Coversheet: Fair Pay Agreements

Advising agencies	Ministry of Business, Innovation and Employment (MBIE)
Decision sought	Agree to draft legislation to create the Fair Pay Agreements (FPA) system
Proposing Ministers	Minister for Workplace Relations and Safety (Hon Michael Wood)

Summary: Problem and Proposed Approach

Problem Definition

What problem or opportunity does this proposal seek to address? Why is Government intervention required?

There are two parts to the problem definition.

Part 1: The Employment Relations/Employment Standards system recognises there is an inherent imbalance of bargaining power in the employment context. In some sectors/occupations and in some circumstances, our current collective bargaining framework is not providing adequate mechanisms to mitigate these imbalances. There is evidence that wages have not kept up with productivity improvements in recent decades. While there are many potential factors, an imbalance of bargaining power is likely to be a contributor.

Part 2: In some labour-intensive sectors of the economy, employers may be able to compete by holding down or reducing terms and conditions offered to workers, often described as a 'race to the bottom'. This type of competition makes it difficult for workers and individual employers to negotiate improved terms and conditions. Where this involves a disproportionate risk transfer to workers, and/or artificially lower prices for services, this can under-compensate workers for the value of their work. Poor terms and conditions are likely to lead to an increase in staff turnover, reduced incentives to make investment that could make staff more productive and a reduction in the quality of services.

Existing labour market regulations do not prevent this effect from occurring. National minimum standards provide some protections for workers, but the suitability of minimum terms and conditions will differ depending on the workforce. In New Zealand, we lack the sector-level coordination mechanisms in our employment regulation framework to establish industry or sector-level minimum standards. While this aspect of the problem is limited to sectors or occupations with a 'race to the bottom', bargaining power and coordination problems can occur across a wider part of the labour market.

Under the status quo, we do not think existing interventions underway will have a significant and sustained impact on the problem definition of (1) reducing the imbalance of bargaining power, and (2) mitigating the 'race to the bottom'.

Summary of Preferred Option

How will the agency's preferred approach work to bring about the desired change? Why is this the preferred option? Why is it feasible? Is the preferred approach likely to be reflected in the Cabinet paper?

The key aims of the intervention are to enable minimum standards to be reflective of the needs of the relevant sector, improve labour market outcomes for workers through addressing competition based on labour costs, and to improve workers' ability to collectively improve their working conditions. A number of options can be identified that are

feasible in the New Zealand context to correct for these market dynamics and address the bargaining power imbalance between employees and employers where these problems arise, while ensuring that employers are still able to compete, adapt and innovate. These options are:

Option 1	Lightly modified Fair Pay Agreements (FPA) Working Group (FPAWG) model. Unions and employers bargain to set minimum pay and terms and conditions for workers across a sector or occupation.	**The Government's proposed option**
Option 2	Modified FPAWG model which only allows specified sectors or occupations with labour market problems to use the bargaining framework.	
Option 3	Empower a government body to introduce a limited set of sector-based minimum standards where it establishes that there is a labour market problem, in consultation with employers and unions.	**MBIE's preferred approach (options combined)**
Option 4	Strengthen existing collective bargaining mechanisms to improve employee bargaining power, and proactively assess workforces to see if they meet the criteria to be added to Part 6A of the Employment Relations Act.	

The Government's proposed model

The Government has proposed addressing this problem through the introduction of an FPA system, which would set bargained minimum standards across an occupation or industry. The proposed system is largely in line with the recommendations of the FPAWG. The Government held a public consultation on the design of an FPA system from October to November 2019. The feedback from submissions helped inform the design of the Government's proposed model. A diagram summarising the Government's model is included at Annex One.

The Cabinet paper reflects this proposed approach: a lightly-modified version of the FPAWG model **(Option 1)**.

MBIE's preferred approach

MBIE's view is that both options 1 and 2 have significant downsides. Both options 1 and 2 may not be consistent with the international framework relating to collective bargaining because they require employers to participate in the bargaining process regardless of their preferences; unlike with current collective bargaining once bargaining has started there is no opportunity for employers to opt out. These features are a necessary result of the ban on industrial action combined with the need to ensure the system actually produces effective outcomes. Although the outcome is difficult to predict we anticipate in many cases the system is likely to result in bargaining stalemates and determinations fixing terms by the Employment Relations Authority, so the added benefit of bargaining may be limited.

We are concerned that option 1 is not well targeted. This means the proposed system may create significant labour market inflexibility and costs when it is used in sectors without a demonstrable labour market issue.

MBIE's preferred approach is to combine options 3 and 4. We consider this approach:

- provides a way to address the underlying problems in a way that is more consistent with the current regulatory framework and international requirements relating to

collective bargaining,

- is able to be better targeted through an analytical process which establishes a need for intervention,
- involves a less complex process and outcomes,
- while it is less likely to lead to cross-sector dialogue about employment issues it reduces the potential for bargaining stalemates.

This approach is not as developed as the Government's proposed model. Before this proposal could be taken forward, MBIE would need to do further policy work, and the public would need to be consulted.

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?

Under MBIE's preferred option and the Government's proposed option, the main beneficiaries would be employees who would be in scope of proposed bargaining or coordination arrangements, who will benefit from increased wages and improved terms and conditions of work. Submitters from a worker perspective commented on many problematic outcomes in the labour market – including unsatisfactory wages, irregular or inadequate hours of work, low staffing levels, poor training – and felt FPAs would prevent these from happening. Depending on the sectors/occupations where FPAs are concluded, they could disproportionately benefit some population groups covered (including women, young people, Māori and Pacific peoples).

Some employers may also benefit from better sector wide coordination and through not being undercut by inappropriate competition on labour costs. Although the international evidence on the impact of sector bargaining is mixed, this new dynamic could lead to an improvement in the quality of services. In addition, better wages, terms and conditions could also lead to more engaged and productive workers, a more attractive employment offering, and reduced turnover. Employers may be incentivised to invest in human and physical capital to improve productivity.

Second round effects would benefit families of the affected workers, and better pricing of services would ensure more accurate relative prices and that the full costs of services are paid for by those receiving the services (rather than workers bearing the cost/risk).

Depending on the level of acceptance of the model across society when it is introduced, and the role that is played by workers and employers as it unfolds, the model could either foster better worker–employer relations more generally or create disharmony.

Under the Government's proposed option (lightly-modified FPAWG model), we have estimated the monetised benefits of higher wages covered by FPAs could be around ~$150–600m (*ongoing annual benefit)* for workers. This figure is based on one set of eight FPAs being concluded in low wage occupations, and would increase over time cumulatively as more FPAs were concluded. It is difficult to quantify improved worker outcomes more broadly (such as from improved non-wage terms and conditions), but workers may also benefit from wellbeing improvements as a result of being able to bargain collectively to address terms and conditions that are 'unfair' or 'inefficient'. Most of the benefits to workers would be offset by increased labour costs to employers (i.e. higher

wages would effectively be a transfer from employers or consumers to workers).

Under MBIE's preferred approach the benefits would be smaller due to the targeted nature of the system. Our illustrative estimate is the monetised benefits could be around $40m per year for targeted minimum standards for three occupations.

The following table summarises the estimated benefits. See section 5 for a fuller analysis.

	Government's proposed model (assuming eight FPAs per year)	**MBIE's preferred model (assuming new standards in three sectors per year)**
Employees covered by FPAs		
Increase in annual remuneration	Est $150–600m ongoing annual benefit. *Note: this figure is for one set of eight FPAs so this would increase cumulatively over time.*	Est $40m per annum *Note: this figure is for one set of three sector standards so this would increase cumulatively over time.*
Increase in wellbeing from improved terms and conditions	Low to high	Low to medium
Regulated employers		
More engaged and productive workforce	Low	Low
Total monetised benefits	**Est $150–600m per year**	**Est $40m per year**
Total unmonetised benefits	**Low to high**	**Low to medium**

Where do the costs fall?

Under both MBIE's preferred option and the Government's proposed option:

Costs would fall primarily on employees and employers within sectors or occupations covered by an FPA.

There may be costs to some employees if employers reduce hours of work, reduce the size of their workforce or do not hire as many workers in order to remain competitive. These risks depend on the ability of employers to absorb higher labour costs, which may vary across firms, and the price elasticity of demand.

Employers would likely face higher costs as a result of increased worker terms and conditions, though the extent will vary depending on the terms and conditions they previously offered employees. In addition to the direct costs, there may be flow-on costs from claims for improved terms and conditions from employees not covered by an FPA. There may also be non-wage costs from reduced flexibility, potentially impacting

innovation, productivity and competition.

There could also be costs to consumers if employers raise the cost of goods and services in response to the higher labour costs. However, this may be appropriate and efficient if the cost of services to consumers is currently below the efficient level. This higher cost would be part of the transfer to workers but may also have other impacts for consumers with tight budget constraints.

Under MBIE's preferred approach, there would be costs relating to the process of participating in consultation (falling on interested employers and unions) and providing supporting regulatory functions and infrastructure for consultation to develop minimum standards (falling on regulators). Overall we think the costs of the interventions would be much lower than under the Government's proposal.

We have estimated the costs of the Government's proposed option and MBIE's preferred approach below. See section 5 for a fuller exploration of these figures.

	Government's proposed model (assumes eight FPAs per year)	**MBIE's preferred model (assumes three sets of regulation per year)**
Employees within coverage		
Cost of bargaining/ consultation	~$1–2m	~$0.5m
Cost of displacement	Low	Minimal
Regulated employers		
Costs of bargaining/ consultation	~$1–2m	~$0.5m
Increased labour costs, leading to a reduction in profit or increase in prices of goods or services[1]	~$150–600m *This figure reflects one set of 8 FPAs. The ongoing costs would be cumulative.*	~$40m *This figure reflects one set of three occupational standards. The ongoing costs would be cumulative.*
Non-wage costs	Medium–high	Low–medium
Regulators and costs faced by government		
Costs to government	~$10–12.5m per annum operating ~$1–2m in capital funding (one-off)	*~ $2.5–5m per annum operating*
Total monetised costs	**Est $163–618.5m per year**	**Est $43.25–46m per year**
Total unmonetised costs	**Medium to high**	**Low to medium**

[1] As noted above, this figure is based on eight FPAs being concluded in low wage occupations. This figure would increase as more FPAs were concluded over time. This figure is purely focussed on wages and does not include other costs such as superannuation contributions, ACC levies, etc.

MBIE considers that all of the options contain risks, and that the case for the introduction of sector-based compulsory standards is only weakly positive in light of the overall likely benefits and costs

MBIE's view is that the Government's proposal would be effective at improving the ability for workers to collectively bargain and would ultimately improve terms and conditions for workers within coverage. However, the low threshold for initiation means that the system could be used in situations where the marginal improvement in terms and conditions for existing workers are achieved at a significant cost to employer flexibility. Given that the main benefits to workers are effectively a transfer from employers, we think there is a significant risk of setting up a system which has net overall costs if the other benefits to workers are less than the cost to employers and of providing the system.

This risk is mitigated under MBIE's preferred model because a labour market problem must be established before the government intervenes. The government body could assess the benefits relative to the costs. We envisage the government body would have the discretion to decline to put in place sector or occupation standards if the costs outweighed the benefits. However, we note this model would require further design work before implementation, and whether and how this assessment would be made would depend on how the system was set up.

What are the likely risks and unintended impacts? How significant are they and how will they be minimised or mitigated?

Impact of current COVID-affected economic climate

Businesses are under significant pressure as a result of the current COVID-19 outbreak and consequential economic impacts. In the current environment, firms are likely to have genuine business reasons for reducing labour costs and re-organising their workforce. More people will find themselves out of work – particularly in specific sectors such as tourism and travel – and alternative employment may be difficult to find in current economic conditions.

Throughout our analysis, we have referred to economic/labour market risks in general, but it is likely that many of the risks that we have identified would be exacerbated in this current environment. Given that any of the options would need to operate across the economic cycle, our analysis and recommendations have taken a range of economic conditions into account, including the current economic and policy climate.

The interventions could reduce employer and labour market flexibility, and productivity growth

Under the Government's proposed option, there is a risk that the resulting FPA binding the sector or occupation could result in terms and conditions which mean employers' abilities to compete, adapt to changing market conditions or innovate may be lessened. There are large number of mandatory to agree topics for FPA bargaining, some of which are not currently required by minimum standards (e.g. ordinary hours, overtime and penal rates). This option could have an impact on competition if some employers cannot afford to comply with the new standard and exit the market, or may choose to not enter due to the new barriers to entry.

These risks are mitigated to some extent by the reliance on bargaining to set terms,

because the bargaining representatives should be well placed to only agree terms which are realistic for the affected parties to comply with. That said, in the event that the parties cannot agree, the Employment Relations Authority will make a determination fixing terms and there is no guarantee that this will result in an acceptable outcome for employers or workers.

The OECD's Economic Division has noted centralising and coordinating negotiations over wages and working conditions has a tendency to compress pay differences among workers.[2] As a result, it can weaken the link between individual performance, wages and working conditions, and could negatively impact productivity growth.

In its 2019 economic survey of New Zealand, the OECD noted that there may be particular risks if the FPA model does not retain significant freedom to determine terms and conditions at the enterprise level.[3]

Under MBIE's preferred option, the risks related to limiting firm flexibility would be reduced by carefully specifying the types of matters which are appropriate for sector-level minimum standards and which are more appropriately left to firm-level decisions in order to preserve appropriate competition and innovation. This risk is also mitigated by creating the standards in consultation with the particular industry. The impact on employer and labour market flexibility will need to be taken into account in the government body's final decision on minimum standards for the particular occupation or sector.

Potential of non-compliance with domestic law and international legal obligations

Under the Government's model:

- Affected parties will be represented during bargaining by unions or employer organisation respectively. FPAs could therefore be seen to undermine rights to freedom of association (and non-association).
- There is a ban on industrial action and there is no opportunity for employers to opt out of bargaining, which may conflict with International Labour Organisation interpretations of fundamental labour principles and rights relating to freedom of association, voluntary collective bargaining and the right to strike.

In contrast, MBIE's preferred model does not create these risks, as it builds on the existing voluntary collective bargaining system which allows for industrial action. In addition, New Zealand's international labour obligations do not preclude the government from introducing minimum standards in consultation with stakeholders (as we do with the minimum wage).

There is a lack of coordination among sector participants, and employers have few incentives to participate

Sector participants are unlikely to be well coordinated. It will be important to implement a system that ensures the range of affected parties have an opportunity to be involved and have their say about what they think the minimum standards should be. This would help to ensure that the minimum standards both address the problems identified and are workable for parties impacted by the changes.

Under the Government's proposed option, one of the risks that was raised during

[2] OECD, "OECD Employment Outlook 2018," pg. 85

[3] OECD Economic Survey of New Zealand, 2019 http://www.oecd.org/economy/new-zealand-economic-snapshot/

consultation that has the most material impact on the viability of the system is the risk that employers generally do not support the FPA system and have little incentive to participate. There is very little incentive for employers to want to be involved with FPA bargaining, aside from the risk of a determination. Employers and employer organisations have raised concerns that the expertise and infrastructure needed for employers to coordinate and bargain on FPAs is no longer present and has been lost since the end of the awards system.[4] This risk is mitigated by BusinessNZ being the default bargaining representative if no other employer organisation is willing to perform the role.

In contrast, MBIE's proposed approach is less reliant on a high degree of coordination among affected parties. Rather it involves strengthening existing collective bargaining to extend the coverage of MECAs. In practice we anticipate any expansion of MECAs would build upon existing collective bargaining so bargaining would be less likely to start from a low-capability base. Finally, participation in government consultation on minimum standards does not require affected parties to be coordinated.

Creating new and expanded roles for government bodies

The Government's proposed option involves new or expanded roles and functions relating to dispute resolution (e.g. expanding the Employment Relations Authority's role in fixing terms of FPAs and vetting of FPAs) and administrative steps in the FPA process (e.g. verifying initiation information and bringing FPAs into force).

MBIE's preferred approach involves creating a new function to set targeted minimum standards for a sector or occupation where there is a labour market problem.

In relation to both options it will be essential to allocate functions where relevant expertise and resources exist, and where this is not possible, to ensure that necessary resources and funding are provided to ensure new functions are able to be developed and the new roles performed successfully.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

The evidence is clear of low levels of collective bargaining, particularly multi-employer bargaining, and union coverage. There is also some evidence of low and stagnant wages in some industries and deteriorating terms and conditions of employment (see Annexes Two and Three).

However, there are limitations with available data on whether there is a 'race to the bottom' of terms and conditions of employment, and in which sectors this is most likely to occur. Data on non-wage terms and conditions is scant at the sector or industry level, and wages data is inconclusive in itself. For example, where wages grow slowly over time, the data is not able to identify if this reflects low or no productivity growth or depression of wages signalling a 'race to the bottom'.[5]

[4] The Awards system was in place in New Zealand from 1894 to 1991, with a limited version available from 1987. The system allowed for the setting of minimum terms and conditions of employment through negotiated settlements between workers and employers which could be extended to cover all workers and employers operating in the industry or occupation concerned.

[5] It may be possible in future to use Stats NZ's Integrated Data Initiative (IDI) to analyse the extent to which competition is eroding terms and conditions, which may not necessarily require additional data to be collected.

More detailed analysis of market dynamics for each sector would be required to be able to form a view, and the explanation of underlying causes will involve judgment and use of models with assumptions to generate counterfactuals. However, we not been able to do this in the time available.

There are also limitations with the level of granularity of the data at the occupational level. To ensure the data is statistically representative it can only be presented at ANZSCO level 3 (level 6 identifies the specific occupation).[6] This means similar occupations have been grouped together to make the data more statistically representative.

Due to the limitations of the national level data, we have looked for evidence from other sources, including industry participants. The response to the consultation provided divergent views about the evidence. Some submitters provided anecdotal evidence of the problems experienced in their sector/industry. While other submitters raised the concern that there was no clear problem definition, or no strong evidence to support the problem definition (as it was articulated in the discussion document).

MBIE's preferred option (options 3 and 4) will require more detailed analysis of the market dynamics of the sector before proceeding with further action. MBIE's preferred option also involves a range of employment regulation tools so that the policy solution can be better-matched to the underlying causes, once the underlying causes are understood. This will ensure that the solution to an identified problem is the most appropriate and cost-effective option available.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
The Ministry of Business, Innovation and Employment
Quality Assurance Assessment:
Meets the criteria
Reviewer Comments and Recommendations:
N/A

[6] The Australian and New Zealand Standard Classification of Occupations (ANZSCO) is often used in data analysis.

Impact Statement: Fair Pay Agreements

Section 1: General information

1.1 Purpose

The Ministry of Business, Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing decisions to proceed with a policy change to be taken by Cabinet.

1.2 Key Limitations or Constraints on Analysis

There is limited evidence to support our analysis

We have used the evidence which is available to the extent possible. We have been able to show that there are sectors with low terms and conditions for workers who have limited access to collective bargaining and otherwise poor bargaining power, though whether this demonstrates a 'race to the bottom' is a matter of debate. There is also some evidence of relatively low job-to-job flows, suggesting employers are not incentivised to increase wages in order to reduce turnover. The potential benefits of greater sector-level coordination in these sectors can be estimated in general terms.

It is difficult to predict the impact of a bargained system

As the Government's proposed model for FPAs is based on a bargaining system, it is difficult to anticipate what impact the system will have. The FPA legislation will create a framework for bargaining but it will be up to unions to initiate in the first instance and make use of the system. Although the NZ Council of Trade Unions has identified cleaners, security officers and supermarket workers as good candidates for FPAs, we do not know in which sectors or occupations unions will actually initiate FPA bargaining, or how many FPAs there will ultimately be (and over what time period).

We also do not know whether the bargaining representatives will ultimately be able to agree an FPA or whether most bargaining will result in an Employment Relations Authority determination setting terms.

The design of the FPA framework has been constrained by Government decisions and the recommendations of the FPA Working Group

In 2018, Cabinet agreed in-principle to introduce a legislative system that allows employers and workers to bargain FPAs that set minimum employment terms and conditions across an industry or occupation. This in-principle support was subject to the Minister reporting back on the advice of the FPAWG and a proposed response. The Government has also stipulated that industrial action would not be permitted during bargaining for an FPA under the new system, and that it would not be 'picking winners' by specifying which sectors or occupations could use the system.

In terms of consultation, the Government established the FPAWG, which had members from unions, employer groups and other representatives. The Government also consulted the general public on the detailed design of an FPA system through a consultation document which was open from 17 October to 27 November 2019. Only the Government's preferred model was consulted on, as Cabinet has already agreed in-principle to introduce a legislative system that allows employers and workers to bargain FPAs. One limitation of

our consultation is that we did not manage to hear from many small employers or non-union workers. There will be an opportunity for engagement with small employers during the Select Committee process for the FPA legislation.

MBIE has provided policy advice under tight timeframes

Finally, MBIE has prepared policy advice and this regulatory analysis under significant time constraints. This context has meant that advice has not been as comprehensive and considered as it would have been without the time constraint and there has been limited consultation with stakeholders on detailed policy questions.

1.3 Responsible Manager (signature and date):

Tracy Mears

Employment Relations Policy Team

Workplace Relations and Safety Policy Branch / Labour, Science and Enterprise Group

Ministry of Business, Innovation and Employment

7 April 2021

Section 2: Problem definition and objectives

2.1 What is the current state within which action is proposed?

There are two elements to the current state that are relevant for consideration of this proposal: the current state of the labour market and the current employment relations context. We also briefly set out details relating to the FPAWG.

Labour market

The economic effects of the COVID-19 pandemic have been significant and are still developing. Economic activity as measured by GDP has fallen by 1.6 percent in the March 2020 quarter and 11 percent in the June quarter, before rebounding by 13.9 percent in the September quarter, and then declining again by 1 percent in the December 2020 quarter. On an annual basis, GDP declined by 2.9 percent over the year to December 2020.[7] There have been significant numbers of workers made redundant and unemployment rose to 5.3 percent in the September 2020 quarter before falling to 4.9 percent in the December quarter.[8]

The focus for policy at present will be on providing the environment in which firms can grow employment. However, high unemployment – at least in some parts of the labour market – means there will be strong competition for jobs which will further exacerbate the bargaining power imbalances that can lead to workers terms and conditions being reduced. Any consideration of changes to labour market regulation at this time will need to balance the impact on the propensity to retain and create jobs and the need to protect workers with low bargaining power. We note, however, that there is no overlap between the occupations which have previously been identified by the NZ Council of Trade Unions as priorities for FPAs and the occupations and sectors which have been significantly affected by the impacts of COVID-19.[9]

Many businesses are under significant pressure as a result of the current COVID-19 outbreak and consequential economic impacts. The Government has provided significant financial support for businesses, including the Wage Subsidy scheme and loans for small businesses.

In the current environment, firms are likely to have genuine business reasons for reducing labour costs and re-organising their workforce. Availability of alternative employment will be variable and will depend on the match between workers and roles.

Throughout our analysis, we have referred to economic/labour market risks in general, but it is likely that many of the risks that we have identified would be exacerbated in this current environment. Given that any of the options would need to operate across the economic cycle, our analysis and recommendations have taken a range economic conditions into account, including the current economic and policy climate.

Current employment relations context

Promoting collective bargaining was made one of the express objects of the current Employment Relations Act. Where bargaining is initiated by a union, an employer must bargain for a collective agreement. The requirement is that they must conclude a collective

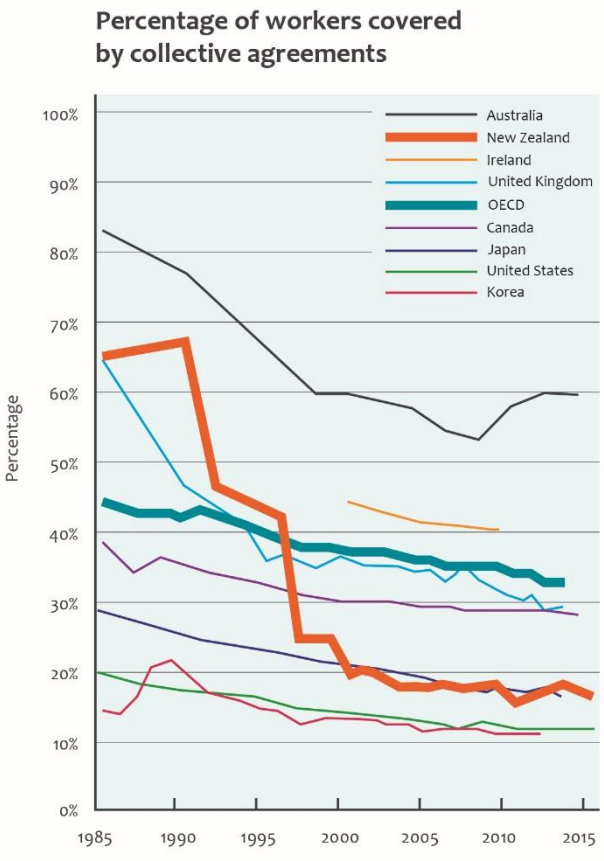
[7] Stats NZ, "Gross domestic product: December 2020 quarter", https://www.stats.govt.nz/information-releases/gross-domestic-product-december-2020-quarter

[8] Stats NZ, "Labour market statistics: December 2020 quarter", https://www.stats.govt.nz/information-releases/labour-market-statistics-december-2020-quarter

[9] The NZCTU has identified cleaners, security officers, and supermarket workers as priorities for FPAs.

agreement unless they have genuine reasons based on reasonable grounds not to. Wages and conditions are bargained either individually or through collective bargaining that takes place primarily at the enterprise level, but provisions have been made to allow for collective bargaining involving multiple employers.

Figure 1



Collective bargaining coverage in New Zealand is low, and coverage of collective agreements has been steadily decreasing

The degree of coverage refers to the proportion of employees who are covered by a collective agreement.[10] As noted by the FPAWG, New Zealand's collective agreement coverage has declined significantly over the past three decades. Collective coverage rates dropped from approximately 65% in 1985 to approximately 16% in 2016.[11] Although the Employment Relations Act 2000 made provisions for voluntary sector bargaining via MECAs, there is not a high uptake and this form of bargaining would be difficult in practice to implement comprehensively across a sector.

The share of employees across the OECD covered by collective agreements has also declined.[12] On average, collective bargaining coverage shrank in OECD countries from 45% in 1985 to 33% in 2013.[13]

Figure 1 shows recent data from the OECD's Employment Outlook, showing the overall trend over the last three decades of decline in the percentage of workers covered by collective agreements in countries the OECD considers similar to New Zealand (these are English-speaking or have predominantly enterprise level collective bargaining).[14]

Union density has also been declining

Union membership density (measured as the ratio of wage and salary earners that are trade union members to the total number of wage and salary earners in the economy) has been declining steadily in most OECD countries over the last three decades.

[10] An employee does not necessarily have to be a member of a union to be covered by a collective agreement as some collective agreements permit employers to offer the same terms to the non-union workforce. On the other hand some union members will not be covered by a collective agreement.

[11] Fair Pay Agreements Working Group report, 2018, pg 21

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

[13] Ibid, pg. 126

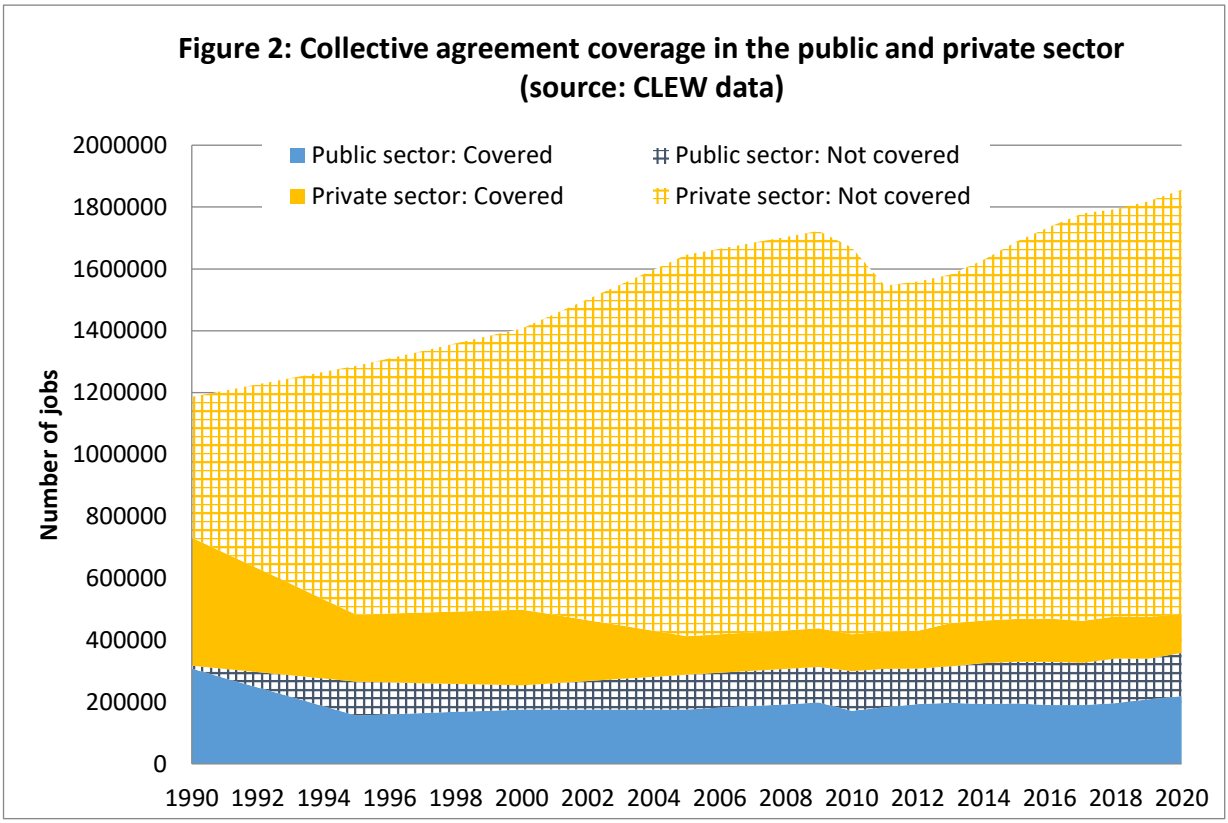
[14] Ibid, pg. 134

In 2017, New Zealand's union density was 17.3%.[15] Union density in New Zealand declined sharply from around 46% to 21% in the four years following enactment of the Employment Contracts Act 1991, and has declined gradually since that time.

Collective bargaining coverage is not growing proportionately to the growth in jobs in the economy

Collective bargaining coverage has decreased proportionately and is not keeping up with growth in the number of jobs in the economy. Currently in New Zealand there are approximately 1,600 collective agreements covering 10% of the private sector workforce. There are also 456 collective agreements covering 60% of the public sector workforce. While the number of employees covered by a collective agreement is stable, the total labour force is growing as illustrated in Figure 2.

Figure 2: Collective agreement coverage in the public and private sector (source: CLEW data)



Note caution must be exercised with the use of these collective bargaining coverage figures, as there is uncertainty about the total number of collective agreements and how many employees they cover.[16]

MECA bargaining coverage is low and is predominantly in the public sector

Of those employees covered by a collective agreement in the private sector, only 7% are covered by a MECA. Contrastingly, in the public sector, 55% of employees covered by a collective agreement are covered by a MECA.[17] In the private sector, a trend towards

[15] Ryall S., Blumenfeld Dr S. 2017, CLEW, Unions and Union Membership in New Zealand – Report on 2017 Survey, https://www.victoria.ac.nz/__data/assets/pdf_file/0016/1731211/New-Zealand-Union-Membership-Survey-report-2017v3-140219.pdf

[16] Centre for Labour, Employment and Work, "Employment Agreements: Bargaining Trends & Employment Law Update 2019/2020", pg. 17

[17] Ibid, pg. 19

coverage under enterprise bargaining rather than MECAs began with the Labour Relations Act in 1987 and was reinforced by the Employment Contracts Act in 1991.[18]

A Working Group was set up to make recommendations on the scope and design of collective bargaining across a sector

The Labour Party's 2017 election manifesto committed to "introducing a system of Fair Pay Agreements (FPAs) that set fair, basic employment conditions across an industry based on the employment standards that apply in that industry".

To give effect to this commitment, Cabinet agreed in-principle in May 2018 to establish a legislative system that allows employers and workers to create a model for FPAs across an occupation or industry, subject to advice from an expert advisory group (the FPAWG) on the scope and design of an FPA bargaining system. The Cabinet paper identified several poor labour market outcomes which it considered could be addressed through establishing agreements that set minimum employment terms and conditions across an industry or occupation. The poor labour market outcomes cited included:

- low per capita productivity and minimal growth
- wages have not keep pace with labour productivity increases.

The key problems that were identified in the Cabinet paper, which may be driving these poor labour market conditions were:

- weak collective bargaining, particularly at the multi-employer and industry level, with limited social dialogue between workers and employers concerning problems at the industry level, and
- a 'race to the bottom' where firms compete by reducing or stagnating wages or conditions of employment. This phenomenon could be driven by imperfect competition for that particular occupation or industry ie where incentives drive employers to compete on labour costs (which push wages down to the lowest common denominator – being the minimum wage).

The FPAWG was established up to design a new tool to complement the collective bargaining system in New Zealand. It comprised employer groups, unions, economists, academics and also included New Zealand's peak bodies for unions and employers. The FPAWG reported back in December 2018 with a recommended model that provides for collective bargaining between employers and employees to occur across an occupation or industry. The key details of the model are described in section 3 below. The FPAWG's report was published in January 2019.[19]

2.2 What regulatory system(s) are already in place?

The employment relations and employment standards system

The employment relations and employment standards (ERES) system regulates employment relationships. It aims to promote employment relationships that are productive, flexible, and which benefit employees and employers. It incorporates mechanisms, including a framework for bargaining, that are intended to:

- support and foster benefits to society that are associated with work, labour market

[18] Ibid.

[19] https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/

flexibility, and efficient markets

- enable employees and employers to enter and leave employment relationships and to agree terms and conditions to apply in their relationships, and
- provide a means to address market failures such as inherent power imbalances and information asymmetries which can lead to exploitation of workers.

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

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

Employment relationships are regulated for a number of reasons:

- to provide a minimum set of employment rights and conditions based on prevailing societal views about just treatment,
- to foster the benefits to society that relate to the special nature of work (including cohesion, stability, and well-being),
- to address the inherent inequality of bargaining power in employment relationships,
- to establish the conditions for a market for hire and reward to operate, and for this market to be able to adjust quickly and effectively (labour market flexibility), and
- to reduce transaction costs associated with bargaining and dispute resolution.

The system therefore provides:

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

The primary legislation governing employment relationships in New Zealand is the Employment Relations Act

The principal object of the Employment Relations Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by:

- recognising that employment relationships must be built not only on implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour
- acknowledging and addressing the inherent inequality of power in employment relationships

- promoting collective bargaining
- protecting the integrity of individual choice
- promoting mediation as the primary problem solving mechanism (other than for enforcing employment standards)
- reducing the need for judicial intervention.

A further objective is to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Protection of the Right to Organise, and Convention 98 on the Right to Organise and Collective Bargaining.

The legal framework for collective bargaining

Collective bargaining involves the negotiation of wages and conditions by a union with an employer (or multiple employers) on behalf of a group of employees. The Employment Relations Act regulates how collective bargaining is undertaken, as mentioned above; one of its stated objects is to promote collective bargaining.

The duty of good faith applies to bargaining for a collective agreement. This includes setting up a process for conducting bargaining in an effective and efficient manner, considering and responding to proposals made and providing information necessary to substantiate claims and responses, amongst others.

The law provides processes for enterprise level bargaining, between one employer and one or more unions, and for MECA bargaining, between multiple employer and one or more unions. These processes include when a party can initiate bargaining for a collective agreement.

Under recent changes to the Employment Relations Act, employers can no longer opt out of MECA bargaining in every case. Employers must bargain for a MECA if one is initiated by the union, though they do not have to conclude a MECA where they have reasonable grounds for not wanting to do so. Although the Employment Relations Act contains mechanisms for MECA bargaining, there are no specific mechanisms to support industry or occupation-wide collective bargaining. MECA bargaining is distinct from true sector bargaining because unions must have members in each employer and there are practical obstacles to initiating bargaining with so many parties involved.[20]

Institutions supporting the functioning of the ERES system

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

Mediation

Mediation services are the primary problem resolution mechanism to enable parties to resolve problems quickly and to preserve the employment relationship. The Employment Relations Act embodies a general presumption that mediation will be the first avenue for

[20] For example it is not possible to have both a single employer collective agreement (SECA) and MECA at the same time, so unions would have to wait for SECAs to expire or terminate them before seeking a sector-wide MECA.

dispute resolution before any determination-making forum is sought.

Employment Relations Authority

The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. The Authority also ensures recorded settlements are complied with.

Employment Court

The Employment Court has exclusive jurisdiction (and corresponding powers) to deal with a range of employment related issues, including hearing a matter previously determined by the Authority.

Labour Inspectorate

Labour inspectors facilitate and enforce compliance with the employment standards related to statutory requirements. Labour inspectors are charged with determining whether the relevant statutory provisions are being complied with; taking all reasonable steps to ensure such compliance and monitoring and enforcing compliance with employment standards.

Other government agencies have an interest in the system

The government is a significant employer (and funder of services) and therefore a number of government agencies have an interest in the impact of any changes to the ERES system on their employment relationships. These interested agencies include the Ministry for Social Development, Public Services Commission, the Ministry of Health and the Ministry of Education.

Fitness-for-purpose of the ERES system

The fitness-for-purpose of the ERES system was evaluated in 2017. The system was found, overall, to be achieving its objectives.[21] There were some areas that were noted as requiring improvement, for example, it was noted that there are still significant implementation issues to be resolved with holiday pay. A need for ongoing monitoring and evaluation was identified to ensure the system's objectives are achieved, and regulation is fit-for-purpose.

The Labour Inspectorate continues to find uneven compliance with minimum employment standards. The Inspectorate is using additional powers and funding to ensure it operates as an effective regulator on employment standards, and is working closely with regulators in other systems, particularly immigration, to leverage its effort to best effect.

More recently, MBIE has assessed the dispute resolution system and we do not consider this part of the ERES system is meeting its objectives. Demand for dispute resolution services has been growing over time, and the COVID-19 pandemic has exacerbated some existing issues in the system and led to long wait times. A review of the dispute resolution system is planned in the near future.

[21] https://www.mbie.govt.nz/cross-government-functions/regulatory-stewardship/regulatory-systems/employment-relations-and-standards-regulatory-system/

2.3 What is the policy problem or opportunity?

Summary of the problem or opportunity

New Zealand has low per capita GDP growth relative to other developed countries and poor productivity. Wages have not kept pace with labour productivity increases.

Despite existing interventions, there are sectors where employees' wages are low and have not increased or where risks are being passed on to employees through poor employment terms and conditions. These poor outcomes may be driven by imbalances in bargaining power between employers and employees and competitive market dynamics which incentivise firms to compete on labour costs.

Collective bargaining coverage is relatively low, particularly at the multi-employer and industry level. New Zealand's ERES framework does not have an effective mechanism for parties to bargain or to coordinate across an occupation or industry to correct for these poor market dynamics. The Employment Relations Act and the dispute resolution system is not effectively countering imbalance of bargaining power issues.

There is an opportunity to strengthen the bargaining power of employees across the labour market

Our ERES system recognises the inherent imbalance of bargaining power, and FPAs could help to reduce the imbalance

The Employment Relations Act recognises that there is an inherent imbalance of bargaining power between an employee and their employer. One of the objectives of the ERES system is to provide a means to address market failures such as inherent power imbalances and information asymmetries which can lead to exploitation of workers. Imbalances of power make individual bargaining for pay and terms and conditions difficult, and therefore the Employment Relations Act promotes collective bargaining as one way of improving labour market outcomes.

Introducing sector-level coordination in some form would provide workers who are receiving poor labour market outcomes an ability to address the power imbalance and employers with a mechanism to manage inappropriate competitive market dynamics. This tool would be particularly useful given bargaining at the firm level could be difficult in fragmented sectors, and those sectors with low union density.

Employment relationships have inherently monopsonistic tendencies, and there is evidence these tendencies are manifesting in New Zealand

A pure monopsony is when a buyer for a product or service has no competition – in the case of employment relationships, when a worker has only one choice of employer. However, a broader definition incorporates other situations in which market power concentrates in employers: anything that limits the ability of workers to change employers in response to lower wages. Just like a monopoly, the effects of monopsony can vary along a scale from pure monopsony to more mild monopsonistic tendencies. Employers can have monopsonistic power through factors such as high substitutability of workers, travel distance to alternative employers, sunk training costs, non-poaching clauses, social and non-wage aspects of jobs. Workers may lack information, transferable skills, or financial reserves, or be averse to the emotional costs of moving jobs. A recently publicised example of these

dynamics involved labour hire workers whose contracts included anti-poaching clauses which prevented them being hired by their triangular employer for better wages.[22]

Monopsony can be measured by observing the response of workers to wage changes (elasticity). The fewer workers that respond to a reduction in wages by shifting jobs, the greater the evidence that monopsonistic dynamics may be at work. This dynamic was observed in a natural experiment involving legislated wage changes for registered nurses at public hospitals in the United States (the US).[23] A 2018 paper[24] describes varying degrees of elasticity found in studies, many around the level of 1 – meaning that if an employer reduces wage rates by 10%, only 10% of workers would leave (rather than 100% of workers, as the theory would suggest if perfect competition existed). The OECD also noted in 2018 that evidence from the US suggests monopsony power may be higher than previously thought.[25]

The Reserve Bank found in November 2018 that the rate of job-to-job flows in the economy fell post Global Financial Crisis and had not returned to pre-crisis levels.[26] This could indicate that the value of having a job has increased, and means employers may not have to increase wages to the same extent in order to deter turnover. Reduced job-to-job flows is consistent with low wage growth, and could indicate an increase in market power for firms as the risk of losing a worker to a competing firm has fallen slightly.

The effect of monopsonistic power is that the employer can hold wages below the efficient market rate. At that wage, the market quantity of labour is lower than it would be otherwise but the greater marginal profit makes it worthwhile from the monopsonist's perspective. Monopsony is, however, inefficient for the economy as wages fall below the marginal product of labour.

There is room in our ERES system for more coordination

The OECD considers a system that has some form of coordination provides better employment outcomes than a fully decentralised collective bargaining system

Collectivisation can be an important means of improving worker terms and conditions, especially in situations where individual bargaining power is low.

The OECD classified New Zealand as having a fully decentralised collective bargaining system.[27] This means collective bargaining is essentially confined to enterprise level bargaining with little, or (in most cases) no wage coordination across bargaining units within a sector. New Zealand's ERES framework does not have an effective mechanism for parties to bargain or to coordinate across an occupation or industry.

In 2018 the OECD assessed the role of collective bargaining systems for labour market

[22] https://www.stuff.co.nz/business/113639803/shameful-exploitation-of-vulnerable-migrant-workers

[23] Phibbs, C, Spetz, J and Staiger, D (2010). "Is There Monopsony in the Labour Market? Evidence from a Natural Experiment". Journal of Labor Economics, 28(2), 211-236.

[24] Naidu, S., Posner, E., & Weyl, E. G. (2018). Antitrust Remedies for Labor Market Power. *Harvard Law Review*, *132*(2), 536–601. Retrieved from https://harvardlawreview.org/2018/12/antitrust-remedies-for-labor-market-power/

[25] OECD, "OECD Employment Outlook 2018," pg. 111

[26] Karagedikli, O. 2018, Reserve Bank of New Zealand, "Job-to-job flows and inflation: evidence from administrative data in New Zealand", https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Analytical%20notes/2018/an2018-09.pdf?revision=13ef293b-8f52-41ad-ad1b-74966193d6a6

[27] OECD, "OECD Employment Outlook 2018," pg. 81

performance and inclusive growth across 35 member countries. It determined that fully decentralised systems that have replaced sector- with enterprise-level bargaining, without some form of coordination within and across sectors, tend to be associated with poorer labour market outcomes.[28] Out of the 35 countries analysed by the OECD, 21 have some form of coordination across sectors.

The OECD recommended that countries consider adopting a model termed as 'organised decentralisation'. This system provides for sector level bargaining or coordination, but leaves significant flexibility for lower-level agreements to set standards combined with the flexibility to agree the hierarchy of agreements or exemptions. Given our ERES system does not easily allow for sector or occupation-based bargaining or coordination, we have a significant distance to move to meet the OECD's recommendations.

There is qualitative evidence of market dynamics leading to poor outcomes but data is limited

Some sectors may be engaged in a wage 'race to the bottom'

There is some evidence of competitive market structures that are leading to poor outcomes for workers. A 'race to the bottom' is where some businesses attempt to undercut their competitors by reducing the cost of labour. In this situation their competitor businesses feel forced to reduce their labour costs in order to remain competitive. This can suppress worker wages and conditions across an occupation/sector, making it harder for individual employees to negotiate better terms and conditions of employment.

Sectors using tendering models appear to be particularly prone

The 'race to the bottom' effect appears repeatedly in tendering models, which typically focus on awarding a contract based on the most cost-effective (which may often be interpreted as 'lowest cost') model and which require tendering firms to accurately estimate, up front, their costs for the lifetime of the contract. Tendering models also make it more difficult for individuals to bargain with their employers about their terms and conditions as employers may have less flexibility once contracts with the supplier have been negotiated.

This is likely to be exacerbated in sectors where labour costs make up a large proportion of the input cost of a good or service, and therefore competition between businesses is largely on the basis of minimising wage costs. Competition on wage costs is also likely to be more intense when there is little differentiation between products (e.g. a purchaser of cleaning or security guard services may not be able to compare the quality of the competing services).

The situation arguably benefits the consumer of the good or service, which is only achievable through artificially low wages or labour costs. Any intervention which corrects for this distortion of the labour pricing mechanism would be expected to increase final product market prices.

We have heard concerns that the tendering model may be causing a 'race to the bottom' in certain industries such as security services,[29] cleaning, and bus driving services.[30] We briefly explore the issues raised about these sectors in Annex Three.

[28] Ibid. pg. 75

[29] Security Guards Wellington, "Submission to the Parliamentary Education and Workforce Select Committee on the Employment Relations Amendment Bill", https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_76257/tab/submissionsandadvice

The available data has serious limitations, but is not inconsistent with the claims above

We have looked at available data from the Household Labour Force Survey to explore how wages have increased over time and with tenure across the occupations that have reported problematic market structures leading to low wages and labour cost.[31]

There are significant limitations with what the available data is able to prove. For example, where wages grow slowly over time, we do not know if this reflects low or no productivity growth or is evidence of an under payment of wages signalling a 'race to the bottom'. Low wages may be a symptom of a number of problems, of which a 'race to the bottom' is only one. We are not aware of any available data that could prove this causality. There are also limitations with the level of granularity of the data. To ensure the data is statistically representative it can only be reported at ANZSCO level 3, grouping together similar level 6 occupations (level 6 identifies the specific occupation).

Despite these limitations, we have presented in Annex Two the mean and median changes in wages over time, and mean and median wages based on time in the role, for several occupation sub-groups. The data shows relatively low wage growth over time as well as low returns to tenure for some occupations, particularly cleaning and laundry workers, and automobile, rail and bus workers. This could be explained by the relative productivity gains levelling off with experience in the role. Alternatively, it could be more difficult to identify differences in quality related to tenure in service based roles. The gap between the minimum wage and the median wage for three of the occupational sub-groups (cleaners, drivers and food preparation assistants) has narrowed over the period shown, suggesting compression of wages at the lower part of the wage distribution (see Annex Two).

Conclusion: Improvement can be made to the ERES system to correct for inappropriate market dynamics resulting in poor outcomes for some workers

Improvements can be made to our ERES system to correct for the market dynamics which are leading to poor outcomes in some sectors. The ERES system could benefit from an additional collective bargaining tool or mechanism of coordination. Caution needs to be taken in ensuring the tool to coordinate employers and workers across a sector does not have unintended consequences.

2.4 What do stakeholders think about the problem?

A Working Group was commissioned to design the system in mid-2019

The FPA Working Group was commissioned by the Government to make independent recommendations on the scope and design of a system of bargaining to set minimum terms and conditions of employment across industries or occupations. The working group was chaired by the Rt Hon Jim Bolger and consisted of the following members:

Dr Stephen Blumenfeld	Director, Centre for Labour, Employment and Work at Victoria University
Tony Hargood	Chief Executive, Wairarapa-Bush Rugby Union

[30] http://www.scoop.co.nz/stories/BU1811/S00556/ctu-calls-for-solidarity-for-locked-out-waikato-bus-drivers.htm?from-mobile=bottom-link-01

[31] http://archive.stats.govt.nz/browse_for_stats/education_and_training/Tertiary%20education/unistats/products-and-services/household-labour-force-survey-data-package.aspx

Steph Dyhrberg	Partner, Dyhrberg Drayton Employment Law
Kirk Hope	Chief Executive, BusinessNZ
Vicki Lee	Chief Executive, Hospitality NZ
Caroline Mareko	Senior Manager, Communities & Participation, Wellington Region Free Kindergarten Association
John Ryall	National Secretary, E tū
Dr Isabelle Sin	Fellow, Motu Economic and Public Policy Research
Richard Wagstaff	President, New Zealand Council of Trade Unions

The Working Group also consulted the following external experts:

- Doug Martin (Martin Jenkins)
- Paul Conway (Productivity Commission)

The Government also released a discussion document to seek feedback on the design of the system

A consultation on the discussion paper 'Designing a Fair Pay Agreements System' ran between 17 October and 27 November 2019. The discussion paper sought views on specific questions relating to the detailed design of an FPA system. The paper provided an overview of the problem definition and intervention logic of the system, but did not directly seek submitters' views on these topics. Nevertheless many submissions commented on the overall merits (or risks) of an FPA system.

Many submitters described problems in the labour market, though the definition and evidence of 'problematic outcomes' were also questioned

Many submitters (particularly individual workers) described how the terms and conditions provided to many workers fail to live up to reasonable standards of fairness (e.g. unsatisfactory wages, irregular or inadequate hours of work). More broadly, submitters described how poor working conditions negatively impact productivity, economic growth, and the wellbeing of individuals, families, and society more broadly. The general consensus among these submitters was that these poor outcomes would not exist if workers had adequate bargaining power or regulatory support to leverage fair treatment from their employers.

Some submitters questioned the intervention logic presented in favour of FPAs. These submitters argued that the FPAWG report and the FPA discussion document rely on spurious or misrepresented data and research to justify the intervention – particularly the OECD's findings on the relative merits of different collective bargaining systems along a spectrum of centralisation and coordination. Many employers questioned the characterisation of some outcomes – such as low pay in certain entry-level 'foothold' jobs – as problematic.

MBIE agrees that there is some evidence of low and stagnant wages in some industries and deteriorating terms and conditions of employment.

Submitters debated whether problematic outcomes in the labour market can be linked to a regulatory gap or if existing mechanisms are sufficient

A large number of submitters (predominantly unions, workers and community groups) noted the need for the ERES system to minimise the imbalance of bargaining power between workers and employers. They argued that New Zealand's current enterprise-based collective bargaining mechanisms fail to achieve this. These submitters argued that this problem is particularly acute in sectors where union membership is low, structural inequalities exist based on ethnicity or gender, workers are isolated, jobs are short-term or insecure, or where employers are hostile to unions. A mechanism for setting a level playing field in such cases was described as a gap in the ERES system. There was a particular emphasis on the abolition of awards through the Employment Contracts Act 1991, which some submitters said fostered market-led competition on wages (rather than on the purpose and quality of businesses) and encouraged a commodification of labour at the expense of workers.

Many employer-perspective submitters argued that the labour market is performing well by most measures, that the ERES system currently provides sufficient mechanisms to address poor labour market outcomes where they do exist, and that a regulatory gap therefore does not exist. Such submitters frequently emphasised New Zealand's high minimum wage relative to the median wage (especially the increase to $20) particularly in comparison to other OECD countries.

MBIE's view is that enterprise-based collective bargaining mechanisms are not working effectively to reduce the imbalance of power between workers and employers in all sectors/occupations. As a result, there is room in the ERES system for more sector-level coordination. Increases to the minimum wage have been effective at raising income for a small group of low earners, but the minimum wage is ultimately a relatively blunt tool for improving outcomes for workers and by its nature is not tailored to the needs of each sector or occupation.

Submitters were polarised on the potential risks and benefits of FPAs as an intervention

Supporters of the FPA proposals argued that FPAs would set a level playing field that would address income inequality and poverty (and their social externalities). They claimed that sectoral coordination would give workers the bargaining power to address unfair, unsafe, demoralising, and ultimately unproductive wages and working conditions, and in doing so, promote broader productivity and economic growth. Supporters largely endorsed the findings of the FPAWG report, with some placing greater emphasis on potential for FPAs to address health and safety issues and structural inequality based on sex and ethnicity.

However, some other submitters (predominantly employers and employer associations) argued that the intervention logic presented by the FPAWG report and FPA discussion document fails to justify FPAs as the most appropriate intervention (for the problems that do exist). They argued FPAs would create a costly and complex system whose negative outcomes would outweigh any potential benefits.

Those submitters highlighted a range of risks presented by the FPA proposals, principally:

- impacts on productivity and international competitiveness
- the stifling of innovation and flexibility when they are needed more than ever
- the complexity and cost of the system (for both employers and government)
- the compromised quality of industrial relations
- anti-competitive behaviour or unfair terms for small businesses

- the disemployment effects of higher labour costs
- the inflationary effects of higher labour costs
- the potential inconsistencies with the right to freedom of association (or non-association)
- the potential inconsistencies with International Labour Organisation protocols.

MBIE agrees there are a number of risks associated with the proposed FPA system. We consider that the proposed FPA system is not adequately targeted at relevant labour market problems and as such, is concerned that the benefits achieved may not outweigh the potential risks.

Population implications

The factors correlated with earning a low wage include: being a woman, being between 16–29 years old, and being non-European.[32] In addition, women, Māori, Pacific peoples, and young people are disproportionately on minimum wages. Disabled people experience significant disadvantage in the labour market, which includes earning less than non-disabled workers (by more than $3 per hour at the mean).

People who fall within more than one of these groups (e.g. disabled young Māori women) are more likely to experience barriers to fair pay as the different forms of discrimination/bias intersect and compound. Wahine Māori are more likely to be earning the minimum wage compared to wahine non-Māori (3.9% compared to 3.4%) and Tāne Māori (3.9% compared to 2.8%). Similarly, wahine Māori are more likely to be on a low wage compared to wahine non-Māori (43.5% compared to 32.6%) and Tāne Māori (43.5% compared to 32.7%).[33]

We undertook some targeted engagement with Māori, Pacific, women, and young people during the consultation on the discussion document, primarily through unions. The people we consulted with were largely supportive of FPAs.

Submissions from representative groups outlined concerns regarding the poorer working conditions experienced by the populations they represent. In particular:

- NZCTU Women's Council described problems faced by women in the labour market which could be addressed by FPAs, including the inability to access flexible working hours or paid parental leave, inappropriate staffing levels in occupations where isolated women are more vulnerable (e.g. security), and access to toilets and toilet stops (e.g. in the transport sector).
- NZCTU Rūnanga indicated that Māori are overrepresented in jobs where liveable pay rates, job security, health and safety, and upskilling are lacking.
- NZCTU Komiti Pasefika noted the disproportionate number of Pacific peoples in sectors with poor outcomes.
- NZCTU's youth branch, StandUp, raised a particular issue around the prevalence of unpaid internships. They believed that FPAs could include training rates and career opportunities (such as qualifications).

If FPA agreements are concluded in sectors that disproportionally impact on these population

[32] For the purposes of this analysis we have defined a low wage as anyone paid less than $22.68, being 120% of the minimum wage of $18.90 per hour during the June quarter of 2020.

[33] Note access to the data used to generate these figures was provided by Stats NZ under conditions designed to give effect to the security and confidentiality provisions of the Statistics Act 1975. The results presented in this study are the work of the author (MBIE), not Stats NZ or individual data suppliers.

groups then it is likely that pay and condition for these workers will improve if they are already in work.

It is possible that FPAs could lead to employers choosing to hire fewer people or reducing hours of work. Any disemployment effects could also disproportionally impact these population groups.

Some small rural/regional employers might find providing the improved terms and conditions set by a FPA difficult, if they were already struggling financially. The ability to include regional variation in FPAs may help mitigate this, if parties identify and agree it is an issue.

Stakeholders have raised concerns that the FPA system will be inconsistent with our International Labour Organisation Obligations

Collective bargaining was endorsed as a fundamental right by all Member States in the ILO Constitution and reaffirmed by the 1998 Declaration of Fundamental Principles and Rights at Work. New Zealand is bound by ILO Convention No 98 (Right to Organise and Collective Bargaining) to "encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

When establishing the FPAWG, Cabinet agreed that industrial action would not be permitted as part of FPA bargaining. The supervisory bodies of the ILO do not generally support a total ban on industrial action. We understand it may be permissible to limit industrial action in four circumstances:

- Where businesses are negotiating an agreement to cover a sector or occupation for the first time (known as a 'first agreement').
- Allowing parties to agree before bargaining commences that they will not use industrial action (known as a 'peace agreement').
- Where a new enterprise would like to commence bargaining with a union prior to engaging any employees (known as a 'Greenfields agreement').
- For certain industries, such as essential services, it may be justifiable and in the public interest to create bargaining systems that involve compulsory arbitration and limit industrial action.

BusinessNZ has raised concerns that the FPA system would not be compliant with New Zealand's international obligations. It argues the FPA proposals breach the ILO's Right to Organise and Collective Bargaining Convention 1949 (C98), to which New Zealand is bound. This convention requires bargaining systems to be consistent with the principle of free and voluntary negotiation.

We discuss the implications of FPAs for our international labour obligations further below in section 6.2.

2.5 What are the objectives sought in relation to the identified problem?

Options have been developed to meet the following objectives:

- Enabling minimum standards to be reflective of the needs of both employees and employers in a sector or occupation, including ensuring the adaptability of employers in the labour market.
- Improving labour market outcomes for workers through addressing competition based on labour costs ('race to the bottom') and industry coordination failures across an occupation or industry.
- Increasing workers' ability to collectively improve their work conditions.

Section 3: Option identification

3.1 What options are available to address the problem?

In this section we discuss the following options:

- **Option 0**: the status quo, taking into account other interventions in the labour market already planned or underway.
- **Option 1**: Lightly modified FPAWG model. Unions and employers bargain to set minimum pay and terms and conditions for workers across a sector or occupation.
- **Option 2**: Modified FPAWG model which only allows specified sectors or occupations with labour market problems to use the bargaining framework.
- **Option 3**: Empower a government body to introduce a limited set of sector-based minimum standards where it establishes that there is a labour market problem, in consultation with employers and unions.
- **Option 4**: Strengthen existing collective bargaining mechanisms to improve employee bargaining power, and proactively assess workforces to see if they meet the criteria to be added to Part 6A of the Employment Relations Act.

Option 0: Status quo

It is possible that changes in the Employment Relations Amendment Act 2018 will encourage greater union density and collective agreement coverage, and therefore the balance of power in certain sectors or occupations might shift slightly towards workers. There is some evidence that the number of multi-employer collective agreements and the share of workers covered by them, has increased as a result of these recent changes.[34]

Other interventions already underway or planned in the labour market and across the economy may also have an impact on the problem in the absence of any FPA intervention. However, we do not think these interventions under the status quo will have a significant impact on the problem definition of reducing the imbalance of bargaining power, increasing coordination, or stopping the 'race to the bottom'.

Temporary employer-assisted work visas [35]

[34] Stephen Blumenfeld, Sue Ryall, Peter Kiely, "Employment Agreements: Bargaining Trends and Employment Law Update 2019/2020", Centre for Labour, Employment and Work (CLEW)

[35] Note that at the time of writing, New Zealand's borders are closed to majority of migrants as a response to Covid-19 (although exemptions may be granted on a case-by-case basis) and sector agreements have been paused. It is uncertain how long these restrictions will last, and how COVID-19 will affect the mix of demand for domestic and migrant labour.

Changes to employer-assisted temporary work visas are being implemented. The changes could help to incentivise employers to invest in increasing productivity and ultimately reduce reliance on lower-skilled temporary migrants. Over-reliance on migrant workers could be artificially supressing the level of wages in particular sectors. These proposed changes could meet some of the objectives of the FPA intervention, although only in sectors where employers tend to rely on migrant labour.

Increases to the minimum wage

In recent years the Government has significantly increased the minimum wage, which reached a level of $20 per hour on 1 April 2021. Although the impact of the minimum wage increases is not yet clear, the increases could have flow-on effects in the labour market and raise wages for workers, which may meet the objectives of FPAs to some extent. There is some evidence of this flow-on effect occurring, particularly in retail trade and accommodation, and food services.[36]

Recent changes to the Equal Pay Act 1972

The Government has recently passed changes to the Equal Pay Act through the Equal Pay Amendment Act 2020 to improve the process for raising pay equity claims. An employee or union can raise a pay equity claim if they consider that there are factors that indicate their work (or the work of union members) is currently or has historically been undervalued.

The pay equity process is focussed on addressing systemic sex-based discrimination. Under the Equal Pay Act, parties must undertake an assessment process of the claimant's work and the work of comparators to determine whether there is sex-based undervaluation, and then bargain to agree on what remuneration free from sex-based discrimination would be.

There could conceivably be some overlap between sectors or occupations bargaining for an FPA and those working through a pay equity claim. For example, if the FPA was being bargained in a sector which was predominantly female and where there were occupations in coverage where pay equity claims had been raised. It will be necessary to make clear the different circumstances in which a pay equity claim could be raised as opposed to an FPA agreement.

Where pay equity settlements are reached they could increase wages and improve terms and conditions in those occupations (if the parties agreed to this). However, there is no extension mechanism to apply the terms outside of the parties who were involved in the claim (i.e. the union(s)/employee(s) and the employer(s) against which the claim was made).

Screen Industry Workers Bill

The Screen Industry Workers Bill (SIWB) is awaiting its second reading in Parliament. It introduces a workplace relations system for contractors in the screen industry. An element of this is a collective bargaining framework allowing occupation-wide collective contracts to be negotiated in the screen industry. The SIWB is the result of the Film Industry Working Group's recommendations on a bespoke workplace relations system which received industry support from both worker and employer/engager organisations. It also reflects the unique position of contractors doing screen production work—who cannot challenge their employment status as a means of accessing employment rights—that this Government

[36] MBIE, National Survey of Employers 2017-18, https://www.mbie.govt.nz/business-and-employment/employment-and-skills/labour-market-reports-data-and-analysis/national-survey-of-employers/

has committed to addressing.

If FPAs were to apply to both contractors and employees, that would have implications for the screen sector bargaining framework, which is designed specifically for contractors in that industry.

Review of the Holidays Act 2003

A Working Group has undertaken a review of the Holidays Act. The Government intends to make changes to the Holidays Act in response to the Group's recommendations. As with any changes to minimum employment standard regulation, this will impact an FPA system by altering the baseline from which agreements will be negotiated.

Strengthening legal protections for contractors

The Government has publicly consulted on options for strengthening the legal protections for contractors. The Government is considering its response to the consultation.

Although contractors will not be initially included in the FPA system, the Government has signalled an intention to include contractors in the near future. Including contractors in the FPA system in future will need to take into account complementary work programmes. There are inter-dependencies between the contractor work stream and any decisions about the treatment of contractors in FPAs. Policy options in the contractors work stream could lower risks of regulatory arbitrage in FPAs, and decisions about the treatment of contractors in FPAs could constrain choices in the contractor space.

Option 1: Lightly modified FPAWG model – bargained sector wide collective agreements (Government's proposed model)

The FPAWG recommended a model of collective bargaining across an occupation or industry.[37] The Government has adopted this model with some modifications. See Annex One for a diagram of the model.

The key design features of the model are:

- The process could only be started by workers for the first initiation. There would be two possible ways into the FPA bargaining system through a representative test of either 1,000 or 10% of all affected workers, whichever is lower. Alternatively, parties could initiate bargaining through a public interest test, based on factors to be set in law. We anticipate this would enable many FPAs to be negotiated at once.
- Parties would negotiate which occupation(s) or sector(s) should be included.
- The system will only set pay and terms and conditions for employees (not contractors).[38]
- Employers and employees would be bound by the resulting FPA regardless of whether they had participated in the process or not.
- The legislation would specify 'mandatory to agree' and 'mandatory to discuss' topics for FPAs. The mandatory to agree topics are base wage rates, how wage rates will be adjusted, whether superannuation contributions are included in base

[37] The Working Group's report and their full recommendations are available here: https://www.mbie.govt.nz/assets/695e21c9c3/working-group-report.pdf.

[38] The Minister intends to incorporate contractors into the FPA system in the near future.

wage rates, ordinary hours, overtime, penalty rates, coverage, duration of the FPA and governance arrangements. The mandatory to discuss topics are redundancy, leave entitlements, objectives of the FPA, skills and training, health and safety, and flexible working.

- Affected parties would be represented by unions and employer representatives. BusinessNZ would be the default bargaining representative for employers in the event that no employer organisation was willing to be bargaining representative.
- Negotiations will be supported by good-faith bargaining, an independent facilitator, and government-funded dispute resolution processes. No strikes or lock-outs would be permitted.
- FPAs will be put in place either through ratification by a majority of workers and employers, or by an Employment Relations Authority determination if an agreement cannot be reached.
- Before FPAs go to ratification they would subject to a vetting process by the Employment Relations Authority to ensure the FPA complies with the requirements of the FPA legislation, minimum employment standards and is not otherwise contrary to law. This would not be required for an FPA determined by the Authority.
- Once FPAs had been vetted or determined, they would be referred to MBIE who would bring them into force through secondary legislation.
- Once in force, FPAs would bind the relevant sector or occupation. Bargaining parties could potentially include regional variations and exemptions for employers facing severe financial hardship (with a limit of 12 months).

How does this option achieve the objectives?

In theory, minimum standards established through bargaining would be reflective of the needs of most employers and employees in the occupation/sector. However, the inability for employers to opt out and the low threshold for initiation means there is a chance that it could be used in situations where the overall costs of additional constraints on employers are higher than the overall benefits to workers. There is also a significant potential for determined FPAs which may not meet the needs of both sides.

This option would likely be effective at improving labour market outcomes for workers through addressing competition based on labour costs and industry coordination failures.

This option would also be highly effective at increasing the ability of workers to collective improve their work conditions.

Option 2: Modified FPAWG Model

Option 2 involves modifications to the FPAWG to target the use of the system to sectors or occupations with a labour market problem. Compared to option 1, the main differences are the proactive listing of sectors or occupations which can utilise the system, higher representation test thresholds, and more focussed mandatory topics to agree. We set out a full list of differences below:

- Eligible workforces would be proactively specified in regulations following a proactive assessment of the public interest test. The public interest test could include an assessment of the evidence of problematic outcomes for employees in the sector and evidence that more sectoral coordination could be beneficial. This would result in fewer FPAs being negotiated and concluded compared to option 1.

This feature is relevant to the feedback received regarding the problem definition and the expectations around what problems FPAs could fix, as it requires a more detailed analysis of the nature of problems in a particular sector and whether FPAs could address them.

- The representation threshold would be increased to 20% with no threshold which involved an absolute number of workers (i.e. the 1,000 worker threshold in option 1 is removed).
- Both a public interest test and a representation threshold would be required before an FPA can be initiated (i.e. the workforce would first need to be specified as eligible to use the system and it would need to meet the representation test).
- The system would specify a set of 'mandatory to agree' topics that each FPA must contain; and 'mandatory to discuss' topics that bargaining parties must consider as part of the bargaining negotiation, but do not need to include in the FPA. The mandatory to agree topics would be narrowly focussed on pay, and would not include terms not already included in minimum employment standards such as overtime and penal rates.
- Once an FPA was ratified or determined, it would be referred to the Minister for Workplace Relations and Safety to bring the FPA into force through regulations. This would ensure that the process of bringing FPAs into force would be subject to a higher degree of democratic accountability than option 1, which would reflect the significant impact that FPAs will have on the labour market.

How does the option achieve the objectives?

Minimum standards established through bargaining would be reflective of the needs of the sector, but there is a significant potential for determined FPAs which may not meet the needs of both sides. The restriction to eligible workforces will make it more likely it is used in occupations/industries where the overall benefits to workers outweigh the overall costs to employers.

To the extent that sectors or occupations with a 'race to the bottom' met the initiation tests, this option would likely be effective at improving labour market outcomes for workers through addressing competition based on labour costs and industry coordination failures.

This option would improve the collectivisation of workers for those sectors or occupations eligible to use the system.

Option 3: Set targeted sector-based minimum employment standards where there are problematic outcomes for employees, in consultation with social partners (MBIE's preferred option in combination with option 4)

This system could set sector-based minimum standards in sectors or occupations where there was evidence of problematic competitive practices that are driving poor terms and conditions for workers in the sector. The difference between this option and option 1 and 2 is that the government would be setting the minimum standards in consultation with social partners, whereas in options 1 and 2 the minimum standards would be agreed through collective bargaining or set by the Employment Relations Authority if parties cannot agree.

The government body could proactively and reactively assess occupations or sectors

Under this option a government body could proactively assess occupations or sectors that may be experiencing labour market problems such as poor terms and conditions. Where evidence supports that there is a case for intervention (where evidence of poor competitive practices and poor worker outcomes exists), a process with interested employers and

unions could commence to establish minimum employment standards to address the labour market problems. A government body would make a determination on the contents and ensure it meets the objectives of the legislation. At the final stage, the government body could either be empowered to make secondary legislation establishing the standards, or the government body could make a recommendation to the Minister for Workplace Relations and Safety to make regulations establishing the new standards.

Alongside proactive assessment of occupations and sectors, criteria could be established where unions, workers or employers of an occupation could request to identify their occupation as one that may need sector minimum standards. This would essentially direct the statutory body to which occupations may need assessment and verification of labour market problems.

This option is not as well developed as the Government's proposed model, and we would need to do further policy work and consult with stakeholders before the Government could proceed with this approach.

Similarities with the Modern Awards system

This would be a targeted version of the Australian system of Modern Awards. It would set sector-based standards that would create a new 'floor' that sits above legislated minimum employment standards.

The first Australian Modern Awards were created by rationalising previous state-based awards, so there is no direct comparator to New Zealand's situation where the first agreements would be created and consulted on from a blank slate.

The Australian Modern Awards approach was not favoured by the FPAWG: in particular the union representatives on the FPAWG were not in favour of any approach that did not allow the parties to bargain the terms and conditions of employment.

How does the option achieve the objectives?

The targeted minimum standards would be designed in consultation with stakeholders but would ultimately be set by the government. The consultation process should ensure that the resulting standards were reflective of the needs of the occupation/sector and that the overall benefits to employees outweighed the overall costs to employers

This option would likely be effective at improving labour market outcomes for workers through addressing competition based on labour costs and industry coordination failures. However, the option would only be effective to the extent that the government body investigating the relevant labour market determined there was a problem requiring intervention.

Although the minimum standards would be created in consultation with stakeholders, this option would not be effective at increasing the collectivisation of workers.

Option 4: Strengthen existing mechanisms (MBIE's preferred option in combination with option 3)

This option proposes to leverage off the existing ERES system to remove barriers to collective bargaining, increase union membership and improve outcomes for workers.

Remove barriers to greater take up of MECAs

This option proposes encouraging the use of MECAs as a way to deliver cross-occupation or sector-wide collective agreements with broader coverage.

The process for negotiating a MECA could be made easier. Currently a single employer collective agreement and a MECA are mutually exclusive, and so a party cannot initiate collective bargaining for a MECA until close to the expiry of any enterprise level agreements or MECAs. This creates practical difficulties for parties wanting to initiate a MECA, as they must ensure the expiration dates of existing agreements align. This option could allow bargaining for a MECA where an existing enterprise level agreement already exists (despite it not have expired yet).

Increase bargaining capability (non-regulatory option)

Bargaining capability training could also be provided to build the capability of employers and unions and to foster constructive and efficient dialogue during bargaining. Funding could also be provided to support the development of unions and business representative bodies across industries and sectors so that social dialogue is encouraged.

Proactively assess whether occupations that are experiencing poor outcomes from tendering practices should receive the protections afforded to vulnerable employees under Part 6A

Part 6A of the Employment Relations Act provides protections for vulnerable workers on the sale or transfer of a business. Specifically subpart 1 obliges employers who take over a contract (the incoming employer) to take on the employees from the previous employer (the outgoing employer). The incoming employer is obliged to maintain all employees' existing employment terms, conditions and entitlements.

A key driver behind this legislation was to prevent the competitive tendering process from undermining the terms and conditions of employees who were subject to frequent restructuring, and who lacked the bargaining power to necessarily negotiate favourable outcomes each time their contracts of employment were renewed.

The existing system relies on workers knowing about the provision and applying to be added to Schedule 1A. Where there is no union presence or low union presence there may be an information gap or lack of incentives to go through the application process. There have only ever been three Part 6A applications to the Minister, two of which were unsuccessful and one application (in relation to security officers) which has been approved and will soon be added to Schedule 1A.

Under this option, a government body could proactively assess whether occupations experiencing poor outcomes from frequent restructuring should be captured by Part 6A, instead of relying on groups applying to be added to Schedule 1A.

A 2012 review of Part 6A found that "although this legislation seems overly complex and imposes costs on, and reduces flexibility for, some employers, the benefits of having special continuity of employment protections for certain workers outweigh these costs."[39]

How does the option achieve the objectives?

This option would not affect minimum standards so it would have no effect on the objective of ensuring minimum standards were reflective of the needs of the sector.

[39] Ministry of Business, Innovation and Employment, "Employment Relations Act 2000: Review of Part 6A: Continuity of Employment", October 2012, p.11

Proactively applying Part 6A to workforces who met the criteria would prevent wages and terms and conditions from being further undermined, and would therefore improve labour market outcomes for some workers.

This option would also increase the ability of workers to collectively improve their work conditions by increasing collective bargaining capability and removing barriers to the wider adoption of MECAs.

In developing feasible options, we have looked at relevant experiences from other countries

We have looked at comparator countries to understand what types of collective bargaining and coordination models deliver good labour market outcomes. However, due to different societal factors, it is not as simple as lifting and shifting a model to suit New Zealand's circumstances. While we can learn lessons and seek to replicate aspects of well-performing models, we need to recognise New Zealand's existing legislative framework as the starting point as well as New Zealand's societal factors, such as low union density and coverage, low sectoral coordination and levels of existing social dialogue.

For example, in section 3.3 we have disregarded options that we do not think are feasible for New Zealand's conditions, such as extension bargaining. An extension bargaining system would involve a mechanism for extending a MECA that reaches a certain threshold of coverage across an occupation or sector to the remainder of the sector. The threshold is usually 50%, which means this mechanism, based on New Zealand's low existing MECA coverage, would have little impact.

3.2 What criteria, in addition to monetary costs and benefits have been used to assess the likely impacts of the options under consideration?

The options have been assessed using the following criteria:

Criteria
• Effectiveness in improving outcomes for workers: the extent to which the model achieves the objective of improving workers' labour market outcomes by addressing the imbalance of bargaining power between employees and employers. The intervention may also reduce instances of inappropriate risk transfers (e.g. unpaid split shifts for workers to manage peaks in demand or undercompensated work at anti-social hours). • Effectiveness in preserving adaptability of employers in the labour market: the extent to which the model achieves the second objective, so that firms can adapt flexibly to shocks in the market and innovative practices are not restricted. • Efficiency: this includes the compliance and regulatory costs of the intervention. This also assess the extent to which the intervention is appropriately targeted and proportionate to the scale of the problem. • Consistency with the ERES regulatory system and domestic/international obligations: an assessment of whether the approach is consistent with the principles of the existing ERES system. Consistency with the current system will lower the cost of complying with additional requirements. Parties will already be familiar with the current system so consistency will reduce design, implementation and enforcement costs. It is also important that the options comply with New Zealand's domestic human rights regime and our international labour obligations.

There is likely to be a trade-off between effectiveness in improving outcomes for workers and effectiveness in preserving adaptability of employers in the labour market, though there could be some changes that can achieve both aims. Higher wages for employees are a transfer from employers, and other improvements to terms and conditions are likely to generate significant costs for employers and reduce their flexibility.

3.3 What other options have been ruled out of scope, or not considered, and why?

Voluntary sector-based FPA bargaining system

Under this model, employers could choose to opt-in at the beginning and opt-out at the end. Industrial action could be allowed. The triggers for initiation could be strengthened, but because employers can opt-out at the beginning of negotiations this change would be optional. The FPA would become akin to a voluntary industry standard, which could have a flow on impact to those employers who choose not to follow it. This option was preferred by Business NZ.

We do not consider this is sufficiently different from the status quo (MECAs). Given it would not establish a binding standard across a sector or occupation this option would be unlikely to have a significant impact on the bargaining power of workers. It would also not be effective at addressing the 'race to the bottom' problem because employers could simply choose to opt out.

Extension bargaining

An extension bargaining system would involve a mechanism for extending a MECA that reaches a certain threshold of coverage across an occupation or sector to the remainder of the sector. Internationally, the threshold is typically set at around 50%, unless there is a good reason for a lower threshold. For example, where collectively organising can be difficult for a group of workers due to the precarious nature of their work the threshold may be set much lower. This would not be able to be used in the majority of the sectors of the New Zealand labour market due to existing low union coverage. The sectors that may achieve 50% coverage are those that already have strong coverage across union and non-union workers, such as the health sector, and arguably would not need the mechanism.

Strengthen collectivisation through an opt-out union membership model

One option would be to encourage greater collectivisation through moving to an opt-out union membership model. This would involve employees automatically being signed up to the union when they join a workplace (if it had a union) unless they opted out. This would reverse the current opt-in system which means employees do not become union members unless they make an active choice to sign up. A 2018 academic article suggests there are a significant number of employees in New Zealand who would like to join a union but are not members, possibly because there is no union presence at their workplace or because they had never been asked to join. [40] It also argues that an opt-out model would have the effect of increasing union membership and would partially internalise the positive externalities of unions, without impinging on employees' freedom not to associate if they wished.

Moving to an opt-out model would be a significant change to New Zealand's ERES system. It would likely be criticised for impinging on employees' freedom of (non-) association

[40] Mark Harcourt, Gregor Call, Rinu Vimal Kumar, Richard Croucher, "A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation", *Industrial Law Journal*, 2018

rights, although these would be no greater than the risks created by the design of the FPA system. This option could increase the level of collective bargaining at an enterprise or multi-enterprise level. However, it would not necessarily address the opportunity identified in the problem definition for more coordinated bargaining across a sector and, depending on the level of collective bargaining it promotes, it may not be effective at improving outcomes for workers.

Assess whether additional national minimum employment standards would be the most appropriate mechanism to address poor employment outcomes

Some of the poor employment outcomes that vulnerable employees face could be addressed through adding minimum standards to the employment standards and employment relations framework.

Some areas that could be regulated include:

- Providing for a maximum number of hours of work per day or week. Some jobs require employees to work long shifts which may be detrimental to an employee's health and safety, productivity and wellbeing.
- Providing for penal rates for over-time work, weekend work or split shifts. Some workers are required to take a break of up to four hours in their working day to ensure they are working during periods of high demand. They are not compensated for this time, even though they are limited in terms of what they could feasibly do with their time off.

This would ensure all employees receive the protections afforded by the minimum employment standard. However, because there are many working conditions that are unique to specific sectors or occupations, applying one standard risks negatively impacting practices that work well for both parties. For example, some workers would rather work three 12-hour days in a row and get the next four days off work. Furthermore, because a minimum standard needs to be workable across all workplaces, it may be set at a level that does not adequately address the problem. Rather, industry-specific standards could provide a more targeted and fit-for-purpose response to address sector or occupation-specific needs.

This is different from option 3 above because it is not targeted minimum standards to address a labour market problem in a particular sector or occupation. Rather this would create new minimum standards across the whole labour market.

Certification scheme for employers

A possible non-regulatory intervention could be for the government to encourage or run a scheme for the certification of employers who achieve a higher standard. It may be that businesses and consumers want to support companies who pay their staff more than the legal minimum, but there is a significant information asymmetry, as purchasers do not have information on the producing firm's labour practices. An accreditation scheme could help purchasers of goods and services (either businesses or consumers) to differentiate between otherwise similar products in the market, reward businesses who were meeting higher standards, and encourage a 'race to the top'. The system could be modelled on the QualMark accreditation system in the tourism industry. There is evidence that consumers are showing an increasing desire to purchase socially and environmentally sustainable products and services.

It is difficult to estimate the impact of such a scheme, and it would be difficult to define a

‘good’ employer who might be worthy of inclusion. The Living Wage accreditation system arguably already fulfils this role, but the number of businesses who have received accreditation is small. We consider other possible interventions will have more impact and should be pursued ahead of an accreditation system.

Section 4: Impact Analysis

We have conducted a qualitative impact assessment as we have limited cost data to compare options in comparable units. Where cost data is available, we have included it in section 5.2.

Marginal impact: How does each of the options identified in section 3.1 compare with taking no action under each of the criteria set out in section 3.2?

		Government's proposed model		MBIE's preferred model	
	Status quo	**Option 1: Lightly-modified FPAWG model**	**Option 2: Modified FPAWG model (targeted at a limited number of sectors with labour market problems)**	**Option 3: Set targeted minimum sector employment standards in consultation with employers and unions**	**Option 4: Strengthening existing mechanisms (e.g. MECAs, Part 6A)**
Effectiveness in improving outcomes for workers	**0**	**++ overall rating** ++ for workers where initiated – – For displaced workers This would be effective at providing bargaining tools for workers to collectively improve their work conditions and would reduce the imbalance of power in many sectors or occupations that meet one of the initiation thresholds. FPAs should result in improved terms and conditions such as pay for workers whose current terms and conditions are below the bargained minima. No direct change for workers whose terms and conditions are above the bargained minima. An FPA could result in lower employment/reduced hours for existing workers if bargained increases/changes mean employers cannot retain competitiveness or increase the use of capital to reduce the use of relatively more expensive labour. The impact is greater than the other options because under this option FPAs could cover a large number of sectors or occupations.	**+ overall rating** + for workers with some coordinated representation – For displaced workers This would be effective at providing bargaining tools for reducing the imbalance of power in sectors that are eligible and meet the initiation threshold (which is a higher threshold than option 1). Where an FPA is bargained, it should result in improved terms and conditions such as pay for workers whose current terms and conditions are below the bargained minima. No direct change for workers whose terms and conditions are above the bargained minima. Would not be effective in improving outcomes for workers in sectors with little coordinated representation that cannot reach the 20% threshold. An FPA could result in lower employment/reduced hours if bargained increases/changes mean employers cannot retain competitiveness or increase use of capital to reduce the use of relatively more expensive labour. This risk is lower than in option 1 as the potential disemployment effects could potentially be taken into account when pre-selecting eligible workforces in regulations.	**+ overall rating** + for workers in identified sectors – For displaced workers Intervention would only occur where there is evidence of labour market problems in that sector, irrespective of the level of representation (removing the representation threshold barriers under options 1 and 2).This would lead to improved outcomes for workers in the specified sectors whose current terms and conditions are below the agreed minima. No direct change for workers whose terms and conditions are above the agreed minima. Intervention could result in lower employment/reduced hours if bargained increases/changes mean employers cannot retain competitiveness, or increase use of capital to reduce the use of relatively more expensive labour. This risk is lower than options 1 and 2 as the potential disemployment effects could be taken into account as part of the policy process. Although workers would be consulted in the development of standards, this would not increase the collectivisation of workers.	**+ overall rating** + for workers covered by strengthened mechanisms **0 to –** For displaced workers MECAs would most likely be used in sectors where there is an established union presence to improve outcomes for union members. However, this option is less likely to be effective at redressing the imbalance of bargaining power in sectors with low union density, and would only moderately increase the collectivisation of workers. Where occupational groups are added to Schedule 1A and receive the protections of continuity of employment on the same terms and conditions, it will mean their terms and conditions should not decrease over time. However, this does not necessarily mean wages will increase. There is a small risk that the intervention could result in lower employment if bargained increases/changes mean employers cannot retain competitiveness, or increase use of capital to reduce the use of relatively more expensive labour.
Effectiveness in preserving adaptability of employers in labour market	**0**	**– –** Due to low initiation barriers, this option is likely to result in many FPAs. FPA bargaining or a determination is likely to result in an increase in labour costs for employers within coverage. The impact of wage increases would depend on the outcome of bargaining, and the ability for employers (that may differ in size, composition etc) to have their positions represented. Where parties cannot agree, the wage will be determined by the Employment Relations Authority. The mandatory scope of the FPA is broad, including hours of work and penalty rates, which is likely to result in reduced business flexibility and high compliance costs dealing with multiple FPAs. This may have impacts on new and existing businesses being able to adopt different business models. It will be difficult to establish ahead of time whether an agreed or determined FPA will have a negative impact on the labour market or other markets for products or services. As a result of FPA wage increases, employers may also face higher costs as they address flow-on relativity implications for workers not within coverage of the FPA.	**– – to –** The Minister's role specifying eligible workforces in regulation would limit the number of FPAs that can be initiated to occupations or sectors where there are labour market problems. Initiating parties would then need to meet representation threshold too. This will likely result in fewer FPAs than Option 1. This option would allow some exemptions and regional variations and therefore somewhat preserves the adaptability of employers. The extent of the impact of wage shocks depends on what is agreed during bargaining, and the ability for employers (that may differ in size, composition etc) to have their positions represented. Where employers cannot agree, the wage will be determined by an independent body. It will be difficult to establish ahead of time whether an agreed or determined FPA will have a negative impact on the labour market or other markets for products or services. As a result of FPA wage increases, employers may also face higher costs as they address flow-on relativity implications for workers not within coverage of the FPA.	**–** Depending on how they are designed, the scope of the sector minimum standards can be confined to those standards that actually address the observed problems in the occupation. As the final control over the outcome of the minimum standards sits with a government body, it is less likely to include terms and conditions that would substantially impact on employers' adaptability in the labour market. However, any sector-wide changes will reduce flexibility to the extent that it mandates certain terms and conditions be applied, ie a higher wage or penalty rates. As a result of the new minimum standard wage increases, employers may also face higher costs as they address flow-on relativity implications for workers not within coverage of the FPA.	**– to 0** While MECAs may apply to more employers, the agreed terms should be acceptable to the particular employer. This is because if an employer cannot agree to a MECA, and that reason is based on reasonable grounds, they would not have to settle a MECA (under 2018 changes to the Employment Relations Act). If a group of workers receive the protections afforded by Part 6A this will limit the adaptability of employers who, when winning a contract, will need to take on employees on the same terms and conditions of employment.

		Government's proposed model		MBIE's preferred model	
	Status quo	**Option 1: Lightly-modified FPAWG model**	**Option 2: Modified FPAWG model (targeted at a limited number of sectors with labour market problems)**	**Option 3: Set targeted minimum sector employment standards in consultation with employers and unions**	**Option 4: Strengthening existing mechanisms (e.g. MECAs, Part 6A)**
Efficiency of the system	**0**	**– – overall rating** **– –** fiscal cost **– –** cost to the bargaining parties **– –** appropriately-targeted and proportionate The fiscal costs of this system – including supporting bargaining, dispute resolution and the other functions required to make the system function – will be substantial (approx $40–50 million over four years). There will be costs to parties from engaging in the process but workers are only likely to enter the process if they believe the benefits exceed the costs. Employers will have to participate. The low representation thresholds to entry mean that an occupation or industry with little coordination could initiate bargaining. This would require significant infrastructure to support selected representatives to be able to coordinate and communicate with those they represent across the occupation or industry (or risk implementing a model that does not represent what either employees or employers want). Ratification requires a majority of all employees and employers in the sector, which could be a complex and costly exercise. Paid meetings will be costly and potentially disruptive, and will cover a large number of sectors and workers. This option is not well targeted and may not be proportionate, considering there will be low barriers to entry and the impacts could be significant.	**– overall rating** **– –** fiscal cost **–** cost to the bargaining parties **+** appropriately-targeted and proportionate Overall, compared to option 1, there will be fewer FPAs being negotiated and concluded, reducing the overall costs of the system. The costs to support bargaining, dispute resolution, and new regulatory functions will be somewhat less expensive than option 1 (approx $30–40 million over four years). The Minister specifying the eligible workforces who can initiate should reduce the number of initiated FPAs overall. Nevertheless, the bargaining representatives will need support to be able to coordinate and communicate with those they represent across the occupation or industry (or risk implementing a model that is not representative of the views of most employees or employers). As with option 1, it will be complex and costly to conduct a ratification vote. Paid meetings will be costly and potentially disruptive, but will affect a small number of sectors due to the limited number of eligible workforces able to use the system. This option is better targeted and more proportionate compared to option 1 as a union must meet both the public interest test and representation test before using the system.	**0 to + overall rating** **– to 0** fiscal cost **– to 0** cost to the affected parties **+** appropriately-targeted and proportionate The process could be relatively more streamlined and efficient, as the government can control the length of the process to determine minimum standards. The costs associated with this option would be considerably less than Options 1 and 2. This option risks setting up a system that may not be used if evidence of indicators does not support the conclusion that there are sufficient labour market problems to intervene. There would be some costs to the affected parties from participating in the government's consultation process. This option is well targeted and proportionate, as the government body would investigate whether there was a demonstrable labour market issue before intervening.	**0 to + overall rating** **0** fiscal costs **0** cost to the affected parties **+** appropriately-targeted and proportionate The cost of regulatory change would not be as significant, compared to the other options, as they would tweak existing legislation. There may be some additional costs for bargaining parties but this may be offset to some extent by the reduced costs from fewer enterprise level agreements and greater coordination of bargaining. The interventions are a mix of targeted (in the case of Part 6A) and non-targeted.
Consistency with the existing ERES system and domestic/ international obligations	**0**	**–** Significant inconsistencies. There are ILO risks around voluntary collective bargaining, no right to industrial action during bargaining and freedom of association (which may also have domestic legal risk through inconsistencies with the Bill of Rights). As the threshold to initiation is very low (1,000 workers), there are risks that, in some industries, a relative small group of workers could initiate and require the sector to bargain. In some instances, it may mean the power is not rebalanced, but shifted to employees. Freedom of association restrictions may not be justified with such a low mandate and no necessary evidence of a problem. As Government is effectively delegating their legislative power to bargaining parties (by allowing parties to bargain and bind a sector), there is a risk that it may be seen as an inappropriate delegation of law making powers.	**–** Significant inconsistencies. There are ILO risks around voluntary collective bargaining, no right to industrial action during bargaining and freedom of association (which may also have domestic legal risk through inconsistencies with the Bill of Rights). Limiting the application of the system to only those sectors where there is a demonstrable labour market problem mitigates this issue to some extent, as the system will only be applied where it is in the public interest. This option also has a stronger mandate than option 1 as the initiation threshold is higher. As Government is effectively delegating their legislative power to bargaining parties (by allowing parties to bargain and bind a sector), there is a risk that it may be seen as an inappropriate delegation of law making powers. However, the involvement of the Minister making regulations mitigates this risk to some extent.	**0** Extends the current minimum standards approach, which is traditionally applied universally, to address problems on a sector basis. This option would require high engagement from, and create significant responsibilities for, the social partners. Consistent with domestic human rights and international labour obligations.	**0** Most consistent. Uses existing mechanisms to address problems.
Overall assessment		This is not the preferred option.	This is not the preferred option.	**This is the preferred option in combination with Option 4.**	**This is the preferred option in combination with Option 3.**

Key:

++ much better than doing nothing/the status quo, **+** better than doing nothing/the status quo, **0** about the same as doing nothing/the status quo, **–** worse than doing nothing/the status quo, **– –** much worse than doing nothing/the status quo

Section 5: Conclusions

5.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

MBIE considers that all of the options contain risks, and that the case for the introduction of sector-based compulsory standards is only weakly positive in light of the overall likely benefits and costs.

The Government favours option 1, a lightly modified FPAWG model, where unions and employers would bargain to set minimum standards across an industry or occupation. This model would involve the introduction of a new framework for sector-level collective bargaining and resulting agreements that are given force across employers through regulation. Those who see collective bargaining as the key mechanism for regulating wages, and terms and conditions for work, are likely to prefer this approach.

MBIE's view is that the Government's proposal would be effective at improving the ability for workers to collectively bargain and would ultimately improve labour market outcomes for workers within coverage.

However, the approach has significant downsides and it is unclear if the system would always have net benefits. Option 1 is not well targeted so may be used in sectors not affected by the problems we have identified. If the system had net benefits this may not be an issue, but we are concerned that FPAs may create significant labour market inflexibility and costs for employers and displaced workers when it is used in sectors without a demonstrable labour market issue, which could outweigh the benefits.

Option 1 may not be consistent with the international framework relating to collective bargaining because they require employers to participate in the bargaining process regardless of their preferences; unlike with current collective bargaining once bargaining has started there is no opportunity for employers to opt out. Although the outcome is difficult to predict we anticipate in many cases the system is likely to result in bargaining stalemates and determinations fixing terms by the Employment Relations Authority, so the added benefit of bargaining may be limited. These features are a necessary result of the ban on industrial action combined with the need to ensure the system actually produces effective outcomes.

The proposal also does not reflect our view that collective bargaining works best when both sides see value in the bargaining process and one side does not feel like it has no choice but to agree a bad outcome.[41]

MBIE's preferred approach is to:

- Empower a government body to develop a limited set of sector-or occupation-based minimum standards as a regulatory instrument where certain conditions are met (option 3).
- strengthen existing collective bargaining mechanisms to improve employee bargaining power, improve bargaining capability, and proactively assess whether workforces should receive additional employment protections under Part 6A

[41] The FPAWG report noted that "a bad or ineffective process can lead to a worsening of employment relationships. Employment relationships are ongoing and long-term; ending a bargaining episode with a 'winner' and a 'loser' does not bode well for this ongoing relationship. A bad process can also lead to protracted negotiations, impatience on both sides and industrial disputes". See pp 33–34 of the report.

(option 4).

MBIE's preferred approach would provide a targeted mechanism for addressing sector-specific minimum terms and conditions. It would be effective at improving outcomes for workers while minimising the impact on the adaptability and flexibility of employers. Because the minimum standards would ultimately be determined by a government body or the decision made by the Minister (in consultation with social partners), there would be more checks and balances than a purely bargained process.[42] Although the outcome would not be bargained, stakeholders would be consulted so this approach would still ensure the minimum standards were reflective of the needs of the sector.

In addition, the combined options can assess which regulatory response would be more effective at resolving the identified labour market problem. For example, if the problem identified is actually about the tendering process reducing terms and conditions of workers through frequent restructuring, instead of using minimum standards as the tool, an assessment could be made that applying the additional employment protections of Part 6A would be a more appropriate protection to resolve the observed labour market problems.

The main rationale for MBIE's preferred approach is that it:

- provides a way to address the underlying problems in a way that is more consistent with the current regulatory framework and international requirements relating to collective bargaining,
- is able to be better targeted and uses an analytical process to establish the need for an intervention,
- involves a less complex process and outcomes,
- while it is less likely to lead to cross-sector dialogue about employment issues it reduces the potential for bargaining stalemates

Submitters in favour of an FPA system identified a range of labour market problems that they expected FPAs to address (e.g. poor health and safety conditions, lack of training, irregular or inadequate hours of work). Submitters against an FPA system argued that the costs of setting up and participating in a new system were not justified given existing mechanisms could be used or strengthened to address the same problem(s). MBIE's preferred option also involves a range of employment regulation tools so that the policy solution can be better-matched to the nature of the problem and underlying causes, once the underlying causes are understood. This will ensure that the solution to an identified problem is the most appropriate and cost-effective option available.

We conclude that although all the options would improve outcomes for at least some workers, it is unclear whether they would provide net benefits

While all of the options considered would outperform the status quo in their effectiveness in improving outcomes for at least some workers, MBIE considers that there is considerable uncertainty around our conclusion that there is overall net and proportionate benefit in making the proposed changes.

This risk is mitigated to some extent by the targeted nature of MBIE's model, where a labour market problem must exist before the Government' intervenes. Even so MBIE's

[42] As we have noted elsewhere, this option would require further policy work before being implemented, including important details such as which body would have the final decision making power to make the new sector or occupation minimum standards (a government body versus the Minister).

preferred approach (options 3 and 4) would require more detailed analysis of the market dynamics of the sector before proceeding with further action.

We complete the remaining sections with reference to both option 1 (the Government's proposed option) and the combination of options 3 and 4 (MBIE's preferred approach).

5.2 Summary table of costs and benefits of option 1: the Government's proposed option *(see Annex Four for how figures were calculated)*			
Affected parties	**Comment**	**Impact**	**Evidence certainty**
Additional costs of proposed approach, compared to taking no action NOTE: ongoing costs are based on 8 FPAs per year			
Regulated employees	Collective bargaining costs (which will be at least partially offset by contributions from the government) – *ongoing annual cost*.	*Est $1–2m*	Low
	Costs for displaced workers	*Low*	Low
Regulated employers	Collective bargaining costs (which will be at least partially offset by a contribution from the government) – *ongoing annual cost*.	*Est $1–2m*	Low
	Non-wage costs	Medium to high	Low
	Increased labour costs (including third parties who fund, wholly or partially, the service) which may result in reduced profit or increased prices. For those employers already paying above the level of the FPA there will be little or no impact. – *ongoing annual cost*.	*Est $150–600m for one set of eight FPAs. Ongoing costs would be cumulative.*	Low
Regulators and costs covered by government	Costs of providing bargaining and dispute resolution infrastructure (*ongoing annual cost*). Costs of providing new regulatory functions in the system (*ongoing annual cost*). Cost of additional resources for enforcement Cost of government contribution to peak bodies and bargaining parties	*Est $10–12.5m per year*	Medium
Total monetised cost	Costs of carrying out bargaining (falling on regulated parties) and providing the necessary infrastructure for this (falling on regulators). Note increased labour costs are effectively a transfer to workers (see benefits table below).	Overall costs to government est $10–$12.5m per year, and $2m in capital funding; overall labour costs $150–$600m	Low

Total non-monetised costs	Including costs for displaced workers and non-wage costs for employers.	Medium–high	Low
Expected benefits of proposed approach, compared to taking no action			
Regulated employees	Monetised impacts of marginal increase to wages	*Est $150–600m for one set of 8 FPAs. Ongoing cost would be cumulative.*	Low
	Unmonetised benefits including wellbeing impacts from improved non-wage terms and conditions	Low–high (depending on the marginal improvement and what is bargained)	Low
Regulated employers	More engaged and productive workforce	*Low*	Low
Total monetised benefit	Monetised benefits of increased wages. Note benefits in terms of improved terms and conditions of work are offset by increased labour costs to employers (see costs table above).	*Est $150–600m*	Low
Non-monetised benefits	Benefits including wellbeing improvements from non-wage terms and conditions.	Low–high unmonetised benefits	

5.2 Summary table of costs and benefits of the options 3 and 4 combined: MBIE's preferred option			
Affected parties	**Comment:**	**Impact**	**Evidence certainty**
Additional costs of proposed approach, compared to taking no action			
Regulated employees	Cost of participation in process to determine minimum standards.	*Est $0.5m*	Low
Regulated employers	Cost of participation in process to determine minimum standards.	*Est $0.5m*	Low
	Marginal increase to labour costs (including third parties who fund, wholly or partially, the service).	*Est $40m for one set of three occupations (costs would be cumulative over time)*	Low
	Non-wage costs (unmonetised)	Low–medium	Low

Regulators	Cost of establishing new function to determine where labour market problems are occurring and setting up an independent body to consult and determine minimum standards. Costs of providing new function in the system to assess where intervention is required, consult stakeholders, and establish minimum standards (*ongoing cost*).	*Est $1–2m (one off)* *Est $2.5–5m (ongoing cost)*	Low
Total monetised costs	Monetised increases to labour costs are effectively a transfer to workers (see benefits table below). Other costs relate to the process of participation to determine minimum standards (falling on regulated parties) and providing the necessary infrastructure for this (falling on regulators).	Est $40m in marginal wage costs for one set of three occupations. Overall costs to government *est $2.5–5 per year*	Low
Total un-monetised costs	Unmonetised costs	Low-medium	Low

Expected benefits of proposed approach, compared to taking no action			
Regulated employees	Monetised impact of increased wages	*Est $40m for one set of three occupations (costs would increase cumulatively over time)*	Low
	Unmonetised impact of improvements to non-wage terms and conditions (including wellbeing impacts). This would be highly dependent on the government body's assessment of what intervention is needed.	Low–medium	Low
Regulated employers	More engaged and productive workforce	Low	Low
Total monetised benefits	Marginal increase to wages. Note benefits in terms of improved terms and conditions of work are offset by increased labour costs to employers (see costs table above).	*Est $40m for one set of three occupations (costs would increase cumulatively over time)*	Low

Total unmonetised benefits	Unmonetised benefits including the impact of improvements to non-wage terms and conditions, and wellbeing improvements.	Medium	Low

To calculate the marginal increase in labour costs we adjusted the figures in option 1 down by calculating the impact of a 10% increase in wages for a fifth of workers for only the three lowest paid occupations (see Annex Four for the list of occupations). This adjustment reflects the fact that the minimum standards would be more targeted than under option 1.

The estimates of the cost to establish and operate the new regulatory function are indicative-only and are loosely based on the costs of the Commerce Commission's authorisation functions in relation to the Commerce Act. The budget estimate will need to be reassessed as part of the further work in developing this option.

5.3 What other impacts is this approach likely to have?

Some of the impacts below apply to both the Government's model and MBIE's preferred model. Where we consider the impacts are different we have explicitly noted this.

Employers and employer associations raised concerns about the risks of an FPA system in their submissions

In relation to the Government's proposed option, some submitters (predominantly employers and employer associations) argued FPAs would create a costly and complex system whose negative outcomes would outweigh any potential benefits.

Those submitters highlighted a range of risks presented by the FPA proposals, principally:

- negative impacts on productivity and international competitiveness
- stifling innovation and flexibility when they are needed more than ever
- the complexity and cost of the system (for both employers and government)
- compromising quality of industrial relations
- anti-competitive behaviour or unfair terms for small businesses
- the disemployment effects of higher labour costs
- the inflationary effects of higher labour costs
- the potential inconsistencies with the right to freedom of association (or non-association), and
- the potential inconsistencies with International Labour Organisation protocols.

MBIE agrees there are a number of risks associated with the Government's proposed FPA system. We consider that the proposed FPA system is not adequately targeted at relevant labour market problems and as such, is concerned that the benefits achieved may not outweigh the potential risks.

More coordination could benefit employers

Under both the Government's proposed option and MBIE's preferred approach, employers could benefit from better sector-wide coordination which allows them to maintain workers' terms and conditions without being undercut by competitors on labour costs.

Betters terms and conditions could reduce staff turnover, increase incentives to make investments in human and physical that could make staff more productive and increase the

quality of services. Employers may also benefit from more engaged workers, as employees see that their contribution is valued appropriately and not undermined through poor competitive practices.

BERL[43] has recently cited Brown, in indicating benefits of sector wide bargaining for employers, as well as workers. Brown said the attraction of industry-wide bargaining arrangements comes from their potential to encompass whole product markets at regional or national level.[44] Both unions and employers have appreciated the chance this offers to pass on some of the cost of wage rises in price rises, traditionally referred to as 'taking wages out of competition'. Ireland has seen the desire by industries (for example, the construction sector) to agree sector minimum standards to prevent some employers from driving down terms and conditions. Industry-wide agreements could be used to manage industry-wide training, and may reduce the problem of 'free-riding' employers who do not train their workers.

Current settings for collective bargaining can involve high transaction costs. Sector-level coordination could provide for better outcomes at a lower cost to some employers.

The OECD's Employment Outlook (2018) highlighted the benefits of coordinated systems

The OECD's analysis[45] compares labour market outcomes under different collective bargaining systems relative to the fully decentralised system (like New Zealand's). They concluded that, using country-level data on labour market outcomes across the 35 OECD countries between 1980 and 2016, coordinated systems are shown to be associated with:

- higher employment
- lower unemployment
- a better integration of vulnerable groups (where the unemployment rates of youth, women and low-skilled workers appear to be consistently lower)
- a lower share of involuntary part-time workers, and
- lower wage inequality for full-time employees (noting that enterprise level bargaining is only effective in lowering wage dispersion when it is in addition to sector level bargaining).

The extent to which these benefits would be realised under an FPA system are unclear as there are many variables to consider, including the ultimate design of the FPA system and the economic and labour market conditions of the country.

The 2018 Employment Outlook also noted that there are risks associated with coordinating across sectors that need to be considered

The OECD has noted that centralising and coordinating negotiations over wages and working conditions has a tendency to compress pay differences among workers. As a result, it can weaken the link between individual performance, wages and working conditions. Sector-level bargaining moves the conversation from firm performance to the performance of the sector, and therefore overall industry performance becomes the main factor for pay increases. In doing so, it can take into account macroeconomic performance,

[43] BERL (2019) "Making sense of the number, Sector wage bargaining – a literature review"

[44] Brown, W., Marginson, P., Walsh, J. (2001) "The management of pay as the influence of collective bargaining diminishes"

[45] OECD, "OECD Employment Outlook 2018"

and therefore competitiveness and resilience. However, by the same token, it may also lead to strong rigidities in wages over time, as negotiating partners are less likely to tailor wages to individual firms or worker's needs.[46]

Flattening the distribution of wages through coordination may, while reducing inequality in pay, also negatively affect productivity growth where it leads to lower investment in education. This is because it can reduce the incentives to work hard and move to a more productive firm, harming firm productivity and the efficient reallocation of workers.

The OECD said that stronger wage compression with collective bargaining may reflect a more pronounced misalignment of wages with either a firm or a sector's productivity, because coordination of pay is determined, in part, by factors other than the firm or sector.[47] This may be more pronounced with cross-sector wage coordination. As the Working Group noted, raising wage floors may make capital investments relatively more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation.

Interestingly, while the OECD's paper noted that wage setting in a decentralised system can lead to a higher value add per employee and higher productivity, there may be corresponding reduced aggregate productivity growth due to slowing down the exit of inefficient firms. Overall, as a result, decentralised systems may not lead to higher aggregate productivity growth.

The Economic Division of the OECD also said there may be risks with the FPA Working Group's model if significant freedom to determine terms and conditions at enterprise level was not retained

The OECD commented on introducing FPAs in the 2019 Economic Survey for New Zealand.[48] The OECD said a process to enable parties to negotiate minimum terms and conditions that will apply across a sector or occupation would likely reduce wage inequality, but also reduce productivity growth in sectors covered if significant freedom to determine terms and conditions of employment at the enterprise level is not retained.[49] It could be "organised decentralised" if there is significant room for lower level agreements to set the standards.[50]

Based on cross-country evidence, the OECD Employment Outlook 2018 suggests that the new system could increase employment and reduce wage inequality for full-time employees but lower labour- and multifactor-productivity growth in the covered sectors.[51] The OECD noted that the latter result suggests that lower flexibility at enterprise level, which characterises centralised bargaining systems, may result in lower productivity growth. The OECD Economics Department's structural reform quantification simulator suggests that the reform would reduce GDP per capita in the long run, the more so the greater of extension of agreements.[52]

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[46] Ibid.

[47] Ibid, pg. 91

[48] OECD Economic Surveys: New Zealand 2019

[49] Ibid at pg.11

[50] OECD Economic Surveys: New Zealand 2019, pg. 37

[51] Ibid.

[52] Ibid.

On the other hand, the OECD has also said sector-level agreements that cover small and medium-sized businesses could help spread best practices in terms of personnel management, training, health and safety, technology usage, insurance, or retirement packages.[53] In this regard, FPAs could play a significant role in enhancing labour market security and strengthening workers' labour market adaptability.[54]

There are lessons to be learnt from the impacts of the Care and Support Workers (Pay Equity Settlement) Act 2017 – a cross-sector agreement setting wages and conditions of employment

New Zealand has implemented a cross-sector agreement for wages and terms and some conditions of employment, in the form of the Care and Support Workers (Pay Equity Settlement) Act 2017. This Act was the first intervention of its kind, and introduced unprecedented changes to the sector, aimed at addressing historical gender discrimination across residential aged care, home and community care and disability support sectors. The settlement prescribes pay rates over four levels, depending on length of service or qualifications attained.

The New Zealand Work Research Institute researched the impacts of the pay equity settlement on the quality of life of the workers and managers in the sectors and published a report in early 2019.[55] The key implications for a sector-based approach to setting wages and terms and conditions were:

- Workers had a "dramatic" increase in quality of life due to increased wage rates.
- Increased wages caused tension with other occupations within the same industry.
- Some workers who received the biggest pay increases had their hours reduced over time and were expected to take on more complex job responsibilities to reflect their increase in pay. Some said they were financially worse off as a result of the settlement. Others said they had more work-life balance and were happy to work less hours.
- There were questions over the value of the skills and accreditation system and how it linked to pay. Some providers said workers just got the certificate to get the pay increase but did not have the necessary skills or experience to do the work at the required level. In other cases, experience was not valued as highly as accreditation.
- Some providers said they may not be able to continue to operate in the future.

It is difficult to predict how an FPA system or minimum sector standards will affect the labour market, but studies of minimum and living wage increases provide useful insights

There is no data available to precisely quantify the effect an FPA system or sector standards would have on the labour market in New Zealand. A key result of the intervention will be raised wages (or other working conditions which increase labour costs), so it is possible to draw useful comparisons with the extensive literature on legislated minimum or living wage increases.

<u>Economic theory predicts lower employment as a result of regulated wage increases</u>

The neo-classical model predicts that putting a minimum floor above the equilibrium

[53] Ibid.

[54] Ibid.

[55] New Zealand Work Research Institute, "The Value of Care", 2019

market wage will decrease employment in the labour market. The workers and employers who would be willing to engage each other below the new minimum may be excluded from the labour market.

Workers willing to work at these lower wages could lose a competitive edge (particularly if they are unskilled and cannot compete with higher-paid workers) and they may exit the labour market. Firms who employed workers below the new minimum may not have the willingness or means to pay the new rate, and will either employ fewer people, offer fewer working hours, or exit the market.

Real-world observations of wage increases do not necessarily show the predicted disemployment effects, but this evidence is not conclusive and negative impacts could be distributed elsewhere

A comprehensive review of the minimum wage literature by Dale Belman and Paul Wolfson found little meaningful effect on hours of work and total employment in the United States.[56] A review of evidence across the OECD found little substantial evidence of disemployment effects for low-skilled or young workers.[57]

Modelling done by MBIE indicates that employment effects are only significant when the change in the minimum wage is significantly out of proportion with the average wage, particularly when employment is growing.[58]

A review of the National Minimum Wage in Britain found no strong evidence of negative effects on hours and employment which suggests that employers have adjusted by reducing profits, increasing prices, changing their pay structures or increasing productivity.[59] This link between increased labour costs and higher consumer prices has also been observed in Hungary.[60]

A different study of minimum wage increases in the UK found that reductions in total work hours negated wage increases in terms of total income.[61]

Mobility between jobs may be impacted

The rate of people moving from job-to-job in the economy fell post Global Financial Crisis and has not returned to pre-crisis levels.[62] This could indicate that the value of having a job has increased, and means that firms might not have to increase wages to the same extent in order to deter turnover. This low rate of turnover may be exacerbated through higher remuneration for certain roles; this is because it may reduce incentives to move to a more

[56] Belman, D, and Wolfson, P. (2014). What Does the Minimum Wage Do? Kalamazoo, W.E. Upjohn Institute for Employment Research.

[57] Sturn, S. (2018). Do Minimum Wages Lead to Job Losses? Evidence from OECD Countries on Low-Skilled and Youth Employment. ILR Review, 71(3), 647–675.

[58] Ministry of Business Innovation and Employment. (2018). Minimum Wage Review 2018.

[59] Low Pay Commission. (2019). 20 years of the National Minimum Wage: A history of the UK minimum wage and its effects.

[60] Harasztosi, P and Lindner, A. (2015), Who Pays for the Minimum Wage? Working paper.

[61] Papps, K and Gregg, P. (2014). Beyond the wage: Changes in employment and compensation patterns in response to the national minimum wage. Low Pay Commission.

[62] Karagedikli, O. 2018, Reserve Bank of New Zealand, Job-to-job flows and inflation: evidence from administrative data in New Zealand, https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Analytical%20notes/2018/an2018-09.pdf?revision=13ef293b-8f52-41ad-ad1b-74966193d6a6

productive firm or could lessen incentives to work harder, which could impact the efficient reallocation of workers and firm productivity.

Employers' ability to adapt to changes in the labour market may be restricted

As mentioned in the analysis table above, FPAs or sector-based standards could impact the flexibility of the particular occupations/sectors where they occur, which may lock-in business models and make it more difficult for new players to enter the market. Some employers may struggle to meet the new terms or standards, possibly resulting in a reduction in competition, job losses, product market price increases and/or a reduction in productivity.

This has to be balanced against the fact that workers may be undercompensated under the status quo, and putting all the risk (e.g. of uneven demand) onto low-paid workers is not necessary or desirable.

In relation to MBIE's preferred model, the risk of locking-in business models would also be reduced by carefully specifying the types of matters which are appropriate for sector-level minima and which are more appropriately left to firm-level decisions, in order to preserve appropriate competition and innovation. Also, flexibility to structure work (e.g. rosters) and other non-wage terms and conditions would be preserved above industry-agreed minimum standards.

The risks to employer's flexibility would also be mitigated to some extent as the standards will be created in consultation with the particular industry. These impacts will need to be a consideration taken into account in the government body's final determination on minimum standards for the particular occupation or sector.

The interventions could have net costs

Under the Government's proposed model we think there is a significant risk of setting up a regime which has net costs if the benefits to workers are less than the cost to employers and of providing the system.

Under MBIE's preferred model, we consider there is a more limited risk, as it is mitigated to some extent by the targeted nature of the model, where a labour market problem must be established before the government intervenes.

There may be a shift from employment to contracting

Our analysis has assumed that contractors are not included in either of the models, although technically these minimum standards could be extended to contractors. If the sector-based minimum wage (option 3) increases the cost of hiring an employee, there is a risk that employers may be able to lower labour costs by structuring work on a contract basis.

We note the Minister intends to include contractors within the FPA system in the near future. Wider work to provide better protections for contractors is being undertaken in a separate project.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

Option 1 (Government's proposed model)

This option would require legislative change to introduce a new piece of primary legislation. The Minister is seeking Cabinet approval to start drafting of the FPA Bill, with legislation to be introduced later in 2021.

Once implemented, the system would be the primary responsibility of MBIE to administer and enforce. Individual FPAs will be given effect through MBIE making secondary legislation once they have gone through the vetting process or are determined by the Employment Relations Authority.

In terms of enforcement, the model will involve both enforcement by the Labour Inspectorate and also by unions, employers and individual workers through the dispute resolution system if they are unable to settle grievances privately. This means that, alongside party-led dispute resolution, suspected non-compliant employers covered by an FPA would also be liable to investigation and prosecution by the Labour Inspectorate where the issue in question related to the FPA base wage, minimum leave entitlements, or overtime and penalty rates.

Combination of Options 3 and 4 (MBIE's preferred model)

This approach is not as developed as the Government's proposed model. Before this proposal could be taken forward, MBIE would need to do further policy work, and the public would need to be consulted.

The changes to create sector minimum standards would require legislative change. This Bill would establish the new functions for assessing occupations that may have poor labour market outcomes and for the processes to determine what minimum sector standards may be required. There would likely be a delayed commencement date to provide enough time to establish the new regulatory functions to support the process for creating sector-based minimum standards.

Once implemented, the system would be the primary responsibility of MBIE to administer and enforce. As regulated minimum standards, enforcement responsibility for FPAs could also be extended to the Labour Inspectorate.

In order to make changes to how MECAs operate, changes would also need to be made to the Employment Relations Act.

6.2 What are the implementation risks?

Option 1

FPAs will need to comply with domestic law and international legal obligations

Freedom of association
Under option 1, an FPA will set the minimum terms and conditions for all employers and employees in the named industries and occupations, including future participants. Given the potentially broad coverage of the minimum terms and conditions, the bargaining parties are unlikely to fully represent all affected people, particularly those who remained passively

disinterested during bargaining and future market participants. Further, employers and employees who wish to participate in bargaining may be compelled to join or create a union or employers' organisation. This means FPAs may compel people to associate with registered organisations/unions in order to have their interests represented around the bargaining table or else risk the organisation/union sign an agreement that is not in their interests. These problems create risks to the right to freedom of association (and non-association). Potential infringements upon this right must be clearly defined, well-safeguarded and justified as a public good.

These risks could also be managed by:

- Enacting the bargaining agreement as regulation, rather than a collective agreement, to make the Government accountable for legitimacy of the bargaining process and the content of the agreement.
- Establishing a representation threshold for initiating bargaining
- Setting clear limitations on the scope and coverage of an FPA.
- Establishing that an FPA has potential to be a public good before bargaining can begin.
- Testing the potential impacts of an FPA before an agreement can be enacted.

ILO obligations

There is a risk that a ban on industrial action may conflict with ILO interpretations of fundamental labour principles and rights relating to freedom of association, voluntary collective bargaining and the right to strike, manifested in ILO Convention 87 on Freedom of Association and Protection of the Right to Organize and ILO Convention 98 on the Promotion of Collective Bargaining. We have discussed risks under an FPA model with the ILO secretariat.

Banning industrial action (but providing compulsory arbitration to resolve disputes where mediation fails) may be viewed by the ILO as not inconsistent with the right to strike in cases where a first agreement is negotiated across a sector or occupation. However, any subsequent agreements would likely need to allow for industrial action to be seen as consistent with the right to strike. The ILO generally sees third party intervention, through restrictions on the right to strike and compulsory arbitration, as problematic in terms of the principles of free voluntary collective bargaining and freedom of association.

There is a risk that the model could be viewed as impacting on the voluntariness of collective bargaining, as once an FPA is initiated there is no ability to opt out of the process (other than limited-time bound exemptions to the final agreement, if both parties agree) and the resulting mandatory terms and conditions will apply to the whole sector – including those not involved in the bargaining – as bargained minimum standards. Some business groups have raised this concern with us. We note the requirement in this option for the Minister to identify workforces which show evidence of problematic outcomes should contribute to a public good argument for a limitation on this right.

There is also a risk that the model may be seen to affect freedom of association if unions represent workers who do not want to be represented by unions. This may mean workers wanting their interests represented would either need to join these groups or communicate their views to the bargaining representative.

The Government does not provide sufficient funding for the FPA system to function appropriately

We have estimated the cost of the Government's proposed FPA system is approximately $40–50m over four years. There is a risk that the Government does not provide sufficient funding to ensure the system can function appropriately. A lack of funding combined with limited barriers to entry into the system (i.e. low initiation thresholds) could result in protracted bargaining processes and delays while parties wait for decisions from regulators and the dispute resolution system. The pressures created by the FPA system could also have flow on implications to the timely delivery of existing dispute resolution functions (e.g. there could be longer waits for mediation or Employment Relations Authority determinations as resources are spread more thinly). If this was to occur, the Government could mitigate this risk by providing more funding.

The FPA system does not incentivise employers to participate

The results of the consultation highlighted that this model provides little incentive for employers to participate constructively. An unwillingness to participate on the employer side could result in delayed and dispute-heavy bargaining processes, which could restrict the effectiveness of the system.

The main motivation for employer participation in FPA bargaining is the negative threat of a determined outcome. Furthermore, if employers are convinced that any determination will not reflect their preferences, then even this incentive loses strength.

To mitigate the risk that there is no employer organisation willing to represent employers in FPA bargaining, in the Government's model BusinessNZ will be the default bargaining representative in the event no other organisation is willing to perform the role.

Despite this default bargaining representative role, BusinessNZ does not support the system and proposes an alternative voluntary FPA system. During the consultation process BusinessNZ's model was endorsed by a majority of submitters from an employer perspective, who also sent a strong message that they believe that FPAs will reduce productivity in covered workforces.

It is likely to be difficult for the bargaining representatives to coordinate and adequately represent all affected parties

Depending on the size of the relevant sector or occupation, it could require significant financial resources to bargain for an FPA. Some unions and employers may be reluctant to participate if they cannot recoup this cost. Employers and employees may lack the necessary bargaining capability and capacity to conclude an FPA effectively.

Coordination of employers may be similarly challenging. Collective bargaining at a sectoral level is uncommon and it can be fairly assumed that employers in many sectors have low levels of bargaining capability and capacity. This will be particularly acute in industries where employment relationships are usually based on individual agreements. Employers in those industries have likely never engaged in multi-employer or sectoral bargaining and possibly never bargained for a collective agreement at an enterprise-level. FPA bargaining is likely to present several unique challenges to bargaining parties, such as:

- organising and communicating with large groups across entire occupations and industries
- coordinating between multiple, potentially conflicting unions and/or employers'

associations

- supporting bargaining representatives over protracted bargaining processes,
- writing an agreement in language appropriate, and clear enough, for use as a legislative instrument which will bind a large number of parties.

Some functions may be limited by the availability or quality of relevant data

Assessing the representation threshold will require reasonably accurate data on the present number of workers in the named occupation and industry, unless the initiating parties uses the absolute threshold of 1,000 workers. This data may be unavailable due to the infrequency of the Census and the small sample size of the Household Labour Force Survey. Reliable high quality data on the number of workers in particular industries could be leveraged from Inland Revenue if the necessary arrangements were made, but occupational data would still be lacking.

Combination of Options 3 and 4

New or expanded roles and functions for regulatory bodies

This option involves new or expanded roles and functions related to establishing processes and determining minimum standards for a sector or occupation where labour market problems are occurring. It will be essential to allocate functions where relevant expertise and resources exist, and where this is not possible, to ensure that necessary resources and funding are provided so that new functions are able to come up to speed and perform the new roles successfully.

Ensuring sector participants involved in setting sector minimum standards represent the range of interests

As the sectors involved in this process of setting sector minimum standards are likely to be vulnerable workforces, many of which do not have high union density, sector participants are unlikely to be well coordinated. It will be important to implement a system that ensures that participants are representing the full range of interests. This would help to ensure that the minimum standards both address the problems identified and are workable for parties impacted by the changes. These risks can be mitigated through thorough public notification of the proposals and engaging with a range of interests in consultation (this could be targeted if needed).

There is some risk that there is not enough evidence of a problem to support intervention

Available evidence of indicators could fail to support the conclusion that there are sufficient labour market problems to intervene with sector minimum standards. This could result in no new terms being created.

MBIE's preferred approach (options 3 and 4) involve targeted access to workforces most in need. A counterfactual would be the Government's model which has few limits to usage, and which would impose relatively larger costs overall on other parties (such as employers).

Ultimately this risk is a necessary feature of limiting usage of the FPA system, and could be seen as both a strength and a weakness of this approach. While it may result in no changes, this would only be in a situation where there was no demonstrable need for a government intervention.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

Note, we consider the way in which the impacts of the new arrangements will be monitored and reviewed would be the same for occupation/sector minimum standards (Options 3 and 4) or an FPA (Option 1).

A full set of performance and success measures, and a monitoring plan, will be developed as part of detailed monitoring and evaluation design based on a detailed programme logic.

The evaluation plan will include two key components: a shorter term implementation evaluation (assessing the effectiveness of MBIE and Employment Relations Authority support for the implementation of the legislation), and a longer term impact evaluation, assessing the extent to which legislation has achieved its intended short-to medium term outcomes.

Implementation evaluation

If funding is made available, it could be possible to commission a formative evaluation of the first few FPAs. These evaluations would gather data on the initiation and bargaining processes as they occur, with the aim of developing recommendations on what is working well and what could be improved. This could involve qualitative interviews with bargaining parties during the bargaining process to gauge how they have approached processes such as setting coverage, choosing representatives, managing communication, resolving disputes and so on. Relevant regulators could also be interviewed to assess how the regulatory systems are performing, particularly new functions such as the initiation test, verification of ratification and the vetting of FPAs.

The New Zealand Work Research Institute's 2017 study of the pay equity settlement's impact on the residential aged care, home and community care and disability support sectors provides a useful example of the sorts of insights that could be gained from such a study.[63]

Longer-term impact evaluation

We intend to do a comprehensive evaluation to assess the impact of the sector wide minimum standards on labour market outcomes. This could involve doing a study of an impacted sector or occupation using Stats NZ's Integrated Data Infrastructure (IDI). It may be possible to design a quasi-experimental study which compares a sector with an FPA to a similar one which does not have an FPA.

The intervention logic and evaluation plan, together with identification of key performance indicators, will be developed over the course of 2021/22. MBIE is currently developing a framework for evaluating the overall effectiveness of the ERES Regulatory Framework. The impact evaluation of FPAs is likely to be nested within this wider programme of work.

[63] Douglas, J and Ravenswood, K (2017). "The Value of Care: Understanding the impact of the 2017 Pay Equity Settlement on the residential aged care, home and community care and disability support sectors", New Zealand Work Research Institute.

7.2 When and how will the new arrangements be reviewed?

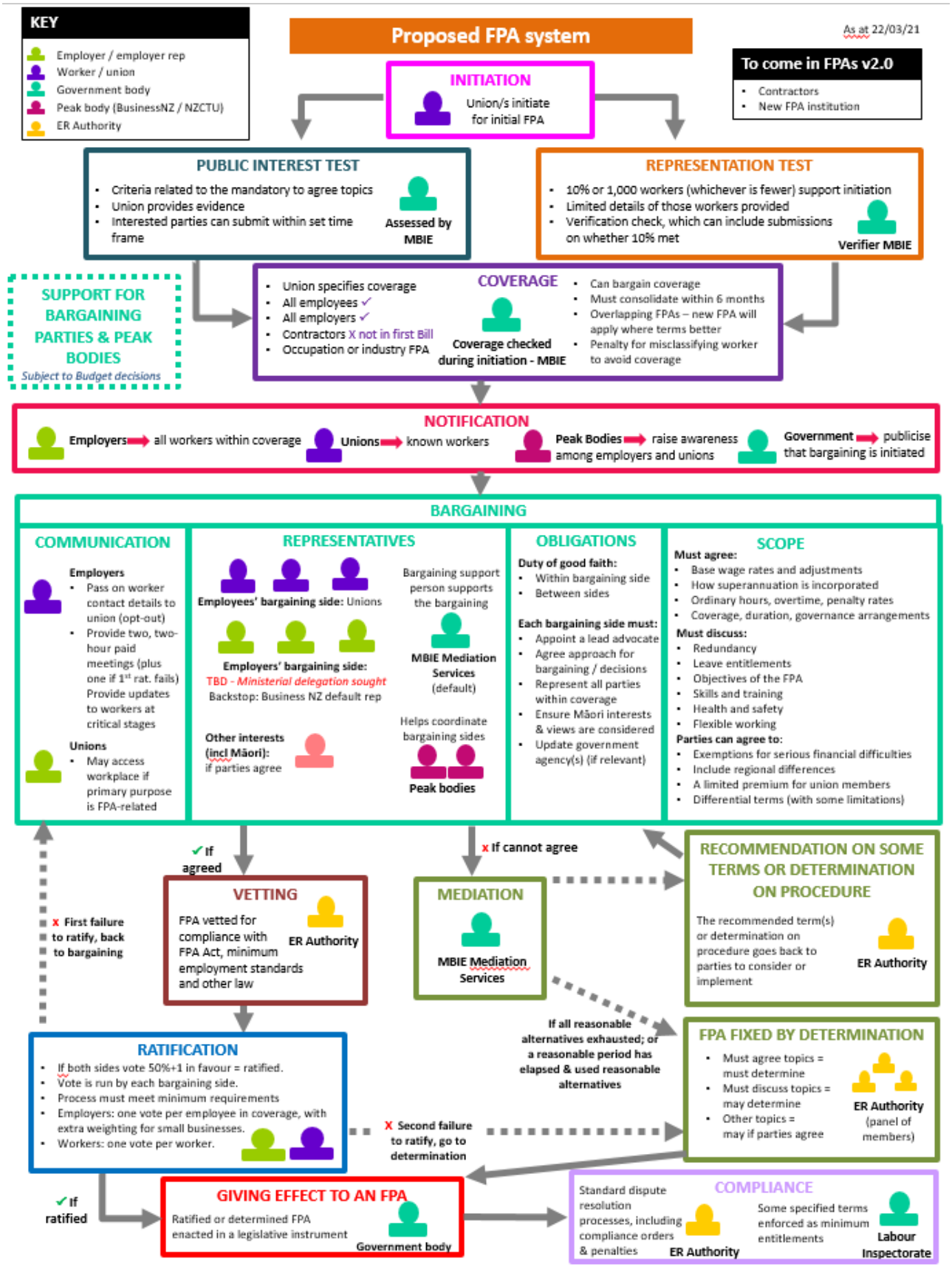
In the near future the Minister intends to proceed with changes to the FPA system, including incorporating contractors into the system and establishing a new institution to perform some of the functions in the system.

We anticipate a comprehensive review of the FPA system will be required after 3–5 years, to assess whether the system is meeting its objectives.

The outcomes of the evaluative studies will be useful for the review, as they could identify areas where the system's design is not fit-for-purpose and prompt tweaks where possible, including changes to the legislation if necessary.

Annex One: The Government's proposed FPA model

Diagram setting out the operation of the Government's FPA proposed model (option 1).



Annex Two: Wages over time

For reference, Figure A1 tracks the annual statutory minimum wage rate.

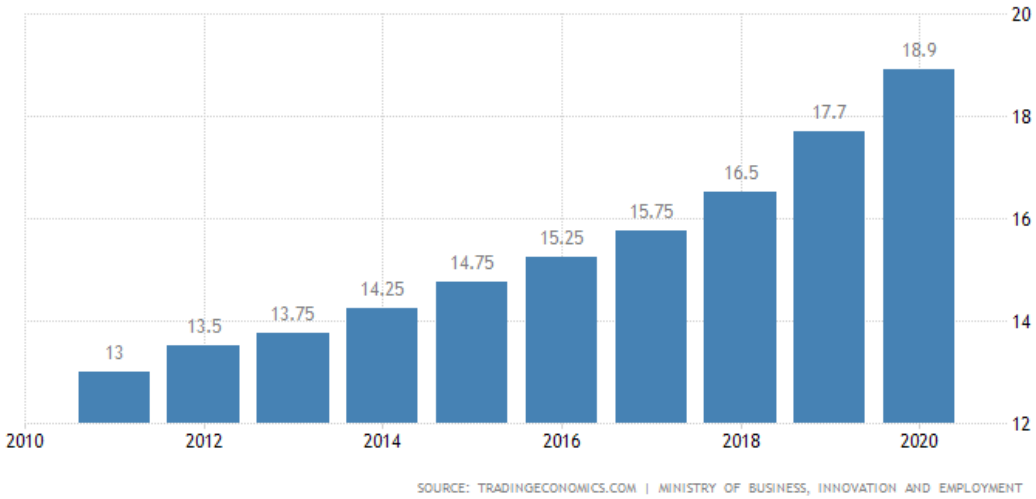
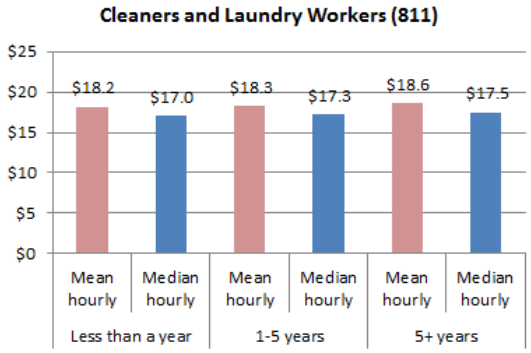


Figure A1 - Minimum Wage Increases

The following charts show mean and median hourly wages from 2019 by tenure for a selection of occupations, and how the median and mean wages for those occupations have changed between 2013 and 2018.

Figure A2 Cleaners and laundry workers

Approximately 17% of cleaners and laundry workers are union members.



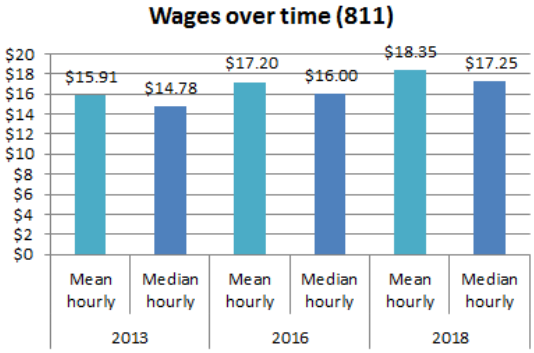
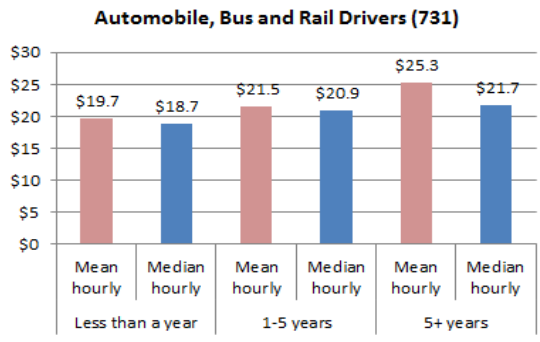


Figure A3 Automobile, bus and rail drivers

The union density for automobile, bus and rail drivers is 36%.



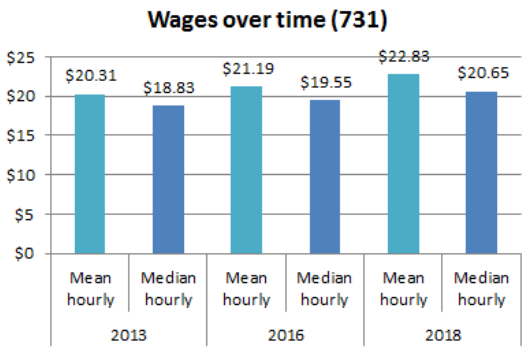
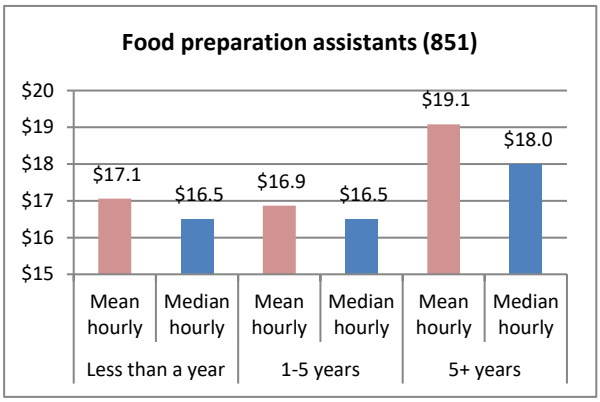


Figure A4 Food preparation assistants

The union membership percentage for food preperation assistants is 6% (at the ANZSCO 2-digit level).



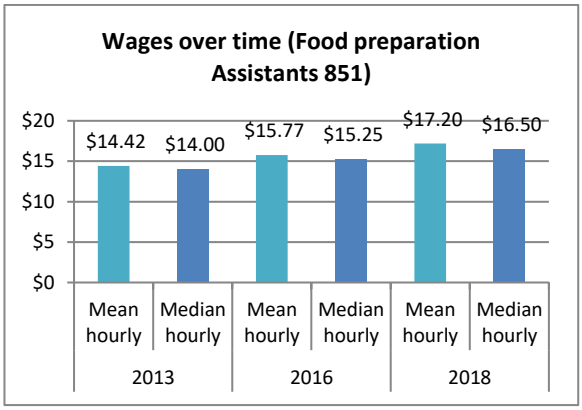
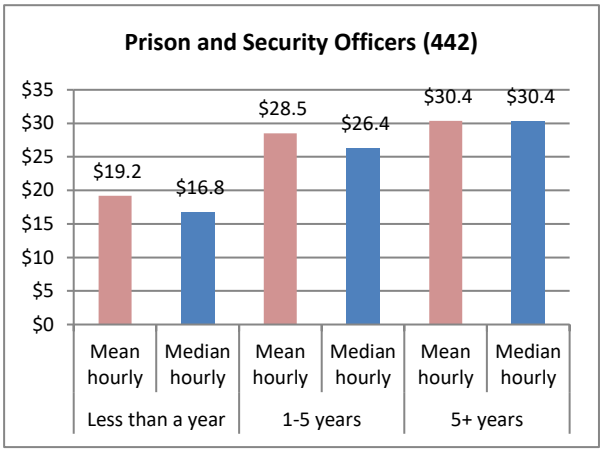


Figure A5 Security services

It is highly likely that the data we have for prison and security officers is heavily weighted towards prison officers. This would explain the level of pay as well as the reported 40% union density for occupation sub group 442. Security services is said to be a very low union density occupation.



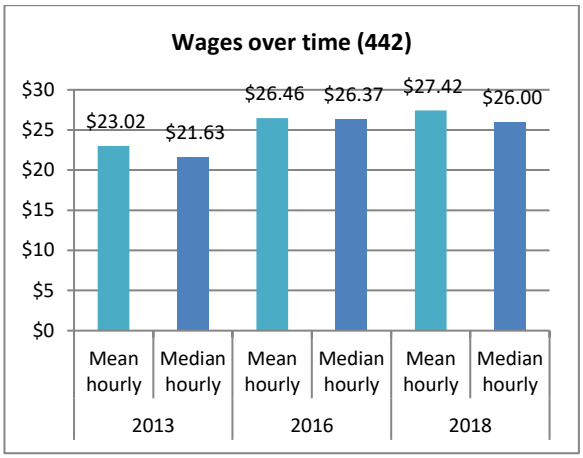
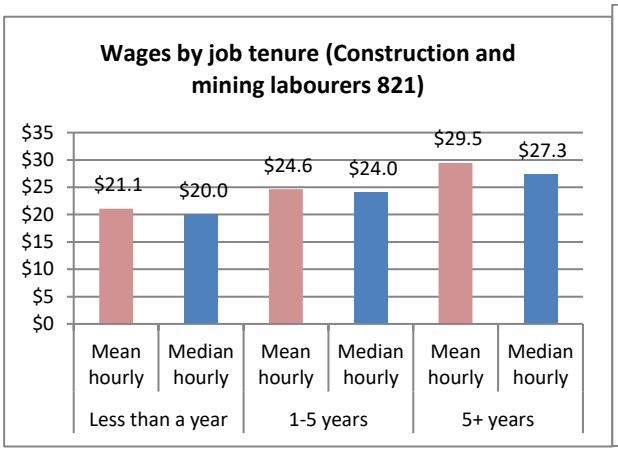


Figure A6 Construction

The union membership percentage for construction and mining labourers at the three digit level is 11%.



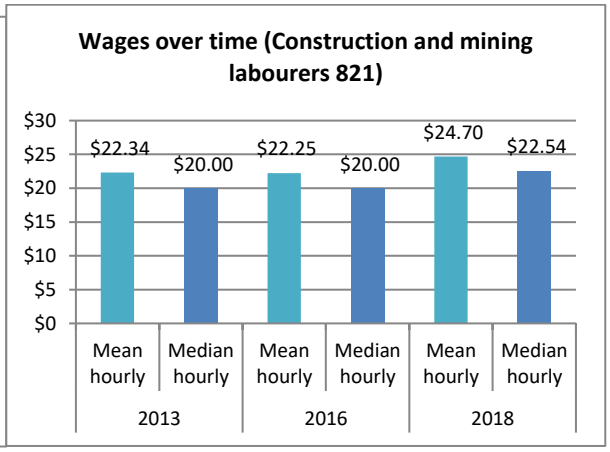
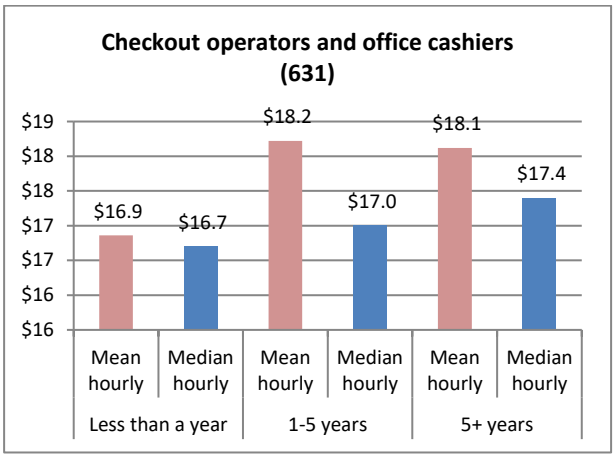
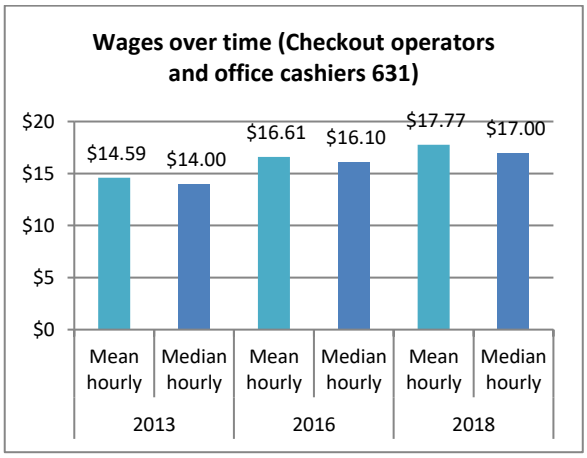


Figure A7 Checkout operators and office cashiers

Due to aforementioned data limitations, relevant wage data is only available for checkout operators and office cashiers (ANZSCO 631), of which we know approximately 75% are checkout operators. Supermarkets are the major employer of this occupation. The data below indicates that checkout operators and office cashiers experience a plateauing average wage return on job tenure. Analysis by the NZCTU claims that the labour productivity of retail

workers has more than doubled since the 1980s, but that real wages have remained flat or decreased over the same period.[64] The occupation has a moderate union density of 14%.





[64] Rosenberg, B (2019). CTU Monthly Economic Bulletin No. 211 June 2019

Annex Three: Examples of sectors where 'race to the bottom' issues have been identified by stakeholders

The security sector

Security guards in Wellington submitted on the Employment Relations Amendment Bill 2018 and said "the nature of the contracting system means that we have very little power over the setting of our wage rates and conditions." The submission also said, "we are paid very close to minimum wage, have huge responsibilities and risks that go with the job and the work is very insecure."[65]

The NZ Council of Trade Unions (NZCTU) commented on the difficulties facing collective bargaining in the security industry and identified security officers as being an occupation that could benefit from an FPA.[66] The NZCTU said: "it is difficult for unions and employers to agree any kind of margin of pay above minimum wage, and to get agreement around training, lone worker support and uniform and equipment provision. If an employer agrees to a deal better than the average, they have to go back to their clients and ask for more money. While that might seem like "business as usual," the problem is that there is always a firm that can bid lower on the basis of paying only the minimum wage, and cutting costs in other ways, such as back office support for guards, equipment and other things." Employers within the security sector have also raised these concerns with MBIE.

Application to give security officers additional employment protections under Part 6A

In 2019 E tū applied to have security officers receive additional employment protections under Part 6A of the Employment Relations Act. The Minister for Workplace Relations and Safety can approve the application if they are satisfied that the employees have little bargaining power, are subject to frequent restructuring and tend to have their terms and conditions undermined by restructuring. The Minister has approved the application and security officers will soon receive the additional employment protections. The fact security officers met the statutory criteria is indicative of the fact that competition on labour costs in the security has tended to undermine wages and terms and conditions over time.

The cleaning sector

Under the Awards system cleaners' conditions were relatively generous compared to the minimum wage. In contrast, the cleaning MECA negotiated by the Building Services Contractors of New Zealand covers 19 companies and only provides a small margin over the minimum wage.

The NZCTU has identified cleaners as an occupation that could benefit from an FPA. It has commented on the challenge of trying to collectively bargain for better terms and conditions in the cleaning industry: "the union for cleaners and companies like Spotless, and those affiliated to the Building Services Contractors Association of New Zealand negotiate every year to attempt to lift wages above the minimum for a few months at least. However the industry has the same problem as security – they are trapped into a 'race to the bottom', as

[65] https://www.parliament.nz/resource/en-NZ/52SCEW_EVI_76257_2273/3a00e2f3c0fd1f68db40bdd34a52a6f82c3fe0bf

[66] http://www.union.org.nz/wp-content/uploads/2019/06/FPA-Security-Backgrounder-for-25Jun-FINAL.pdf

other, less scrupulous companies come and offer themselves for lower prices which, all too often, are the main focus of clients."[67]

Workers also commented on their terms and conditions in the cleaning industry: "we have been underpaid and undervalued for so long it is not fair. I've been a cleaner at two of the police stations for 14 years now, but over that time companies changed all the time. Hours get cut but the workload still remains the same. Recently I have lost a total of 25 hours, and now I am looking for another part-time job at night."[68]

The public bus transport industry

Workers within the bus transport industry have frequently been on strike over the recent years, primarily over conditions of work.[69] A key concern of bus drivers was the requirement to work split shifts which saw them having to cover the morning and evening shifts but take time off unpaid in the middle of the working day. According to Tramways Union, this has meant that some workers would be away from home for 14 hours, but only paid for a proportion of this.

This can become a particularly acute problem where the occupation or industry largely or completely structures itself this way, because workers have limited or no ability to seek work elsewhere and their income may be so low that they will take any hours offered.

Data from the Household Labour Force Survey shows that the job vacancies index for bus and coach drivers has increased substantially compared to other occupations over the past five years. While there could have been some structural reasons for this change prior to COVID-19 impacts, such as the growth in tourism and public transport services and thus demand for bus drivers, the increasing vacancy trend is noteworthy. Even though there appears to be a persistent bus and coach driver shortage, the conditions of work do not appear to be changing. This persistent driver shortage and frequent industrial action could indicate systemic sector-wide concerns around how work is structured across the industry. Normally in a competitive market the terms and conditions of work would adjust to correct the worker shortage, however, there is little evidence of this occurring here.

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67 http://www.union.org.nz/wp-content/uploads/2019/06/FPA-Cleaning-Backgrounder-for-25Jun-FINAL.pdf

68 Ibid

69 http://www.scoop.co.nz/stories/BU1810/S00601/national-bus-strike-tuesday-drivers-call-for-new-standards.htm; https://www.newshub.co.nz/home/new-zealand/2018/07/wellington-bus-strikes-begin-over-unsafe-working-hours.html ; https://www.tvnz.co.nz/one-news/new-zealand/hundreds-bus-drivers-strike-today-over-pay-and-working-conditions

Annex Four: Cost estimates for the Government's proposed option

It is difficult to determine how many FPAs will be initiated in the Government's proposed FPA system. We have chosen eight FPAs per year as a rough baseline assumption, following discussions with stakeholders on how many initiations could occur in the first year.

We have assumed that FPAs will be initiated in sectors with low wages (defined as where the majority of workers are paid $20 per hour or less), so we have selected eight occupations by the lowest average wages.

Labour costs

The largest cost component of this option is increased labour costs to employers. This is effectively a transfer to employees from employers in the form of improved terms and conditions of work, and is therefore offset when looking at net benefit/cost.

The total costs and benefits of the proposed approach are difficult to quantify. They will depend on the relative size of the occupation/industry and the outcomes of agreed FPAs. For indicative purposes only, to assess the potential labour costs from possible wage increases, we examined 8 occupational subgroups based on those with the lowest average hourly wages. We calculated the marginal yearly wage costs of two scenarios:

- 10% wage increase for a fifth of workers: $155 million each year
- 10% wage increase for all the workers paid under $20 per hour: $593 million per year

We have rounded these figures to $150m and $600m respectively to reflect the uncertainty associated with the estimates.

Occupations according to proportion of workers earning under $20 per hour	**Regular hourly rate (main job)**		**% below $20/hour**	**Mean weekly income**	**Total workers**	**10% increase for a fifth of workers**	**10% increase for workers below $20**
Three-digit occupation (ANZSCO)	Mean	Median		All sources		Marginal cost per year	
Food Preparation Assistants	$17.33	$16.5	91.27%	$412.07	21,900	$9,385,306	$42,832,059
Checkout Operators and Office Cashiers	$17.77	$17	91.08%	$406.57	15,600	$6,596,192	$30,039,200
Hospitality Workers	$17.79	$17	84.34%	$487.59	39,200	$19,878,069	$83,828,005
Packers and Product Assemblers	$18.32	$17.26	78.94%	$640.76	17,200	$11,461,915	$45,237,469
Cleaners and Laundry Workers	$20.01	$17.5	73.05%	$479.78	44,900	$22,403,807	$81,826,805
Hairdressers	$19.85	$18.22	72.58%	$630.05	9,900	$6,486,995	$23,540,772
Sales Assistants and Salespersons	$19.98	$18	72.16%	$655.99	107,000	$72,998,567	$263,386,424
Child Carers	$18.5	$18	71.96%	$462.04	12,800	$6,150,676	$22,130,768
Total					**255,700**	**$155,361,527**	**$592,821,503**

These illustrative figures are subject to a number of caveats and reflect significant assumptions:

- The most recent data we had available is from the New Zealand Income Survey attachment to the Household Labour Force Survey for June 2018. This means the nominal impact of wage increases is likely to be larger than these calculations as wages have increased since then.
- We assumed that eight FPAs will be concluded and these will be in the sectors with the lowest average wages.
- We assumed that wages would increase by 10% for (1) a fifth of workers or (2) all workers paid under $20 per hour respectively. A 10% wage increase roughly approximates the difference between the minimum wage and the living wage. The actual cost will depend on the number of workers that receive an increase in wages due to the FPA.
- To calculate the wage increase we used average weekly income from all sources. This may not reflect the entire wage earned at the specified occupation, however, it is the best proxy that we have. This calculation also assumes that employees' weekly income does not change over the year.
- The increased wages do not include related costs to employers such as superannuation contributions, leave, levies, etc.

Increases in labour costs could impact on the government as an employer (or funder) of those employees impacted by an FPA. This would necessitate increased funding to reflect increased labour costs, or a trade-off in terms of quantity of services employed/contracted.

Bargaining costs of the parties

The remaining cost components relate to bargaining costs. We expect these will be significantly lower than increased labour costs/returns to labour. The Government's model includes a maximum of 10 people that can be at the bargaining table on each bargaining side. We expect bargaining for an FPA would take around six months, with around 100 working days assigned for actual bargaining, mediation and for an FPA to be determined (if it went through the full dispute resolution process). On this basis, we estimate costs of between $1–2 million across the eight FPAs, depending on how many representatives are around the table and the complexity of the agreement.

These costs are then weighed against improved worker wellbeing from being able to bargain. We cannot quantify this benefit.

However, the value associated with being able to bargain (e.g. the participation benefits from expressing collective voice) could outweigh what it will actually cost employees to do so. The estimated value of $1–2 million is only an approximate indication of the scale of potential costs. Actual collective bargaining costs are likely to vary depending on the following factors:

- level of organisation across occupations/parties represented
- capacity among bargaining parties
- frequency/duration of bargaining
- size of the workforce, and
- approach to bargaining.

The cost-effectiveness of bargaining will also vary, depending on how many people the FPA covers (in terms of potentially reducing the amount of individual negotiation required for employers, however, individuals may still wish to bargain above FPA minima).

We would expect that the renegotiation process of FPAs will likely be a quicker and less

costly process comparative to the first FPAs bargained for that sector. Therefore, the ongoing bargaining costs would be likely to reduce over time.

Cost recovery

The Government's proposed model utilises the existing ERES dispute resolution system and will retain the existing levels of cost recovery (e.g. some fees in relation to the Employment Relations Authority and Employment Court). The Government is not considering any other cost recovery in the system.