MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Iain Lees-Galloway	**Portfolio**	Workplace Relations and Safety
Title of Cabinet paper	**Fair Pay Agreements: public consultation**	**Date to be published**	Before 11 November 2019

List of documents that have been proactively released		
Date	**Title**	**Author**
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Information redacted **YES**

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Some information has been withheld for the reasons of confidentiality and confidential advice to the Government.

In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Economic Development Committee

FAIR PAY AGREEMENTS: PUBLIC CONSULTATION

Proposal

1. This paper seeks approval to release a discussion document that will seek feedback on a refined model for a Fair Pay Agreements system. Following public consultation and analysis, I intend to return to Cabinet for policy decisions and drafting instructions.

Executive Summary

2. The New Zealand labour market has systemic weaknesses. Our productivity is low and wages have not kept up with productivity increases in many sectors and occupations. Those workers on low wages are not receiving wage increases of the same proportion as those on high wages resulting in increasing inequality. While New Zealanders work long hours, their productivity per hour is low; and we are not investing enough in skills development, training, or research and development to help improve our productivity.

3. The labour market lacks sector or occupation-wide bargaining, which no doubt contributes to these issues and facilitates a 'race to the bottom' in some sectors and occupations. The Organisation for Economic Cooperation and Development (OECD) recommends labour markets contain a mix of sector and enterprise bargaining as it is associated with reduced inequality, vulnerability of workers, and unemployment.

4. Sector or occupation-wide bargaining to set minimum standards would help strengthen the weaker parts of our labour market. A Fair Pay Agreements (FPA) system would create a new mechanism for collective bargaining to set binding minimum terms at the sector or occupation level, thus improving outcomes for workers. Collective bargaining or negotiating an individual employment agreement would still occur above the minimum terms.

5. A well-designed FPA system would protect workers from the race to the bottom in wages and conditions and therefore also protect businesses that pay good wages and provide appropriate working conditions from having to compete in a race to the bottom.

6. In 2018, I convened a FPA Working Group of employer representatives, worker representatives, and experts to report on the design and scope of a possible sector bargaining system. The Rt Hon Jim Bolger chaired the FPA Working Group. It recommended a system where workers could initiate FPA negotiations if a set threshold was met, and then employers and workers would bargain to set minimum terms and conditions across an occupation or sector.

7. The FPA Working Group agreed on most elements of the model. Their key disagreement was whether the resulting agreement must bind all affected employers by default. Employer representatives argued that the model should permit employers to opt out. Other members recommended that only time-bound exemptions be allowed in limited circumstances.

8. I seek agreement to release a discussion document which seeks feedback on the FPA Working Group model and some proposed refinements. The discussion document sets out a system which broadly aligns with the Working Group recommendations, but proposes some divergence from the recommendations in some aspects.

9. The consultation will run for six weeks. Once it is closed and I have considered stakeholders' views, I will report back to Cabinet in 2020 seeking approval to draft legislation.

Context – the current system and its pitfalls

10. New Zealand's employment relations and standards system aims to promote productive and beneficial employment relationships. The system provides for national minimum standards to set a floor for terms and conditions (such as the minimum wage) and negotiations (individual or collective) above these minimum terms.

11. Collective bargaining rates are low in New Zealand by OECD standards, particularly in the private sector.[1] There is even less multi-employer bargaining. In fact, most bargaining happens between individual employers and individual workers.

12. The OECD has 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.[2] The lack of sector bargaining in much of New Zealand's workforce likely contributes to our low productivity and rising income inequality where workers have less access to collective bargaining.

13. In some sectors or occupations, low rates of bargaining and the lack of sector bargaining likely enable a 'race to the bottom,' where businesses undercut their competitors offering low or no wage growth or shifting risks onto workers. For example, businesses may submit low tenders costed based on paying their staff below market rate, or expect workers to do split shifts or casual working hours (transferring risk to the worker).

14. Although labour force participation is high and unemployment is low in New Zealand, the extent and equity of wage growth is less positive. Real 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, decile 10 increased by more than 38% and decile 9 by 34% between 1998 and 2015. Deciles 2–6 have experienced increases of less than 20%. The only low decile to achieve reasonable increases was decile 1 which includes those on the minimum wage set by Government.

1 Collective 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.
2 OECD Employment Outlook 2018

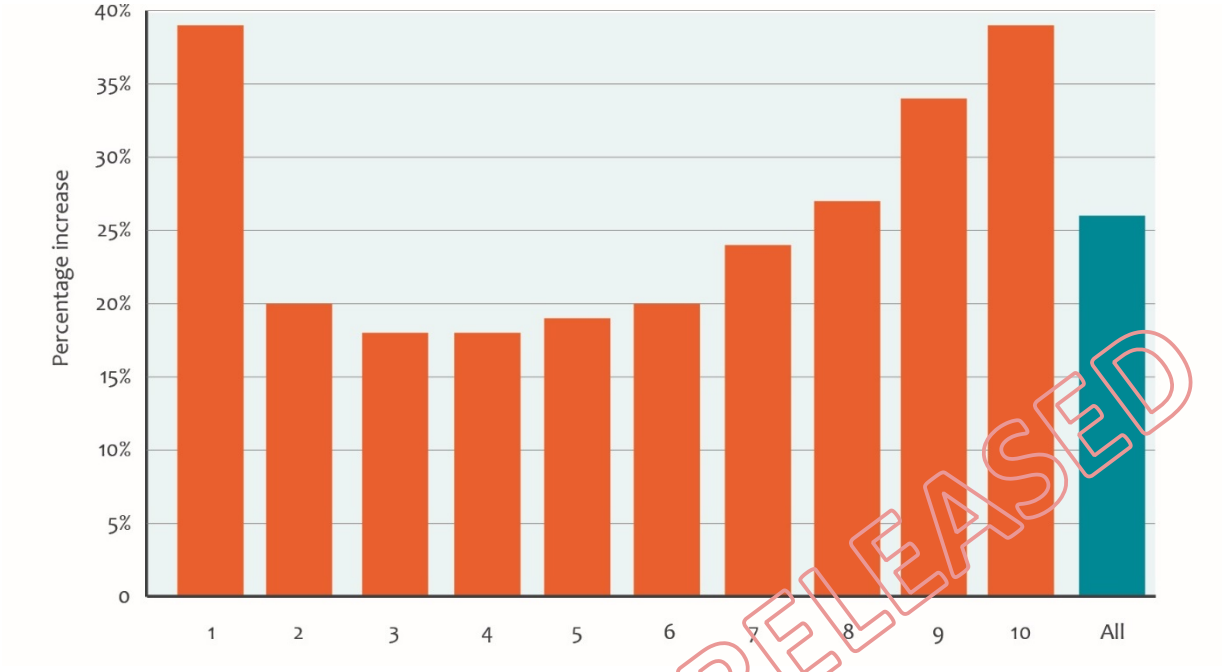

Figure 1: Real increase in average hourly wage in each decile for employees from 1998–2015

15. Further, wages have not kept up with productivity increases in recent decades (see Figure 2). So workers are producing more without realising the full benefit.

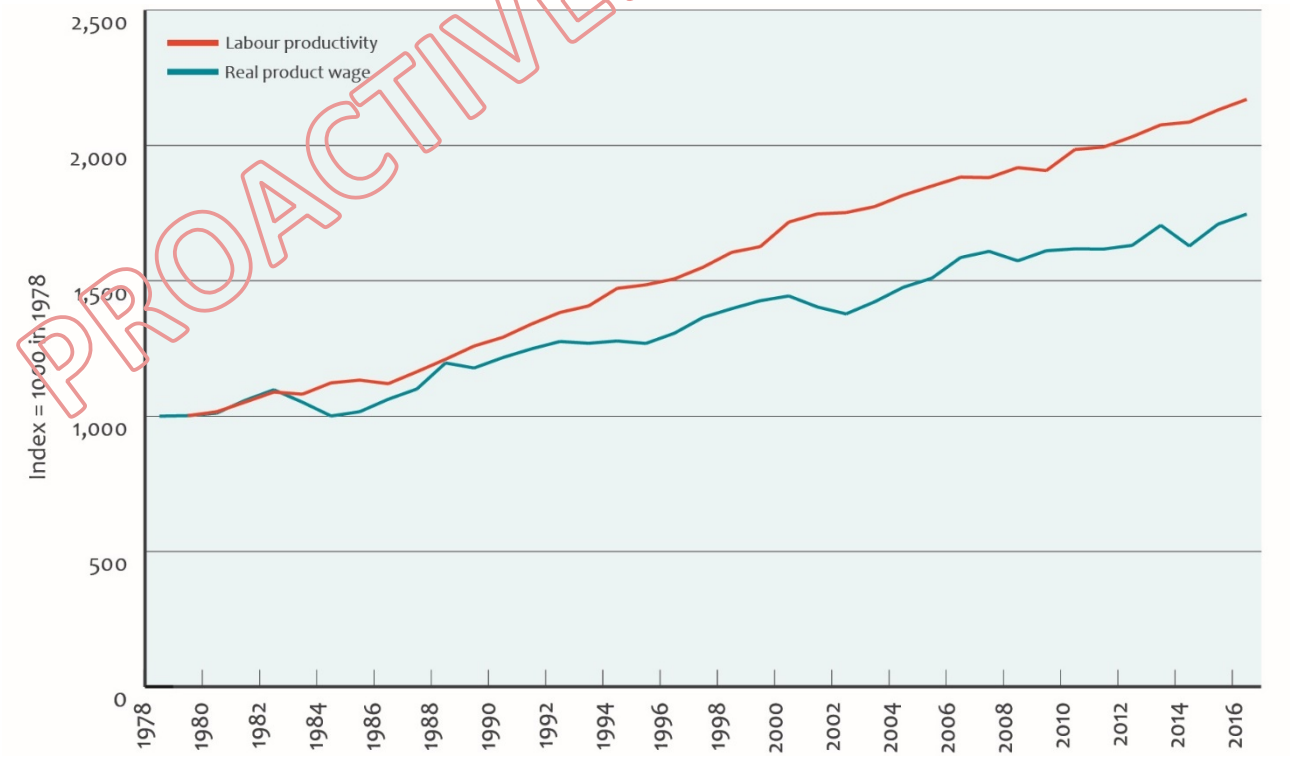

Figure 2: Labour productivity and the real product wage (1978–2016)

There is a range of other relevant interventions but a gap remains

16. The Government has initiated measures across a number of portfolios which could improve labour market outcomes and drive productivity growth. These include reforms

to vocational education and training, refocussing industry policy, investment through the Provincial Growth Fund, and deepening early stage capital markets.

17. The tax and transfer system has a role in addressing low wages, poverty and inequality including Working for Families and the Accommodation Supplement. However, we do not want to use welfare to sustain low wages.

18. The Employment Relations Amendment Act 2018 has gone some way towards restoring collective bargaining settings on an enterprise basis. However, this is unlikely to effect change for workers with limited access to collective or sector bargaining. Our collective bargaining system is designed to address firm-specific issues, not sector-wide issues. While the system allows for multi-employer collective bargaining, it is not designed to easily allow multi-employer collective agreements across a whole sector.

19. The Government sets a limited number of statutory minima including the minimum hourly wage which is reviewed every year, and health and safety requirements. However this does not prevent the undervaluing of roles above that baseline.

20. The Equal Pay Act 1972 provides a remedy for employees in female-dominated industries where rates of pay have been subject to historical undervaluation. The framework is being improved by way of the Equal Pay Amendment Bill. However, pay equity claims are limited to female-dominated industries that have been subject to gender-based undervaluation. There may be industries that are not female-dominated but are subject to other systemic problems.

21. While each of these interventions plays a useful role, none would enable employers and employees to improve outcomes for workers by bargaining together towards binding minimum terms at the sector or occupation level.

Potential benefits of Fair Pay Agreements

22. A properly designed FPA system would have a range of benefits. If appropriately targeted, FPAs may help lift sectors out of a low-wage, low-productivity cycle by giving firms greater incentives to invest in physical and human capital. An FPA would in effect set sector or occupation-specific minimum terms and conditions. This helps encourage businesses to compete on product value by investing in training, capital and innovation, rather than by competing on the cost of wages and conditions for workers.

23. In efficient and competitive labour markets, workers' wages should reflect their productivity, but Figure 2 suggests the gap between labour productivity growth and wage growth has widened in recent years. FPAs may also help support a broader sharing of the benefits of productivity gains in the economy, as reflected in the labour income share. By limiting competition based on reduced wages and conditions you create a stronger incentive to compete on product value, and to invest in real productivity growth. This is most likely to occur in combination with broader policies to lift investment in skills, innovation and technology that fundamentally underpin a high productivity, high wage economy.

24. FPAs may improve coordination across sectors or occupations. The employees and employers in a sector are best placed to negotiate minimum terms and conditions that are specific and relevant to their circumstances.

25. Overall workers will benefit from improved wages and conditions with the consequent increase in wellbeing. Firms would benefit from being incentivised to invest in long-term productivity enhancements (with associated higher profits), a more stable employment relations environment and a level playing field by preventing competitors undercutting them through poor employment practices and low wages and conditions.

26. The success of the FPA system will depend on how employers and workers choose to make use of this system, so it is difficult to quantify the size and nature of these benefits in advance.

The FPA Working Group and its report

27. In May 2018, Cabinet agreed in principle to establish a system so that employers and workers could bargain for FPAs that set minimum employment terms and conditions across a sector or occupation [CAB-18-MIN-0250 refers]. Cabinet's in-principle agreement was subject to the policy being further considered by Cabinet once the FPA Working Group had reported back on the scope and design of the system.

28. Cabinet agreed that two policy settings should apply to any FPA system: industrial action would not be permitted as part of FPA bargaining; and it would be up to workers and employers in each sector to make use of the system, rather than the Government 'picking winners'. The Working Group designed its model in light of these requirements.

29. The FPA Working Group was established in June 2018. The Rt Hon Jim Bolger chaired the Working Group, which comprised employer representatives, worker representatives, academics and community representatives. The Working Group submitted its report to me on 20 December 2018. The report is attached at Annex One.

30. The report notes New Zealand's inequality and productivity challenges, and examined data relating to the hollowing out of wages; the overrepresentation of youth, Māori, Pacific peoples, part-time workers and women in low paid jobs; and the reduction in collective bargaining coverage in New Zealand since 1990.

31. The Working Group reviewed sector bargaining models in other countries, but determined that it was not possible to simply 'lift and shift' those models to New Zealand, because of our particular circumstances and history.

32. The Working Group noted OECD advice 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.

33. The Working Group noted that FPA bargaining could be most useful in sectors or occupations where particular issues are identified, but also may be useful where workers and employers simply identify room for improvement. They did note that FPAs

may not be necessary or useful in some sectors or occupations, but did not elaborate on which.

34. 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 is lower. A public interest test would consider whether harmful labour market conditions are evidenced which warrant an FPA. Once either test is met, employers and workers would nominate bargaining parties (such as industry associations and unions) who would also represent non-members in good faith.

35. If parties could not agree, the Working Group recommended they first go to mediation, with determination by an independent body as a last resort, recognising that the normal incentive of industrial action is not available to keep parties at the bargaining table. If an agreement is set by determination, there would be no ratification requirement, but otherwise a majority of both employers and workers would need to approve the agreement for it to take effect.

36. The Working Group recommended that FPAs should be extended to all workers (i.e. both employees and contractors). This was to avoid perverse incentives to reduce FPA coverage. However, the Working Group also acknowledged that including all workers would be complex and that the Government may wish to give effect to this recommendation through other work underway.

37. The Working Group emphasised that an FPA system is most likely to gain traction if it presents real opportunities for both employers and workers to gain from the process. To that end, the Working Group explored the opportunities for productivity gains to be pursued in FPA bargaining, such as investment in skills and technology.

38. The Working Group members held divergent views on whether employers should be obliged to participate in and be bound by an FPA bargaining process if it was triggered. Employer representatives held the view that employers should be able to opt-in to the process at the start of negotiations. The majority of the Working Group considered that voluntary coverage would undermine the fundamental objective of FPAs – to set new minimum standards which apply to all parties in the sector or occupation to avoid under-cutting of terms, although they did recommend that limited, time-bound exemptions be allowed.

39. The Report noted that for a new FPA system to be successful, it will be necessary to support the capability of unions and employers, as well as to resource core regulatory institutions (such as the Employment Relations Authority).

40. The Working Group's design was necessarily high level, given the timeframes for its work and the need for decisions to be made on the overall model before the detail can follow. The Working Group noted that a considerable amount of detailed policy and design work would be required before recommendations could be put to the Government to implement the system into law and practice. To minimise complexity, the Working Group recommended building on existing institutions and practices where appropriate, for example in dispute resolution and enforcement.

Discussion document and a refined model for consultation

41. I have considered the Working Group's recommendations and sought detailed policy advice from officials.

42. This paper seeks approval to release a discussion document which includes a proposed model for consultation. This paper also sets out a proposed timeline for bringing substantive policy recommendations back to Cabinet, and for introducing legislation to bring these changes into force.

43. I support the Working Group's broad design of a system where, in certain sectors or occupations, all employers and employees are bound by sectoral minimum terms and conditions, with some exceptions allowed. Those terms would be set through bargaining initiated by employees or employers, with coverage defined and negotiated by the parties. I believe this will allow for appropriate minimum standards, while maintaining the flexibility for sector or occupation participants to define what is appropriate for their circumstances.

44. The discussion document describes a model which broadly aligns with the system recommended by the Working Group.

45. In the sections below, for each element of the FPA model, I set out the Working Group recommendations and the proposal for consultation.

Initiation

The role of the public interest test

46. The Working Group recommended that the initiating parties would only need to meet one test – either the public interest test or the representativeness test. This is a viable option for the initiation of FPAs.

47. Alongside the Working Group's model, I also recommend consulting on the value of requiring both a public interest test and a representativeness test. Combining the tests ensures the system would be both effective and have mandate. It also acknowledges that once FPA bargaining is initiated, parties are bound into the process and must conclude an agreement. Therefore, it is designed to be a reasonably high test to justify this, while not so high that it means few or no FPAs are initiated.

48. The primary purpose of an FPA system is to provide for a collective bargaining system to mitigate inherent imbalances of power in vulnerable workforces. A public interest test would tie initiation to actual labour market conditions in an occupation or sector, ensuring that the FPA system is targeted to benefit workers whose wages or terms are suppressed by inherent imbalances of power in vulnerable workforces.

49. I intend to seek input on which mechanism would best demonstrate that a representativeness threshold has been met.

Content of the public interest test

50. The Working Group recommended that the public interest test take the form of an assessment of harmful labour market conditions based upon a specified list 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 did not specify whether each criterion would be mandatory.

51. I agree with the Working Group's recommendation that the conditions be set in law. Specifying the conditions in law would signal what the Government considers to be in the public interest, and would bring a degree of certainty to parties. A disadvantage is that it would not be future-proofed against emerging harmful practices, as amending law takes time.

52. I also propose to consult on defining the criteria at the level of thematic problems. Two potential criteria for the public interest test are:

- a problematic outcome for workers in the sector, and
- potential that more sectoral coordination could be beneficial

53. This combination would ensure that resources are allocated to sectors where workers and employers are not only in evident need, but also where an FPA is likely to be a suitable intervention. The latter criterion ensures that resources are not needlessly diverted to sectors where FPAs are unlikely to have a sufficient impact to outweigh the risks.

54. Within these thematic criteria it will be necessary to have a specific list of indicators. The discussion document includes an indicative list of indicators to consult on.

How the public interest test would work in practice

55. There is an additional question of whether a public interest test would assess applications against statutory criteria or whether eligible occupations/sectors should be named in regulations from the outset.

56. The Working Group recommended that the public interest test should be assessed after FPA bargaining is triggered by the initiating parties. This approach is most consistent with Government's existing decisions. The Working Group's model supports the Government's pre-existing directive that it will not "pick winners", and that "it will be up to the workers and employers in each sector to make use of the system" [DEV-18-SUB-0100 refers].

57. This approach would prevent unnecessary assessments of the public interest, as an occupation or sector would only be assessed against the criteria if a party sought to initiate bargaining. It would still mean the independent body must assess whether an occupation or sector meets the public interest test whenever any party seeks to initiate.

58. Another approach could be to pre-determine eligible occupations/sectors in law based on there being a public interest for those eligible to access the system. This is a feasible option, and would have the advantage of limiting access to FPA bargaining to a manageable level, and providing a degree of certainty to business. However, the counterbalance to increased certainty is reduced flexibility to changing circumstances. This approach would also involve the Government "picking winners", which has previously been flagged as out of scope.

59. I propose to seek views on both approaches.

Level of the representativeness threshold

60. The Working Group had recommended 10% or 1,000 workers (whichever is lower). The Working Group was concerned that a higher threshold would be too difficult to meet in sectors with low collective coverage and where there was the highest need for FPAs.

61. It will be important not to set the bar so high that it prevents workers triggering FPA bargaining or so low that a small group of employees would be able to draw their remaining peers and corresponding employers into bargaining and then a binding agreement. For this reason, the bar should not be set too low. I consider the 10% threshold of employees recommended by the Working Group strikes an appropriate balance. However, I plan to consult on this threshold and ask whether another threshold may be more appropriate.

Absolute representation threshold

62. The Working Group recommended that if 1,000 workers indicated their wish to trigger FPA bargaining, it would trigger bargaining if that figure equalled less than 10% of the sector or occupation, as defined by the initiating party.

63. I am consulting on the Working Group's option, or the alternative of not including any absolute threshold in the representativeness test.

64. A percentage alone is consistent across all sectors and occupations, whereas an absolute threshold would create significant inconsistencies across sectors or occupations of varying sizes.

65. A percentage alone does not advantage large or small sectors. In contrast, an absolute threshold of 1,000 would effectively cap the 10% threshold at 10,000 workers, meaning that that all sectors or occupations over 10,000 workers would benefit from a less onerous initiation test. 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 from. This may result in initiations affecting very diverse businesses, which could reduce the likelihood of finding common ground.

66. To enable parties to understand whether a percentage threshold has been met, I intend to explore options to make data publically available regarding sector and occupation size. The decision on if the threshold has been met will be decided by the relevant public authority.

Possible employer initiation

67. The Working Group recommended that only workers (through unions) should be able to initiate bargaining. This aligns with the current provision under the ERA, where an employer cannot initiate collective bargaining unless it covers work that was already covered by a collective agreement.

68. Restricting initiation to workers only is a viable option. In practice, even if both employers and employees could initiate, I expect the vast majority of demand for

FPAs, and actual initiations, would likely be from workers. Limiting it to workers would mitigate the risks of employers' misusing the system or pushing through a low-quality agreement, but at the cost of also preventing any opportunity for employers to initiate where they genuinely seek improvement.

69. I propose to consult on whether employers should also be able to initiate (either for an initial or subsequent FPA).

Notifying affected parties that an FPA has been initiated

70. Notification will be required after an FPA is successfully initiated for various reasons:

- Affected parties need to understand that change is underway which could affect them.
- Employers, employers' 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.

71. 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. Smaller employers will need to contribute to the negotiations to make sure that they are not unfairly disadvantaged and their perspectives are taken into account.

72. Notification will also be much easier for concentrated, well organised sectors – conversely it will be very difficult in fragmented, disorganised sectors.

73. In relation to notification, I propose to consult on whether the Government should pursue a multi-pronged approach. Employers could have primary responsibility for informing employees, supported by peak-body networks and unions where applicable. Some independent government involvement will be required in order to ensure that as many people as possible know that FPA bargaining is about to commence (or has commenced). Otherwise it is likely that a large number of affected parties will not have a chance to contribute to FPA negotiations, and later may even be unaware that an FPA is in force.

74. At a minimum, the use of existing government information and compliance channels should be pursued to increase awareness of FPAs being bargained. Such information provision should only involve minimal additional costs beyond business as usual.

Coverage

Coverage of contractors

75. The Working Group recommended where an FPA is negotiated in a sector or occupation it should provide minimum standards for all workers: 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.

76. That problem is not limited to an FPA system. I have commissioned a separate project from the Ministry of Business, Innovation and Employment (MBIE), to consider options for strengthening protections for vulnerable workers and dependent contractors. Extending protections to contractors would be a significant shift in our employment relations and standards system and requires careful design work.

77. The Government has agreed to make reforms to the film sector, which will allow contractors in that sector to collectively bargain. I plan to shortly seek Cabinet approval for public consultation on possible further protections for dependent contractors. I have asked officials to consider how to incorporate possible FPA coverage into this work.

78. I therefore agree in principle with the Working Group's assessment that an FPA system may need to extend wider than employees. I plan to progress work in tandem on contractors and bring this work together. Timing considerations may mean that Fair Pay Agreement legislation is introduced first for employees and then extended out to include contractors.

How the affected parties will be defined

79. The Working Group recommended that workers and their representatives who initiate bargaining should propose the intended boundaries of the sector or occupation to be covered by the agreement, within any limits set by legislation. Once the proposed boundaries are set through initiation, the parties would be able to bargain the boundaries of coverage. While the Working Group contemplated legislated limits on coverage, none were recommended.

80. To implement the Working Group's recommendations, I propose consulting on requiring coverage to be set by specifying named occupation(s) within a named sector or sectors. This would mean, for example, an initiator might name the coverage as Kitchenhands, Waiters, Bar Attendants and Baristas (occupations) in Cafes and Restaurants (sector). Kitchenhands who work in the Aged Residential Care Services sector would be excluded from coverage.

81. The advantages of this approach are that it is workable, consistent and limits the risk of overlap. The requirement to specify both occupation and sector, combined with the representativeness test requirement, should drive initiators to only include relevant occupations, those whose terms could benefit from an FPA. For example, high paid occupations would likely not be included. However, initiators could in theory still list every sector which contains workers in the relevant occupation, or vice versa, and thus in effect have full flexibility to set the scope, as envisaged by the Working Group. I expect the likely narrower scope may contribute to better bargaining as parties may have more in common (e.g. Cafe and Restaurant employers are likely to have more in common with each other than they do with Residential Care Services employers).

82. The disadvantage is that it would not create minimum terms that apply across an *entire* occupation: it would apply only to workers in the specified sectors, albeit likely the dominant sectors employing those occupations.

Whether parties can negotiate changes to coverage

83. The Working Group recommended that the occupation or sector to be covered should be defined and negotiated by the parties. While the Working Group did not go into detail, the words "and negotiated" indicate that the coverage set by the initiating party could be revisited in bargaining, to be expanded or contracted.

84. I propose to consult on the proposal that parties can negotiate to alter the coverage, but the initiation tests would still need to be reassessed if there was significantly redefined coverage agreed. This is consistent with the spirit of FPAs, to enable parties to negotiate for minimum terms which best suit their sector and occupation. It 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. The timing of this check will need to be carefully thought through to prevent checking being used as a delaying tactic.

85. This approach would require the body charged with verifying the initiation tests to recheck. 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.

Whether exemptions are allowed

86. The Working Group recommended parties be allowed to bargain for limited, time-bound exemptions (e.g. up to 12 months). Particular circumstances where exemptions are allowed should be set in legislation and be agreed on 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 ratification.

87. The Working Group indicated that there may be some circumstances where exemptions from FPA coverage may be warranted, for example, where an employer may face going out of business if compliance with the FPA terms and conditions would make it insolvent.

88. I agree with the Working Group's recommendation. Allowing for at least some exemptions recognises the diversity of firms in any sector. Exemptions mitigate risks of undue harm to employers, particularly new entrants and small businesses that may lack the resources to adapt to new employment terms and conditions quickly. Allowing exemptions gives an avenue to accommodate such businesses without compromising the terms of the main agreement.

89. There is a risk that a majority of employers may be incentivised to block exemptions which may benefit their competitors. This might be mitigated by a possible market impact test, which would assess the agreement to ensure it will not create undesirable competition and labour market outcomes.

90. I agree with the Working Group that limits should be set in law, and officials will do further work to develop those limits. I propose to consult on what circumstances would warrant a temporary exemption.

91. FPAs require a critical mass of employers to be bound in order to be effective. Wide exemptions could increase the complexity, uncertainty and misallocation of resources in the impacted sector, and could create perverse incentives for employers to structure businesses to qualify for an exemption.

Allowing for regional differences in FPAs

92. The Working Group recommended that parties should be able to include provisions for regional differences within sectors or occupations in their FPAs, as they recognised that labour markets can vary significantly across New Zealand.

93. There is likely to be more commonality between geographically-close employers, rather than across regions (for example, common customer base, costs, labour shortages and other barriers). The Working Group recognised that an FPA system is likely to gain real traction where it is focused on problems which are broadly experienced in the sector.

94. I agree with the Working Group's recommendation that parties can include regional differences. Allowing for parties to agree regional differences in bargained minimum standards can serve as a pressure valve (similar to exemptions) from the uniform approach. It will enable parties to allow for real geographical differences in labour and product markets, in recognition that in some cases they 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.

95. However, there is still 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 differences. This risk could be partly mitigated by ensuring that employer representatives in bargaining do represent the full range of affected parties. The market impact test (see paragraph 125) would also assess the regional impacts.

96. The discussion document also asks an open question about whether FPAs with less than national coverage should be allowed. In other words, whether regional FPAs should be possible – distinct from regional *variations* to a national FPA.

Scope

97. The Working Group recommended that the legislation should set the minimum content that must be included in each FPA, and recommended these 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, and

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

98. The Working Group did not further specify what form the provisions should take, or how substantive they should be.

99. I largely agree with the Working Group's recommendations. I propose two categories of topics should be consulted on: mandatory and excluded. The mandatory topics might include:

    - coverage,
    - duration,
    - governance arrangements,
    - base wage rates and increases across the term of the agreement,
    - whether superannuation employer contributions are included in the base wage
    - overtime and penal rates,
    - skills and training,
    - ordinary hours / days of work,
    - redundancy and
    - leave requirements.

100. All other topics would be permissible unless they were listed in the excluded category. This approach will give the bargaining parties flexibility to agree on which terms particular occupations/sectors most need. I have not identified any topics which should be excluded; I intend to consult on this.

101. I propose to consult on the proposal that in the event of a bargaining stalemate, the determining body should only be able to set the mandatory terms of the FPA (i.e. not the permissible ones).

102. While there is a risk that some of these terms could lock-in business models or reduce competition, I believe the benefits of flexibility are important and this risk can be mitigated through the market impact test (see paragraph 126).

103. The discussion document will also test an alternative approach: listing topics in mandatory and permissible categories. This option would exclude any topic not listed in either of the categories.

Bargaining parties

Who can represent affected parties

104. 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 the representative bodies could not be perfectly representative, so they 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. If multiple

groups of interests wanted to be represented, they should be accommodated within reason.

105. I agree with the Working Group that unions and employer organisations should be the primary bargaining representatives, with a duty to represent non-members in good faith. This would be largely workable, effective and efficient. Given the FPAs are intended to be a system of *collective bargaining* for setting minimum standards in an occupation/sector, it is logical for the bargaining parties to be unions and employers in line with the current system. Under this option, as under the Employment Relations Act, collective bargaining could only occur through negotiation between unions and employers or employer organisations.

106. Unions and employer organisations will almost always be the most representative groups available to bargain. Even where unions or employer organisations only represent a minority of an occupation/sector they are likely to be the 'most representative' groups. As the Working Group noted, selecting the most representative group is usual practice internationally. Confidential advice to Government

107. Existing organisations are also likely to have the best bargaining capability, although employer organisations may need to develop their capability in this area given bargaining representatives on the employer side normally come from individual employers.

108. I consider it would be useful to consult on a variation to this approach where unions and employer organisations would still be the primary representatives, but there may also be seats for other interests at the bargaining table (such as funders, non-members or others).

109. There are risks associated with this variation. Coordination between unions/employer organisations and the non-member representatives is likely to be difficult, and the unions and employer organisations may object to working with others. Other representatives would have a questionable mandate and are likely to have low bargaining capability, and may need financial support from the government in order to participate. It would be useful to seek views on this variation through the consultation process.

110. I considered and do not recommend consultation on two other options, where either any organisation could be a representative party, or if there would be no rules and even individuals could be representatives. While these options would meet the mandate criteria and would represent low barriers to representation, I do not believe they are feasible. It could be unclear who individuals at the bargaining table are 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.

111. I propose to consult on other related matters such as whether there should be limits on the number of representatives..

Costs of bargaining

112. The Working Group advised that the bargaining parties should not disproportionately bear the costs of bargaining. It also recommended that the Government should consider bargaining fees, a levy, or a government contribution to costs.

113. There are two quite different approaches which 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 apportionment of costs is often dealt with at the beginning of bargaining through a Bargaining Process Agreement. This is the approach that has been taken in relation to the screen sector collective bargaining reforms, and the Equal Pay Amendment Bill.
- 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 disproportionately imposed on bargaining parties.

114. The quantum of bargaining costs is uncertain, but I expect it to be reasonably significant (particularly for new agreements).

115. I consider there are three feasible options in relation to costs.

- **Option 1: Bargaining fees**. This could take the form of a one-off levy on non-members of the union(s) or employer organisation(s) to cover the costs of the bargaining parties. The levy would come at the end of bargaining once the costs were known. A bargaining fee would achieve an equitable sharing of costs between affected parties but it would require the creation of a complex administration system. It would mean that everyone within coverage of the FPA would have to pay for its negotiation.
- **Option 2: Costs as they fall, except government contributes to/fully covers tangible costs (flights, catering, venue hire)**. A contribution to the costs of bargaining would ensure that the costs which fall on the bargaining parties are not disproportionate – increasing workability and mandate. However, stakeholders may be unhappy that they are not compensated for the cost of staff time in bargaining, which could be significant. This would also potentially create inconsistencies with the current employment relations/employment standards (ERES) approach, and pay equity and screen sector bargaining.
- **Option 3: Costs as they fall**. This would be consistent with the approach in the current ERES system. While this would be a feasible approach, I 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/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 (e.g. bargaining fees).

116. I recommend not consulting on two other options, including the government paying for all the costs of bargaining and the government contributing to the costs of staff time. The FPA bargaining system is substantially different to the current collective bargaining system, given that the bargaining parties are not the only affected parties. However, these two options would be a significant departure from the current ERES system where parties cover their own costs. In addition, I am not aware of any bargaining situation in which the government contributes towards the cost of staff time.

117. The consultation document includes three options: a bargaining fee, government contributing to tangible costs, or costs as they fall.

118. I note a risk that departure from the status quo (costs as they fall) creates inconsistencies with other projects such as the film sector reforms and the Equal Pay Amendment Bill, but I consider any perception of a departure is justifiable.

Requirement to act in good faith

119. The Working Group recommended that the existing bargaining processes in the Employment Relations Act should be retained, including the duty of good faith.

120. As with collective and individual agreement negotiations now, I intend that the negotiating parties should be required to deal with one another (and the employment institutions) in good faith throughout the process.

Communication during the bargaining process

121. The bargaining representatives need to be able to communicate effectively with the parties they represent. This communication will need to be both top-down and bottom-up in order to ensure that the bargaining representatives truly speak on behalf of those they represent.

122. Government support will be required to help employer and employee representatives to communicate with the people they represent. The parties to the FPA negotiations should take the leading role in communicating with the people they represent, and other affected parties where possible. However, as with the notification process above, the government will need to minimise the risk that affected parties are not properly communicated with and their views tested. This support could take the form of financial support or education/information from existing government bodies.

123. In relation to communication functions, I recommend consulting on the bargaining parties having the primary responsibility to communicate with the employers and employees they represent, supported by the peak bodies.

A measure to identify possible negative outcomes from FPA bargaining

124. I want to ensure that there are appropriate safeguards within the FPA system to identify possible negative outcomes from proposed bargaining or resulting bargained FPAs. For example, an agreement that looks likely to substantially reduce competition in a sector may not be in the public interest.

125. The Working Group acknowledged that:

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

126. To mitigate these risks I propose to consult on whether there should be an independent party which checks that the agreement reached among the parties or by determination is not likely to have an unduly negative impact on the sector itself or the wider economy.

127. A *market impact test* could identify these risks. Unlike the test envisaged at the initiation phase (which aims to assess whether there is a *positive* need for an FPA), this test would assess whether there is a likelihood of significant negative impacts on labour and product markets and whether these impacts outweigh other benefits.

128. In order to avoid excessive barriers to FPAs being finalised there could be a high threshold to meet before an agreement could be referred back or rejected by the government body. For example the agreement must be likely to have a significant negative market impact, rather than creating any risk of a market impact. Depending on the nature of the impact, the government body may refer the FPA back to the parties or determining body to renegotiate or reconsider. In extreme circumstances, the government body may reject the FPA if it believes the market impact is fundamental and could not be mitigated. I envisage (and will consult on) a balancing test where the impact of an FPA is measured against potential benefits.

129. It would be best for the government body to do the assessment following the conclusion of the agreement, because any assessment before the parties conclude and agree an FPA would be so speculative as to be unworkable. It will be easier to assess the likely impact once actual agreed terms can be examined. This does create a risk of wasted bargaining (if the agreement was vetoed or sent back at the end), but I believe knowing the test will be applied later will incentivise parties to avoid agreeing terms with an unduly negative impact.

130. There is a risk relating to the difficulty of this function, and the fact that there is no obvious entity to perform it. Even competition analysis by itself is complex, but this test goes beyond just a competition assessment and will require analysis of the labour market and dynamics in the sector. There will be an inevitable trade-off between comprehensiveness and timeliness. This assessment would mitigate many of the other risks in the system.

131. When I report back to Cabinet after the consultation process I will make recommendations on what form (if any) the measure to identify possible negative outcomes should take, which government body should perform this function, and the specific threshold that the body will assess FPAs against. If a new body is required to perform this function, the establishment of the body would involve significant additional costs outside the financial implications set out in this paper.

132. Finally, in some cases there could be an interaction between the determination process and the market impact test. If the parties reach a bargaining stalemate and a government body makes a determination, it will also be necessary for the determined agreement to be assessed against the market impact test. If the mandatory minimum

terms eligible for determination are narrowly scoped it is less likely there will be a market impact from a determined agreement. As set out above, if the determined agreement failed the market impact test, the government body assessing the test could either refer it back to the determining body or end the process with no agreement.

Navigator to support the bargaining parties

133. The Working Group proposed that there should be a 'facilitation' function, to support a more efficient and effective bargaining process and to minimise the risk of disputes occurring. The functions of the role envisaged by the Working Group are:

- assisting the parties with the process and answering any questions that they may have;
- advising on the options for the process the parties could follow to reach agreement; and
- helping parties to discuss the range of possible provisions of the collective agreement.

134. The Working Group did not envisage this role as the current 'facilitation' role undertaken by the Employment Relations Authority. The Authority's facilitation role is intended to act as a circuit breaker for parties to collective bargaining that are having *serious difficulties* in concluding a collective agreement. The role allows the Authority to provide non-binding recommendations. The threshold to access facilitation is high to encourage parties to try and resolve their problems between themselves and to use facilitation as a last resort.

135. In contrast, the Working Group envisaged this role as a support function to assist bargaining parties throughout the bargaining process. I propose that this role should be aligned more closely with the more common understanding of what 'facilitation' means.

136. These functions largely already exist under the current dispute resolution system, and are performed by mediation services. However, mediation is often lesser known or used to assist parties in the earlier stages of bargaining in a facilitation role. Rather, mediation services are most routinely engaged once the parties have begun negotiations and have come to an impasse.

137. I agree with the Working Group that this function is needed to support effective and efficient bargaining – I have labelled this as a 'navigator'. I propose that a person should be assigned to bargaining parties at the beginning of the FPA process to help them understand how bargaining would work under the new system, help to establish a bargaining process agreement and to facilitate the bargaining, deescalating conflict where possible.

138. This person could answer any bargaining and process related questions, while helping parties navigate negotiations and effectively manage and resolve early disputes as they arise during negotiations (before they have gotten to the stage of impasse). Being able to effectively resolve problems as they arise in bargaining can result in less

pressure on the later parts of the dispute resolution system, as most of the bargained matters are resolved by parties early through effective navigator support.

Dispute resolution

139. The principle guiding the Working Group's recommendations on a dispute resolution system for FPAs has been to maintain, as far as possible, the existing processes under the Employment Relations Act, with additions or simplifications where appropriate for sector-wide bargaining. The aim, the Working Group said, is to minimise the time and cost lost through litigation and to keep the process simple.

140. The below Diagram 1 illustrates the bargaining process until there is an agreement, and the steps within the dispute resolution process, as recommended by the Working Group.

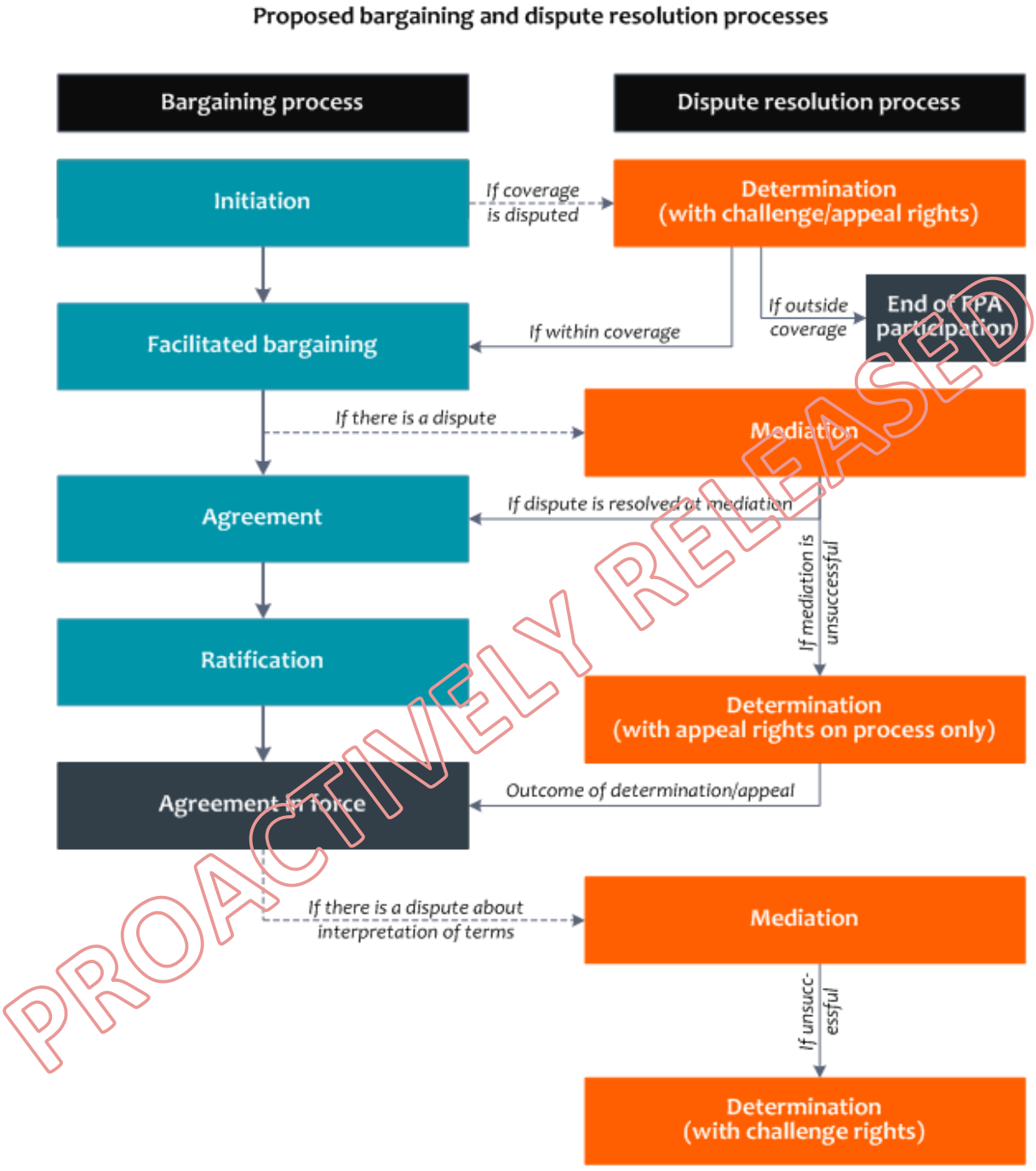

Diagram 1: Proposed bargaining and dispute resolution process

141. I agree with the guiding principle that the Working Group used of developing a FPA dispute resolution model that can leverage off the existing system, at least initially until demand for FPAs is more readily predictable. Doing this allows the system to be more readily scaled up and down, depending on demand.

Mediation

142. There is a question about whether mediation is still needed, given the new 'navigator' function is likely to involve mediating disputes as they arise. Mediation would provide another possible way of breaking an impasse before parties apply to get the matter determined. Having this additional step with a new person in the room may provide

the avenue for parties to resolve the dispute and settle the terms themselves. Alternatively, it may be seen as another step parties who are already at an impasse have to go through before being able to apply for a determination.

143. I propose to ask an open-ended question in the discussion document which would seek views on whether there are benefits to requiring an additional step before determination. In other words, whether bargaining parties should be required to enter mediation after a stalemate, or proceed directly to a determination process.

Appeal rights

144. I agree with the Working Group and recommend that appeal rights be limited to matters of law only.

145. The Legislation Design and Advisory Committee (LDAC) guidelines provide 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. Any limitations should be based on the purpose of the appeal, the competence of the appellate body and the appropriate balance between finality, accurate fact finding and correct interpretation of the law.

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

147. 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.

148. I consider that this rationale should also apply to determined terms and conditions by the decision making body under the FPA model. I consider the Authority, with assistance from an expert panel, would have the expertise to make this determination of the terms and conditions.

149. Limiting the right of bringing an appeal to matters of procedure will also encourage finality and avoid prolonged and costly litigation. This is especially true for an FPA determination, due to the scope of impacted parties that could potentially appeal a decision, on any number of factors.

Ratification

150. The Working Group recommended that an agreement reached by the parties should be ratified before it can be signed, requiring a majority of each side (i.e. of affected workers and of affected employers). The Working Group stated the ratification procedure should be set in law, unlike the current provisions in the Employment Relations Act where parties may decide how to ratify an agreement. The Working Group also recommended an exception to this when an agreement has been concluded by determination – that point is discussed in the next section.

151. I agree with the Working Group's recommendations to require ratification and to set the process in law (with one exception if there is a bargaining stalemate). It will be particularly important to ensure an FPA has support from those it binds, as representatives are likely to be more removed from those they represent than under current collective agreement or multi-employer collective agreement bargaining. I agree that a majority is a sensible indication of favour.

152. However, rather than requiring a majority of all affected parties, I propose consulting on requiring a majority (i.e. 50%+1) of voters. Requiring positive support from a majority of *all affected parties* would require a high voter turnout to be achieved for the ratification to have any chance of success. Requiring a majority of *voters* would prevent one side from preventing the agreement simply by not voting or encouraging parties to vote.

Resolving a bargaining stalemate (determination process)

153. The Working Group recommended that where a dispute cannot be resolved through mediation, parties should be able to apply to have the matter determined. It suggested the determining body could be the Employment Relations Authority or the Employment Court. 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. To avoid costly and lengthy litigation processes, the Working Group recommended that parties should only be able to challenge the determination on limited procedural grounds, with rights of appeal. Where an FPA is set by determination, no ratification process would be needed, (i.e. the determination would be binding).

154. The Working Group noted that the Government had already stated that no recourse to industrial action will be permitted during bargaining, and intended that the system will have sufficient incentives in place to encourage parties to reach agreement without the need for industrial action. In making the above recommendation, the Working Group believed that the prospect of binding determination would replace industrial action as that incentive.

155. I agree with the Working Group that some incentive is necessary to focus parties on bargaining and reaching a successful conclusion. It would not be in parties' interests to have an open-ended system that could result in endless bargaining. This should still operate as an incentive for each side to try to find agreement, as the outcome of the determination will be uncertain and could result in an outcome one side considers unfavourable.

156. The binding determination option raises risks relating to whether the system is truly *voluntary* collective bargaining. Generally the ILO considers compulsory arbitration to be contrary to the principle of free and voluntary negotiation. Compulsory arbitration is considered an acceptable option to resolve disputes in situations where industrial action is banned, but such a ban is in turn only valid in limited scenarios (for example, for essential services, or the first agreement in the sector or occupation, or where mediation fails due to bad faith behaviour).

157. I propose to consult on the determining body being the Employment Relations Authority. Such a power would align much more closely with the Authority's existing powers and Authority member's expertise than with the Employment Court.

158. I propose that in addition to allowing the determining body to set terms, it should be able to rule that an agreement is only required on a subset of matters which were negotiated. In addition, the determining body would be restricted to making a determination on mandatory matters only.

159. I intend to consult on the proposal that the determining body should be able to ask for advice from experts to assist them in making their determination. FPA bargaining is likely to involve multiple complex interests, and each occupation will come with its own unique challenges which will impact on how a clause 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.

Nature of FPAs – how to bind affected parties once the agreements are concluded

160. Once bargaining is concluded, the terms will need to be applied across the named sectors and occupations and declared as binding. This is different to normal collective bargaining, which only applies to the signatory parties to the agreement (with the exception of new employees who are covered by the terms of an existing collective agreement for their first 30 days of employment).

161. The Working Group did not specify the legal status of an FPA but recommended that the terms of an FPA apply to all employers and employees in the named sectors and occupations. The parties to the resulting agreement are unlikely to be fully representative of all affected people, particularly those who remained passively disinterested during bargaining and future market participants. This tension between blanket coverage and non-exhaustive representation creates the following legal risks if FPAs are treated as collective agreements:

- **Delegation of law-making powers**: authorisation of non-parliamentary entities to bind others must be justifiable. Under the doctrine of contract privity, agreements between contracting parties usually only govern their own rights and obligations. Government should have a veto power or set clear limitations on delegated authorities.
- **Freedom of association**: the process for imposing terms agreed by parties on non-members must be clearly defined, well-safeguarded and justified as a public good.

162. The delegation of law-making powers is particularly problematic given the wide public impact of the terms, the potential of FPAs to impose financial obligations (bargaining fees or levies) and the creation of offences punishable in the courts.

163. The clearest way to ensure that these safeguards are met is to apply the terms of the bargained agreement through a legislative instrument (regulation). This transfers the act of binding non-parties from the bargaining representatives to the Executive. The processes required to enact a legislative instrument are designed to ensure that resulting regulations are democratically accountable, clearly enforceable, and publicly available.

164. This method balances the participatory, adaptable and tailored features of negotiated agreements with the surety that a public authority will prevent the tool from being misused.

165. The principal risk in the regulatory option is that the process of drafting and approving regulations would override the autonomy of the bargaining parties if that is part of the process. Granting government (Parliamentary Counsel Office, Cabinet, agencies) oversight over the final terms moves the system away from being a genuine collective bargaining system, as the final terms may not necessarily mirror those agreed by the parties. The ILO considers the restriction, annulment or interruption of collective agreements by public authorities as generally contrary to the principle of free and voluntary collective bargaining.

166. It is important to note that using regulations to apply bargained terms moves FPAs away from the standard collective bargaining model. As the regulatory route is the most legally appropriate option, the system could be envisioned as bargained minimum standards rather than collective bargaining. The Government's decision to prohibit industrial action has also moved the system away from standard collective bargaining. If the system was accepted to be bargained minimum standards, adhering closely to the ILO standards would no longer be necessary. However, it may still be desirable to give the fullest possible autonomy to the bargaining parties to encourage meaningful participation.

Registration of finalised agreements

167. Under the current employment relations system, once a collective agreement is finalised it must be lodged with the Chief Executive of MBIE. The registered agreements must only be used for "statistical or analytical purposes". Employers and unions covered by the agreement are responsible for making it available to affected parties.

168. I do not see any reason to depart from the status quo in relation to registering agreements, apart from the fact that FPAs will need to be publicly available and as accessible as possible for affected parties. It would be best if all FPAs were available on a central, government-run FPA website. I propose that completed FPAs should be required to be lodged with the Chief Executive of MBIE, and then made publicly available.

Cost recovery

169. The degree to which cost recovery is appropriate for the functions relating to a FPA system depends on whether the eventual benefits accrue to only the affected parties. While FPAs will primarily benefit the affected parties, such as through better coordination and better working conditions, I consider FPAs will have wider benefits. It is in the interests of wider society that employers and employees are equipped with the tools to mitigate imbalances of bargaining power through collective bargaining. Notwithstanding the direct benefits of the agreements, there are also likely to be positive externalities from improving pay and conditions (including wellbeing benefits for families).

170. In relation to the dispute resolution functions, the current system promotes ready access to these functions to efficiently resolve disputes at the lowest level possible and reduce the need for judicial intervention. I propose to consult on the principle 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.

171. The remaining institutional costs of the system, including assessing whether the initiation triggers have been satisfied and assessing the market impact test, will be significant. It will be necessary to balance the parties contributing an appropriate share of these costs with the need to minimise barriers to accessing the system. I propose to consult on the principle that parties should contribute to some of these costs, likely through a fee to initiate bargaining.

Risks and mitigations

172. The introduction of sector or occupation-wide minimum agreements has potential risks:

- FPAs are intended to set minimum standards across sectors and occupations. This may mean that terms are set which some employers struggle to meet, or which limit individual employers' ability to tailor employment terms to best suit their employees.
- It will be important to ensure compliance with New Zealand's international and domestic obligations, particularly in relation to freedom of association and the voluntary nature of collective bargaining. Officials have been engaging with the ILO on compliance with ILO obligations and will continue to do so.
- As an FPA system would empower market participants to set binding terms to apply across their sector or occupation, it will be important to ensure my proposals do not comprise inappropriate delegation of law-making powers.
- Overly onerous initiation or negotiation processes may mean that no or few FPAs are concluded, or do not deliver the desired outcomes, potentially exacerbating existing problems with the labour market.
- The proposal to initially exclude contractors from the FPA system could exacerbate existing incentives to misclassify workers as contractors. Workers outside scope of FPAs could potentially end up worse off.
- The application of FPAs to all employees in a sector or occupation may disincentivise union membership, which could in turn weaken firm-level collective bargaining.

173. I have worked carefully to mitigate these risk and will continue to do so. Possible elements of the system will also mitigate the risks and unintended consequences of the system:

- **The combination of the public interest and representativeness thresholds:** this combination ensures that the FPA system is focussed on occupations/sectors where there is a labour market problem and where sectoral coordination will be beneficial.

- **Market impact test**: if enacted, this would help to mitigate risks that the final FPA will have a significant negative impact on the sector itself or the wider economy (e.g. competition risks).
- **Government putting the agreements into regulation**: this reduces the risk of an inappropriate delegation of law making powers, by retaining for the government the ultimate responsibility for making the FPA binding.

174. Confidential advice to Government [redacted]

Overall effect of the system

175. The Government is creating a productive, sustainable and inclusive economy that works for everyone.

176. Taken together, I consider the elements of the proposed system will achieve the Government's vision of using the employment relations framework to create a level playing field where good employers are not disadvantaged by providing reasonable, sector-standard wages and conditions, supporting New Zealanders to build a highly skilled and innovative economy that provides well-paid, decent jobs, and delivers broad-based gains from economic growth and productivity fairly to all.

Impact on population groups

177. I note that some population groups such as Māori and Pasifika are over-represented in low-paying and low-skilled work, and have higher unemployment and lower employment rates.

178. As with any other group of workers, Māori and Pasifika who are employed in sectors which use the FPA system could benefit from increased wages or improved terms and conditions.

179. It will be important to engage with Māori and Pasifika groups during the consultation process to understand their perspectives on FPAs.

Next steps

180. Once Cabinet has approved the consultation document, the consultation will run for 6 weeks.

181. I will then consider the responses to the consultation document and report back to Cabinet to seek authorisation to draft legislation in 2020.

Consultation

182. The proposed model for consultation is a refinement of the FPA Working Group's recommendations. The Working Group itself included unions, employer organisations and other experts.

183. I have not consulted stakeholders on the proposed response to the Working Group's model; they will have a chance to contribute through the consultation process.

184. The Treasury, State Services Commission, Department of Prime Minister of Cabinet (Policy Advisor Group), Ministry of Pacific Peoples, Ministry of Social Development, Te Puni Kōkiri, Ministry of Health, Department of Corrections, Ministry for Women, Ministry of Education, Oranga Tamariki–Ministry for Children, Inland Revenue and Ministry of Transport were consulted on this paper.

Financial Implications

185. Later decisions on whether to implement an FPA system will have financial implications, which will be signalled as part of the proposals and followed by a Budget bid if appropriate. These implications include both the government as a provider of services but also as an employer.

186. It is difficult to quantify the fiscal costs of operating the system, but an indicative estimate is approximately $5 million per year after the first few years (assuming three FPAs are initiated a year once the system is up and running). There will also be a one-off cost of setting up the new functions of approximately $1–2 million. There would be an additional one-off cost if a new government body was required to be established to perform the market impact test.

187. Part of the difficulty of estimating costs is the uncertainty about demand for FPA bargaining. This leads to a flow-on risk that bargaining infrastructure and support resources would be designed with too much or too little capacity, and thus may be unused or need to be rationed.

Legislative Implications

188. Legislation will be required to implement an FPA system, which may provide for delegated legislation. Confidential advice to Government [redacted] However, I now intend to seek Cabinet approval to draft legislation in 2020.

189. Officials have consulted LDAC on the design of the system, and intend to continue to consult with them throughout the further design and drafting processes.

Impact Analysis

190. An interim Regulatory Impact Assessment (RIA) has been produced by MBIE to inform Cabinet decisions on the release of a discussion document on proposals relating to FPAs. The Quality Assurance Panel provided the following statement:

"A cross-agency Quality Assurance Panel with representatives from the Treasury and MBIE has reviewed the RIA dated 17 September 2019, and considers that it partially meets the relevant quality assurance criteria.

The RIA is well written and easy to follow. The running headings are very helpful in expressing the key points. The length is commensurate with the significance of the issue. Confidential advice to Government [redacted]

[redacted]

The panel has not assessed the RIA against the 'consulted' QA criteria at this stage, because consultation has yet to take place. The panel notes that the FPA Working Group undertook consultation with stakeholders, including union and employer groups.

The panel looks forward to reviewing the updated RIA to inform final policy decisions."

Human Rights

191. The promotion of collective bargaining assists with New Zealand's compliance with ILO Convention 98 on Collective Bargaining. As noted in the body of this paper, the FPA system does have potential human rights implications, including relating to freedom of association.

192. A total ban on industrial action is generally contrary to ILO obligations regarding freedom of association and the promotion of collective bargaining.

Gender Implications

193. FPAs are likely to have gender implications. Women are over-represented in low-paid employment, and make up 60% of those who earn the minimum wage.[3]

194. If FPAs are concluded in sectors where women are over-represented, they may achieve an improvement to their pay or terms and conditions.

Disability Perspective

195. FPAs are likely to have disability implications.

196. Disabled people experience significant disadvantage in the labour market. In June 2018, the employment rate for non-disabled people was 70%, but only 22.3% for disabled people. In 2013, 74% of disabled people (aged 15–64) who were not employed said they would like to work if a job was available.

197. As noted above in relation to population groups such as Māori and Pasifika, FPAs could improve pay and conditions for people with disabilities who are already working.

Publicity

198. I intend to accompany the release of the discussion paper with an announcement and supporting factsheets, including a short summary of proposals being consulted on and a summary of the option being consulted on.

199. The consultation will be promoted on social media, government websites and in email newsletters. There will be direct engagement with key stakeholders, including with representatives of businesses, workers and minority groups.

3 MBIE, Minimum Wage Review 2018

Proactive Release

200. I intend to release this paper in accordance with the Government's proactive release policy.

Recommendations

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

1. **Note** that in May 2018 Cabinet agreed in principle to the introduction of a Fair Pay Agreements (FPA) system, subject to advice from the FPA Working Group on the scope and design of the system and the Minister for Workplace Relations and Safety reporting back to Cabinet on the Government's response [CAB-18-MIN-0250].

2. **Note** the FPA Working Group submitted its recommendations to the Government, and the Working Group's report was released in January 2019.

3. **Note** that the Working Group's report presents a case for the introduction of sector or occupation-wide bargaining to set minimum terms in some circumstances, and sets out a proposed model and associated policy settings that could be implemented through legislative change.

4. **Note** that the system recommended by the Working Group includes the following key policy features:

    4.1. Workers could initiate FPA negotiations if they met a threshold of 10% or 1,000 workers (whichever is lower) in the nominated sector or occupation, or a public interest test was met (i.e. harmful labour market conditions are evidenced which warrant an FPA).

    4.2. The occupation or sector to be covered by an FPA would be defined and negotiated by the parties, but it should include all workers in that occupation or sector (not just employees).

    4.3. Once agreed, FPAs would bind all employers and workers in the relevant sector or occupation to the minimum standard. In some circumstances, it may be appropriate for time-limited exemptions from FPA agreements to apply.

    4.4. If parties could not agree during negotiations they should enter dispute resolution. Where mediation is not successful parties should seek a binding determination from a body such as the Employment Relations Authority or Employment Court.

5. **Note** the employer representatives on the Working Group disagreed that the system should be compulsory for employers.

6. **Note** that the Minister for Workplace Relations and Safety agrees with the Working Group's view that contractors should be included in the system, and has asked MBIE to consider options for strengthening protections for dependent contractors, including the potential for collective bargaining and links into FPAs, as a separate policy project.

7. **Agree** to release, subject to minor drafting changes, the attached consultation document which sets out a proposed model for consultation.

8. **Agree** to consult on a proposed FPA model broadly consistent with the Working Group's model, which includes the following elements:

    8.1. FPAs will only set *minimum* terms for the affected group. Collective bargaining or negotiation for an individual employment agreement would still occur above the floor set by the FPA.

    8.2. The design of the FPA system would initially not include contractors, but a parallel piece of work is considering the extension of the FPA system to contractors.

    8.3. If the public interest test is applied, it could require the initiating party to demonstrate a problematic outcome for workers in the sector, and the potential that more sectoral coordination could be beneficial.

    8.4. Coverage for FPAs should be defined by the initiating parties, and expressed as clearly-defined occupations within sectors. The bargaining parties could then negotiate the boundaries of coverage as needed, but any significant change would need to be reassessed against the initiation thresholds.

    8.5. Parties may agree to allow temporary exemptions from coverage.

    8.6. Parties may include regional differences in the terms of the FPA. The discussion document asks whether regional FPAs should be allowed.

    8.7. The primary bargaining representatives should be unions and employer organisations.

    8.8. There should be two categories of topics for FPAs: mandatory and excluded. Any topic not excluded would be allowed. The consultation document also asks whether, alternatively, mandatory and permissible categories of topics should be set.

    8.9. The mandatory topics could include pay rates and how they will be adjusted over the term of the FPA, whether superannuation employer contributions are included in the base wage, overtime and penal rates, skills and training, ordinary hours/days of work, redundancy and leave requirements.

    8.10. A navigator will be assigned to each FPA process to assist the parties, advise on the process, and help parties to discuss the range of possible provisions of the agreement.

    8.11. Bargaining parties should be required to deal with one another (and employment institutions) in good faith throughout the process.

    8.12. The dispute resolution system for FPAs should leverage off the existing system as much as possible. Appeal rights should be limited to matters of law only.

    8.13. Ratification of a finalised FPA should require the support of 50%+1 of each side.

8.14. In the event of a bargaining stalemate, the Employment Relations Authority should have the power to make a determination on the mandatory terms of FPAs. The consultation document also asks an open question the Authority's role in relation to permissible terms.

8.15. There will be some cost recovery in the system.

9. **Agree** to consult on possible alternatives for FPA processes:

9.1. Whether the threshold for initiation of bargaining for an FPA should be 10% of affected employees (as recommended by the Working Group), or some other ratio;

9.2. Whether there should be an absolute representation threshold (e.g. 1000 workers);

9.3. Whether initiating parties should be also required to meet the public interest test in all cases;

9.4. Whether sector coverage of FPAs should be set in advance by way of a specified list of sectors where a public interest case for intervention has been made;

9.5. Whether initiation of FPAs by employer parties should be permissible;

9.6. Whether other bargaining parties should be allowed at the table alongside unions and employers and, if so, under what circumstances;

9.7. Whether once an FPA has been finalised, it should be subject to a market impact test by a government body to ensure that any benefits are weighed against possible significant negative consequences on the sector, or the wider economy (including competition). The market impact test may result in the government body referring the FPA back to the parties or determining body to renegotiate or reconsider, or in extreme circumstances, rejecting the FPA if it believes the market impact is fundamental and could not be mitigated.

10. Confidential advice to Government [redacted]

11. **Note** that in addition to the above costs of operating the system, there will be costs for bargaining parties unfunded by the government including costs for the government as an employer.

12. **Note** that the Minister for Workplace Relations and Safety will submit a budget bid for funding the system once final decisions have been made.

13. **Note** that the introduction of the FPA system carries some risks including:

13.1. The ban on industrial action and the compulsory arbitration in the FPA system is inconsistent with our International Labour Organisation obligations.

13.2. The system will set minimum standards for the occupations/sectors which have FPAs, locking-in business models and making it more difficult for new players to undercut other businesses with lower wages or conditions. Some employers may struggle to meet the terms of FPAs.

13.3. The balance of incentives on parties could be such that no or few FPAs are concluded, or do not deliver the desired outcomes, potentially exacerbating existing concerns with the labour market.

13.4. The decision to initially exclude contractors from the FPA system could exacerbate existing incentives to misclassify workers as contractors.

13.5. The application of FPAs to all employees in a sector or occupation may disincentivise union membership, which could in turn weaken firm-level collective bargaining.

14. **Note** that possible elements of the consultation model could also mitigate many of the risks of the system:

- **A possible combination of the public interest and representativeness thresholds:** this combination ensures that the FPA system is focussed on occupations/ sectors where there is a labour market problem and where sectoral coordination will be beneficial.
- **A possible market impact test**: this will ensure that the final FPA will not have a significant negative impact on the sector itself or the wider economy (e.g. competition risks).
- **Government putting the agreements into regulation**: this reduces the risk of an inappropriate delegation of law making powers, by retaining for the government the ultimate responsibility for making the FPA binding.

15. Invite the Minister for Workplace Relations and Safety to seek Cabinet decisions on the model in 2020 including approval to draft legislation.

16. **Note** that the Minister for Workplace Relations and Safety will report back on the results of consultation process at the same time as seeking approval to draft legislation.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety