Designing a Fair Pay Agreements System
Discussion Paper

October 2019

New Zealand Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

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Message from the Minister

Kia ora tātou,

New Zealand's economy is in good shape. We have one of the highest employment rates in the OECD and we have near record low unemployment. We are keeping GDP growth in line with our OECD partners. Our economy has solid foundations.

There are specific areas of concern though. For a number of decades we have experienced increasing levels of inequality and poverty. Too many hard working New Zealanders are struggling, too many children are living in poverty. Too many parents tell us they are working more than one job to get by and aren't getting enough time with their children. These are long term problems that have developed and built up over decades.

Significant reductions in support for New Zealanders' wellbeing were made through the 1980s and 1990s. Support for businesses and families, healthcare and welfare was significantly cut in the name of 'market flexibility'. While some changes may have been useful for GDP growth, we are still dealing with the negative impacts to our wellbeing today.

Within 20 years New Zealand lost its status as one of the most equal in the OECD, and the inequality has kept increasing since then. While incomes at the top increased quickly and GDP grew steadily, incomes at the bottom stagnated and child poverty more than doubled.

It is clear that the benefits of economic growth have not been shared fairly in New Zealand. The wealthiest have seen their salaries grow at twice the rate of our middle income earners since 1998. For middle and low income earners only the minimum wage, set by government, has increased at reasonable percentages. It's also concerning that low wage growth has lagged behind increases in labour productivity increases. Even overall average wage growth is not keeping up with increases to productivity.

New Zealanders are working harder and longer, but are not fairly sharing in the rewards of their work.

New Zealand's labour market has played a role in this increasing inequality under the guise of 'market flexibility', and it now has systemic weaknesses:

- workers on low wages are not receiving wage increases of the same proportion as those on high wages resulting in increasing inequality
- those workers are more vulnerable with little access to collective bargaining
- some businesses that pay good wages are having to compete with others who cut wages and conditions to win contracts, meaning fair employers miss out
- wage increases have not kept up with productivity increases in many sectors and occupations
- while New Zealanders work long hours, their productivity per hour is low, likely because we are not investing enough in skills development, training, or research and development to help improve on productivity.

New Zealand is an outlier in not having sector-wide collective agreements. The OECD recommends countries adopt it alongside enterprise and individual bargaining, because this combination is associated with better employment and equality outcomes.

The OECD has also advised that countries where broad framework conditions are set at sector-level and detailed provisions at firm level tend to deliver good employment performance, better productivity outcomes and higher wages for covered workers.

Fair Pay Agreements would create a new mechanism for collective bargaining, to set binding minimum terms at the sector or occupation level. A well-designed system would ensure workers are rewarded fairly for their work and protect employers from competitors who gain market share by driving down workers' terms and conditions.

By preventing a race to the bottom you encourage competition based on better products and services, and investment in skills, training and equipment – all more sustainable routes to productivity growth, and certainly more likely to produce productivity improvements than low wages and poor conditions.

The Government is building a sustainable, productive and inclusive economy. To do this we need modern workplaces that value hard working New Zealanders, invest in people's training and skills for the future, share their ideas and reward them appropriately. That means we need to address the difficult long term problems that have led to inequality and unfair working conditions.

So far we have introduced the Wellbeing Budget, lifted the minimum wage, raised Working for Families payments, provided support for families with newborns, increased Paid Parental Leave, access to free healthcare and are progressing pay equity legislation. We have also increased support for research and development, education and training, and are working with businesses, unions, academics, iwi and the public in key areas.

We are now taking the time to get the design of a Fair Pay Agreement system right. We started this process in 2018 with a Working Group of business and worker representatives who found large areas of agreement and also had a few differences. They reported back with comprehensive and valuable recommendations for how Fair Pay Agreements should work.

I have received advice from MBIE officials about the next level of detail needed to enable implementation. Now we need to get broader public views on the options for the elements of the system.

We want to hear from businesses, workers and the public before we finalise this work to ensure we develop a system that is manageable, accessible and offers benefits for all the parties involved. I look forward to your feedback.

Ngā mihi nui,

Hon Iain Lees-Galloway

Summary

This document outlines some options for a new system to allow workers and employers to negotiate better minimum terms and conditions of employment for their occupations and sectors. The result of these negotiations will be Fair Pay Agreements; a new type of regulation to combine the adaptability of bargained contracts with the dependability of Government-backed minimum standards.

The Government wants to support employees who are experiencing poor labour market outcomes while ensuring that employers are still able to compete, adapt and innovate. This work is part of our vision for a highly skilled and innovative economy that delivers good jobs, decent working conditions and fair wages while boosting economic growth and productivity.

Last year, we brought worker and employer representatives together with experts in collective bargaining and law to design a Fair Pay Agreements system. The group delivered their recommendations to us in December 2018. They noted that their design included risks, areas of disagreement and questions for further consideration.

The Government has developed a range of options for consultation based on the group's recommendations and is now seeking public feedback before making further decisions. We are working to improve the policy design before we consider progressing with the legislation necessary to get a Fair Pay Agreements system up and running.

This document begins with background information on the existing employment regulatory system, areas where the labour market is underperforming, and the establishment and recommendations of the Fair Pay Agreements Working Group. The following pages provide a glossary of terms and information about the submission process. A summary of all questions we are seeking feedback on is provided at the end of the document.

The next seven sections explain different aspects of how an FPA system could work.

- Section 1 describes the process which would could be used to begin the FPA process.
- Section 2 describes possible rules for deciding which employers and workers an FPA will apply to.
- Section 3 describes aspects of how the bargaining process itself could work.
- Section 4 describes what could happen if the representatives at the bargaining table are unable to move past a disagreement during bargaining.
- Section 5 outlines an option of a test to check that a finalised agreement will not have unacceptable negative effects on the economy.
- Section 6 describes options for a process for finalising, enacting and recovering the costs of an FPA.

We appreciate your interest and encourage you to submit your views.

About the discussion document

We want to hear the thoughts of individuals and organisations on the possible design of a Fair Pay Agreement (FPA) system. The Ministry of Business, Innovation and Employment is collecting written submissions to gather a range of views on how the options might work in practice, how it could be improved and how the policy could impact different groups. We encourage anyone with an interest to send in a written submission.

How to make your submission

A series of options are outlined in this document with questions in boxes where we would like to hear feedback. These questions are summarised at the back. Submissions will be accepted in the six weeks **from 17 October 2019 to 27 November 2019**.

Here is how you can have your say:

- Open and save a copy of the submission form at: www.mbie.govt.nz/fairpayagreements
- Make a submission on any of the questions. If you cannot use the template, you can write your submission on a blank document. If you do this, please clearly indicate which question number you are responding to.
- You can of course make comments on further issues you believe are relevant outside of the questions.

Email your submission to: FairPayAgreements@mbie.govt.nz

If you cannot use email, you may write to:

Employment Relations Policy

Ministry of Business Innovation and Employment

PO Box 1473

Wellington 6145

The deadline for submissions is 5pm on Wednesday 27 November.

What happens after you have sent your submission

Officials from the Ministry of Business, Innovation and Employment will collect all submissions sent by the closing date. These submissions will be analysed and will help to inform final decisions and assist with the development of legislation.

For further information

Website: www.mbie.govt.nz/fairpayagreements

Email: FairPayAgreements@mbie.govt.nz

Submissions and the Official Information Act 1982

Submissions received by the Ministry of Business, Innovation and Employment are subject to release under the Official Information Act 1982 (OIA).

Please set out clearly in your submission if you have any objection to any information in the submission being released under the OIA. In particular, clearly state which part(s) you consider we should withhold, and the reason(s) for doing so.

The OIA sets out reasons for withholding information. Reasons could include that the information is commercially sensitive or that you wish us to withhold personal information, such as names or contact details. An automatic confidentiality disclaimer from your IT system is not a reason to withhold information.

We will consider your objections when responding to requests under the OIA.

We will use any personal information you supply while making a submission only for matters covered by this document. Please clearly indicate in your submission if you do not want your name included in any summary of submissions that we may publish.

Glossary of terms

ANZSCO: The Australian and New Zealand Standard Classification of Occupations, a skill-based grouping used to categorise occupations and jobs in the labour market.

ANZSIC: The Australian and New Zealand Standard Industrial Classification, an activity-based grouping used to categorise businesses by the industry (sector) they operate in.

Bargaining parties: the groups present at the negotiation of a collective agreement.

Business NZ: the primary organisation representing employers in New Zealand.

Contractor: a self-employed worker who invoices businesses for their services and is not covered by most employment-related laws. Contractors are not allowed to engage in collective bargaining but a law change will soon allow contractors in the screen industry to do so.

Collective bargaining: negotiation of wages and conditions by a union on behalf of a group of employees.

Council of Trade Unions (CTU): the primary organisation representing unions in New Zealand.

Employee: a person working under an employment agreement who usually receives a wage or salary from their employer.

Employment Relations and Employment Standards (ERES) system: the system of rules and procedures which govern the basic terms which must be provided when workers sell their services to an employer, and how their relationship is organised.

Initiation: the procedure for starting a collective bargaining process.

The International Labour Organisation (ILO): agency of the United Nations which sets international labour standards and develops programmes to promote decent work around the world.

Labour force participation rate: the total number of people who are employed or unemployed and looking for work, as a percentage of the total working-age (15 years and over) population.

Labour Inspectorate: the regulator tasked with identifying and investigating employment standards breaches and taking enforcement action.

Labour market: the market which matches people looking for work in line with their skills and needs with employers looking to fill vacancies and do the work necessary to run and grow their businesses.

Labour productivity: the value of goods or services able to be produced by a worker in a set amount of time.

Legislation: rules created by the government, including laws which are passed by Parliament and other forms of regulation.

Minimum standards: the basic terms and conditions which must be given to anyone who is employed, such as the minimum wage or leave entitlements.

Occupation: a group of workers who perform a similar activity (e.g. hairdressers, fire fighters).

The Organisation for Economic Cooperation and Development (OECD): an international organisation for sharing policy knowledge and research between 36 member countries.

Parliamentary Counsel Office: the government office responsible for drafting and publishing laws and regulations.

Ratification: the action of giving formal consent to an agreement, making it officially valid, sometimes through a vote.

Regulation: a rule made by the Government which does not need to pass through Parliament because it has been delegated to another body – usually a Minister. This is often done because the matter is too technical or not of sufficient importance to require Parliamentary oversight.

Sector: a grouping of employers who engage in a similar activity, often named after the key product or service produced (e.g. the insurance sector).

Unemployment rate: the number of people who are unemployed divided by the number of people who are in the labour force (either employed, or unemployed and looking for work).

Background

Employment relationships are regulated in New Zealand to ensure good outcomes for workers and employers

New Zealand has rules and procedures which regulate the relationship between employers and employees. Beginning, maintaining and ending an employment relationship must be as effective, fair and flexible as possible to support wellbeing, prosperity and social cohesion. We call the system of rules and collection of institutions involved in this process the Employment Relations and Employment Standards (ERES) regulatory system.

The ERES system recognises that the relationship between employers and employees is not always fair. Employers can often have more power or information than individual employees. The ERES system has two key tools for addressing this problem: minimum standards and collective bargaining.

Minimum standards set the basic terms and conditions which must be given to anyone who is employed, such as the minimum wage or leave entitlements. An employer who does not provide these conditions to an employee can be investigated by the Labour Inspectorate and face significant penalties. Collective bargaining is when unions negotiate on behalf of groups of workers with their employer to agree on terms and conditions above the minimum standards. The ERES system contains rules and processes which support this process. Both sides are expected to deal with each other honestly, openly, and without misleading each other (in good faith), but the system helps solve disagreements through mediation where necessary. Minimum standards and collective bargaining are covered in responsibilities New Zealand has agreed to meet under international labour and human rights treaties.

The New Zealand labour market has systemic weaknesses

The OECD has found that countries that set general conditions for sectors or occupations, and subsequently allow more detailed terms to be negotiated at the level of specific businesses, tend to deliver better employment and unemployment performance, better productivity outcomes and higher wages for covered workers. These systems can also be expected to have less wage inequality than those where bargaining takes place primarily between a union or individual employees and their employer.[1] The lack of sector bargaining in much of New Zealand's workforce could be contributing to our low productivity and income inequality.

Collective bargaining rates are low in New Zealand by OECD standards, particularly in the private sector.[2] New Zealand has the sixth lowest collective bargaining coverage in the OECD at 15.3% (less than half of the OECD average of 33.3%). Since 1980, New Zealand has experienced likely the steepest decline in collective bargaining coverage in the developed world.[3]

Most wage setting occurs between individual employers and individual workers. The OECD has commented that: "The last decades have shown that in many cases the alternative to collective

[1] OECD (2018). *OECD Employment Outlook 2018, pp. 74-75).*

[2] Collective agreement coverage rates in New Zealand dropped from approximately 65% in 1985 to approximately 16% in 2016. This compares to coverage in OECD countries from 45% in 1985 to 33% in 2013.

[3] John Schmitt and Alexandra Mitukiewicz (2011). *Politics Matter: Changes in Unionization Rates in Rich Countries, 1960-2010.* Center for Economic and Policy Research.

bargaining is not individual bargaining but either state regulation or no bargaining at all, as only few employees can effectively negotiate their terms of employment with their employer."[4]

In some sectors or occupations, the lack of collective bargaining may enable a 'race to the bottom', where businesses undercut their competitors by cutting workers' wages or shifting risks onto workers. For example, businesses may submit low tenders costed based on paying their staff the minimum wage, or expect workers to do split shifts or casual working hours (transferring risk to the worker).

Although labour force participation is high and unemployment is low in New Zealand, the extent and equity of wage growth is less positive. Wage growth in the last 20 years has been unequally distributed and has produced a 'hollowing-out' effect across the income distribution (see figure 1). Percentage wage increases have been high in the upper deciles: for example, the average hourly wage of deciles 9 and 10 increased by 34% and more than 38% respectively between 1998 and 2015. Deciles 2–6 experienced wage increases of less than 20% over the same period. The only low decile group to achieve reasonable wage increases was decile 1, which includes those on the minimum wage set by the government.

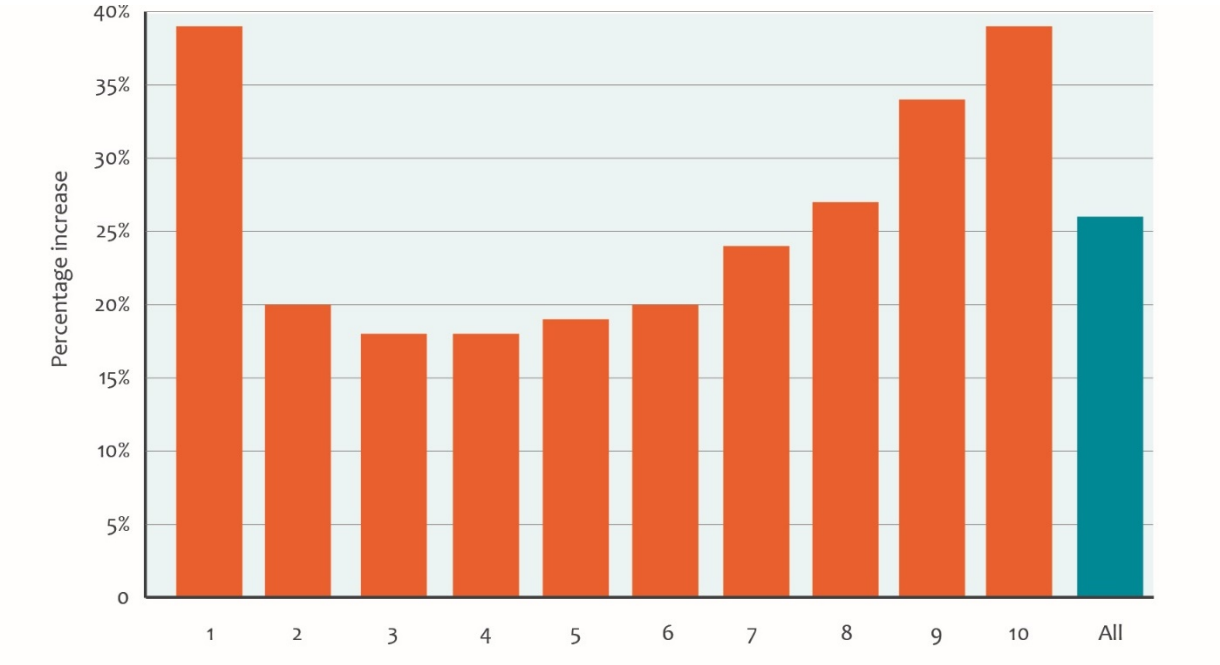


Figure 1: Real increase in average hourly wage in each decile for employees from 1998–2015

New Zealand has faced long term problems with its labour productivity, or the value of goods or services able to be produced by a worker in a set amount of time. Our rate of labour productivity growth has been lower than that of other developed countries for many years. Most economic growth has occurred because of a growing population, more people entering the workforce and staff working more hours, rather than through things like more innovation, capital investment or international trade.[5]

[4] OECD (2017). *OECD Employment Outlook 2017*. p165.
[5] Conway, P (2018). *Can the Kiwi Fly? Achieving Productivity Lift-off in New Zealand*. New Zealand Productivity Commission.

Wage growth has generally followed the rate of productivity growth since the 1970s, but a gap has opened up in recent years (see figure 2). This means that workers may be receiving a smaller share of the value of their work than in previous decades. Since rising in the 1990s, income inequality remains above the OECD average.[6] Lower-income earners spend a higher proportion of their income on housing, which has intensified inequality as the cost of housing has risen.[7] Māori, Pasifika, part-time workers and women are overrepresented in these low-income deciles.[8]

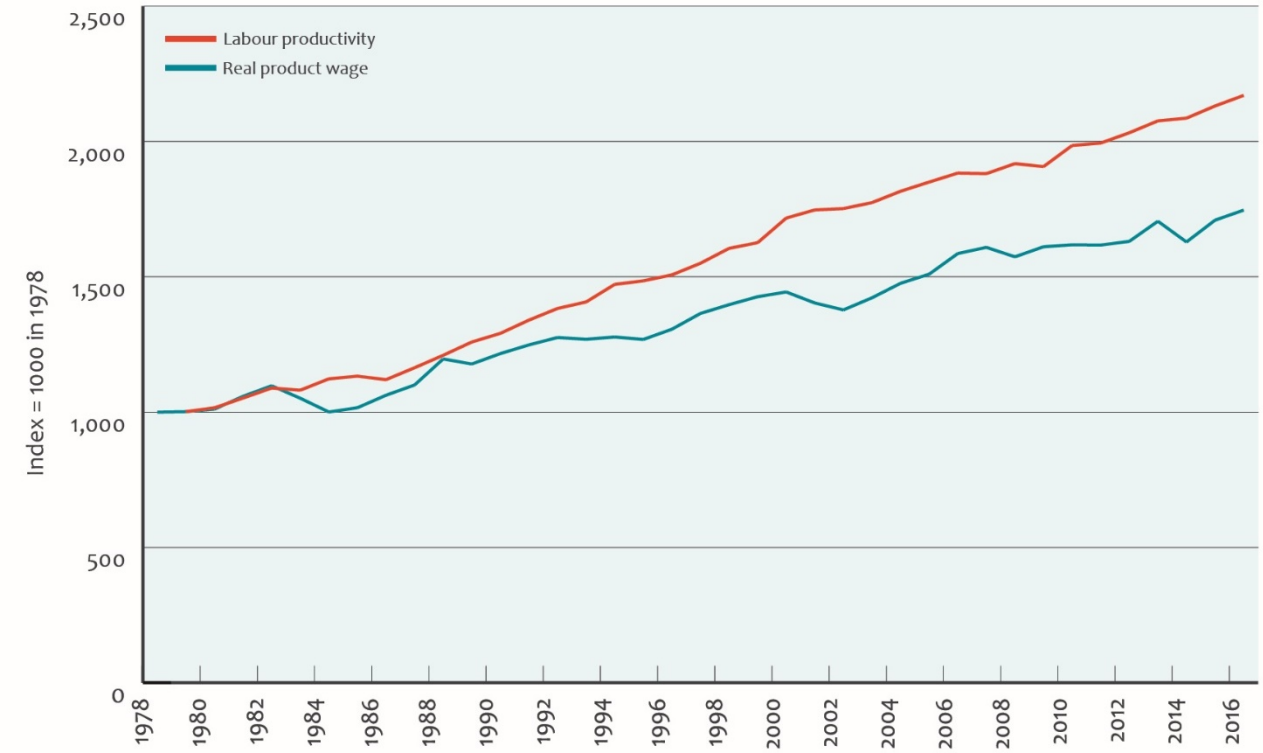


Figure 2: Labour productivity and the real product wage (1978–2016)

We asked a panel of experts – the Fair Pay Agreements Working Group – to design a new tool to improve labour market outcomes

In May 2018, Cabinet noted New Zealand's weak collective bargaining at the sectoral level and the pressure for businesses to compete by lowering wages or working conditions. The Government agreed in principle to a new tool in the ERES toolkit – Fair Pay Agreements – to let employers and workers bargain to set unique minimum employment terms and conditions for a sector or

[6] Fair Pay Agreements Working Group (2018). *Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits*. p11.
[7] Stats NZ (2018). *Household income and housing-cost statistics*: *Year ended June 2018*. https://www.stats.govt.nz/information-releases/household-income-and-housing-cost-statistics-year-ended-june-2018; Stats NZ (2017). *Rising prices for essentials hit beneficiaries the hardest*. https://www.stats.govt.nz/news/rising-prices-for-essentials-hit-beneficiaries-the-hardest; Perry, B (2017). *Household incomes in New Zealand: Trends in indicators of inequality and hardship 1982 to 2016*. Ministry of Social Development.
[8] Fair Pay Agreements Working Group (2018). *Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits*. p14.

occupation. The Government appointed the FPA Working Group (the Working Group) to give advice on how this new system could work. The Working Group was chaired by the Rt Hon Jim Bolger and consisted of employer, worker and community representatives as well as experts in economics and law.

We gave the group two constraints:

- strikes (when workers refuse to work) and lock-outs (when employers refuse to let workers work), also known as industrial action, would not be allowed as part of FPA bargaining, and
- it would be up to the sectors and occupations involved to use the system, rather than the Government 'picking winners'.

The Working Group delivered a report with its recommendations to the Government in December 2018. After analysing New Zealand's labour market and investigating systems for the sector-wide setting of minimum terms and conditions in other countries, the Working Group laid out a proposal for a system suited to New Zealand's unique circumstances.

- The Cabinet paper to establish the FPA Working Group can be found at: https://www.mbie.govt.nz/assets/dc5a233b69/improving-the-employment-relations-and-standards-system-fair-pay-agreements.pdf
- The full FPA Working Group report can be found at: https://www.mbie.govt.nz/assets/695e21c9c3/working-group-report.pdf

The report suggested that sector-wide collective bargaining could fill a gap in the ERES regulatory system and improve labour market outcomes

Most collective bargaining in New Zealand takes place between a single employer and one or more unions. These types of agreements cover only a small and shrinking percentage of employees.[9] The current system allows for collective agreements with multiple employers but there is a not a high uptake of these agreements. There are no specific mechanisms to support sector or occupation-wide collective bargaining.

Coordinated bargaining between groups of employers and workers in the same occupation or sector makes it easier for them to tackle problems which are common to them all. Collective bargaining encourages workers and employers to engage with others in their sector and can lead to improved social dialogue. This sort of collaboration can reduce power imbalances and lead to terms and conditions that are more tailored to specific circumstances than national minimum standards.

In some sectors or occupations, employers may face a 'race to the bottom', where businesses undercut their competitors by cutting labour costs or shifting risks onto workers. Coordination can support employers who want to give specific, industry-standard conditions to their workers but are undercut by competitors willing to pay their workers less. This kind of coordination can encourage businesses to compete on product value by investing in training, capital and innovation, rather than by cutting wages and conditions for workers.

[9] Ryall, S and Blumenfeld, S (2018). *Unions and Union Membership in New Zealand – report on 2017 Survey.* Centre of Labour, Employment and Work.

Many workers may not have the resources, knowledge or bargaining power necessary to form a union or negotiate with their employer individually. Supporting coordination can help workers who would otherwise struggle to negotiate on equal terms with their employer.

The Working Group proposed a model for an FPA system

To begin the process of making an FPA, the Working Group suggested that a group of workers must first define an occupation or sector that they want the FPA to apply to. Once this group is decided, they would need to demonstrate that:

- they have the support of 1,000 workers or 10% of the workers in this defined group, or
- there are harmful enough conditions in the defined occupation or sector to justify an FPA (the 'public interest test').

If either of these tests were passed, employers and workers in the defined sector or occupation would be represented at the bargaining table by unions and employer organisations. The Working Group noted that many occupations and sectors may need support from the Government to increase their bargaining capability. The choice of bargaining representatives would take place through an election in the affected sector or occupation.

Once elected, the nominated bargaining parties would negotiate until they reached an agreement. The agreement would need to be approved by a majority vote of all affected workers and employers to take effect. However, if the parties were unable to reach an agreement, the Working Group recommended that they enter into mediation. If mediation also fails, the Working Group proposed that the Employment Relations Authority or Employment Court should be able to make a final determination on the question and declare the agreement to be binding. Given that industrial action will not be allowed, the Working Group thought that the determination process would be a necessary incentive for parties to reach an agreement.

Under the Working Group's model, the agreed FPA would then apply to all workers - both employees and contractors - in the defined coverage.

The Working Group agreed that the benefits of FPAs could be greatest where employers and workers could find ways to boost productivity – such as though skills and technology investment.

The majority of the Working Group agreed that the new minimum standards of an FPA should bind all employers by default, but employer representatives argued that it should be voluntary for employers to participate in the system. The employer representatives were concerned that a compulsory system would force an inappropriately uniform standard across a large diversity of employers. The majority of the Working Group considered that if the system were not compulsory, it could not truly address the 'race to the bottom'.

The Working Group agreed that some exemptions should be allowed for special circumstances, such as an employer being able to demonstrate that they would be put out of business by higher wages, but that exemptions should have a maximum time limit (e.g. up to 12 months).

The Working Group noted that there were aspects of the recommended model where further work needed to be done.

We have developed the Working Group's recommendations and are seeking feedback on a range of options

Since receiving the Working Group's report in December 2018, we have considered its recommendations and undertaken detailed policy work. This work has focused on areas where the Working Group's recommendations were broad and needed further detail, or where additional work was needed to make the system as effective, balanced and workable as possible.

The following sections step through the Working Group's model and explore alternatives to develop their recommendations.

Each section includes questions where we are seeking public feedback. These include areas where the Government has identified multiple viable options, and open-ended questions where we are willing to consider a range of options. The process is divided into six areas: initiation, coverage, bargaining, dispute resolution, anti-competitive behaviour and conclusion.

To provide context and ease navigation, the beginning of each section contains a timeline (example below) with the relevant stages of the FPA process highlighted in colour.

Initiation	Coverage	Bargaining	Dispute resolution	Anti-competitive behaviour	Conclusion

1 Initiation

This section describes some options for how an FPA process could be started. This includes who can initiate bargaining and the tests that must be passed before bargaining can begin.

Summary

- We are seeking your views as to whether one or both of a public interest test and a representation test must be met in order to start the bargaining process.
- We are seeking your views as to whether the representation test threshold should be set at 10% or some other number.
- We would like your views on whether to also include an absolute numerical threshold for the representation test (such as 1,000 workers).
- We are seeking your views on whether employers should also be able to apply to start the FPA process.
- The criteria for the public interest test could be set in law and could cover two broad themes: (1) that there are problematic outcomes for workers in the sector; and (2) that coordination across the sector could help resolve the problematic outcomes.
- Government, employers, employer organisations and unions could all have a role in notifying affected employers and employees.

1.1 When an FPA can be initiated

The Working Group recommended a model where bargaining can be triggered by workers if either a representation test or a public interest test is met. They recommended a representation threshold of 10% or 1,000 of the affected workers, whichever was lower. If workers could not meet the representation threshold, they could still start bargaining if they met the public interest test (meaning there were harmful labour market conditions).

The Working Group's model is viable. We are interested in feedback on their proposal and some other options we have identified.

Should both the public interest test and a representation test need to be met to initiate an FPA?

The primary purpose of the FPA system is to correct for inherent imbalances of power in vulnerable workforces. Once FPA bargaining is initiated, parties are bound into the process and must conclude by having agreement from both parties (or have a government body set terms). Requiring a representation test will ensure that bargaining has sufficient support from workers or employers in the sector to justify this compulsion. Requiring a public interest test to be met in each case will tie initiation to labour market conditions in an occupation or sector, ensuring that the FPA system is targeted to where there is opportunity for collective bargaining to address a problem.

Your views

1. *Do you think that either a representation or a public interest test is needed to initiate an FPA? Or do you think that applicants should need to pass both a public interest test and a representation test to initiate an FPA? If not, what would you recommend instead?*

1.2 The representation threshold test

A 10% representation threshold

The Working Group set a low barrier to entry (1,000 workers or 10% of the sector) to avoid making the FPA system too hard to access, particularly in sectors with low union presence where there may be the greatest need for intervention. The private sector unionisation rate is approximately 10%.[10]

There is a balance to be struck between not setting the bar so high that it prevents workers triggering FPA bargaining, and setting a bar that acknowledges that in triggering FPA bargaining, a group of employees would be able to draw their remaining peers and corresponding employers into bargaining and then a binding agreement. We are seeking feedback on whether 10% or some other number is the appropriate threshold for initiation.

We have not yet established how the initiating party would need to prove they had the required support. Applicants could be required to gather signatures on a petition with individual workers listed, or unions could be able to apply on behalf of their membership. We are also still considering which government body is best suited to administering this test.

Your views

2. *Is 10% a reasonable threshold to ensure that applicants have some support from their sector or occupation before negotiating an FPA? If not, what do you think a reasonable threshold would be?*
3. *How should an applicant group need to prove that they have reached a representation threshold? (such as through signatures, membership etc.)*

A numerical representation threshold

The Working Group recommended including an absolute threshold of 1,000 workers as part of the representation test. Applicants would use this threshold, rather than the 10% threshold, if their occupation or sector was larger than 10,000 workers. This was intended

[10] Ryall, S and Blumenfeld, S (2017). Unions and Union Membership in New Zealand – report on 2017 Survey. Victoria University of Wellington Centre for Labour, Employment and Work.

to help large sectors where organising 10% of the workforce would be a significant and challenging task.

However, an absolute threshold would result in inconsistent mandates depending on the size of the sector. The larger the sector, the smaller the percentage of workers needed to reach the 1,000 threshold. For example, in the 2013 Census there were 96,831 sales assistants and salespersons in New Zealand. If the 1,000 worker threshold was included, 1% of the occupation would be able to trigger an FPA. This could incentivise parties to seek to initiate bargaining with broad coverage, as it would widen the pool of affected parties from which the absolute threshold could be drawn. This may result in initiations affecting very diverse businesses, which could reduce the likelihood of finding common ground.

In contrast, a percentage threshold alone does not advantage large or small sectors and is consistent across all sectors and occupations.

Your views

4. *Do you think applicants should be able to trigger bargaining by gaining a set number of supporters? If so, what do you think an appropriate number would be?*

We are seeking feedback on the inclusion of an employer representation test

The Working Group recommended that only workers (and their unions) should be able to apply to trigger bargaining. In the current system, employers can only initiate bargaining if there is already a collective agreement in place at their workplace.

There may be some value in allowing employers to initiate an FPA. We recognise that there could be situations where a group of employers may feel that an FPA could be useful in their sector, particularly if they are being undercut on labour costs and would like to set a level playing field that works better for their employees. There is a risk that businesses could misuse this ability to reduce competition in their sector on purpose, but we are considering other tools which should help to prevent this (see Section 5). If an employer representation test is not included, employers will still be able to lend their support to an FPA by encouraging workers to initiate.

There is greater difficulty in assessing what a representation threshold of employers should look like. For example, the test could be designed so that each employer represents one vote or the threshold could be measured by how many employees the employer has, with the disadvantage that this could reduce the influence of small businesses. How the different employer types are treated (i.e. how a labour hire company's or a franchisee's relative vote would be measured) and how they are counted could have significant effects on how the representation threshold test could work.

Your views

5. *Do you think that employers should be able to initiate an FPA bargaining process in their sector?*
6. *How should employers be counted in a representation test – by number or by proportion of the relevant employees that they employ?*
7. *If employers are counted by number, what do you think would be the best way to classify and count them?*

1.3 The public interest test

The Working Group recommended that the public interest test take the form of an assessment of harmful labour market conditions based upon a specified set of criteria. They provided a list of suggested conditions that range from relatively discrete and measurable (such as a high proportion of temporary and precarious work) to more complex (historical lack of access to collective bargaining). They provided a list of suggested conditions, but did not make a recommendation on whether they thought an occupation or sector would need to demonstrate all or only a few of the conditions. They also did not specify who should assess whether the test is met. The appropriate body to perform this role is still under consideration.

Criteria for the public interest test

The criteria for a public interest test could be set in law and would need to be responsive and flexible to capture the unique problems faced in different occupations and sectors.

It is important to note that many indicators may not be problematic by themselves, but create poor outcomes for workers when combined with other factors. Setting the criteria as relatively broad themes ensures that the decision maker has the flexibility to take this into account. Two possible criteria which groups wanting to initiate could be required to meet are:

- there are current problematic outcomes for workers in the sector, and
- there is the potential for more sectoral coordination to be beneficial.

A combination of the two criteria should ensure that the system is focused on sectors not only where workers and employers are in evident need, but also where an FPA is likely to be a suitable intervention.

Your views

8. *What problems do you think an FPA is best suited to address?*
9. *What do you think should need to be demonstrated by an applicant group to prove that an FPA will be in the public interest?*
10. *What do you think of the criteria about problematic outcomes and potential for more sectoral coordination? If you disagree, please indicate which other criteria you think should be included or if a different approach would be better.*
11. *How much evidence should the applicants be responsible for providing, and what should need to be collected independently by the assessing authority?*

Possible indicators for the public interest test

The two criteria suggested in the previous section could be assessed based on a recommended but flexible list of indicators.

A decision maker could assess the relevant evidence based on the indicators for the particular occupation or sector and make a decision about whether there are problematic outcomes in the sector which an FPA could address. A key focus of this test could be the compounding effects of these indicators when combined. Many of the indicators below

may not be problematic in some contexts. For example, non-standard working hours might be beneficial for a student or working parent. However, these sorts of indicators could lead to low quality jobs when combined with each other.

A possible list of indicators:

Potentially problematic outcomes for workers in the sector	Potential that more coordination in the occupation or sector could be useful
• Wages are not matching the value of worker productivity: although there has been increased output quantity or quality, it is not due to investment by employers (in technology, training, real estate etc) • Workers experience poor returns on qualifications and training or uncompensated skill development over the duration of their employment • There is un- or under-compensated risk transfer from employers to employees (e.g. insecure shifts, insufficient equipment) • There is a high incidence of insecure (casual, seasonal, labour hire and fixed-term) employment agreements • There is a high incidence of non-standard, irregular or uncertain working hours, and limited worker flexibility or voice in these areas • There are high rates of exploitation and non-compliance with minimum standards in the occupation or sector • There is a high incidence of health and safety violations or reports of job strain (stress, fatigue, depression) amongst workers, indicating distinct deficits in the quality of work environments in the sector • There is generally an insufficient provision of training for workers to adequately perform required tasks, particularly where the health and safety of workers or the public is at stake	Evidence of low coordination, or barriers to successful coordination, at a sectoral level: • Low collective agreement coverage • High turnover • Workers are spread across many workplaces and employers (high 'fragmentation') • Large occupation/sector • Low union/employers association density Evidence of a limited ability for employers to improve terms: • Common use of tendering processes • Labour costs are a high proportion of business costs, or one of the only areas where employers have the ability to lower their costs

Your views

12. *What indicators do you think a decision maker should take into account when applying the public interest test?*
13. *Should the list of indicators be open, providing the decision maker flexibility to look at other factors to assess the two broad criteria?*
14. *Is there a particular indicator, or a group of indicators, that should be given extra weight when deciding if a sector or occupation is in need of an FPA?*
15. *Should the indicators be updated regularly? If so, how regularly, and by whom?*
16. *Do you think the decision maker should have absolute discretion to decide that the public interest test has been met? If not, why not? What do you think the threshold should be?*

How the public interest test could be assessed

There are two options for how a public interest test could be worked into the FPAs process.

1. Parties apply if they pass the representation test and consider the sector may have harmful labour market conditions

This is the Working Group's recommended option. The parties would apply to have an occupation or sector assessed as part of the initiation process. If an occupation or sector met the test and had 10% support, bargaining for an FPA would then commence.

2. Parties can only initiate if they are a pre-approved sector or occupation

An alternative option would be to agree a list of pre-approved occupations or sectors, using the public interest test criteria, in which an FPA would be allowed to be bargained. This list could be written into regulations. Only occupations and sectors listed in this way would be able to bargain for an FPA.

The risk with this option is that groups who feel they need an FPA may not be able to access the system. However, deciding the sectors where an FPA could be made beforehand would provide the greatest certainty for parties, the government and the public. To provide more flexibility, the list could be re-evaluated periodically to make sure that the system can adapt to changing circumstances, or parties could apply to be added to the list through meeting set criteria.

Your views

17. *Do you think the public interest test should be available on-demand to anyone, or should a list of allowed sectors or occupations be set in law?*
18. *If the sectors and occupations able to bargain for an FPA are pre-selected in law, which sectors and occupations do you think we should assess against the test first? Are there any that should not be selected? Why?*
19. *If a pre-selected list of sectors and occupations was re-evaluated periodically, how often do you think this should be done?*

1.4 Affected employers and employees will need to be notified that bargaining has been initiated

There will need to be a notification process once an FPA is successfully initiated, because:

- Affected parties need to understand that change is underway which could affect them.
- Employers, employer organisations, unions and employees need to know FPA negotiations have commenced in order to participate in the bargaining process.
- Employers may want to clarify whether they fall within or outside the scope of the proposed coverage.

Notification will be easier for concentrated, well organised sectors – but it may be difficult in fragmented, disorganised sectors. It will be important to minimise the risk of a situation where employers and employees only become aware of a completed FPA once negotiations have already finished, or not at all.

An option is a multi-pronged approach to notifying people that bargaining has been initiated. This could include some independent government involvement, in order to ensure that as many people as possible know that FPA bargaining is about to commence. At a minimum this could include existing Government information and compliance channels, like websites and newsletters. Employers could have responsibility for informing employees, as they know best who their employees are. They could be supported by employer organisations and unions where applicable.

There will also need to be communication throughout the bargaining process (See Section 3.5).

Your views

20. Do you think that the government, employers, employer organisations and unions should all play a role in notifying people that FPA bargaining has been initiated?
21. Do you think that employers should have responsibility for informing employees that an FPA has been initiated? Why or why not? If not, who do you think should do this instead?

2 Coverage: deciding who an FPA should apply to

The Working Group recommended that an FPA should apply to a group of workers—including contractors and employees—in an occupation or a sector, and most Working Group members recommended it apply to all employers who employ that kind of worker. There would only be limited, temporary exemptions. This section describes our analysis of this recommendation and some alternative options.

Summary

- Work on the application of FPAs to contractors will proceed in parallel.
- Parties must define the specific occupations and sectors that the FPA will apply to according to set guidelines.
- Parties will be able to renegotiate coverage once bargaining has started, but must pass the initiation tests again if the change to coverage is significant.
- Limited, temporary exemptions for at-risk employers will be allowed.
- We are seeking your comments on whether regional variations or entirely regional FPAs should be allowed.

2.1 The application of FPAs to contractors

The Working Group recommended that an FPA cover all workers in the named sector or occupation: contractors as well as employees. The Working Group considered that if the system only applied to employees (not contractors), it could incentivise some employers to define work outside of employment to avoid FPA obligations.

We are currently considering options for strengthening protections for contractors and it would make sense to include them in FPAs. We plan to progress this work in parallel.

2.2 Defining and renegotiating who will be covered by the terms of the new agreement

Should parties define the specific occupations and sectors that the FPA will apply to using standardised classification systems?

The Working Group contemplated limits on how an applicant group could define the coverage of their proposed FPA, but did not recommend any specific guidelines. Once the boundaries are set through initiation, the parties would be able to bargain the boundaries of coverage.

An option is requiring coverage to be set by specifying occupations within a sector or sectors. The Australian and New Zealand Standard Classification of Occupations (ANZSCO) and the Australian and New Zealand Standard Industrial Classifications (ANZSIC) could be used as a basis for groups to define what they want to be covered. Both systems are

commonly used for sorting data and have publicly available explanations for how different workers and businesses can be classified into particular groups. We would explore options for making data on sector and occupation size publically available to ensure the representativeness test is workable.

The requirement to specify both occupation and sector, combined with the public interest test and representativeness test, should drive initiators to only include relevant occupations that could benefit from an FPA. For example, occupations with high bargaining power would likely not be included if applicants need to pass a public interest test (see Section 1.3). This will encourage applicants to choose the most relevant coverage and reduce the risk of overlaps.

The Working Group recommended that parties should be able to renegotiate the coverage of the agreement once bargaining has started. This would allow parties the flexibility to alter coverage if, for example, they determine partway through bargaining that a broader or narrower group would enable a better agreement to be reached.

Where coverage is significantly redefined parties could be required to reconfirm that they meet the initiation tests. This approach would require the body charged with verifying the initiation tests to recheck their analysis. While this would be an additional step, allowing parties to agree to widen or narrow coverage is likely to result in better agreements, as opposed to requiring them to continue bargaining when it has become apparent the coverage is not suitable. The timing of this check would be designed to prevent it being used as a delaying tactic.

Your views

22. *Do you think that applicants should need to define the coverage of their proposed FPA in terms of the occupations and sectors concerned?*
23. *Do you have any comments on the use of ANZSCO and ANZSIC to define coverage? Do you think that there are better alternatives?*
24. *Do you think that parties should be able to bargain different coverage, with any significant changes needing to pass the initiation tests? If so, should there be any restrictions to prevent the test being used to delay an FPA?*
25. *Should there be restrictions on the permissable grounds for changing coverage during bargaining? If so, what should they be?*

Parties bargaining for limited time-bound exemptions from an FPA

The Working Group recommended that parties be allowed to bargain for limited, time-bound exemptions (e.g. up to 12 months). Employers granted such an exemption would need to adopt the minimum terms and conditions contained in the FPA once this time elapses. Particular circumstances where exemptions are allowed should be set in law and agreed upon by parties in the bargaining process. Agreements could include defined circumstances for temporary exemption, or lay out administrative procedures for the parties or an independent body to approve exemption requests after the agreement is finalised.

Allowable grounds for exemption and limitations on the maximum length of exemptions that can be agreed in an FPA could be set in law. This could include, for example, where an employer may face going out of business if it complied with the FPA terms and conditions.

Providing for temporary exemptions could be a simple way to lessen the disruption to vulnerable businesses without compromising the longer-term movement towards a level playing field.

Your views

26. *In what circumstances do you think a temporary exemption from an FPA may be warranted?*
27. *If included, should exemption clauses be mandatory, or permissible? (see Section 3.2)*
28. *Should the bargaining parties be allowed to negotiate additional, more specific exemptions above those set in law?*
29. *What do you think is a reasonable maximum length of time that an employer should be exempted from the terms of an FPA?*
30. *Should an exemption be able to apply to an entire FPA, or just certain terms?*

Allowing parties to negotiate for regional variations in a national FPA

The Working Group suggested that an FPA should be allowed to include regional variations in terms and conditions. This could act as a pressure valve to minimise the impact of new minimum terms and conditions in areas where the new wages and conditions are not as suitable to local business models or living costs.

There are significant differences between the labour markets and living costs in different regions and cities in New Zealand. This makes it potentially risky to set minimum terms and conditions for all workers and employers in a sector or occupation across the entire country.

Allowing parties to bargain regional variations in minimum terms when negotiating an FPA is an option. Allowing parties to agree regional variations in bargained minimum standards can serve as a pressure valve (similar to exemptions) for those who would suffer most from the uniform approach. It would enable parties to allow for real geographical differences in labour and product markets. This would recognise that in some cases businesses in different regions are not direct competitors. This may mitigate some employer concerns, particularly about the different conditions faced by firms in big cities compared to the regions.

However, there may be a risk that employers in a dominant geographical area (for example, big cities) form the majority, and can impose a standard on the minority group, without allowing for regional variations. This risk could be partly mitigated by ensuring that employer representatives in bargaining represent the full range of affected parties. The market impact test outlined in Section 5 could assess anti-competitive behaviour and its regional impacts.

Your views

31. *Do you think that parties should be allowed to negotiate regional variations in the minimum terms of an FPA?*
32. *If they are included, what do you think a good level for regional variations could be – regions (regional councils and unitary authorities), territorial authorities (city and district councils) or something else? Should this be set in law or left to the parties to decide?*

Allowing separate regional FPAs

One option is that FPAs could be initiated and bargained for particular regions only, rather than needing to be bargained across an entire occupation at a national level.

If regional differences are too stark, it could be easier to let parties set coverage at a regional level at the beginning of the process. This could significantly increase the number of FPAs and the complexity of managing the system. However, regional coverage could be the easiest way to make sure that the terms of FPAs are well-suited to the unique circumstances of each region.

Further, there are concerns that the data required to assess the representation threshold and public interest test may become less reliable or statistically unrepresentative at the regional level, as the sample size becomes smaller.

Your views

33. *Do you think that parties should be able to initiate bargaining towards an FPA for specific regions? What, in your view, are the risks of allowing this?*
34. *If regional FPAs are allowed, should parties be able to change the regional coverage during bargaining?*
35. *Do you think there are particular sectors or occupations which could benefit from, or be harmed by, regional FPAs?*

3 The bargaining process

This section outlines an option for the scope of an FPA, who the bargaining representatives for the parties could be and what bargaining support could be required for an efficient and effective process.

Summary

- Parties must bargain in good faith.
- The scope of terms and conditions allowed in an FPA could be set in law.
- These terms could be grouped into two categories: mandatory and excluded. Another alternative would be to also set out permissible terms.
- Only mandatory topics could be set in the determination process, unless requested by the parties.
- Unions and employer associations may be the primary bargaining representatives, but we are seeking your feedback on non-members or unrepresented interests' involvement.
- We are seeking your opinions on three options for how bargaining costs should be shared.
- A 'navigator' could be provided to assist parties in the bargaining process.
- The bargaining parties could have primary responsibility for managing communication with the workers and employers they represent. The government could have oversight and the parties could be supported by the national employer and worker organisations, Business NZ and the New Zealand Council of Trade Unions (CTU).

3.1 Parties must bargain in good faith

As with collective and individual employment agreement negotiations in the current ERES system, an option is that the parties to the negotiations should be required to deal with one another (and the relevant government bodies) in good faith throughout the process. Good faith means negotiating honestly, openly, and without misleading each other. It requires parties to be active and constructive in establishing and maintaining a productive relationship in which they are responsive and communicative.[11]

Your views

36. *Do you think that a duty of good faith should apply to bargaining parties in their dealings with each other and any government bodies as part of the FPA process?*
37. *Should a duty of good faith for FPA bargaining involve the same responsibilities as under the*

[11] For more information on good faith, see: https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/

current Employment Relations Act? What new responsibilities, if any, will be needed?

3.2 The scope of terms and conditions to be included in agreements could be set in law

The Working Group recommended that legislation should set the minimum content that must be included in each FPA, and recommended the following topics:

- 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 of the FPA), and
- governance arrangements to manage the operation of the FPA and ongoing dialogue between the signatory parties.

The Working Group did not further specify what form the required topics should take, or how essential they should be.

Option of two categories of topics: mandatory and excluded

Mandatory topics are topics that would need to be included in every agreement in some form. The option for the mandatory topics could include: base wage rates, increases across the term of the agreement, whether superannuation employer contributions are included in base wage rates, overtime and penal rates, redundancy, leave requirements, coverage, duration and other governance arrangements. All other topics would be permissible unless they were listed in the excluded category. We would like your views on what any excluded categories might be, or if they are needed.

This approach will give the bargaining parties flexibility to agree on which minimum terms are most needed in their occupation or sector. Having mandatory terms ensures that at least some progress is made in improving workers' outcomes. It does contain a risk that parties include terms which have anti-competitive effects, but a market impact test could stop this (see Section 5).

An alternative option is to have only mandatory and permissible categories. Any topic not listed in either category would be excluded. This would narrow the available topics and prevent the anti-competitive risk up front. The permissible category gives parties the flexibility to drop certain topics if they are proving impossible to agree on or seem too likely to harm competition or employment.

If we adopted this option, a list of terms we have been considering for the mandatory and permissible categories is included on the following page.

Mandatory	Permissible
• Base wage rates • How the wage rates will be adjusted • Whether employer superannuation contributions are included in base wage rates • Overtime/penal rates • Redundancy • Leave requirements • Skills and training • Ordinary hours/days of work • Coverage • Duration • Governance arrangements to manage the operation of the FPA, including ongoing dialogue	• Objectives of the FPA • Other provisions on wage rates (falling outside of mandatory requirements) • Other provisions on superannuation • Regional differences • Allowances • Equal employment opportunities • Flexible working

Your views

38. *What do you think of having mandatory and excluded categories?*
39. *What do you think of the mandatory topics?*
40. *What terms, if any, should be in the excluded category?*
41. *What do you think of the alternative option to have only mandatory and permissible categories?*
42. *Should any of the items in the permissible and mandatory lists be in a different category?*
43. *Do you think that in the event of a bargaining stalemate, the determining body (see Section 4.2) should only be able to set the mandatory terms of the FPA?*

3.3 Who can represent affected parties at the bargaining table

The Working Group recommended that for the FPA system to be workable, only employer organisations and unions should represent affected parties at the bargaining table. It recognised that these organisations may not be perfectly representative, so it recommended that all affected employers and employees should have a chance to vote on their bargaining team. In addition, it recommended that representative bodies must represent non-members in good faith (see Section 4.1). The Working Group also suggested that if multiple groups wanted to be represented, they should be accommodated within reason.

Unions and employer associations as major representatives

Given that FPAs are intended to be a system of *collective bargaining* for setting minimum standards in an occupation or sector, it is logical for the bargaining parties to be unions and employers (or employer associations), as they are in the current system.

Unions and employer organisations are almost certainly the most representative groups available to bargain. Even where unions or employer organisations only represent a minority of an occupation or sector, they are likely to be the 'most representative' groups that exist. As the Working Group noted, selecting the most representative group is normal practice internationally.

This option is likely to be consistent with New Zealand's international labour obligations. Existing organisations are also likely to have the most experience with the bargaining process, although workers in many sectors may have limited or no experience in collective bargaining. We anticipate that employer organisations might need to develop their capability in this area because employer bargaining representatives normally come from individual businesses.

The Working Group's approach would require unions and employer organisations to represent non-members in good faith, but people may still question the ability of an organisation to truly represent non-members in good faith.

We have ruled out two other options: where either any organisation could be a representative party; or where there would be no rigid rules, so even individuals could be primary representatives. While these options would encourage broad, accessible representation, we do not believe they are feasible. It would be unclear who individuals at the bargaining table were representing. There would be no guarantee that the bargaining representatives would be effective, and the bargaining process may become unworkable given difficulties coordinating negotiating positions. Under these options there would need to be some way of selecting from the representatives who put themselves forward, adding complexity and compromising the efficiency and workability of the system.

Alternative representatives

A possible variation is where unions and employer organisations would still be the primary representatives, but there could also be potential seats for non-unionised workers and other interests (such as funders or non-organised employers) at the bargaining table.

There are risks associated with this variation. Coordination between unions/employer organisations and the non-member representatives is likely to be difficult. Unions and employer organisations may object to working with non-members. Non-member representatives are likely to have low bargaining capability, and may need costly financial support from the government in order to participate effectively. Such an approach may also be inconsistent with the International Labour Organisation's principle that collective

bargaining with representatives of non-unionised workers should only be possible when there are no trade unions at the respective level.[12]

Your views

44. *Do you think that unions and employer organisations should be the major bargaining representatives as is normal?*
45. *Should there be a limit on the number of representatives at the bargaining table?*
46. *Should other interests be represented? E.g. non-unionised workers, non-organised businesses, funders or future entrants to the market. Should this be by agreement of the major bargaining parties?*
47. *How should bargaining representatives be selected? Is there a role for Government in ensuring the right mix of parties is at the table?*

3.4 How the costs of bargaining could be shared

There are a variety of costs which will be involved in the process of making an FPA. There will be tangible costs related directly to bargaining, such as transportation, accommodation, venue hire and catering for the bargaining representatives. Businesses and workers may also face costs if staff time is required for discussion of bargaining-related matters at work.

The Working Group suggested that the groups with representatives at the bargaining table (and by extension their members) should not bear an unfair share of these costs. It also recommended that we should consider bargaining fees, a levy, or a Government contribution to bargaining costs.

There are two quite different approaches that could be taken in relation to costs:

- Use the existing bargaining model, where the parties agree on how the costs of bargaining will be dealt with (without government involvement). The sharing of costs is often discussed at the beginning of bargaining and written into a bargaining process agreement.
- Use a different model where the costs of bargaining could be spread across affected parties through a levy, bargaining fee, or where the government could fund the bargaining parties. These options would address the Working Group's concern that costs should not be unreasonably imposed on bargaining parties.

Taking these approaches into consideration, there are three feasible options for how costs could be shared.

- **Option 1: Bargaining fees**. If unions and employer associations are the only representatives, there could be a one-off charge on non-members to cover the costs of the bargaining process. This bargaining levy would come at the end of the process once the costs were known. This approach would achieve an equitable sharing of

[12] International Labour Organisation (2015). *'Collective Bargaining: A policy guide'*.

costs between affected parties but it would require the creation of a complex administration system by the bargaining parties and/or the government. Everyone within coverage of the FPA would have to pay for its negotiation, regardless of whether they benefitted from it.

- **Option 2: Costs as they fall, except government contributes to tangible costs (such as flights, catering, or venue hire)**. A government contribution to some of the costs of bargaining would ensure that the costs are not unreasonably skewed towards the bargaining parties. This approach would be a departure from the approach in the existing employment relations system.
- **Option 3: Costs as they fall**. This would be consistent with the approach in the current employment relations system. While this would be a feasible approach, we recognise it would place a significant burden on a small group of bargaining representatives, who would be bargaining on behalf of a much larger occupation or sector.

There may be a case for the government contributing to at least some of the costs of bargaining, or for there to be a system for recovering costs (i.e. bargaining fees).

Two other options are not put forward, the government paying for all the costs of bargaining and the government contributing to the costs of staff time. These two options would be a significant departure from the current ERES system where parties cover their own costs. In addition, we are not aware of any bargaining situation in which the government contributes towards the cost of staff time.

Your views

48. *Which of the three options for bargaining costs do you agree with, and why? Is there another option which you consider is best?*
49. *If a bargaining fee or levy is introduced, how should non-members be identified?*
50. *If a bargaining fee or levy is introduced, should the charge be made for all employees/employers as of a certain date? Would there need to be exceptions for certain circumstances? If so, which circumstances?*
51. *Could there be good reasons for departing from the current situation where bargaining parties cover the costs of bargaining?*

3.5 Active support during the bargaining process

Managing a negotiation involving a whole sector or occupation will be a challenging task for bargaining representatives. We see a role for the government in helping the bargaining parties work through negotiations and communicate important information to employers and workers.

A navigator to support parties from the outset of the bargaining process

The Working Group proposed that there should be a government-funded 'facilitation' function, to support a more efficient and effective bargaining process and to minimise the risk of disputes occurring. To avoid confusion with 'facilitators' which currently exist in the employment relations system, we will use the name 'navigator'. The Working Group imagined that a navigator would:

- assist the parties with the bargaining process and answer any questions that they may have,
- advise on the options for the process the parties could follow to reach agreement, and
- help parties to discuss the range of possible provisions in the agreement.

The Working Group said this role was not the same as the existing 'facilitation' role undertaken by the Employment Relations Authority (the Authority). The Authority's facilitation role is intended to act as an intervention for parties that are having *serious difficulties* in concluding a collective agreement. The role allows the Authority to provide non-binding recommendations. Parties are encouraged to try and resolve their problems between themselves and to use this sort of facilitation as a last resort.

In contrast, the Working Group imagined a navigator's role as being a supporter to assist bargaining parties from the start of the bargaining process.

These functions largely already exist through Mediation Services, but they are not often used as tools to assist parties in the earlier stages of bargaining. They are instead most routinely engaged once the parties have come to a stalemate.

This function would support effective and efficient bargaining. A navigator could help bargaining parties understand how bargaining will work under the new system, assist with establishing a bargaining process agreement, support bargaining discussions and de-escalate conflict where possible. Effectively resolving problems through this role could result in less pressure on the other parts of the dispute resolution system. We are interested in your views on whether any further functions would be needed or desirable for the navigator role.

Your views

52. *Do you think that a 'navigator' should be provided to support the bargaining parties?*
53. *What skills do you think would be most useful for a navigator to have?*
54. *Do you think the navigator should have any additional functions than those described?*
55. *Should the navigator role be performed and resourced by the government?*
56. *Should the parties be allowed to provide their own navigator, or refuse to have one altogether, if they agree to it?*

A role for the government in supporting communication, but primarily the responsibility of the bargaining parties with help from BusinessNZ and the New Zealand Council of Trade Unions

The bargaining representatives need to be able to communicate effectively with the employers and employees they represent. This communication will need to be both top-down and bottom-up in order to ensure that the bargaining representatives are truly speaking on behalf of the workers and employers they represent. Unlike with the current bargaining system, unions and employer organisations will need to communicate with more than just their members.

The parties to the FPA negotiations should take the leading role in communicating with the people they represent, and other affected parties where possible. Government support will be required to help employer and employee representatives to communicate with the people

they represent. As with the notification process, the government will need to minimise the risk that affected parties miss the chance to be informed and share their views. This support could take the form of financial support or education and information from existing government bodies.

In relation to communication functions, bargaining parties could have primary responsibility to communicate with the employers and employees they represent, supported by the principal nationwide employer and worker organisations: BusinessNZ and the New Zealand Council of Trade Unions.

Your views

57. *Do you think that the bargaining representatives should have the primary responsibility for communicating with the parties they represent?*
58. *At which stages of the FPA process should there be a requirement to communicate with the employers and employees under coverage of the agreement? (eg. initiation, application for determination etc.)*
59. *How much oversight, if any, should the government have over the communication process?*
60. *Do you think that the principal nationwide employer and worker organisations (BusinessNZ and the New Zealand Council of Trade Unions) should support the bargaining parties to communicate with members?*

4 Dispute resolution: resolving a bargaining stalemate

It will be essential for there to be a system in place for dealing with situations where the bargaining parties cannot resolve an ongoing disagreement. This section sets out some options for resolving bargaining disputes.

Summary

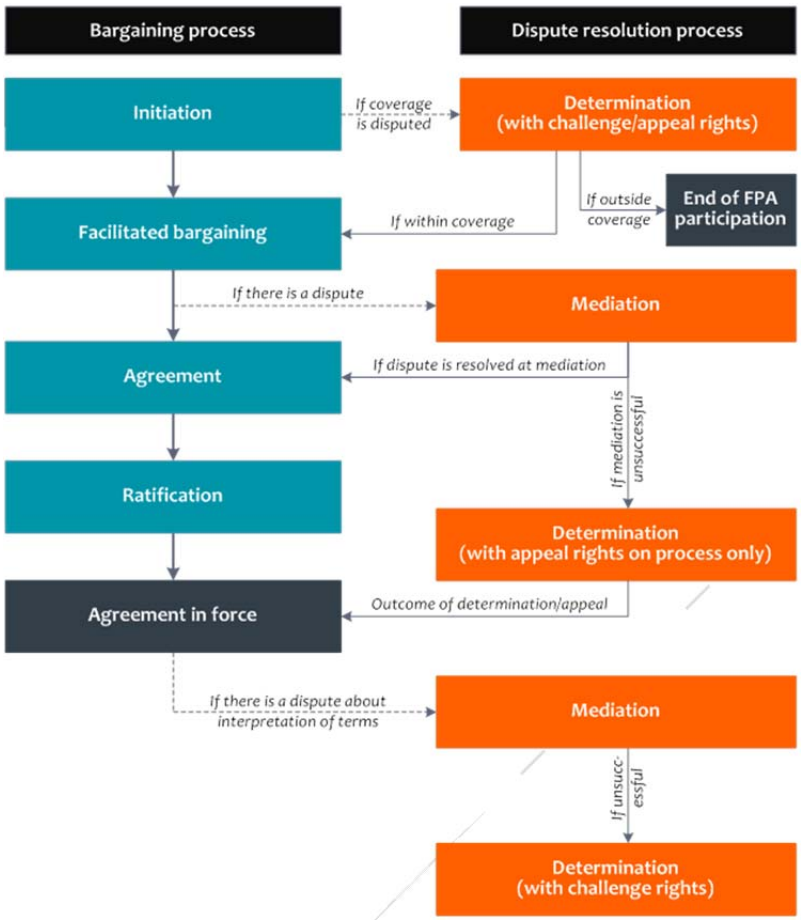
- We are seeking your views on whether mediation should be a required step before parties seek a determination.
- Parties unable to break a bargaining stalemate could have the matter settled through a binding determination process.
- The results of a determination will be subject to appeal only on matters of law.

The Working Group recommended designing a dispute resolution system that would maintain the existing processes under the Employment Relations Act, with additions or simplifications where appropriate. This would minimise the time and expenses lost through legal procedures and keep the process as simple as possible.

Under the Employment Relations Act, parties can access free mediation services for support with collective bargaining (such as establishing a bargaining process agreement) or to help manage disputes as they arise. Where parties are experiencing serious difficulties in bargaining they may be able to access facilitation on application to the Employment Relations Authority. In facilitation, the Authority can make non-binding, and potentially public, recommendations about the terms and conditions of the collective agreement to help parties come to a resolution.

An illustration of the bargaining and dispute resolution process for FPAs recommended by the Working Group is set on the next page.

The Working Group's proposed bargaining and dispute resolution processes



A dispute resolution model that can work would use existing systems and institutions. Doing this allows the system to be more readily scaled up and down, depending on demand.

Your views

61. *Do you think that we should make use of the existing employment relations dispute resolution system for FPAs?*

4.1 Mediation: a fresh view on a bargaining stalemate

We are interested in your views about whether mediation is needed as an additional step in the dispute resolution process, given that the new function of 'navigator' may involve mediating disputes as they arise. The additional value of mediation is likely to be having a fresh perspective on the concerns raised by the parties.

Mediation would provide another way to break a deadlock before parties apply to get the matter determined by a determining body. Requiring this additional step may provide an avenue for parties to resolve the dispute and settle the terms themselves. Alternatively, it may be seen as an unnecessary step that parties who are deadlocked have to go through before being able to apply for determination. Mediators could be given the ability to make

non-binding recommendations to the parties, as they currently do for collective bargaining in the ERES system. This would differentiate mediators from the more impartial navigators and make mediation a useful step between navigated bargaining and determination.

Your views

62. *In the event of a bargaining stalemate, should it be mandatory for parties to enter into a formal mediation process before they can seek a determination?*
63. *Should mediators be able to provide non-binding recommendations to the bargaining parties? Are there any other functions which a mediator, but not a navigator, should have?*

4.2 Determination: The final process for resolving a deadlock

Bargaining disputes on mandatory terms may be determined by a determining body

The Working Group recommended that where a dispute cannot be resolved through mediation, parties should be able to apply to have the matter decided by a determining body. The deciding body would then either issue a determination including terms for settlement in the agreement, or refer the matter back to mediation where appropriate. This role could be carried out by the Employment Relations Authority as it aligns closely with its existing powers and expertise.

We stated at the outset that industrial action would not be permitted in the FPA system. The Working Group noted that parties would still need sufficient incentives to reach agreement without the threat of strikes or lockouts. The Working Group thought that a final, legally binding determination would be a motivation to come to an agreement at the bargaining table.

The determining body could be able to make a determination on the mandatory terms and conditions that the bargaining parties could not agree on. Where terms and conditions are only permissible, the parties would need to come to an agreement in mediation or the term or condition will not be included in the FPA. Determined agreements would still need to pass a market impact test (if included, see Section 5), so the determining body will have an incentive to decide terms and conditions that do not unacceptably lock-in business models or reduce competition.

Determining body's role regarding permissible FPA terms and conditions

We are interested in your views about what role the determining body should have in relation to parties being unable to agree to permissible, but not mandatory, terms and conditions (see Section 3.2 for more information on permissible and mandatory terms). There are several options for the body's role:

- to determine that parties have been bargaining in good faith without an outcome for a period of time, and that an FPA should progress on mandatory terms and conditions alone (and any agreed permissible matters). This would mean the determining body would act as a circuit breaker for bringing bargaining on permissible matters to a close,

- where there is a bargaining stalemate and both parties agree; to provide non-binding recommendations to the parties on permissible terms and conditions that have not been able to be agreed, and/or
- where there is a bargaining stalemate and both parties agree; to provide a determination for the parties on permissible terms and conditions.

The determining body could be able to ask for advice from experts to assist them in making their decision

The determining body could be able to ask for advice from experts to assist them in making their determination. An FPA is likely to involve multiple complex interests, and each occupation will come with its own unique challenges which will impact on how a term should be determined. In order to understand these challenges fully and make a decision that balances the interests of the parties, the determining body may need to rely on experts within the sector.

Your views

64. *What should count as a bargaining stalemate?*
65. *Should circumstances be set in law, or should parties need to agree that they have reached a stalemate?*
66. *Do you think that there should be a determination process in the event of a bargaining stalemate? If not, would there be sufficient incentives for parties to reach an agreement?*
67. *Do you think that the Employment Relations Authority is the most appropriate organisation to carry out the determination function?*
68. *Do you think that the determining body should only be able to set terms for the mandatory topics of an FPA?*
69. *What role do you think the determining body should have in relation to bargaining stalemates for permissible FPA terms, if any? Should the determining body be able to set terms for permissible matters with the consent of the bargaining parties? Should it be able to make recommendations?*
70. *Do you think that the determining body should be able to ask for advice from experts to assist it in making its determinations?*
71. *Should the panel of experts need to be demonstrably independent from the bargaining parties?*
72. *If a panel of experts is consulted, should their advice be public or strictly confidential? Should experts be protected from liability for their advice?*

4.3 Appeal rights in the dispute resolution system will be limited to matters of law

The Working Group recommended that appeal rights be limited to matters of law only. This means that the determination cannot be challenged on the substance of the decision, only on whether the determining body followed the right process in reaching their decision.

The Legislation Design and Advisory Committee guidelines advise that the rights to bring first and subsequent appeals should not be unreasonably limited. The guidelines set out when reasonable limitations may apply and state that as a general rule first appeals should include a

right of appeal on the facts of the case. Any limitations should be based on the purpose of the appeal, the competence of the body tasked with judging the appeal and the appropriate balance between finality, accurate fact-finding and the correct interpretation of the law.

Under the Employment Relations Act currently, appeal rights are limited where the Authority has made recommendations under their facilitative powers, and where they have fixed terms and conditions of a collective agreement under section 50J of the Act[13]. The appeal to the Employment Court is limited to questions of law, as opposed to the merits of the decision itself.

The rationale for limiting the appeal to questions of law is that the decision to fix terms and conditions itself does not lend itself to appeal, as it requires balancing the interests of the parties and coming to a decision on what the terms and conditions of the FPA should be. It is not an exercise in interpreting or applying the law.

Limiting the right of bringing an appeal to matters of procedure would also encourage finality and avoid prolonged and costly legal processes. This is especially true for an FPA determination, due to the wide range of impacted parties that could appeal a decision on a variety of factors.

Your views

73. *Should appeal rights be limited in any way? If so, what sort of limitations would be appropriate?*
74. *Do you think that appeal rights should be limited to matters of law only?*

[13] Under Section 5J Employment Relations Act 2000, a party to a collective bargaining process may apply to have the terms of the agreement settled by the Employment Relations Authority if there has been a serious and sustained breach of good faith

5 Anti-competitive behaviour

We want FPAs to bring good outcomes for employers, workers and consumers. The Working Group suggested that the Government look into ways to ensure that the potential negative consequences of an FPA are kept to a minimum.

We note that the aim of FPAs is to prevent competition from being based on cutting wages and conditions. The standards set would apply across a sector, limiting that sort of negative competition, and would be minimums which businesses can choose to improve upon or not.

We would like to hear your views on whether anything further is necessary to prevent anti-competitive behaviour that is not in the public interest, and if so, when in the process this issue is best covered.

Summary

- Should all agreements be subject to a market impact test before being ratified or should market impacts, if any, be addressed some other way?
- We are seeking your thoughts on whether any test should be included, and if so, how and when it should be administered.

The Working Group recommended that we consider how to assess and mitigate potential negative effects of an FPA, such as on competition or consumer prices. They suggested that competition law mechanisms may need to be adapted to mitigate the risks of such effects.

There is a risk that FPAs could entrench certain ways of running a business, or set high barriers for new businesses to enter the market. This could reduce competition and restrict innovation.

Market impact test

Having a market impact test could encourage bargaining parties to set terms with lesser impact on the public interest.

Having a specific test may be difficult or unworkable. It could be difficult to analyse all of the relevant market dynamics in in each case, especially if there is insufficient data for that particular occupation or sector. If the threshold for passing the market impact test is set too high, it could become a barrier to any agreements being finalised.

There is also a question as to when any test would be applied. It would be useful for a test to consider the proposed terms of an FPA but testing at this stage of a process would create a risk of wasted bargaining.

Your views

75. *Should FPAs be subject to a market impact test or should potential impacts be addressed by other means?*
76. *If not, is there another way to address market impact (such as consideration during negotiations)?*
77. *Do you think that the results of the market impact test should be subject to appeal? If so, what sorts of limitations would be appropriate?*

The scope of consideration for a market impact test

Key focus areas of a market impact test could be:

- the fairness of impacts across different employers in the sector, such as business in the regions, small businesses and businesses who may enter the sector in the future, ensuring those employers who pay well aren't disadvantaged, and
- impacts on the economy as a whole, particularly increasing local spending by workers, reducing health costs on the state, consumer prices, labour markets, regional economies and competition.

We note a market impact test could be complex and time-consuming to assess. It is unclear which government body could perform the function and what evidence and proof would be required. The closest parallel is the Commerce Commission's authorisation process under the Commerce Act, where it assesses whether anti-competitive transactions are in the public interest.

Your views

78. *What potential impacts of an FPA should be considered in a market impact test? What information would be required to assess these impacts? Are there any impacts which should not be considered?*
79. *Should there be a maximum time limit on how long a market impact test should take?*
80. *How feasible do you think the market impact test would be for a government body to assess?*

How risks and benefits should be weighted

There are two ways that the decision maker could assess a potential market impact test:

- the risks could be judged on balance with the potential benefits, with significant risks allowed if there is evidence of more significant benefits; or
- the risks could be assessed against a threshold of unacceptable risk which cannot be crossed regardless of the benefits.

The balancing option would be complicated and time consuming, but could allow for agreements to progress where there are evident risks in some areas but also the potential for good outcomes overall. Assessing the FPA against a threshold of unacceptable risk would be simpler and more clearly address potential problems. However, it could severely limit the number of possible agreements if the threshold is set too low.

The fundamental question is whether the risks are inherently unacceptable or if the potential benefits are of such value that some negative outcomes elsewhere are tolerable.

Your views

81. *How do you think potential risks and benefits should be assessed? Are some negative outcomes justified if the end result will be an overall benefit?*

Where the FPA fails the market impact test

Depending on the nature of the impact and the details of the terms or conditions themselves, an option is that the government body may refer the FPA back to the parties to renegotiate (where the terms were agreed by the parties) or to the determining body to reconsider (where the terms were set by the determining body).

An option is that in extreme circumstances, the government body may reject the FPA if it believes the market impacts are fundamental and cannot be mitigated. In this case the FPA bargaining would end without an agreement.

Your views

82. *Should the government body have discretion to send agreements back to the bargaining parties or the determining body if they fail the market impact test?*
83. *If the decision maker can send agreements back to the bargaining parties, should they be able to give recommendations?*

Is there a role for further market impact tests after agreements are enacted?

The economy and labour markets are complex and constantly changing. Even if an agreement passes a market impact test at one point in time, the economic situation might change over the lifetime of an agreement and modify how the agreement affects employers, workers or consumers. It could be sensible to give an ongoing evaluation role to the government body tasked with assessing the market impact test.

Your views

84. *Do you think that there should be an ongoing role for the market impact test after the agreement is put into force? If so, do you think a post-enactment market impact test would need to differ from the initial market impact test in any way?*
85. *If there is a market impact re-evaluation test, should it be available through an application process or another way? If on-demand, should there be an application fee or some other necessary criteria to pass before the test can be requested?*

6 Conclusion: putting an agreement into force and recovering costs

This section looks at the processes that will be necessary to move from a bargained agreement to an enforceable set of minimum terms and conditions. It is important that the conclusion of the FPA process is designed so that the content of the bargained agreement has a democratic mandate, is simple to access and can be properly enforced. There will be a cost to providing the various administrative and bargaining support functions outlined so far. It is important that these costs are paid for in a way that is workable and fair.

Summary

- All agreements settled by the bargaining parties (but not the determining authority) could be required to pass a vote with a majority of voters (both employees and employers) in the affected sector.
- Agreements could be put into force through regulations.
- Agreements could be registered and accessible on a centralised FPA website.
- We are considering and seeking feedback on two options for enforcement, modelled on minimum standards and collective agreements respectively.
- Cost recovery for the dispute resolution functions could be consistent with the existing cost recovery model unless there are good reasons for this to differ.
- Bargaining parties could contribute to some of the remaining administrative costs, likely through a fee to initiate bargaining.

6.1 Ratification: voting to approve an FPA

Once bargaining has concluded, the Working Group recommended that workers and employers covered by the proposed FPA be given a chance to vote on whether they approve the agreement. This process would not need to take place if the agreement was determined by the determining body.

The Working Group suggested that this vote (or 'ratification') should require the support of a majority of all affected parties on each side to be successful. This means that half of all workers and employers affected would need to give their vote in order for the agreement to be finalised. This would require a high voter turnout for agreements to be successful and could be manipulated if parties put pressure on others not to vote.

It could be difficult to count the number of employer votes due to the varied nature of business structures and sizes. These issues are outlined in Section 1.2.

Ratification process to require a majority (50% +1)[14] of voters on each side

This means that the vote will only consider the opinions of those who voted, so the result will not be skewed towards rejection by those who do not participate.

It will be important for people to trust that the process is fair and accountable. An option is that a government body should have a role to help inform affected workers and employers that a vote is underway and confirm that the ratification process has been carried out soundly.

Your views

86. *Do you think that FPAs should need to be ratified by a majority of employers and workers who will be affected?*
87. *Do you think that a majority of voters is a more workable requirement than a majority of all affected parties?*
88. *How should employer votes be counted: one vote per business, or votes as a proportion of workers employed in the covered sector?*
89. *How do you think the Government should support a ratification process?*
90. *What should happen if an agreement does not pass ratification? Should parties return to bargaining?*
91. *What should happen if some terms and conditions are determined by the determining body and others are agreed by the parties? Should the whole agreement need to be ratified, or just the terms agreed by the parties?*

6.2 Enactment: putting the agreement into force

Regulations as the legal mechanism to bind affected workers and employers once agreements have been ratified or determined

FPAs have the potential to impose costs on workers or businesses, create punishable offences and affect a wider group of people than the bargaining representatives. We do not think it would be appropriate for the bargained agreement to be binding as soon as it is ratified by a sector or determined by a court.

Bargained agreements could be put into force through regulations. This would help to ensure that the terms are legally vetted for loopholes, unclear language and inconsistency with other laws. Guidelines could be established outlining clear limitations on the grounds, if any, and scope for altering a bargaining agreement during this process.

[14] The 'plus one' in '50% +1' means that the vote would need one more person than 50% of the voters in order to be successful. This is the smallest possible simple majority.

Your views

92. *Should the Government be allowed to change any terms of an FPA in the process of enacting it through regulations? If so, on what grounds?*

Agreements will need to be published in a centralised place and made easily accessible to the public

It will be important for workers and employers to be able to find information about FPAs easily and for it to be clear whether they are covered. If they are covered, the terms and conditions that apply to them should be easily accessible.

This would most likely take the form of a government-run website where all FPAs are published. This could include a tool for users to find out whether they are covered and, if so, where to find the relevant terms and conditions. A similar tool has been made by the Australian government for their Modern Awards system.[15] The website could also include general information about the bargaining process and updates regarding ongoing negotiations.

Your views

93. *What do you think is the best way to ensure that people are able to easily find information about FPAs?*

6.3 We are seeking views on the most suitable mechanism for enforcing an FPA

Standard collective agreements are enforced by the workers and employers who are covered by them. This means that any worker who thinks they are not receiving the terms and conditions they are entitled to can raise this issue with their employer, or escalate the dispute to the Employment Relations Authority themselves (or through their union). On the other hand, base minimum standards can also be enforced by the government through the Labour Inspectorate. This organisation monitors businesses, responds to reports that employers may be breaking the law and takes legal action where breaches are identified. This ensures that minimum standards are followed in cases where workers might not know that they have certain minimum rights or where, even if they know minimum standards are being breached, they feel unable to confront their employer themselves.

If agreements are put into force through regulations, legislation could also declare the terms and conditions of the FPA to be minimum standards within the jurisdiction of the Labour Inspectorate. This would help workers who are not aware their work is covered by an FPA or who do not have the individual ability to demand the terms of an FPA from their employer. There is a risk that this could stretch the resources of the Labour Inspectorate.

[15] For more information on Modern Awards see https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/modern-awards

Additionally, it may make sense to use the existing enforcement procedure for collective agreements. This would require the workers covered by the agreement (or their union) to bring their own disputes to the Employment Relations Authority if they cannot resolve the issues with an employer.

Your views

94. *What should happen if a person or group thinks that the minimum terms set by an FPA are not being met?*
95. *Do you think the Labour Inspectorate should have the ability to enforce minimum terms set by an FPA?*

6.4 Cost recovery

If the benefits of the FPA system are primarily enjoyed by the bargaining parties, rather than the wider public, passing costs on to the bargaining parties could be fair. While FPAs will primarily benefit the affected occupations and sectors, such as through better coordination and better working conditions, there could also be wider social and economic benefits. For example, it is in the interest of wider society that employers and employees are equipped with the tools to address imbalances of bargaining power through collective bargaining. Improving pay and conditions could have secondary benefits for the wider public in terms of health, education or economic stimulus.

The current system promotes easy access to dispute resolution functions, such as Employment Mediation Services, to efficiently resolve disputes early and reduce the need for intervention through the court system. An option is that cost recovery for the dispute resolution functions should be consistent with the existing cost recovery model unless there are good reasons for this to differ. This would mean that the navigator (see Section 3.5) and mediation (see Section 4.1) would be free, and there would be relatively small fees for escalating issues to the Employment Relations Authority.

We are considering the extent that bargaining parties should be required to pay for the costs of the remaining FPA functions, such as assessing the initiation and market impact tests. It will be necessary to balance parties contributing an appropriate share of these costs with the need to minimise barriers to accessing the system. The best place for a fee would be at the beginning of the bargaining process. An option is that parties should cover at least some costs of the administration of the FPA process, but we are seeking your views on what appropriate cost recovery could look like.

Your views

96. *Do you think that the costs of dispute resolution in the FPA process should be consistent with the current system?*
97. *Aside from dispute resolution, do you think there are any functions or services in the FPA process for which it would be inappropriate to charge a fee?*
98. *What would be an appropriate share of costs between the government and bargaining parties for the other functions (excluding dispute resolution)?*

Summary of questions

Initiation

When an FPA can be initiated

1. Do you think that either a representation or a public interest test is needed to initiate an FPA? Or do you think that applicants should need to pass both a public interest test and a representation test to initiate an FPA? If not, what would you recommend instead?

The representation threshold test

2. Is 10% a reasonable threshold to ensure that applicants have some support from their sector or occupation before negotiating an FPA? If not, what do you think a reasonable threshold would be?
3. How should an applicant group need to prove that they have reached a representation threshold? (such as through signatures, membership etc.)
4. Do you think applicants should be able to trigger bargaining by gaining a set number of supporters? If so, what do you think an appropriate number would be?
5. Do you think that employers should be able to initiate an FPA bargaining process in their sector?
6. How should employers be counted in a representation test – by number or by proportion of the relevant employees that they employ?
7. If employers are counted by number, what do you think would be the best way to classify and count them?

The public interest test

8. What problems do you think an FPA is best suited to address?
9. What do you think should need to be demonstrated by an applicant group to prove that an FPA will be in the public interest?
10. What do you think of the criteria about problematic outcomes and potential for more sectoral coordination? If you disagree, please indicate which other criteria you think should be included or if a different approach would be better.
11. How much evidence should the applicants be responsible for providing, and what should need to be collected independently by the assessing authority?
12. What indicators do you think a decision maker should take into account when applying the public interest test?
13. Should the list of indicators be open, providing the decision maker flexibility to look at other factors to assess the two broad criteria?

14. Is there a particular indicator, or a group of indicators, that should be given extra weight when deciding if a sector or occupation is in need of an FPA?
15. Should the indicators be updated regularly? If so, how regularly, and by whom?
16. Do you think the decision maker should have absolute discretion to decide that the public interest has been met? If not, why not? What do you think the threshold should be?
17. Do you think the public interest test should be available on-demand to anyone, or should a list of allowed sectors or occupations be set in law?
18. If the sectors and occupations able to bargain for an FPA are pre-selected in law, which sectors and occupations do you think we should assess against the test first? Are there any that should not be selected? Why?
19. If a pre-selected list of sectors and occupations was re-evaluated periodically, how often do you think this should be done?

Notifying affected employers and employees

20. Do you think that the government, employers, employer organisations and unions should all play a role in notifying people that FPA bargaining has been initiated?
21. Do you think that employers should have responsibility for informing employees that an FPA has been initiated? Why or why not? If not, who do you think should do this instead?

Coverage

Defining and renegotiating coverage

22. Do you think that applicants should need to define the coverage of their proposed FPA in terms of the occupations and sectors concerned?
23. Do you have any comments on the use of ANZSCO and ANZSIC to define coverage? Do you think that there are better alternatives?
24. Do you think that parties should be able to bargain different coverage, with any significant changes needing to pass the initiation tests? If so, should there be any restrictions to prevent the test being used to delay an FPA?
25. Should there be restrictions on the permissable grounds for changing coverage during bargaining? If so, what should they be?

Exemptions

26. In what circumstances do you think a temporary exemption from an FPA may be warranted?
27. If included, should exemption clauses be mandatory, or permissible?
28. Should the bargaining parties be allowed to negotiate additional, more specific exemptions above those set in law?

29. What do you think is a reasonable maximum length of time that an employer should be exempted from the terms of an FPA?

30. Should an exemption be able to apply to an entire FPA, or just certain terms?

Regional alternatives

31. Do you think that parties should be allowed to negotiate regional variations in the minimum terms of an FPA?

32. If they are included, what do you think a good level for regional variations could be – regions (regional councils and unitary authorities), territorial authorities (city and district councils) or something else? Should this specificity be set in law or left to the parties to decide?

33. Do you think that parties should be able to initiate bargaining towards an FPA for specific regions? What, in your view, are the risks of allowing this?

34. If regional FPAs are allowed, should parties be able to change the regional coverage during bargaining?

35. Do you think there are particular sectors or occupations which could benefit from, or be harmed by, regional FPAs?

The bargaining process

Good faith

36. Do you think that a duty of good faith should apply to bargaining parties in their dealings with each other and any government bodies as part of the FPA process?

37. Should a duty of good faith for FPA bargaining involve the same responsibilities as under the current Employment Relations Act? What new responsibilities, if any, will be needed?

Scope

38. What do you think of having mandatory and excluded categories?

39. What do you think of the mandatory topics?

40. What terms, if any, should be in the excluded category?

41. What do you think of the alternative option to have only mandatory and permissible categories?

42. Should any of the items in the permissible and mandatory lists be in a different category?

43. Do you think that in the event of a bargaining stalemate, the determining body should only be able to set the mandatory terms of the FPA?

Representation

44. Do you think that unions and employer organisations should be the major bargaining representatives as is normal?
45. Should there be a limit on the number of representatives at the bargaining table?
46. Should other interests be represented? E.g. non-unionised workers, funders or future entrants to the market. Should this be by agreement of the major bargaining parties?
47. How should bargaining representatives be selected? Is there a role for Government in ensuring the right mix of parties is at the table?

Bargaining costs

48. Which of the three options for bargaining costs do you agree with, and why? Is there another option which you consider is best?
49. If a bargaining fee or levy is introduced, how should non-members be identified?
50. If a bargaining fee or levy is introduced, should the charge be made for all employees/employers as of a certain date? Would there need to be exceptions for certain circumstances? If so, which circumstances?
51. Could there be good reasons for departing from the current situation where bargaining parties cover the costs of bargaining?

Active support

52. Do you think that a 'navigator' should be provided to support the bargaining parties?
53. What skills do you think would be most useful for a navigator to have?
54. Do you think the navigator should have any additional functions than those described?
55. Should the navigator role be performed and resourced by the government?
56. Should the parties be allowed to provide their own navigator, or refuse to have one altogether, if they agree to it?
57. Do you think that the bargaining representatives should have the primary responsibility for communicating with the parties they represent?
58. At which stages of the FPA process should there a requirement to communicate with the employers and employees under coverage of the agreement? (eg. initiation, application for determination etc.)
59. How much oversight should the government have over the communication process?
60. Do you think that the principal nationwide employer and worker organisations (BusinessNZ and the New Zealand Council of Trade Unions) should support the bargaining parties to communicate with members?

Dispute resolution

61. Do you think that we should make use of the existing employment relations dispute resolution system for FPAs?

Mediation

62. In the event of a bargaining stalemate, should it be mandatory for parties to enter into a formal mediation process before they can seek a determination?

63. Should mediators be able to provide non-binding recommendations to the bargaining parties? Are there any other functions which a mediator, but not a navigator, should have?

Determination

64. What should count as a bargaining stalemate?

65. Should circumstances be set in law, or should parties need to agree that they have reached a stalemate?

66. Do you think that there should be a determination process in the event of a bargaining stalemate? If not, would there be sufficient incentives for parties to reach an agreement?

67. Do you think that the Employment Relations Authority is the most appropriate organisation to carry out the determination function?

68. Do you think that the determining body should only be able to set terms for the mandatory topics of an FPA?

69. What role do you think the determining body should have in relation to bargaining stalemates for permissible FPA terms, if any? Should the determining body be able to set terms for permissible matters with the consent of the bargaining parties? Should it be able to make recommendations?

70. Do you think that the determining body should be able to ask for advice from experts to assist it in making its determinations?

71. Should the panel of experts need to be demonstrably independent from the bargaining parties?

72. If a panel of experts is consulted, should their advice be public or strictly confidential? Should experts be protected from liability for their advice?

Appeal rights

73. Should appeal rights be limited in any way? If so, what sort of limitations would be appropriate?

74. Do you think that appeal rights should be limited to matters of law only?

Anti-competitive behaviour

75. Should FPAs be subject to a market impact test or should potential impacts be addressed by other means?

76. If not, is there another way to address market impact (such as consideration during negotiations)?

77. Do you think that the results of the market impact test should be subject to appeal? If so, what sorts of limitations would be appropriate?

78. What potential impacts of an FPA should be considered in the market impact test? What information would be required to assess these impacts? Are there any impacts which should not be considered?

79. Should there be a maximum time limit on how long the market impact test should take?

80. How feasible do you think the market impact test would be for a government body to assess?

81. How do you think potential risks and benefits should be assessed? Are some negative outcomes justified if the end result will be an overall benefit?

82. Should the government body have discretion to send agreements back to the bargaining parties or the determining body if they fail the market impact test?

83. If the decision maker can send agreements back to the bargaining parties, should they be able to give recommendations?

84. Do you think that there should be an ongoing role for the market impact test after the agreement is put into force? If so, do you think a post-enactment market impact test would need to differ from the initial market impact test in any way?

85. If there is a market impact re-evaluation test, should it be available through an application process or another way? If on-demand, should there be an application fee or some other necessary criteria to pass before the test can be requested?

Conclusion

Ratification

86. Do you think that FPAs should need to be ratified by a majority of employers and workers who will be affected?

87. Do you think that a majority of voters is a more workable requirement than a majority of all affected parties?

88. How should employer votes be counted: one vote per business, or votes as a proportion of workers employed in the covered sector?

89. How do you think the Government should support a ratification process?

90. What should happen if an agreement does not pass ratification? Should parties return to bargaining?

91. What should happen if some terms and conditions are determined by the determining body and others are agreed by the parties? Should the whole agreement need to be ratified, or just the terms agreed by the parties?

Enactment

92. Should the Government be allowed to change any terms of an FPA in the process of enacting it through regulations? If so, on what grounds?

93. What do you think is the best way to ensure that people are able to easily find information about FPAs?

Enforcement

94. What should happen if a person or group thinks that the minimum terms set by an FPA are not being met?

95. Do you think the Labour Inspectorate should have the ability to enforce minimum terms set by an FPA?

Cost recovery

96. Do you think that the costs of dispute resolution in the FPA process should be consistent with the current system?

97. Aside from dispute resolution, do you think there are any functions or services in the FPA process for which it would be inappropriate to charge a fee?

98. What would be an appropriate share of costs between the government and bargaining parties for the other functions (excluding dispute resolution)?

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