar commitments to productivity and skill development although the minimum wage rates are generally based on work classifications. The negotiations for both MECAs normally take place with a key group of employers and the unions. The unions then go around other employers and get them to sign on as a 'subsequent party' to the MECA.

While the MECAs have been good for setting the base industry employment conditions, if an employer does not want to accept the industry standards created in the MECA, there is little the union can do to force the issue, especially in small enterprises. Even the subsequent industry parties have lists of conditions from the MECA that they opt out of.

3.10 Collective bargaining experiences in New Zealand

What makes for good bargaining process?

In our experience, a good bargaining process underpinned by a strong rules-based system that addresses the inherent inequality of bargaining power in employment relationships will lead to a good outcome. By good outcome we mean one both parties support, with real improvements over the status quo. The Group considers the elements of effective collective bargaining come down to three factors: attitude/commitment, skills and process.

The attitude or commitment of parties to collective bargaining is important. Good collective bargaining requires good faith and a genuine willingness to engage and negotiate. Collective agreements are forward-looking documents and, to reflect this, good collective bargaining involves a conversation about where both the business and workers are going in the next few years. Bargaining works best for employers when they can see it is transformational not transactional, i.e. it affects the whole business, not just higher wages. A good attitude when





approaching bargaining can also be self-reinforcing: bargaining allows for intense discussions about real issues, which ultimately adds value to the entire employment relationship.

Good bargaining also typically involves having skilled people in the room, and strategic leadership that takes a long-term perspective.

In terms of the process, it must be built around a strong rules-based process that addresses the inherent inequality of bargaining power in employment relationships. This includes employers not interfering in the choice of workers to join a union, respecting the workers' right to meet in the workplace to formulate their bargaining position, elect their own bargaining team and to conduct bargaining in an efficient manner. This also includes the ability of the parties to access statutory processes for the resolution or determination of the terms of such an agreement if bargaining becomes protracted or difficult. The capacity and capability of bargaining parties will also support an efficient process and lead to timely outcomes. It can also be useful to involve trained third-party facilitators, mediators or other forms of support.

What makes for a bad process?

A bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and industrial disputes.

Barriers to good outcomes can take a number of forms. This may involve bad faith, where one or both parties are making no real effort to honestly engage. If the approach to bargaining is transactional, it's harder to get all parties to the bargaining table. Likewise if one party feels like it is being forced to the negotiating table, or there is a lack of bargaining skills, it can lead to an ineffective process.

In the case of MECAs, if one party is unwilling to come to the table – or wants to withdraw from an established MECA when it is being revised – that is enough to put an end to negotiations.

Bargaining can be quite different depending on the scale of the parties or the characteristics of the industry. The bargaining process can impose higher relative transaction costs on small businesses, who can have quite different needs. It can also be harder in industries or occupations with higher turnover.

Coordination

Notwithstanding the existence of some MECAs, the vast majority of collective agreements negotiated in New Zealand are for single employers. In contrast, FPAs would require a high degree of coordination to work effectively, and could require multiple representative groups to be involved.

We note levels of coordination can vary significantly across industries and occupations in New Zealand: some industries have well-established industry groups and unions, whereas others do not. Even where industry groups do exist, they tend to be focused on representing the interests of the industry and sharing best practice, and do not typically have a role in collective bargaining.





The process of collective bargaining and the problem of coordination can also be more difficult where small and medium enterprises are predominant in a sector, as is common in New Zealand.

4 The role of Fair Pay Agreements in our economy

4.1 Purpose of introducing a Fair Pay Agreement system

The Government asked us to make independent recommendations on the scope and design of a legislative system of industry or occupation-wide bargaining, which would support the Government's vision for:

- A highly skilled and innovative economy that provides good jobs, decent work conditions and fair wages while boosting economic growth and productivity.
- Lifting the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- An employment relations framework that creates a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages.
- Meeting New Zealand's obligation to promote and encourage the setting of terms and conditions of employment by way of collective bargaining between workers, workers' representatives, employers and their representatives.

The Government mandated that it will be up to the workers and employers in each industry to make use of the system to improve the productivity and working conditions in the industry.

In designing this system, the Government also mandated us to manage and where possible mitigate the following risks:

- slower productivity growth if a FPA locks in inefficient or anti-competitive businesses models or market structures,
- a 'two-speed' labour market structure with a greater disparity in terms and conditions and job security between workers covered by FPAs and those who are not,
- unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels,
- undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and
- possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

4.2 Where Fair Pay Agreements would fit into the ERES system

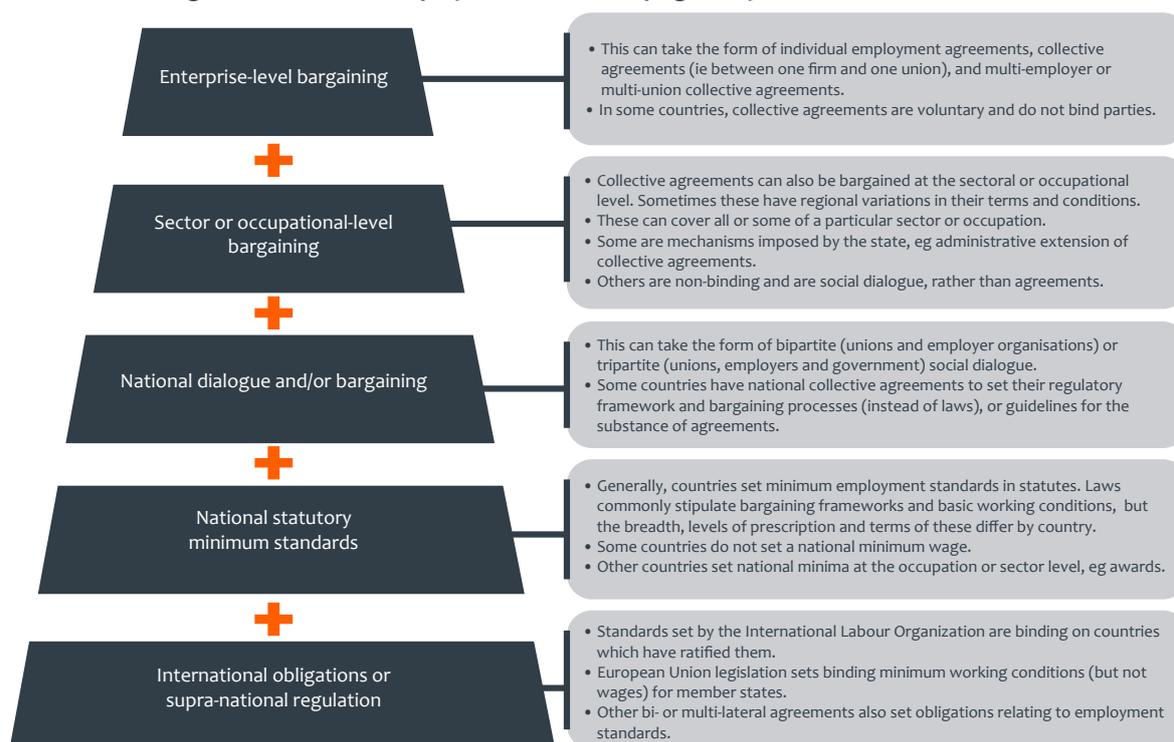
As mandated by the Government in our terms of reference, FPAs would provide a collective bargaining mechanism which complements the existing ERES system, rather than replacing it. FPAs would strengthen sector or occupational level bargaining, providing a new collective bargaining tool for workers and employers to use, as shown in Figure 16.





Figure 16

The general model for employment relationships globally



Relationship with minimum employment standards

A FPA system will allow for collective agreements which bind a sector or occupation. These will build on, rather than replace, existing minimum standards. Minimum standards will continue to operate as a ‘floor’, and terms in an FPA agreement may match or improve on those standards. If minimum standards overtake those in the FPA over time, the minimum standards would apply.

Relationship with enterprise level collective agreements

Workers and firms would also be able to negotiate enterprise level agreements (whether MECAs, MUCAs, single employer collective agreements, or individual employment agreements) within that sector or occupation. These agreements would be able to, as appropriate to the circumstances:

- further improve on the terms and conditions in the FPA,
- clarify the specific terms which apply at the enterprise level (for example, when the FPA sets a range),
- set terms and conditions for employers or workers which are exempt from the FPA, and/or
- set terms and conditions on matters where the FPA is silent.





5 Summary of proposed FPA model and key features

In developing the design of a FPA system, we have examined several options, including how to apply the use of extension bargaining (Continental Europe) and a more coordinated approach (Nordic model) in New Zealand.

The Group agrees with the OECD's advice that there is no single international model for collective bargaining or employment relations that can be applied in another country, without being adapted to suit that country's social and economic context.

We recognise we are not designing a system from a blank sheet, and certain characteristics of our current state need to be considered pragmatically:

- the existence of statutory minimum standards,
- low levels of organisation among workers and employers, and
- low levels of take up of voluntary approaches to sector or occupational bargaining in New Zealand, particularly in private sector and among small businesses

Further, we took into account that a FPA system is intended to complement, and not replace or stand alone from the existing employment relations and standards system. Where the existing system works this can be adapted for FPAs.

Nevertheless, the group agreed New Zealand could benefit from stronger employer – worker dialogue. If a collective bargaining dialogue at sectoral or occupational level is introduced, it is most likely to gain real traction when:

- it is focussed on problems which are broadly based in the sector,
- it presents real opportunities for both employers and workers to gain from the process
- parties are well represented, and
- where it is connected to the fundamentals of the employment relationship: the exchange of labour and incentives to invest in workplace productivity-enhancing measures such as skills and technology.

The Group considered this measure could be most useful in sectors or occupations where particular issues with competitive outcomes are identified, for example, where competition is based on ever-decreasing labour costs rather than quality or productivity. It could also be useful more generally where workers and employers identify scope to improve outcomes across a sector or occupation.

We also considered that this may not be a necessary or useful tool in some sectors or occupations.

Employer representatives participated actively and constructively in the process and can agree with many of the recommendations and design features of the proposed FPA system. However, they advised the Group they cannot support the compulsory nature of the system for employers as currently drafted.

The employer representatives' preference would be a system which is based on voluntary participation for employers at the start, and for reasonable grounds for employers to opt out from the process or resulting agreement later on.





The Group recommended the Government seek advice on the compatibility of the system with New Zealand's international obligations.

6 Detailed design of a FPA collective bargaining system

6.1 Initiation

The Government asked us to recommend a process and criteria for initiating FPA collective bargaining, including bargaining thresholds or public interest tests.

The FPA collective bargaining process should be initiated by only workers and their union representatives

We recommend the group initiating the process must be workers' union representatives, and they must nominate the sector or occupation they seek to cover through a FPA. How they define the proposed boundaries of the sector or occupation may be narrow or broad.

There should be two circumstances where a FPA collective bargaining process may be initiated

The Group envisages two circumstances where employers and/or workers' union representatives in a sector or occupation may see benefit in bargaining a FPA.

On the one hand there may be an opportunity for employers and workers to improve productivity and wage growth in their sector or occupation through the dialogue and enforceable commitments FPA collective bargaining provides.

On the other hand, there may be harmful labour market conditions in that sector or occupation which can be addressed through employer-worker collective bargaining. This would enable them to reach a shared and enforceable FPA that sets wages and terms and conditions across the sector or occupation, to tackle those harmful conditions and to set a level playing field where good employers are not disadvantaged by paying reasonable industry-standard wages.

The Group can therefore see two routes for a FPA collective bargaining process to be initiated:

- **Representativeness trigger:** In any sector or occupation, workers, via their union representatives, should be able to initiate a FPA collective bargaining process if they can meet a minimum threshold of number of workers in the nominated sector or occupation, or
- **Public interest trigger:** Where the representativeness threshold is not met, a FPA may still be initiated where there are harmful labour market conditions in the nominated sector or occupation.

The representativeness threshold should cover both union and non-union workers

Where workers through their union representatives wish to initiate a FPA process, we recommend a minimum representativeness threshold should apply across all workers in the nominated sector or occupation. This should cover both union members and non-union workers.





We recommend at least ten per cent or 1,000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) must have indicated their wish to trigger FPA bargaining.

This representativeness threshold is intended to ensure there is sufficient demand for bargaining within the sector or occupation. There would be no equivalent employer representation threshold.

The conditions to be met under the public interest trigger should be set in legislation

To provide certainty for all parties, if the option of a ‘public interest trigger’ is progressed, we recommend the conditions for harmful labour market conditions should be set in legislation and assessed by an independent third party.

In developing the conditions for this test, Government should consider including some or all of the following:

- historical lack of access to collective bargaining,
- high proportion of temporary and precarious work,
- poor compliance with minimum standards,
- high fragmentation and contracting out rates,
- poor health and safety records,
- migrant exploitation,
- lack of career progression,
- occupations where a high proportion of workers suffer ‘unjust’ conditions and have poor information about their rights or low ability to bargain for better conditions, and
- occupations with a high potential for disruption by automation.

These conditions, or criteria, should be designed so they assess whether there is an overriding public interest reason for FPA bargaining to be initiated in that particular sector or occupation.

An independent body is needed to determine these conditions are met

Under either route, there is a need for an independent body to determine the initiation conditions have been met before the bargaining process commences:

- Under the representativeness trigger, where the number of workers requesting the process is lower than 1,000, the body would determine the baseline number of workers in the nominated sector or occupation and confirm the threshold of ten per cent has been met.
- Under the public interest trigger, the body would determine the claim that the harmful conditions are evidenced, and invite comment from affected parties within a set time period.

There should be time limits set for the body to complete the determination process to provide certainty for all parties on whether the bargaining process may proceed.

Once determined, the body would inform all affected parties (workers and employers) that bargaining will commence. This provides an opportunity for any party who considers they do not fall within the proposed coverage to contest whether they fall within the coverage.





Once initiation is complete, the bargaining process would be the same under either trigger circumstance.

The Group considered such an independent body would have quasi-judicial functions, for example, in circumstances where the coverage or representativeness threshold need to be adjudicated, rather than agreed by consensus. The body would need to interpret the legislation and exercise determinative functions. We suggest the body could be a statutory body, similar to a Commission, at arm's length from the Government of the day. The independent body must be a costs free jurisdiction.

The Government will need to consider how to assess and mitigate potential negative effects

We acknowledge some sectors perceive there could be negative effects on competition or consumer prices from FPA bargaining. For example, agreements could have the effect of shutting out new entrants to an industry, or higher wage costs passed on through product price increases. We invite the Government to consider how existing competition law mechanisms may need to be adapted to mitigate the risk of such effects.

6.2 Coverage

The Government asked us to make recommendations on:

- how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the FPA system would apply to employees only, or a broader class of workers,
- whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so, and
- whether FPAs should apply to industries or occupations, or both.

The occupation or sector to be covered should be defined and negotiated by the parties

We recommend parties should be able to negotiate the boundaries of coverage, within limits set in the legislation. The workers and their representatives initiating the bargaining process must propose the intended boundaries of the sector or occupation to be covered by the agreement.

It is important for FPAs to cover all workers – not just employees – to avoid perverse incentives to define work outside of employment regulation

The majority of the Group considered the parties covered by the FPA should include all workers in the defined sector or occupation, subject to any exemptions (see below). We consider it is necessary for FPAs to cover all workers, as otherwise the system may create a perverse incentive to define work outside employment (regulatory arbitrage).

However, the Group acknowledges this would be a significant change to the current employment relations model, and some members noted contractors operate under a business, rather than employment, model.





We acknowledge the issue of defining workers as contractors to avoid minimum standards is a broader issue, and Government may wish to give effect to our recommendation through other work directly on that issue across the ERES system.

All employers in the defined sector or occupation should be covered by the agreement

The Group noted the premise of the FPA was that it should cover all employers in the defined sector or occupation in order to avoid incentives for under-cutting the provisions of the FPA. This approach, if adopted, should also extend coverage under the FPA to any new employers or workers in that sector or occupation after the FPA has been signed.

The majority agreed it would be important for employers to be able to achieve certainty and avoid incurring unnecessary transaction costs. If an employer does not believe they are within the coverage of the initiation of a particular FPA they should be able to apply to the independent body for a determination of whether they fall within the coverage and are required to be involved in the FPA process.

There may be a case for limited flexibility for exemptions from FPAs in some circumstances

The Group noted lifting standards may force some employers out of the industry, if they can neither absorb costs nor raise prices and remain competitive in the market. A higher floor for wages or conditions may also discourage employers from hiring some workers with perceived risk factors.

We consider some flexibility should be permissible in FPAs, for example for employers where they are facing going out of business. Parties could include defined circumstances for temporary exemptions for employers or workers in the FPA. They could also do this by including administrative procedures for the parties or a third party independent body to approve requests for an exemption after the FPA is ratified.

Particular circumstances where exemptions are allowed should be set in legislation and be agreed on by parties in the bargaining process.

As a general rule, the Group considered any exemptions should be limited and typically time bound (e.g. up to 12 months), as exemptions will increase complexity, uncertainty, perverse incentives (e.g. incentivising small firms not to grow), and misallocation of resources in the affected sector. There would be merit in including exemptions in law or producing sample/guideline exemptions for FPA clauses for parties to use as a basis.

The existence of a FPA should not deter employers from offering more favourable terms to their workers.

6.3 Scope

The Government asked us to make recommendations on the scope of matters that may be included in an agreement, including whether regional variations are permitted.





The legislation should set the minimum content that must be included in the agreement

The Group recommend the minimum content for FPAs should be set in legislation. This is a similar approach to the current collective bargaining system under the ER Act. The Group considered FPAs must be a written agreement and must include provisions on:

- the objectives of the FPA,
- coverage,
- wages and how pay increases will be determined,
- terms and conditions, namely working hours, overtime and/or penal rates, leave, redundancy, and flexible working arrangements,
- skills and training,
- duration e.g. expiry date, and
- governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties.

We considered it will be useful for parties to be able to discuss other matters, such as other productivity-related enhancements or actions, even if they do not reach agreement on provisions to insert in the FPA.

We recognise labour markets can vary significantly across New Zealand (e.g. on a geographic basis). Therefore, we considered parties should also be able to include provisions for regional differences within sectors or occupations.

We also considered whether FPAs could potentially disadvantage particular groups through the wage rates that are set, for example young workers; or for long-term beneficiaries in their first year back in employment. We recommend the Government consider whether the parties should be able to agree variations in the terms set within a FPA on these or other grounds.

The Group also considered the duration of agreements should be up to the parties to agree, but with a maximum of five years.

Parties should be able to bargain on additional terms to be included in the agreement

The Group considered additional industry-relevant provisions should be able to be included by negotiation in the FPA, so long as they were compliant with minimum employment standards and other law.

Any enterprise level collective agreement must equal or exceed the terms of the relevant Fair Pay Agreement

The Group recommends employers and employees could agree an enterprise level collective agreement in addition to the FPA, and if so, the principle of favourability should apply. This would mean any enterprise level collective agreements must equal or exceed the terms of the relevant FPA. They may offer additional provisions not within the scope of the FPA agreed for that sector or occupation.





6.4 Bargaining parties

The Government asked us to make recommendations on the identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation.

Parties should nominate a representative organisation to bargain on their behalf

To be workable, we consider the bargaining parties on both sides should be represented by incorporated entities.

Workers should be represented by unions, and employers may be represented by employer organisations.

We note different groups of both workers and employers may wish to have their own representatives and the system should accommodate this within reason. For example, small employers may wish to be represented independently from large employers, or there may be multiple representative organisations involved.

The Group also considered any representatives should be required to have relevant expertise and skills.

If there is disagreement within a party about who their representative is (or are, if plural) the first step would be mediation. If mediation was unsuccessful, parties could then refer to the independent third party to determine who the representative(s) should be.

There should be a role for the national representative bodies to coordinate bargaining representatives

Both employers and workers should elect a lead advocate to ensure there is an orderly process and to be responsible for communication between the parties, and with the independent body.

The Group considers there will need to be a role for national level social partners, for example, Business New Zealand and the New Zealand Council of Trade Unions, to coordinate bargaining representatives.

Parties should be encouraged to coordinate

The Group recognised the fundamental principle of freedom of association. The Group noted there would be wider benefits for both employers and workers from belonging to representative organisations. For example, industry organisations can offer peer networks, human resources support, and training opportunities for workers and management. All of these could contribute to raising firm productivity. Unions offer representation, advice and support to members and membership benefits. This could take the form of greater participation in existing representative groups or forming new ones, particularly in sectors or occupations with low existing levels of coordination.





Representative bodies must represent non-members in good faith

As a Group, we recognise representative bodies will not be perfectly representative – not every worker is a member of a union, and not every employer will belong to an industry organisation.

It is important, for instance, that all workers potentially covered by an FPA are able to vote on their bargaining team representatives whether they are union members or not. The same principle should apply for the employer bargaining group.

It is a normal practice in collective bargaining internationally for the ‘most representative bodies’ to conduct bargaining processes. We think in New Zealand this can be achieved by placing, for example, duties on the representative bodies at the bargaining table to represent non-members, to do so in good faith, and to consult those non-members throughout the process. We note there may be challenges in undertaking this wide consultation in some sectors or occupations, but we do not think this is insurmountable, given modern communication technologies.

Workers need to be allowed to attend paid meetings to elect and instruct their representatives

The Group considered there will need to be legislated rights for all workers covered by FPA bargaining to be able to attend paid meetings (similar to the union meetings provision in the ER Act), to elect their bargaining team and to exercise their rights to endorse the provisions they wish their advocate to advance in the FPA process. Careful consideration will be needed on how to implement this in practice given the potentially wide coverage.

Costs should not fall disproportionately on the groups directly involved in bargaining

There is currently no provision for costs to be covered under the ER Act. Where bargaining is at enterprise level, meetings are typically on site and costs currently often fall on unions and employers.

For FPA bargaining, inevitably negotiations will require travel for some bargaining parties. The Group considered the parties chosen to represent the sides in negotiations should not disproportionately bear these costs. The Group concluded Government should consider how these costs should be funded – for example, through Government financial support, a levy, or bargaining fee.

6.5 Bargaining process rules

We recommend as a default, existing bargaining processes as currently defined in the ER Act (as amended by the Employment Relations Amendment Act 2018) should apply, including the duty of good faith.

Clear timelines are needed to prevent lengthy processes creating excessive uncertainty or cost

There should be clear timelines set for the FPA initiation process, including for the third party to determine whether bargaining may commence after receiving notification from an initiating party. This will give certainty to all parties.





Notification of parties will be a critical element of the process

Once a FPA process is initiated, it will be critical that all affected employers and workers and their respective representatives are notified, have an opportunity to be represented, and are informed throughout the bargaining progress. Minimum requirements for notifying affected parties should be set in law.

Bargaining should be supported through facilitation²⁹

Once bargaining has been initiated, we recommend a neutral expert facilitator be available to support parties during the bargaining process.

This facilitator could include, for example:

- informing bargaining teams about the process,
- advising about options for the process the parties should follow to reach agreement, and
- helping parties to discuss the range of possible provisions of the collective agreement.

This facilitation function is intended to support a more efficient and effective bargaining process and to minimise the risk of disputes occurring. There should not be any threshold test for the parties to access this facilitation service.

The Government or the independent body should also provide materials to reduce time and transaction costs, for example, templates for the bargaining process and agreement, similar to those currently provided on the Employment New Zealand website.

6.6 Dispute resolution during bargaining

The Government asked us to make recommendations on the rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both.

The principle guiding the Group's recommendations on a dispute resolution system for FPAs has been to maintain, as far as possible, the existing processes under the ER Act, with additions or simplifications to be suitable for sector-wide bargaining. The aim is to minimise the time and cost lost through litigation, and to keep the process simple. Resource and encouragement needs to be provided to help the parties to resolve issues themselves, with support.

When disputes cannot be resolved, the current ER Act system provides recourse to determination by the Employment Relations Authority. Determinations may be challenged through the court system, and ultimately with appeal rights.

The alternative the Government could consider is to introduce an arbitration-based model, with recourse to an individual arbiter or arbitration panel, with rights to appeal in the Courts. This would require the establishment of a bespoke model and institutions to support it.

Figure 17 outlines the key features of our proposed approach to dispute resolution.

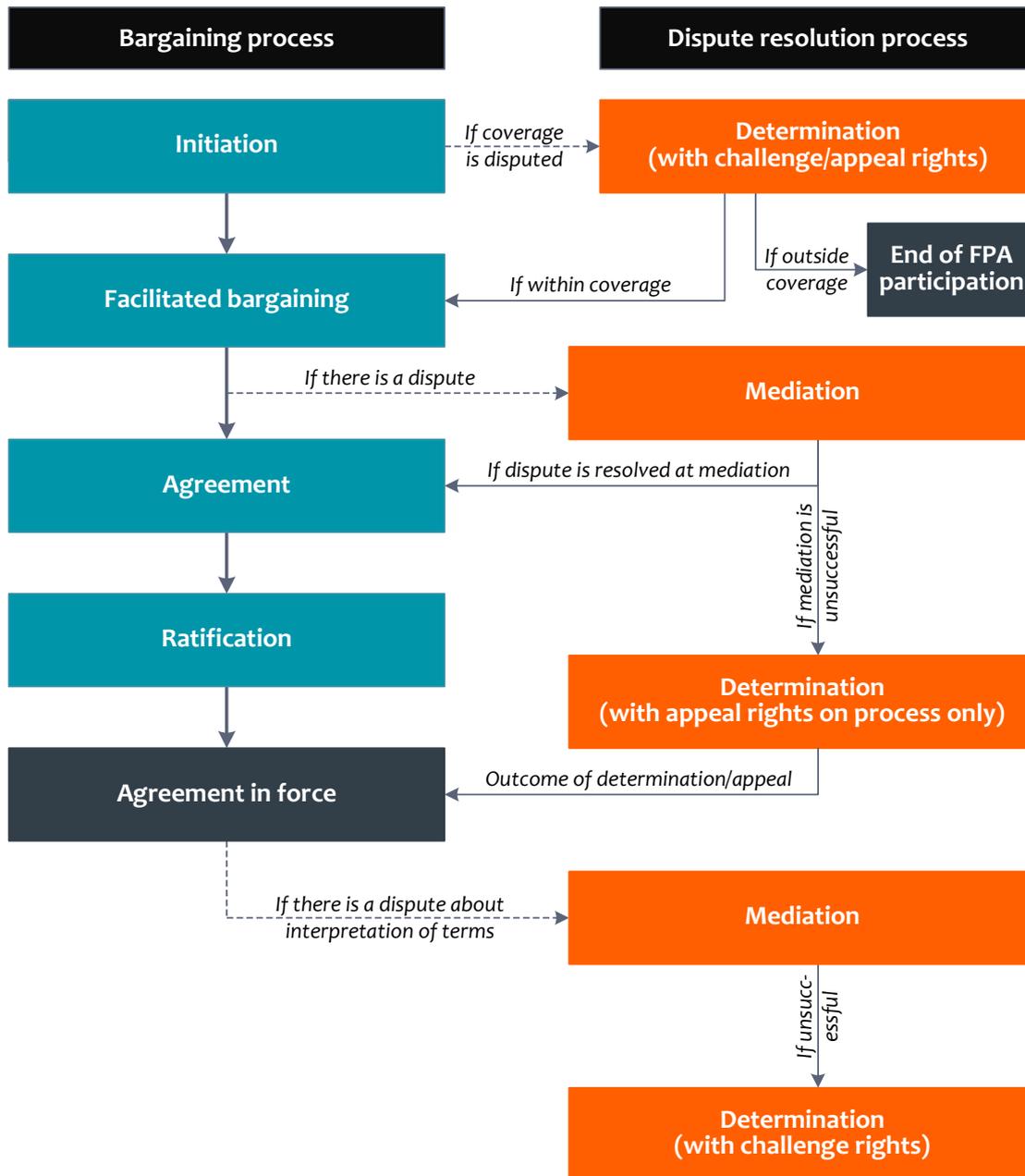
²⁹ Note this is envisaged as neutral, expert facilitation, not facilitated bargaining under the current ER Act.





Figure 17

Proposed bargaining and dispute resolution processes



There is no recourse to industrial action during bargaining

The Group noted the Government has already stated no industrial action – i.e. strikes or lock outs – will be permitted, during bargaining. It will therefore be critically important that dispute resolution mechanisms work effectively.

We have interpreted this to be a relational, not a temporal, ban – it is only strikes and lockouts related to FPA bargaining which are prohibited, not strikes about other matters which coincide with FPA bargaining.





This prohibition of strikes during bargaining for FPAs does not preclude striking during enterprise level collective bargaining over the same matters. In other words, FPAs complement the terms of collective agreements in the same manner as employment standards.

After initiation, disputes over coverage may be determined by the Employment Relations Authority

We recommend a party should be able to apply to the Employment Relations Authority for a determination if the party has received an initiation notice for an FPA but disputes that it is covered by the process. The aim is to provide an efficient mechanism for determining those that should be included, to minimise the risk of excluding relevant parties or parties incurring costs by participating unnecessarily.

Where parties disagree with the determination, we recommend the existing challenge and appeals process applies.

When disputes arise during bargaining, parties go to mediation in the first instance

If disputes arise during bargaining, we recommend either party may refer the process to mediation to resolve disputes concerning either substantive or procedural matters. A neutral expert mediator will play an active role in supporting the parties to resolve the dispute.

Where a dispute cannot be resolved through mediation, parties may apply to have the matter determined

Where mediation does not resolve the dispute, we recommend either party can apply to a deciding body, to have the matter finally determined. We suggest the body could be the Employment Relations Authority or Employment Court. The deciding body may then either issue a determination including terms for settlement in the agreement or refer the matter back to mediation where appropriate.

The Group considers the deciding body should be independent with the requisite specialist skills and experience in collective bargaining matters. This may mean, where necessary, having the support of expert advice or a panel to assist the deciding body to make a determination on the matter.

Parties may only challenge the determination on limited procedural grounds, with rights to appeal

In order to avoid costly and lengthy litigation processes, we recommend either party may only challenge a determination on limited procedural grounds. Appeals should be heard through the court system.

Once in force, any dispute over the terms of a Fair Pay Agreement should use the standard dispute resolution process

Once the FPA has been agreed and is in force, if parties disagree about how the terms should be interpreted, we recommend either party seek to resolve the dispute through mediation.





Where mediation is unsuccessful, either party may seek a determination from the Employment Relations Authority, with the right to challenge it in the Employment Court, and recourse to appeal through the Court of Appeal. This is the current process for parties who have a dispute about the terms of a collective agreement under the ER Act.

6.7 Conclusion, variation and renewal

The Government asked us to make recommendations on the mechanism for giving effect to a FPA, including any ratification process for employers and workers within the coverage of an agreement.

The Government also asked for recommendations on the duration and process for renewing or varying an agreement.

Where parties reach agreement, conclusion should require ratification by a simple majority of both employers and workers

Where bargaining has concluded in parties reaching an agreement we recommend the agreement must not be signed until a simple majority of both employers and workers covered by the agreement have ratified it.

Where bargaining is referred to determination of the terms of the agreement, the final agreement should not need ratification

In circumstances where mediation fails to resolve the disputes, and the parties refer the bargaining process to determination, the Group considered this determination should then become a FPA without a further ratification process. There should only be an appeals mechanism on the grounds of a breach of process or seeking a determination as to coverage.

The procedure for ratification must be set in law

We recommend the procedure for ratification be set in law. This differs from the current requirements under the ER Act where parties may decide how to ratify an agreement. We have recommended this departure from the existing law because, under a bargained FPA, all affected parties in the sector or occupation will need to be given an opportunity to ratify.

The law should clarify that workers are entitled to paid meetings for the purposes of ratifying the agreement.

Registration of FPAs should be required in the law, and they should be publicly available

Once an agreement has been concluded, parties must register and lodge the FPA with Government. The FPA itself should be made publicly available and affected parties notified.

Before an agreement expires, either party should be able to initiate a renewal of the agreement, or for variation of some or all terms

The Group considered any variation or renewal of the agreement agreed between the bargaining parties must meet the same initiation and ratification thresholds.





An expiring FPA should be able to be renewed easily, for example employers and workers may be able to vote for a renewal with wages increased in line with the Consumer Price Index or another indicator.

6.8 Enforcement

The Government asked us to consider how the terms of an agreement should be enforced.

The Employment Relations Act approach to enforcement should be applied

Overall, we consider the existing dispute resolution and enforcement mechanisms under the ER Act should be applied to the new FPA system, with the changes noted above to dispute resolution during bargaining.

This would provide for parties who believe there has been a breach of a FPA to turn first to dispute resolution services including mediation, before looking to enforcement options including the Labour Inspectorate and the Court system.

The Government will need to consider whether additional resources for bodies involved in dispute resolution and enforcement are needed during the detailed design and implementation of the overall system.

We suggest unions, employers and employers' organisations should (where possible and appropriate) also play a role in supporting compliance, to identify breaches of FPAs, and address implementation problems.

6.9 Support to make the bargaining process work well

The Group considers a number of conditions need to be present to support a positive outcome to a FPA collective bargaining process:

- Capability and capacity in both parties to support the bargaining process, with the skills and expertise to manage a respectful, efficient dialogue that leads to timely outcomes.
- Strategic leadership on both sides that takes a long-term perspective, supporting a transformational not transactional conversation, i.e. to ensure it affects the whole sector or occupation, not just higher wages.
- High levels of inclusion and participation in the dialogue, particularly among small employers, both through direct involvement at the bargaining table and consultation.
- In a process likely to require involvement of multiple representative groups, a high degree of coordination to work effectively and efficiently.
- The involvement of trained third-party facilitators to support the parties through the process.

In addition, both workers and employers will need to see potential benefits of bargaining for an FPA, with a real improvement over the status quo. There also needs to be a genuine willingness to engage and confidence in the good faith approach of both parties.





Support to build capability and capacity of the parties and to facilitate the process is needed

In order to facilitate effective bargaining, a good level of information will need to be provided to parties, and capability building will be important to build up the skills of those around the negotiating table, and maximise the potential for constructive bargaining.

The Government will also need to consider the role and resourcing required for the third party body to support the various elements of the bargaining process described above including the processes for determination of the trigger tests, notifications to parties, and facilitation of the bargaining process.

A proactive role will also be needed to provide notification, information and education on their obligations to employers and workers following the ratification and coming into force of a FPA.

Resourcing levels for support services will need to be considered

The existing functions provided by Government to support the collective bargaining process are fit for purpose and should still apply, including the provision of:

- general information and education about rights and obligations,
- information about services available to support the bargaining process and the resolution of employment relationship problems,
- facilitation, mediation and determination services,
- compliance and enforcement through the Employment Relations Authority, Labour Inspectorate and the courts, and
- reporting and monitoring of the employment relations system.

However, the Government should consider the level of resourcing available as part of the detailed design and implementation of the overall system. In particular, we consider resourcing will be needed for dedicated facilitators to work with parties at all stages of bargaining, as well as for the independent body to assess whether trigger conditions have been met and notify parties.





Annex 1: Terms of Reference of the Fair Pay Agreement Working Group

Purpose

- 1 The Fair Pay Agreement Working Group has been established to make independent recommendations to the Government on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations.

Background

- 2 This Government has a vision for a highly skilled and innovative economy that delivers good jobs, decent work conditions and fair wages while boosting economic growth and productivity. When we lift the conditions of New Zealand workers, businesses benefit through improved worker engagement, productivity and better workplaces.
- 3 The Government's vision of the employment relations framework is a level playing field where good employers are not disadvantaged by paying reasonable, industry-standard wages. New Zealand must have a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity.
- 4 In addition, the Government intends to promote the setting of terms and conditions of employment by way of collective bargaining between workers, worker's representatives, employers and their representatives.

Objectives

- 5 The objective of the Fair Pay Working Group is to make independent recommendations to the Government on the scope and design of a legislative system of industry or occupation-wide bargaining.
- 6 In achieving these objectives, it will be important to ensure that the Working Group's recommendations manage and where possible mitigate the following risks:
 - 6.1 slower productivity growth if a Fair Pay Agreement locks in inefficient or anti-competitive businesses models or market structures
 - 6.2 a 'two-speed' labour market structure with a greater disparity in terms and conditions and job security between workers covered by Fair Pay Agreements and those who are not
 - 6.3 unreasonable price rises for some goods and services if increased labour costs are not offset by productivity gains and profit margins are held at existing levels
 - 6.4 undermining of union membership through the reduction of the value of enterprise bargaining by way of the pass on of collectively negotiated terms and conditions to non-union members, and





- 6.5 possible job losses, particularly in industries exposed to international competition which are unable to pass on higher labour costs to consumers of those goods and services.

Parameters and scope

- 7 The Fair Pay Agreement Working Group's recommendations must address:
 - 7.1 the process and criteria for initiating Fair Pay Agreement bargaining (including bargaining thresholds or public interest tests)
 - 7.2 identification and selection of bargaining participants including any mechanisms for managing the views of workers without union representation
 - 7.3 how to determine the scope of agreement coverage, including demarcating the boundaries of the industry or occupation and whether the Fair Pay Agreement system would apply to employees only, or a broader class of workers
 - 7.4 whether Fair Pay Agreements should apply to industries or occupations, or both
 - 7.5 the scope of matters that may be included in an agreement, including whether regional variations are permitted
 - 7.6 rules or third party intervention to resolve disputes, including whether the third party's role is facilitative, determinative or both
 - 7.7 the mechanism for giving effect to an agreement, including any ratification process for employers and workers within the coverage of an agreement
 - 7.8 how the terms of an agreement should be enforced
 - 7.9 duration and process for renewing or varying an agreement
 - 7.10 whether there are circumstances in which an employer can seek an exemption from a relevant agreement and the process for doing so
- 8 Any model proposed by the Fair Pay Agreement Working Group must:
 - 8.1 operate effectively as a component part of the overall employment relations and standards system, including existing single- and multi-employer collective bargaining and minimum employment standards, and
 - 8.2 manage and where possible mitigate the risks in paragraph 6.
- 9 The Fair Pay Agreement Working Group's recommendations must be within the following parameters:
 - 9.1 Industrial action is not permitted as part of bargaining over a Fair Pay Agreement.
 - 9.2 It will be up to the workers and employers in each in each industry to make use of the system to improve the productivity and working conditions in the industry.





Membership

10 The Fair Pay Agreement Working Group will be chaired by the Rt Hon Jim Bolger.

11 The Fair Pay Agreement Working Group will comprise the following members:

Dr Stephen Blumenfeld	Director, Centre for Labour, Employment and Work at Victoria University
Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Tony Hargood	Chief Executive, Wairarapa-Bush Rugby Union
Kirk Hope	Chief Executive, BusinessNZ
Vicki Lee	Chief Executive, Hospitality NZ
Caroline Mareko	Senior Manager, Communities & Participation, Wellington Region Free Kindergarten Association
John Ryall	National Secretary, E tū
Dr Isabelle Sin	Fellow, MOTU Economic and Public Policy Research
Richard Wagstaff	President, New Zealand Council of Trade Unions

12 The chair and members of the Fair Pay Agreement Working Group will be entitled to a fee in accordance with the Cabinet fees framework for members appointed to bodies in which the Crown has an interest.

13 Officials from the Ministry of Business, Innovation and Employment will support the Working Group as secretariat. The Working Group will be able to seek independent advice and analysis on any matter within the scope of these terms of reference.

Timeframes

14 It is anticipated that the Fair Pay Agreement Working Group will:

14.1 commence discussions in June 2018

14.2 make recommendations to the Minister for Workplace Relations and Safety by November 2018.

15 These dates may be varied with the consent of the Minister for Workplace Relations and Safety.





Annex 2: Occupations ranked according to proportion of workers earning under \$20 per hour

This table was created by obtaining wage information for all occupations in New Zealand at the three-digit level (minor groups) under the Australian and New Zealand Standard Classification of Occupations (ANZSCO).³⁰ We then arranged these occupations according to the proportion of workers earning under \$20.00 an hour.

Occupations according to proportion of workers earning under \$20 per hour	Regular hourly rate (main job)		% below \$20 per hour	Weekly income (all sources)	Total workers
	Mean	Median	Percent	Mean	
Food Preparation Assistants	17.33	16.5	91.27%	412.07	21,900
Checkout Operators and Office Cashiers	17.77	17	91.08%	406.57	15,600
Hospitality Workers	17.79	17	84.34%	487.59	39,200
Packers and Product Assemblers	18.32	17.26	78.94%	640.76	17,200
Cleaners and Laundry Workers	20.01	17.5	73.05%	479.78	44,900
Hairdressers	19.85	18.22	72.58%	630.05	9,900
Sales Assistants and Salespersons	19.98	18	72.16%	655.99	107,000
Child Carers	18.5	18	71.96%	462.04	12,800
Freight Handlers and Shelf Fillers	21.41	18	64.93%	716.11	8,600
Food Trades Workers	20.44	19	59.99%	774.54	40,100
Miscellaneous Labourers	20.34	18.5	59.74%	763.92	40,100
Miscellaneous Sales Support Workers	23	19.18	58.96%	624.5	8,300
Farm, Forestry and Garden Workers	20.93	18.7	57.14%	794.71	41,400
Delivery Drivers	20.43	19.36	56.81%	702.71	6,500
Education Aides	20.8	19.21	55.89%	511.57	15,500
Clerical and Office Support Workers	21.11	19.5	50.54%	754.89	13,000
Sports and Fitness Workers	24.19	20	49.13%	668.39	15,000
Arts Professionals	24.41	20	48.00%	753.7	7,800
Storepersons	21.3	20	47.68%	900.62	25,900
Machine Operators	21.52	20.2	44.41%	902.38	18,900
Personal Service and Travel Workers	24.49	20.62	43.48%	873.51	20,300
Automobile, Bus and Rail Drivers	21.95	20.45	39.45%	870.24	16,300
Food Process Workers	23.67	22.38	39.30%	965.91	27,000
Horticultural Trades Workers	24.54	22	38.69%	755.25	17,200
Farmers and Farm Managers	35.62	22	38.34%	1272.73	54,500
Receptionists	23.19	21.58	37.96%	713.52	24,100
Animal Attendants and Trainers, and Shearers	25.97	21.6	37.33%	870.54	7,600
Textile, Clothing and Footwear Trades Workers	25.13	22	36.98%	1036.31	2,500

³⁰ Stats NZ, "New Zealand Income Survey".





Occupations according to proportion of workers earning under \$20 per hour	Regular hourly rate (main job)		% below \$20 per hour	Weekly income (all sources)	Total workers
	Mean	Median	Percent	Mean	
Accommodation and Hospitality Managers	26.93	21.37	36.05%	973.61	19,600
Retail Managers	24.86	21.31	34.33%	1077.04	36,600
Floor Finishers and Painting Trades Workers	24.73	23	32.61%	957.82	15,700
Personal Carers and Assistants	21.46	21	31.32%	688.28	54,800
Keyboard Operators	21.55	21.58	31.16%	768.33	5,900
Insurance Agents and Sales Representatives	25.04	22.54	30.93%	986.1	48,300
Prison and Security Officers	27.25	26	30.31%	1130.81	15,400
Miscellaneous Factory Process Workers	24.9	22.8	30.22%	1031.12	9,000
Chief Executives, General Managers and Legislators	50.4	31.97	28.59%	1922.54	148,600
Construction and Mining Labourers	50.75	23	27.92%	1094.88	22,900
Automotive Electricians and Mechanics	24.9	25	26.95%	1074.62	21,300
Mobile Plant Operators	25.79	23.98	26.54%	1176.93	27,200
Call or Contact Centre Information Clerks	23.3	21	25.87%	911.61	6,700
Bricklayers, Carpenters and Joiners	24.93	25	25.15%	1066.64	19,700
Real Estate Sales Agents	55.47	28.77	25.07%	1741.83	16,600
Panelbeaters, and Vehicle Body Builders, Trimmers and Painters	24.05	24	24.98%	979.11	4,700
Glaziers, Plasterers and Tilers	26.79	23.97	24.67%	1096.99	11,900
Plumbers	30.94	24.93	23.52%	1107.35	12,500
Printing Trades Workers	29.04	27.9	23.46%	1148.29	5,300
Miscellaneous Technicians and Trades Workers	28.6	24	22.90%	1136.1	11,700
Electricians	31.41	27.2	22.58%	1290.76	18,100
Fabrication Engineering Trades Workers	26.29	25	20.70%	1167.9	13,900
Logistics Clerks	25.69	23.97	20.32%	1070.98	26,600
ICT and Telecommunications Technicians	27.18	23.97	20.01%	1066.63	8,800
Stationary Plant Operators	27.87	24.93	19.74%	1249.98	13,200
General Clerks	34.07	24.29	19.14%	954.96	64,800
Health and Welfare Support Workers	24.89	23.5	19.01%	884.46	21,600
Truck Drivers	24.05	23.61	17.88%	1195.82	31,000
Mechanical Engineering Trades Workers	32.51	30	16.39%	1432.54	17,500
Architects, Designers, Planners and Surveyors	41.98	31.17	15.86%	1572.76	28,600
Construction, Distribution and Production Managers	32.17	29	15.80%	1454.33	61,500
School Teachers	28.69	27.24	15.32%	1097.53	101,300
Agricultural, Medical and Science Technicians	26.45	24.69	14.55%	1051.22	17,100





Occupations according to proportion of workers earning under \$20 per hour	Regular hourly rate (main job)		% below \$20 per hour	Weekly income (all sources)	Total workers
	Mean	Median	Percent	Mean	
Three-digit occupation (ANZSCO)					
Social and Welfare Professionals	29.31	26.15	14.41%	1040.55	35,200
Media Professionals	40.4	35.96	14.29%	1562.61	7,700
Health Therapy Professionals	41.58	32.6	13.83%	1475.11	16,900
Wood Trades Workers	29.86	26.37	13.29%	1293.12	5,000
Miscellaneous Clerical and Administrative Workers	31.54	25.89	12.71%	1238.82	17,600
Office and Practice Managers	32.97	25.21	11.90%	1125.24	35,900
Air and Marine Transport Professionals	55.22	40	11.58%	2002.36	8,400
Electronics and Telecommunications Trades Workers	29.49	28	11.29%	1274.34	13,800
Accounting Clerks and Bookkeepers	34.29	26.37	11.02%	966.58	35,700
Building and Engineering Technicians	33.21	29.73	10.89%	1348.28	21,400
Miscellaneous Education Professionals	34.79	30.69	10.66%	1119.05	12,300
Information and Organisation Professionals	44.82	35.8	9.99%	1564.73	34,600
Personal Assistants and Secretaries	30.11	27	9.76%	1035.7	20,400
Database and Systems Administrators, and ICT Security Specialists	38.83	32.5	9.58%	1559.42	6,200
Medical Practitioners	79.83	71.92	8.78%	3076.52	14,600
Sales, Marketing and Public Relations Professionals	36.42	30	8.69%	1431.97	23,500
Business Administration Managers	43.08	35.96	8.64%	1813.23	70,200
ICT Network and Support Professionals	39.22	35	8.46%	1606.92	9,300
Tertiary Education Teachers	39.54	35.96	8.45%	1494.3	22,700
Natural and Physical Science Professionals	41.89	36.44	6.55%	1705.59	16,600
Contract, Program and Project Administrators	34.31	29.92	6.50%	1268.59	20,100
Health Diagnostic and Promotion Professionals	36.64	35.96	6.48%	1265.62	14,700
Advertising, Public Relations and Sales Managers	42.8	38.36	6.43%	1896.85	34,300
Accountants, Auditors and Company Secretaries	42.11	38.36	6.42%	1652.86	45,600
Defence Force Members, Fire Fighters and Police	35.08	31.84	6.18%	1540.19	21,800
Miscellaneous Hospitality, Retail and Service Managers	35.55	34.52	5.97%	1548.15	18,900
Engineering Professionals	43.23	38.36	5.53%	1843.23	40,700
Miscellaneous Specialist Managers	39.38	36.76	5.28%	1669.84	8,700
Human Resource and Training Professionals	37.48	31.97	5.15%	1492.07	14,600
Financial Brokers and Dealers, and Investment Advisers	44.06	32.32	5.10%	1917.98	9,800
Legal Professionals	49.81	40	4.65%	2046.89	19,200





Occupations according to proportion of workers earning under \$20 per hour	Regular hourly rate (main job)		% below \$20 per hour	Weekly income (all sources)	Total workers
	Mean	Median	Percent	Mean	
Three-digit occupation (ANZSCO)					
Business and Systems Analysts, and Programmers	44.78	41.94	4.32%	1803.22	52,400
ICT Managers	57.95	52.74	2.65%	2624.76	10,200
Financial and Insurance Clerks	32.47	28.77	2.38%	1314.62	18,700
Midwifery and Nursing Professionals	33.12	32	2.20%	1139.91	57,700
Education, Health and Welfare Services Managers	41.44	36.23	1.27%	1808.82	14,500

