Departmental Disclosure Statement

Fair Pay Agreements Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

24 March 2022

Contents

Part One: General Policy Statement

Policy objective

The Fair Pay Agreements Bill provides a framework for bargaining for fair pay agreements. The objective is to improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain industry-wide or occupation-wide minimum employment terms. The Bill builds on the analysis and recommendations of the Fair Pay Agreement Working Group in December 2018.

While New Zealand's labour market has some strengths, it also has systemic weaknesses. These include a significant prevalence of jobs with inadequate working conditions, low wages, and low labour productivity. For example, Māori, Pacific peoples, young people, and people with disabilities are over-represented in jobs where low pay, job security, health and safety, and upskilling are significant issues. Barriers to good labour market outcomes are particularly prevalent for people who fall within more than 1 of those groups. The Bill will help address these issues.

At present, New Zealand's employment relations and employment standards regulatory system only allows for collective bargaining at an enterprise level (ie, between individual employers and unions. There is no mechanism for parties to co-ordinate collective bargaining across entire occupations or industries.

The Bill creates a framework for bargaining for fair pay agreements by—

- setting out a general duty of good faith, and good faith obligations that apply to bargaining parties (within the same bargaining side and between bargaining sides); and
- prescribing processes for initiating bargaining (including when a default bargaining party may be required), carrying out bargaining, and finalising a fair pay agreement; and
- providing processes to resolve disputes that may arise during bargaining for a fair pay agreement; and
- establishing regulation-making powers to give full effect to fair pay agreements bargained under the Bill.

Fair pay agreement bargaining process

The Bill enables any eligible union to initiate bargaining for a fair pay agreement if it meets either a representation test of at least 1,000 employees or 10% of the employees in proposed coverage, or a public interest test based on specified criteria such as low pay, little bargaining power, or lack of pay progression. The chief executive of the Ministry of Business, Innovation, and Employment (**CE MBIE**) will assess applications based on either test and may request further evidence and information from the initiating union if required.

The Bill requires an initiating union to describe the coverage of a proposed fair pay agreement (a **proposed FPA**) as either an industry-based agreement or an occupation-based agreement. All employers and employees within the proposed coverage will be covered by the fair pay agreement.

Under the Bill, bargaining will take place between bargaining parties representing employees and employers. Employee bargaining parties will be eligible unions. Employer bargaining parties will be eligible employer associations, and could also include certain specified public sector employers who are allowed to participate directly in bargaining. A bargaining party must meet certain requirements, such as having an employee (or an employer who has an employee) within the coverage of the proposed FPA as a member. If one side is unrepresented (or becomes unrepresented during bargaining), default parties will step into bargaining.

The Bill creates notification and communication obligations for eligible unions and affected employers. Employers must allow employees to attend two 2-hour paid meetings for fair pay agreement purposes (1 additional paid meeting must be allowed for a proposed FPA, a proposed renewal, or a proposed replacement if the (initial) 2 meetings have been used). Employee bargaining parties will also be able to access a workplace if there are employees within coverage at that workplace and the visit is for fair pay agreement purposes. The Bill provides safeguards relating to the notification and communication requirements, similar to those under the Employment Relations Act 2000.

The Bill sets out a general obligation of good faith that applies to certain relationships, which is based on similar obligations in the Employment Relations Act 2000. It also outlines specific good faith obligations between parties within the same bargaining side (for example, between 2 bargaining parties), and also between the employee bargaining side and the employer bargaining side. These obligations will support efficient, constructive bargaining that is focused on finalising a fair pay agreement in a timely manner. Each bargaining side will also have obligations to use its best endeavours to represent those within coverage, and to ensure that Māori employees and employers are represented effectively.

The Bill sets out what must, or may, be contained in a fair pay agreement. Each fair pay agreement must specify when it comes into force and when it expires, its coverage (with sufficient clarity), the normal hours of work, minimum base wage rates (including when and how they are adjusted), overtime, penalty rates, any superannuation, the governance arrangements that will apply to the bargaining sides, and the process for each bargaining side to engage with the other bargaining side, if they are bargaining to vary the agreement.

The Bill also sets out several other topics that bargaining parties must discuss whether to include in a fair pay agreement, for example, health and safety requirements or leave entitlements. Those do not need to be included in the fair pay agreement. Bargaining sides will also be able to agree different terms that apply to different employees or classes of employees, for example, the terms of the fair pay agreement may differentiate on the basis of the territorial districts in which the employees work. Bargaining sides can also agree that the fair pay agreement (or certain terms of the fair pay agreement) will have delayed commencement for specified employers. Bargaining sides will be able, but not required, to discuss and include any other employment-related topics they consider to be relevant.

The Bill provides a dispute resolution process based on the Employment Relations Act 2000. Parties may access mediation and support services under the Bill. If parties cannot resolve their dispute using those services, a bargaining party may apply to the Employment Relations Authority (the **Authority**) for a determination. In addition, if parties cannot reach agreement during bargaining and specified criteria are met (for example, exhausting all other reasonable alternatives) or if ratification of a fair pay agreement has failed twice, a bargaining side may apply to the Authority to fix the terms of the fair pay agreement through a determination.

After bargaining, in order to finalise a fair pay agreement it must be—

- assessed and approved by the Authority; and
- ratified by the employees and employers who would be covered by the proposed FPA; and
- verified by the CE MBIE; and
- brought into force by the CE MBIE through secondary legislation.

When a fair pay agreement has been finalised, all employers within coverage will be bound by it, regardless of whether they participated in the bargaining process. Likewise, all employees within coverage will receive the new minimum employment terms set by the fair pay agreement. This will improve outcomes for employees across the labour market.

Enforcement

The Bill includes a penalty regime for non-compliance consistent with other employment legislation.

Consequential amendments

Implementing the Bill requires consequential amendments to the Employment Relations Act 2000, the Equal Pay Act 1972, the Holidays Act 2003, the Judicial Review Procedure Act 2016, and the Minimum Wage Act 1983.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits, Fair Pay Agreements Working Group, December 2018 https://www.mbie.govt.nz/dmsdocument/4393-working-group-report-pdf Cabinet Paper: Fair Pay Agreements: Approval to draft, April 2021 https://www.mbie.govt.nz/dmsdocument/14297-fair-pay-agreements-approval-to-draft-proactiverelease-pdf Initial summary of submissions on the Fair Pay Agreements discussion document, December 2019 https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/ Final summary of submissions on the Fair Pay Agreements discussion document, Ministry of Business, Innovation and Employment, 2020 Final summary of submissions on the Fair Pay Agreements discussion document (mbie.govt.nz) Supplementary summary of submissions on the Fair Pay Agreements discussion paper – overall merits of the system, Ministry of Business, Innovation and Employment, 2020 Supplementary summary of submissions on the Fair Pay Agreements discussion paper – overall merits of the system (mbie.govt.nz) Background policy documents contributing to the design of the Fair Pay Agreement System – https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
Fair Pay Agreements – Regulatory Impact Statement (RIS), Ministry of Business, Innovation and Employment, Published 8 July 2021. A copy of the RIS is available at: https://www.mbie.govt.nz/dmsdocument/15512-fair-pay-agreements-regulatory-impact-statement-pdf Fair Pay Agreements Regulatory Impact Assessment update to account for the expansion of Labour Inspectorate powers. A link to the document will be published on the MBIE website as soon as possible.	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
MBIE's Regulatory Impact Analysis Review Panel (which Treasury provided input) reviewed the RIS prepared by MBIE (published 8 July 2021 - link in 2.3 above seeking Cabinet's agreement to draft legislation). The Panel considered that the information and analysis summarised in the RIS meets the criteria necessary for Ministers to make informed decisions on the proposals. MBIE's Regulatory Impact Analysis Review Panel also assessed the RIS for the expansion of the Labour Inspectorate powers as meeting the criteria necessary for Ministers to make informed decisions on the proposals.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	YES
A decision is being sought from Cabinet to expand the power of the Labour Inspectorate to enable them to decide if an employee is within coverage of an FPA. This was not addressed in the (published) 8 July 2021 RIS (link in 2.3 above) but is included in the expansion of Labour Inspectorate powers RIS (published as soon as possible). The objective is to ensure that the Labour Inspectorate can obtain sufficient information to enable a robust, defensible decision as to whether an employee is covered by an FPA or not in the majority of cases with only the most complex cases needing to be referred to the Employment Relations Authority (Authority) for investigation. This will enable more timely and cost-effective decisions on coverage for both employees and employers. Expanding the Labour Inspectorate's powers has privacy implications, which have been considered and discussed with the Office of the Privacy Commissioner (refer section 3.5 for the powers).	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	YES
The RIS[1] estimated that the monetised benefits of higher wages covered by FPAs could be around ~$150–600m (ongoing annual benefit) for workers.[2] 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 are concluded. Employers would likely face higher costs as a result of increased worker terms and conditions, although the extent will vary depending on the terms and conditions they previously offered employees. There may also be flow-on costs from claims for improved terms and conditions from employees not covered by an FPA, and non-wage costs from reduced flexibility, potentially impacting innovation, productivity and competition. There may also 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. Please refer to Appendix One for further information on section 2.5.	

[1] https://www.mbie.govt.nz/dmsdocument/15512-fair-pay-agreements-regulatory-impact-statement-pdf
[2] Increased labour costs are effectively a transfer from employers to employees. The FPA Bill only applies to employees, not all workers.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	**YES**
(b) the nature and level of regulator effort put into encouraging or securing compliance?	**YES**

a) The main impact is likely to be reduced remunerative benefits to covered employees from employers' non-compliance with the relevant obligations. This has not been quantified in the RIS (link above, 8 July 21) and depends on the level of effective compliance. Expected employee benefits from improved employment terms and conditions are also likely to be reduced if obligations are not met. This is due to the impact that the level of compliance is likely to have on employees' bargaining power during bargaining, e.g. if obligations, such as allowing employees to attend a meeting, are not complied with during bargaining.

b) The main enforcement approach is employees enforcing their own rights through the dispute resolution system. The Labour Inspectorate as regulator has a supplementary enforcement role for minimum entitlement provisions only. Additional costs, such as MBIE's education and guidance activity, may be incurred by the regulator to raise compliance but these costs are likely to be offset by increased benefits (mainly to employees) from enforcement activity. This means that the potential costs and benefits are likely to be partially impacted by the level of regulator effort. A key mitigation to significant additional costs is that the Labour Inspectorate has good regulatory and compliance systems already in place to manage reported non-compliance and, as regulator for the employment regulatory system, has wide ranging experience in addressing these matters. Also, MBIE's Employment Services will provide education and guidance activities to inform employers and employees of their rights and obligations under FPAs and support compliance activities.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
At various points of the policy development process, consultation took place with the MBIE's Employment's International Labour Policy Team, the Ministry of Foreign Affairs and Trade, and the International Labour Organization's International Labour Standards Department on implications of the proposed FPA system models for specific international obligations. The Ministry of Justice was consulted on the policy relating to the Bill's compliance with international obligations as part of the Ministry's Bill of Rights Act vetting. Inconsistencies with or limitations on international human rights obligations identified were covered in the Cabinet paper seeking approval to draft the Bill. These were minimised in the design of the FPA system to the extent possible while still achieving the policy objective.[3] Cabinet decided (CAB-18-MIN-0100 refers) that industrial action would be prohibited within the FPA system. This aspect of any FPA legislation will engage the right to strike and is likely to be seen by the ILO as inconsistent with ILO Convention 87. However, while industrial action is an important corollary of collective bargaining, the objectives of the FPA system may not be achieved if parties are allowed to take industrial action at the occupation or industry level during bargaining. Instead of resorting to industrial action to resolve an impasse in bargaining, parties will be more easily able to access dispute resolution services compared to bargaining under the Employment Relations Act,[4] including recommendations from the Authority and the fixing of terms. The prohibition on industrial action as part of FPA bargaining does not prevent all industrial action in New Zealand in that parties will still be able to take industrial action during collective bargaining under the Employment Relations Act. Feedback from submitters during the public consultation is included in Appendix Two.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?
As FPA bargaining will be enabled by legislation, and the resulting agreements enacted by secondary legislation, the Crown is obligated to design the FPA system in a way that facilitates effective representation and participation of Māori during bargaining. The Bill supports the Crown's Te Tiriti o Waitangi obligations by requiring bargaining parties to use their best endeavours to ensure Māori are effectively represented and to consider Māori views and interests. MBIE will continue to engage with Te Puni Kōkiri to ensure that implementation of the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	**YES**
The Ministry of Justice assessed the FPA Bill and has concluded that it is consistent with the Bill of Rights Act 1990. Its advice has been provided to the Attorney-General, which is expected to be available on the Ministry of Justice's website upon introduction of the Bill: http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights	

[3] Relevant international human rights obligations are from the ILO's Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No. 87); the ILO's Convention No. 98; article 22 of the International Covenant on Civil and Political Rights 1966 (ICCPR); and article 8 of ICESCR. New Zealand has not ratified ILO Convention No. 87.

[4] For example, the provision of a bargaining support person to help people navigate through the bargaining process in a very flexible way.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	**YES**
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	**YES**
(a) The Bill creates two levels of penalties for failing to comply with an obligation: when bargaining (up to $20,000 for an individual, and up to $40,000 for any other person); and when a FPA is in force (up to $10,000 for an individual, and up to $20,000 for any other person). The rationale for the penalty for 'other person' (e.g. company) being double the 'individual' amount is to maintain consistency with the existing penalty framework in the Employment Relations system. This is because many of the actions in the FPA system are the same or similar across the Employment Relations system. Clauses that apply when bargaining, and when a FPA is in force, are in Appendix Two. (b) The Bill includes clauses relating to the jurisdiction of a court or tribunal. The jurisdiction of the Authority will be expanded to include FPA-related matters. It's exclusive jurisdiction is to make determinations about all matters arising under the FPA Act. When the Authority makes decisions under the FPA Act, appeal and judicial review rights will be consistent with those available under the Employment Relations Act where: the Authority has fixed the terms of an FPA, appeal rights are limited to appeals on a question of law; and a party must exhaust any appeal rights before seeking judicial review; and judicial review is limited to situations where the Authority lacked jurisdiction. The Employment Court has exclusive jurisdiction to determine challenges to the Authority's determination, actions for the recovery of penalties, and applications for review.	

3.4.1. Was the Ministry of Justice consulted about these provisions?	**YES**
The Ministry of Justice was consulted on the penalty clauses in the FPA Bill and was comfortable with the approach taken.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	**YES**
The FPA Bill creates key clauses that relate to how personal information is dealt with:[5] *Employer to provide employee information:* An employer who is advised that the chief executive has approved initiating bargaining for a proposed FPA must provide contact details about each of the employer's covered employees to the initiating union and any other employee bargaining party for the proposed FPA. If coverage changes, an employer must also provide contact details of each newly covered employee except an employee who elects not to have their contact details provided. An employee can elect not to have their details provided. *Use of employee information:* An initiating union or employee bargaining party that receives contact details about employees must only use those contact details for an FPA-related purpose. This is an important safeguard, consistent with the Privacy Act principles. *Storage and retention of information:* A union that receives information about employees must ensure that the information is stored separately from any other information held by the union. Access to the information is limited to union employees for a purpose in the Act, to communicate with the employee about bargaining, or for the union to access the workplace to discuss a proposed FPA. A union must not keep the information for longer than is required. Please refer to Appendix Two for a list of other clauses that also engage privacy rights.	

[5] "Personal information" is defined broadly in the Privacy Act 1993 and "means information about an identifiable individual".

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner (OPC) provided the following feedback: "The Fair Pay Agreement Bill is complex and involves significant flows of personal information between different interested parties, governed by prescriptive legislative provisions. To protect the privacy of employees and build trust in the system, many of whom may be in vulnerable employment situations, it is important to pursue a data minimisation approach to the design of the Fair Pay Agreement system, and ensure employees are made aware of how their personal information will be used and disclosed. The Privacy Commissioner considers there are important design questions that need to be addressed with regard to: (a) the level of personal information needed at the initiation stage of bargaining for a proposed FPA; (b) ensuring the provisions related to use, storage and retention of personal information are applied consistently through the process of a FPA; and (c) notifying employees why their personal information is needed, how can they opt-out, implications of opting out and the process of opting back in at the initiation stage as well as before the ratification stage. We have suggested a range of drafting amendments to help clarify and enhance privacy safeguards in the Bill, so as to ensure employee personal information is protected. The Privacy Commissioner welcomes the opportunity to work with Officials on the Bill." MBIE's response to the feedback is set out in Appendix Two.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
In September 2019, Cabinet agreed to consult on a proposed FPA model broadly consistent with the FPAWG's model, and to release the discussion paper, 'Designing a Fair Pay Agreements System' [DEV-19-MIN-0266]. Public consultation occurred from 17 October to 27 November 2019. The discussion document informed the public about the FPA system and the submission process. Overall, 648 submissions were received on the design of a FPA system and that feedback from the consultation has informed particular design features. A large number of submitters expressed views in support or opposition to an FPA system in general. Workers and unions generally supported FPAs and supported design features that made FPAs more accessible, while employers generally opposed FPAs and supported design features that limited FPAs. Initial summary of submissions: https://www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislation-reviews/fair-pay-agreements/ Final summary of submissions on the Fair Pay Agreements discussion document (mbie.govt.nz) Supplementary summary of submissions on the Fair Pay Agreements discussion paper – overall merits of the system (mbie.govt.nz)	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	**NO**

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	**NO**

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	**NO**

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	**YES**
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	**YES**

a) The Bill creates some strict liability offences, for example, a party that does not comply with any provision of a fair pay agreement (clause 161(3) and (4)), an employer who fails to provide its employees' contact details (clause 39(4)), an employer who fails to allow a covered employee to attend the minimum paid fair pay agreement meetings they are entitled to attend (clauses 82(6), 83(5), and 84(3)). The rationale for these strict liability clauses is to maintain consistency across the employment relations system. Higher penalty amounts are applied where the behaviour can negatively affect FPA bargaining and employees' ability to participate in the FPA process.

b) Clause 21(3) imposes a penalty where an employer misclassifies an employment relationship as a contractor relationship to avoid FPA coverage. Cabinet has agreed that the onus of proof be reversed for this offence, and that to avoid being penalised, an employer would need to prove that they took the action for reasons other than to avoid FPA coverage [Rec 71 CAB-21-MIN-0126]. The onus of proof is to be consistent with any other civil standard, whereby the decision maker needs to be satisfied on the balance of probabilities.

The justification for this reversal of proof is that it would be very difficult for an employee to prove what the employer's intention was. Where there has been a successful case establishing misclassification relating to an individual, the Labour Inspectorate can issue an improvement notice in relation to other similar employees in that employer's workplace.

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
The Bill creates significant decision-making powers to the Authority, including, for example, the ability to fix the terms of a FPA (especially minimum entitlement provisions), and determining whether a person is in or out of coverage. Such coverage determinations are particularly significant because they directly affect employees' and employers' rights, obligations and entitlements. A Labour Inspector may also determine whether an employee is covered by a FPA. Safeguards are included in the Bill to ensure that there are checks and balances in place when exercising these decision-making powers. For example, the Authority must comply with the principles of natural justice and must consider specified matters when fixing the terms of a proposed FPA. A person who is dissatisfied with a coverage determination made by a Labour Inspector has a right of appeal to the Authority against the determination.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
One of the terms of a FPA may be a time-limited exemption from the application of a FPA (i.e. a delayed commencement) for named employers for specified terms for a specified period. The power created in the Bill to grant an exemption provides flexibility to avoid undue negative impacts (such as an employer going out of business) by giving employers who need more time before they must comply with the terms of the FPA. The Bill also creates regulation-making powers that, for example, define the meaning of terms that are used in the public interest test (e.g. systematic exploitation of migrant workers), specify who the employee default bargaining party is, and set out the requirements of the terms of the FPA. The Bill also enables FPAs (secondary legislation) to set new minimum entitlement provisions that will override minimum entitlements (such as minimum wage rates, leave and entitlements) that are set out in the Minimum Wage Act and Holidays Act.	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES

FPAs will be brought into force by the Chief Executive of MBIE making secondary legislation, empowered by the primary legislation. The Chief Executive will not have any discretion about whether to bring a FPA into force, but will need to be satisfied that procedural steps in the process had been followed, e.g. the FPA had been vetted and then ratified or fixed by the Authority.

The Chief Executive may also vary the terms of a fair pay agreement (if the variation has been agreed by both sides and ratified) by issuing a fair pay agreement variation notice. These empowering provisions, including regulation-making powers, are necessary to ensure that people understand what is meant by the requirements in the FPA Act and have more detail to comply with the obligations.

The Bill creates the following regulation-making powers to:

(a) provide for anything this Act says may or must be provided for by regulations;
(b) specify who the employee default bargaining and the employer default bargaining parties are;
(c) specify further detail around the public interest test criteria;
(d) specify further details around evidence that may be provided by the union in an application to show the public interest test has been met;
(e) prescribe other information to be included in union's application to initiate bargaining;
(f) prescribe other information to be included in eligible employer association's application to form or join employer bargaining side;
(g) specify other information in union's application to join the employee bargaining side;
(h) specify other information in application to cease being a bargaining party;
(i) specify the form required, and details of mandatory content in a FPA;
(j) specify the form required, and details of leave entitlements;
(k) prescribe minimum entitlement provisions as either a specified amount or method of calculation;
(l) specify a term in a FPA that applies to employees in different districts;
(m) prescribe the form for the chief executive issuing a fair pay agreement notice;
(n) prescribe the form for notice to amend a FPA;
(o) prescribe the form for setting out terms in the chief executive's notice to vary FPA;
(p) specify other information in application to commence bargaining for proposed renewal or replacement FPA;
(q) prescribe the format for Authority's determination to fix terms of a FPA;
(r) prescribe the manner for electing to challenge the Authority's determination.

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO

Appendix One: Further Information Relating to Part Two

Extent of impact analysis available – question 2.5(a) and (b)

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).

FPAs could indirectly increase the price of goods and services if increased labour costs are passed on to consumers. The range and supply of goods and services available to consumers could be reduced if employers exit the market due to an FPA. This may also be the case if the terms of an FPA raise barriers to entry for new firms.

The following table summarises the estimated costs:

	Government's proposed model (assumes eight FPAs per year)
Employees within coverage	
Cost of bargaining/ consultation	~$1–2m
Cost of displacement	Low
Regulated employers	
Costs of bargaining/ consultation	~$1–2m
Increased labour costs, leading to a reduction in profit or increase in prices of goods or services[6]	~$150–600m *This figure reflects one set of 8 FPAs. The ongoing costs would be cumulative.*
Non-wage costs	Medium–high
Regulators and costs faced by government	
Costs to government	~$10–12.5m per annum operating ~$1–2m in capital funding (one-off)
Total monetised costs	**Est $163–618.5m per year**
Total unmonetised costs	**Medium to high**

[6] 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.

The following table summarises the estimated benefits:

	Government's proposed model (assuming eight FPAs 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.*
Increase in wellbeing from improved terms and conditions	Low to high
Regulated employers	
More engaged and productive workforce	Low
Total monetised benefits	**Est $150–600m per year**
Total unmonetised benefits	**Low to high**

Appendix Two: Further Information Relating to Part Three

Consistency with New Zealand's international obligations – Question 3.1

During the public consultation in 2019 on the proposed design of the FPA system, some submitters raised concerns regarding inconsistencies with International Labour Organisation Conventions. One of the issues raised related to the ILO's Right to Organise and Collective Bargaining Convention 1949 (Convention 98), to which New Zealand is bound.[7] For example, the requirement that an FPA should result when FPA bargaining is initiated, compulsory arbitration (terms of the FPA can be fixed if both sides can't reach agreement) and coverage of non-parties could challenge the principle of free and voluntary collective bargaining. However, these features are essential to achieve the Government's intended objective that enforceable minimum terms are produced at the end of FPA bargaining. Also, it should be noted that the FPA system supplements the bargaining options available under the Employment Relations Act, rather than replacing them, so that the parties have a number of options available to them.

Offences or Penalties – Question 3.4(a)

Certain terms of a FPA will be minimum entitlement provisions, meaning the Labour Inspectorate can enforce these in accordance with the Employment Relations Act. As already set out in the Employment Relations Act, this includes the ability to apply to the Employment Court where there are serious breaches of these terms that could attach severe consequences including a:

- Pecuniary penalty of up to $50,000 for an individual or for a body corporate up to $100,000 or 3 times the amount of the financial gain made by the body corporate from the breach;
- Compensation order to recommence impacted employers;
- Banning order that bans an employer from the labour market for up to 10 years.

Where an employer fails to keep the additional wage and time records required by the FPA Act (which may include the days of the week and times of the day that employees within coverage worked), the employer will commit an infringement offence and may be subject to an infringement fee of $1000.

Penalty for non-compliance with obligation when bargaining

Clause 196 applies to an obligation if a provision of this Act provides that the Authority may impose a penalty, not exceeding the applicable amount specified in this clause, for a breach of that obligation. A person who breaches an obligation (or a person who incites, instigates, aids, or abets a breach) to which this section applies is liable,—
(a) if the person is an individual, to a penalty not exceeding $20,000:
(b) for any other person, to a penalty not exceeding $40,000.
Relevant clauses are:
(a) any person who exerts undue influence on another person in relation to membership of a union or employer association:
(b) an employer who breaches the duty of good faith by doing anything with the intention of inducing an employee not to be involved in initiating bargaining, bargaining, or a ratification vote:
(c) breach of the duty of good faith by any party that it applies to, where they have engaged in behaviour that is deliberate, serious and sustained, or intended to undermine bargaining:
(d) an employer who intentionally or recklessly fails to comply with the requirements to notify affected employees of the initiation, ratification, variation, or renewal of a proposed FPA or a fair pay agreement:

[7] Employers have indicated an intention to bring their concerns to the formal notice of the International Labour Organisation. There are two options for this. First, through a representation made to the ILO Governing Body that the introduction of Fair Pay Agreements will put New Zealand in breach of ILO Convention 98 on the Right to Organise and Collective Bargaining. This could see a tripartite committee of the Governing Body set up to investigate and recommend action to the Governing Body. Second, by having New Zealand included in the list of countries for examination by the ILO Committee on the Application of Standards at the International Labour Conference, which will occur in mid-2022. Neither option has yet occurred.

(e) a person who intentionally or recklessly provides inaccurate information as part of an application to initiate bargaining:
(f) an employer who fails to allow an affected employee to attend the minimum paid fair pay agreement meetings they are entitled to attend in relation to bargaining:
(g) an employer who unreasonably refuses to permit entry for, or obstructs, a union representative who is entitled to enter a workplace:
(h) an employee bargaining party, employer bargaining party, or employer who intentionally or recklessly provides inaccurate information as part of the ratification evidence:
(i) an employer who fails to provide its employees' contact details:
(j) an employer who intentionally fails to provide information in relation to a new employee:
(k) an employer bargaining party or employer who intentionally fails to provide information when bargaining for a proposed variation has been agreed:
(l) an applicant for approval to bargain for a proposed renewal or a proposed replacement who intentionally or recklessly fails to comply with the obligation to provide information relating to bargaining.

Penalty for non-compliance with obligation when fair pay agreement in force

Clause 197 applies to an obligation if a provision of this Act provides that the Authority may impose a penalty, not exceeding the applicable amount specified in this clause, for a breach of that obligation. A person who breaches an obligation (or a person who incites, instigates, aids, or abets a breach) to which this section applies is liable,—
(a) if the person is an individual, to a penalty not exceeding $10,000:
(b) for any other person, to a penalty not exceeding $20,000.
Relevant clauses are:
(a) breach of duty of good faith by any party that it applies to, where they have engaged in behaviour that is intended to undermine a fair pay agreement:
(b) an employer misclassifies an employment relationship as a contractor arrangement to avoid coverage of a fair pay agreement:
(c) a party that does not comply with any provision of a fair pay agreement:
(d) a party obstructs or delays the Authority from performing a function under this Act.

Privacy issues – Question 3.5

In addition to the clauses listed in section 3.5, other clauses that also engage privacy rights, include but are not limited to:
(a) Personal information that has been provided to the bargaining side (excluding contact details) for the purposes of bargaining must not be disclosed to any person except in a form that does not identify the individual;
(b) The Chief Executive may collect personal information only for the purposes of assessing whether an applicant to initiate bargaining has met the required tests, or verifying that a ratification vote complies with the requirements. Any information collected must be disposed of within 12 months after validating the FPA;
(c) The chief executive may require the applicant to provide additional information or evidence if the application does not contain enough information;
(d) The Chief Executive may invite public submissions on whether the application meets one of the tests;
(e) The Chief Executive must publicly notify the following information, including approval of application, name of applicant, type of test relied on, reasons for the test being met, and coverage;
(f) The Chief Executive to provide each bargaining party for the proposed FPA with the name of each other bargaining party for the proposed FPA;
(g) Information requests from one bargaining side, during bargaining, for information from the other bargaining side must be in writing, specify the nature of the information requested in sufficient detail to enable the information to be identified, specify the claim, or the response to a claim, specify a reasonable time for information to be provided. Any request for information must be provided directly to the bargaining side that requested the information, or to an independent reviewer;
(h) An employer must provide its covered employee's contact details to an employee bargaining party other than the initiating union if the employer is required to provide those contact details to

the initiating union but the initiating union is no longer an employee bargaining party, and the employee bargaining side has provided the employer with the address of the other employee bargaining party to which the employer must send the contact details;
(i) The employer bargaining side must ensure that it provides the current contact address provided to each employer;
(j) The initiating bargaining party must provide further evidence to the Chief Executive if the Chief Executive has publicly notified it has approved an application to initiate bargaining, and the bargaining sides have agreed to amend the coverage;
(k) An employer must provide the contact details of each newly covered employee due to coverage changing (except for the details of an employee who elects not to have their contact details provided) to the employee bargaining side;
(l) If a new employee commences employment during bargaining, an employer must provide the contact details of each new employee (except for the details of an employee who elects not to have their contact details provided) to the employee bargaining side;
(m) Prior to ratification, the employer must provide the details about each of its covered employees to the employee bargaining side, including the employee's name, job title, site at which the employee works, contact details;
(n) In relation a proposed variation, the employee bargaining side must provide the employer bargaining side with specified information, including the address to which the employer is required to send the covered employee's contact details. This also applies to a new employee who commences employment in a role that is within the coverage of a fair pay agreement, and during the bargaining process for a proposed variation. An employer bargaining side must also provide information to a new employee that employs 1 or more covered employees;
(o) A Labour Inspector has extended powers to inspect any wages and time record or any holiday and leave record, any other document held that records the remuneration of any employees, and any other document that the Labour Inspector reasonably believes may assist in determining whether an employee is covered by a fair pay agreement.

Privacy issues – Question 3.5.1

Following feedback from the Office of the Privacy Commissioner, new clauses have been added in the Bill to strengthen privacy safeguards regarding the collection, use, disclosure, storage and retention of personal information. Amendments were also made to remove the content which is more suited to the (Chief Executive) prescribed form from the union statement. Instead, the union must provide the (Chief Executive) prescribed form which will, at a minimum, set out: that the employer is required to provide the employee's contact details to the initiating union and employee bargaining parties (unless the employee opts out), how the employee can opt out, the consequences of opting out or not opting out, and how the employee can opt back in.