Submission by

BusinessNZ

GROWING PROSPERITY AND POTENTIAL

to the

Employment and Workforce Select Committee

on the

Fair Pay Agreements Bill

19 May 2022

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SUBMISSION BY BUSINESSNZ - FAIR PAY AGREEMENTS BILL

INTRODUCTION

1. BusinessNZ welcomes the chance to submit on the Fair Pay Agreements Bill, and wishes to appear before the Select Committee to speak to its submission.

GENERAL COMMENT

2. The Fair Pay Agreements Working Group (FPAWG) delivered its report to the government in December 2018. Its recommendations were couched in terms of preventing a "race to the bottom" in wages and conditions of employment in highly competitive industries e.g., cleaning, security and food retail.

3. However, the Bill does not deliver on this. Instead, it appears designed purely to give unions enormous sway over the wages and conditions of workers across New Zealand whether or not those workers have any interest in having their conditions set by unions. This is apparent in several areas including:

    a. *Initiation,* where only unions can initiate an FPA (employers have no say), and where the representativeness criteria are so low as to be farcical and the very subjective public interest test appears to be simply a device to circumvent the representativeness test when a union can't meet even that low threshold.

    b. *Representation,* where unions with years of experience of collective bargaining will negotiate with employer groups cobbled together for the occasion, many of which have no experience of industrial relations and collective bargaining. And in the absence of a suitable employer bargaining party, unions will be able to take their claim for an FPA straight to the arbitration body for determination. In this instance, employers will not be represented at all.

    c. *Ratification* of settlements where employers' votes will be weighted, forcing them to have an intimate knowledge of which employers are affected and exactly how many affected employees each has on the day of the ratification vote, at the same time as providing that a second failed (i.e., "no") vote will refer the settlement to the Employment Relations Authority (ERA) for determination. This makes a vote against an FPA effectively meaningless.

4. The Bill establishes a cumbersome, labour intensive, costly system of monumental complexity that completely fails to recognise the fast-moving nature of today's economic environment. Instead, it reinstates the failed national occupational award system in existence between 1894 and 1991. In so doing, the Bill also fails to recognise the most basic lesson learned during that period, which is that even the award system recognised that one size did not fit all.

5. BusinessNZ believes FPAs will not deliver the claimed benefits, in fact they will prove damaging, and should not be introduced at all.

6. With this in mind, BusinessNZ

   a. **opposes** the introduction of the Fair Pay Agreements Bill on a number of premises, including that they:
      i. are unfair to workers and employers
      ii. are unworkable in practice
      iii. breach international law
      iv. will lead to a significant increase in disputes and litigation
      v. will be economically damaging

   b. **recommends** that
      i. the Bill not proceed or, in the alternative,
      ii. be replaced by a system of voluntary collective bargaining built on present provisions for codes of practice and multi-employer collective agreements

7. BusinessNZ's reasons are set out below.

UNFAIR TO WORKERS AND EMPLOYERs

Flexibility available to workers will be reduced

8. Two of the elements that must be included in FPAs are remuneration, including overtime and penal rates, and hours of work. By definition, these will be common to most if not all workplaces covered by the FPA. Yet not all workplaces work the same way. Many now have flexible working arrangements that take account of employee preferences as well as accommodating changes in circumstances.

9. Events such as the Covid 19 pandemic have driven the need for flexibility to hitherto unknown levels. However, the one size fits all design of FPAs will act as a significant brake on such initiatives, and reduce the ability of businesses to adapt to, or workers to cope with, the demands of balancing work and life.

10. In our view the message the Government should be promoting is ***"your work your way."*** The message sent by the Bill is ***"your work, our way"***. This is out of step with modern reality.

Workers will not get the full benefit of increases

11. The Government claims that FPAs are necessary to improve the wages of the lowest paid. However, there are a number of factors that make this goal difficult if not impossible to achieve in practical terms. These factors illustrate a fundamental lack of understanding on the Government's part as to the effects of pay increases at the lower end of the pay spectrum.

12. First, FPA settlements, by definition, need to be affordable for most if not all affected employers. Settlements that are affordable only by the largest employers will simply drive small businesses under. Indeed, history (informed by New Zealand's system of national awards in place from 1894 – 1991) demonstrates clearly that national level settlements will necessarily be conservative. Furthermore, even conservative settlements will effectively increase the value of the minimum wage with respect to the occupation the FPA covers. This unilateral imposition of extra costs on employers who were not at the bargaining table therefore will be yet another cost blow to, particularly small, employers who already bear the brunt of economic hard times brought about by Covid and, more recently, the effects of the war in Ukraine.

13. Second, the current minimum wage of $21.20 per hour ($44,223 per annum) is now close to the tax threshold of 30% (payable on income above $48,000). The current "Living Wage" now aspired to by many and paid by some (particularly in local government) is $22.75 per hour ($47,457 per annum) [1]. Increases in the minimum wage in 2023 will close the gap with the 30% tax bracket before any FPA settlements are applied. This will reduce the value of FPA settlements for those who cross the threshold.

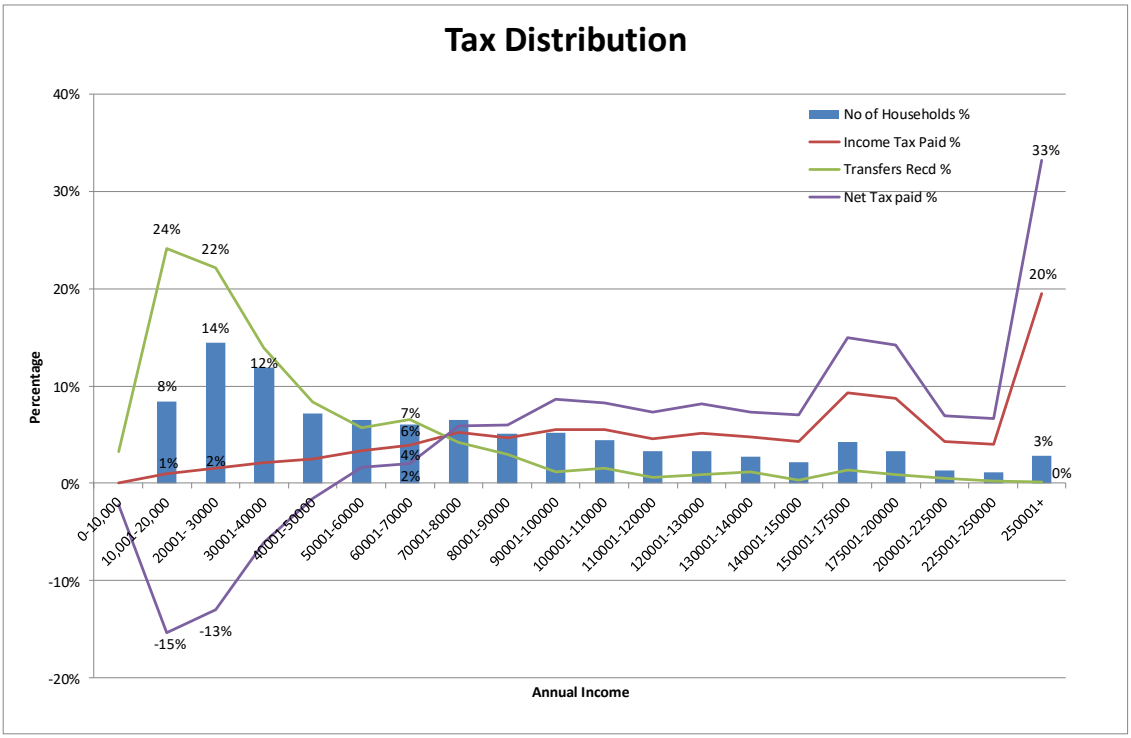
14. In any event, it is unlikely any settlements will be reached at all before the next election, let alone by the time of the next scheduled increase in the minimum wage in April 2023. This is because too much about the process and outcomes is yet unknown, and there are a large number of points in the process at which lengthy litigation is almost inevitable, including the criteria under which an FPA may be initiated, the composition of bargaining teams, the fairness of the process and proposed settlements, the ratification process and the accuracy with which the government translates a settlement into enabling legislation[2].

15. Third, wage increases for the lower paid (whether achieved via FPAs or other means) are in many cases likely to be further diminished by the application of abatement criteria attached to government subsidies such as Working for Families, meaning many workers will not reap the full benefits.

16. While this occurs now, it will be exacerbated by FPAs. Since settlements will be imposed generally upon all workers and employers there will be little ability to ameliorate the abatement effects of transfer payments on pay increases with workarounds such as improved non-monetary benefits for individuals. Any such workarounds will simply add further cost, further hurting productivity. In other words, the current flexibility many employers use to assist workers will become unavailable.

[1] This will increase to $23.65 per hour, or $49,334, per year on 1 September 2022.

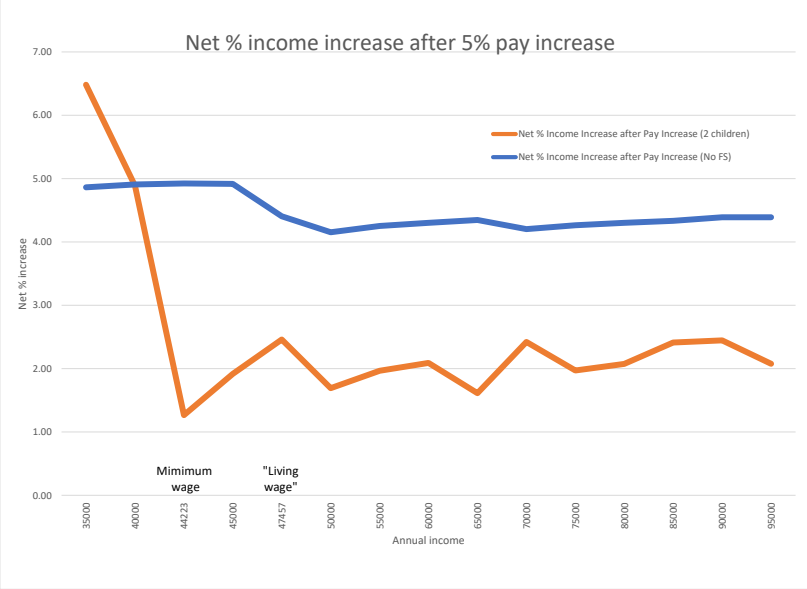
[2] See Paragraph 101 for an indication of the possibilities for litigation



Source: NZ Treasury

17. As shown in the graph above, low-income earners are the greatest recipients of income subsidies and thus the group paying the lowest (in some cases negative) net tax. They therefore are the group who will reap the lowest net gains from pay increases, because pay increases will be offset against the level of subsidy they receive.

18. On average, a single income family receiving WFF payments will receive roughly 50% of the net value of any pay increase they have been awarded, compared with over 80% for a single income family which is not in receipt of the WFF (see below).

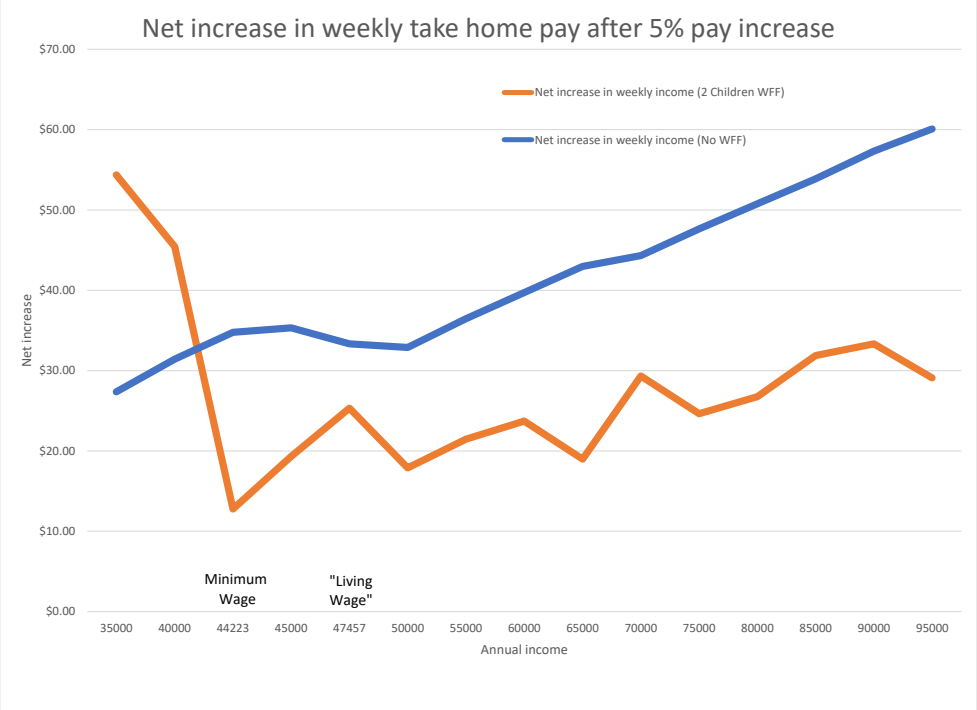


19. The abatement process is especially significant for the low paid since WFF payments can be a substantial proportion of weekly income (33% for a family with 2 children and single income on the minimum wage of $21.20 per hour or $44,223 per annum).

The effect of abatement

20. Just over 44% of all New Zealand income earners earn less than $42,700 per year, the point at which the WFF abatement process commences. Roughly 51% earn less than $47,457 (the annual value of the so called "living wage of $22.75 per hour).

21. Once a family income crosses the abatement threshold, the effect is clear, as illustrated in the following graph.



22. Equally clear is that setting the threshold in this way creates a potentially significant disincentive to accepting increases that raise family income above the WFF abatement threshold.

23. The disincentives created by the abatement process affect business too. For instance, an employee offered promotion to a bigger branch in a nearby town turned the offer down, as the effect on family income wasn't worth it. The business concerned was unable to further increase their offer to the employee, as this would have had flow on effects through the other branches of the business. Instead, the business started the process for recruiting a new branch manager from scratch.

24. Other businesses have reported employees demanding higher increases to offset the reduction in family support payments. These employees felt aggrieved that their net income would increase by only a fraction of the

ostensible value of the increase offered. In most of these cases the employees saw their remuneration as being separate from the WFF payment despite the fact that the WFF had boosted their overall family income. Some employees in single income families regard the WFF as income for their partner rather than for themselves, further separating remuneration and WFF in their mind.

25. There is even more woe in store for those in receipt of child support payments, primarily women. Child support is counted as income for Working for Families purposes and therefore will increase the amount by which pay increases are abated.

26. Recognition of these deleterious effects on settlements is likely to generate higher claims for wage increases. Yet a settlement will be acceptable only when it is sustainable by the vast majority of those businesses covered by it.

27. As occurred under the pre 1991 award system, this is will simply generate frustration among workers leading ultimately (as occurred with the award system in the late 1960s) to the collapse of the FPA system for all practical purposes and the advent of second tier enterprise-based bargaining where workers seek to achieve their aims at the enterprise level. Notwithstanding a prohibition on strikes for FPAs, strikes can occur in relation to enterprise level – and the Employment Relations Act provides for them - and under the previous award system occurred frequently.

28. Ultimately, introducing FPAs without addressing these issues may actually put more money in government coffers than it will in workers' pay packets.

Workers will face long waits for increases

29. Not only are workers not likely to receive meaningful increases in disposable income, but they may also have a long wait before the next increase. FPAs will be in force for a minimum of 3 and maximum of 5 years. Technically at least, workers covered by FPAs will have no right to changes to their conditions of employment for at least 3 years.

30. While it will be possible to build in phased increases, these, as mentioned above, are most likely to be conservative, to insure against unsustainable costs (particularly for businesses that operate with low margins). Inflation over a 3-year period is highly likely to see the value of workers' incomes fall behind in real terms. Workers' only redress will be to seek increases over those in the FPA (second tier bargaining), which opens up the right to strike as mentioned above.

FPAs risk disenfranchising unions

31. Under the award system, demarcation disputes between unions were common due to strict rules about which unions covered which work. At times

these disputes caused as much disruption as strikes over collective bargaining.

32. The Bill enables unions (on behalf of workers) to nominate the coverage of a proposed FPA. Over time, this will almost certainly create tensions between the boundaries of FPA coverage and the unions that negotiate them, recreating demarcation as an issue.

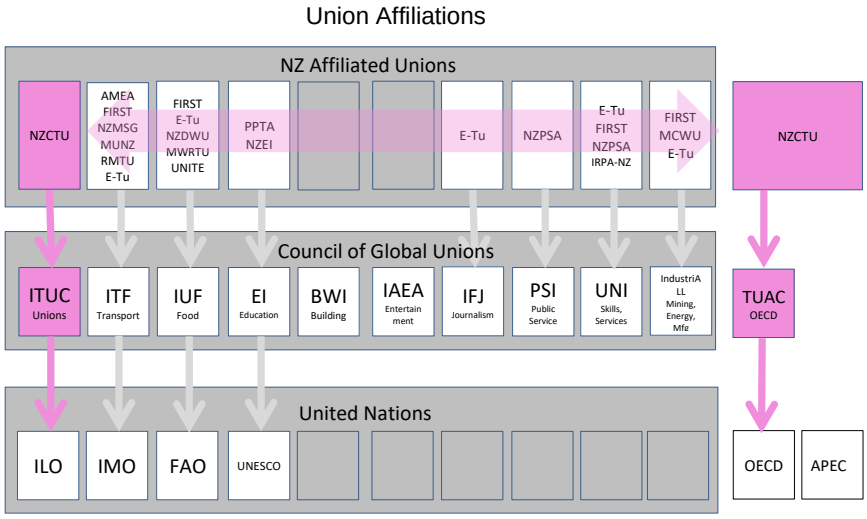
33. There are currently around 135 unions in New Zealand. Tensions already exist between many of the fewer than 30 unions that are affiliated to the NZ Council of Trade Unions and the more than 100 unions that are not; the Resident Doctors Association is a notable example as evidenced by media attacks from the CTU[3].

34. Opportunistic claims for FPAs by CTU affiliates could easily force non-affiliated domestic unions into a corner, particularly those that currently are associated with a single employer. There are many of these in New Zealand, in private schools, local government, ports and private sector companies. These company affiliated unions are traditionally disavowed by internationally affiliated unions.

35. As an example, a union that is not represented in all ports, but which has enough members to initiate an FPA, can effectively "take over" the conditions of the ports in which they do not currently have a presence. This could easily disenfranchise other unions currently present, and lead to levels of internecine union conflict not present since before the 1990s. It may also affect the constructive relationships currently in place between many employers and their local union by replacing those unions with more nationally oriented ones.

36. As can be seen in the diagram below, several of the CTU's major New Zealand union affiliates are strongly linked to the international union movement, and thence into the United Nations and OECD. Affiliated unions enjoy strong support in these bodies.

[3] https://www.stuff.co.nz/national/politics/109799092/as-junior-doctors-strike-leaked-email-shows-bitter-rivalry-between-unions



37. To further illustrate this point, the Public Service Association is one of 30 unions currently registered as covering Government Administration and Defence[4]. It is the only one of that group affiliated to the CTU and to its global counterpart, Public Service International. It is New Zealand's largest union with over 50,000 members. It therefore is easily capable of meeting the 1000-person or 10% threshold for triggering a claim for, say, clerical workers.

38. Doing so, however, could disenfranchise the remaining 29 public sector unions with respect to clerical workers. It would have a similar effect on private sector unions that currently cover clerical workers. This effect could be repeated for all occupations covered by the PSA.

39. Similar effects could be read into the coverage of the FIRST Union which is registered as covering Transport and Storage; Accommodation, Cafés and Restaurants; Cultural and Recreational Services; Construction, Finance and Insurance and Property and Business Services (the widest registered coverage of all New Zealand unions).

40. At the very least, the proposed system is likely to lead to demarcation style disputes between unions, something not possible under the present system.

FPAs ARE UNWORKABLE IN PRACTICE

Complexity

41. The Bill proposes a system of enormous complexity. The list below is a non-exhaustive list of issues all participants in FPA bargaining will need to grapple with.

    a. Initiation criteria
    b. Threshold criteria

[4] http://www.societies.govt.nz/cms/registered-unions/register-of-unions

c. Notification requirements
d. Coverage (sector, industry, occupation or sub occupation; regional or national?)
e. Exemptions
f. Good faith criteria
g. Scope of FPAs (i.e, what they can cover)
h. Representation, including of those people and organisations not members of representative bodies
i. Bargaining costs and cost recovery
j. Support and resource requirements
k. Anticompetitive behaviour
l. Disputes
m. Arbitration
n. Appeals
o. Ratification
p. Enactment
q. Enforcement

42. These issues are illustrative of a system that is vastly more complex that the present system of collective bargaining under the Employment Relations Act 2000.

43. While the Bill addresses the issues in paragraph 41 in terms of basic requirements, there is no guidance as to how the many and complex obligations can be met without breaching the law. Yet each of these issues represents a significant risk of dispute and litigation, and ultimately penalty.

44. The lack of available guidance (and the complete inexperience of the vast majority of employers -and, indeed many unions - in award-based bargaining systems) increases this risk considerably, making it possible that finalising an FPA could take months, even years. This is not conducive to the economic agility required in today's Covid, climate and technology challenged business environment.

45. Many, if not most, employers are not associated with any national organisation let alone one with the expertise to represent them in collective bargaining. Simply identifying and contacting employers whose employees will be caught by the coverage of a proposed FPA is hugely problematic. This means many thousands of small businesses may have no input at all into matters that affect the very existence of their businesses. "Best endeavours" is not good enough here.

46. Business organisations representing employers face similarly huge issues of cost and risk. Contacting and informing employers, many of whom are unknown to the organisation, as well as gathering and synthesising their views into a cohesive employer bargaining position are complex processes even under the current Employment Relations Act regime.

47. The costs of organising and conducting bargaining in many cases amount to many thousands of dollars. Small businesses may find even these costs unsustainable let alone the cost of any settlements. Unions typically expect the employer to pay to the costs of transporting, accommodating and feeding workers representatives, as well as having to pay for logistics and, frequently, the hire of external advocacy expertise. With a system as complex as that proposed, the risks of not being able to fully comply with the Bill's requirements are high, as well as the risk of challenges from employers who claim to have been overlooked and whose views have not been taken into account. This risk reaches certainty if an FPA settlement imposes significant costs on employers who had no say in the agreement on those costs.

48. The proposed approach is even more unacceptable in the face of the Bill's requirement that settlements be subject to a ratification vote by employers. This is so impracticable as to be farcical. It is arguably impossible for an employer organisation representing, say, retail workers to know in time for a ratification vote how many employers in the country have employees that will be covered by a proposed FPA and how many employees each of those employers has on that day.[5]

49. Coverage also will create many issues as evidenced by the demarcation disputes that occurred under the pre-1991 award system. For instance, is an employee employed by a supermarket to drop off goods ordered online a driver or a retail worker? Issues such as this have taken years to resolve in Australia, which has an award-based system (though rather different from that proposed for New Zealand). Asking businesses and employees to engage in a system with so many "moving parts" is unlikely to produce efficient and fair outcomes, certainly in the short term and probably not at all. Almost by definition, becoming familiar with the new system will make the first attempts slow, ultimately delaying any results and possibly making them less economic as time goes on without a settlement.

Timeframes

50. The timeframes provided for establishing an FPA are themselves an obstacle to FPAs delivering timely and fair outcomes. The table below highlights the core steps in the proposed process with the associated deadlines provided in the Bill. This table does not deal with any delays inherent in the criteria if the successive stages are not met, or with the effects of litigation at various stages.

Step	Action	Timeframe
1	Union applies to establish FPA	
2	MBIE responds to application	ASAP

[5] Employers with fewer than 20 employees will have their votes weighted by the number of employees they employ. This means for the vote to be representative of employers views it is necessary to know the number of employees each employer has on the day the vote is taken.

3	MBIE may call public submissions	ASAP
4	Public submissions received	At least 20 days after invitation
5	Union notifies employers and other unions of approved application	Within 15 days of approval
6	Employer notifies employees of union notice	Within 30 days of receipt of notice
7	Employer to provide employee details to employee bargaining side	At least 20 days after notifying employees
8	Formation of employer bargaining side	3 months after Step 2
9	Agree side agreement	Within 20 days of Step 8
10	Provide information	"Reasonable timeframe"
11	Bargaining	Unspecified
12	ERA assesses proposed FPA	No later than 20 days after receipt of proposed FPA
13	Notify ratification	No later than 20 days after Step 12
14	Hold ratification	At least 40 days after Step 12
15	Notification of ratification result	As soon as reasonably practicable
16	MBIE verifies proposed FPA	No later than 20 days after receiving all required evidence of ratification vote

51. As can be seen, it will be at least 3 months before bargaining for an FPA can even start and given the complexity of the process following initiation it will be almost impossible to conclude an FPA within 6 months of commencement even with good will on both sides.

52. The over 20 pay equity claims currently in bargaining under the Equal Pay Act provide valuable insights into the complexity of the FPA process. The bargaining process for achieving a pay equity settlement has much in common with that proposed for FPAs and pay equity outcomes will be analogous to FPAs as they will cover workers across a given occupation.

53. To date only one of the over 20 claims has been settled after many months of negotiations. Reasons for delays include difficulties in establishing employer representation and in gaining access to information to support claims, the same issues that are apparent in the Government's FPA proposals.

54. The reality is that it will take much longer than assumed to achieve an FPA, first as unwilling employers come to grips with both the process and union claims, and second in terms of the logistics required to complete each stage.

55. When the high probability of litigation at one or more stages is factored in, particularly in relation to early FPA claims, it becomes strongly arguable that the first FPAs will in fact take many months, even years, to complete.

56. In the meantime, employers who have been notified they will be covered by an FPA are likely to act conservatively with regard to wage increases in the interim while they wait to see a settlement they cannot escape. That will not serve workers interests well and can be expected to increase workplace tensions between workers and their employers.

Representation

57. Deciding who will represent employers under the Bill's provisions is fraught with practical difficulty. Both a lack of sufficiently representative organisations for given occupations and a lack of expertise in national level collective bargaining with battle hardened unions will create enormous challenges for employers confronted with a claim for an FPA.

58. These include how to identify affected employers and how to choose a representative bargaining team who will bargain on behalf of affected employers.

59. While the Bill sets out the requirements in this regard, it provides no guidance on how to meet the requirements. Any guidance not included in the legislation will be a point of potential litigation making even starting bargaining, let alone reaching a settlement, a real challenge. It can reasonably be assumed that the first FPAs will be a significant test of process that could take months if not years to resolve.

60. Significant practical issues also arise when it comes to claims initiated in the public sector, but which also involve coverage of private sector employers and workers.

61. There will be a question of "dominant interest" to be resolved. For instance, an FPA claim in the public sector that has private sector coverage may be construed by the state as a public sector issue with flow on effects, whereas private sector employers may feel they have a primary interest in the outcome as they are individually vulnerable and want to protect their particular interests. This engenders a need for rules about the status of the parties representing different sectors. This has not been taken into account in the Bill.

62. The public and private sectors are different labour markets. Single deals covering both sectors may distort job values in both unless they are differentiated in settlements (a difficult task and possibly not permitted under proposed FPA bargaining rules). The consequent tensions when expressed in settlements may depress real job values and incentivise skills flight, which is already a concern.

63. The public sector is funded from a common purse while each private sector employer stands alone. This creates significant potential for dispute, driven by different cost impacts, between the two primary employer voices at the

table (state and private). This potential is amplified when the variety of funding options is considered.

64. For instance, a claim for nurses in the state sector will impact in the private sector differently depending on whether the source of funding for a settlement is from government (e.g., nurses in the aged care sector) or from customers (e.g., private hospitals). Different funding sources will create a cascade of increasing issues. DHB nurses' settlement costs will ultimately be met from the crown account, aged care nurses' costs will be met from within funding grants and this will constrain operational spending if the grants are not topped up. The wider private sector will either need to increase prices to customers or constrain services (or both).

65. Furthermore, most if not all industry organisations are currently ill equipped to deal with FPAs in their own industries let alone walk confidently in the divide between their industries and the state on labour relations issues. The costs inherent in being an industry occupational group have not been quantified yet are likely to be considerable given the administrative burdens imposed on employer representatives by the Bill.

Industry or occupation

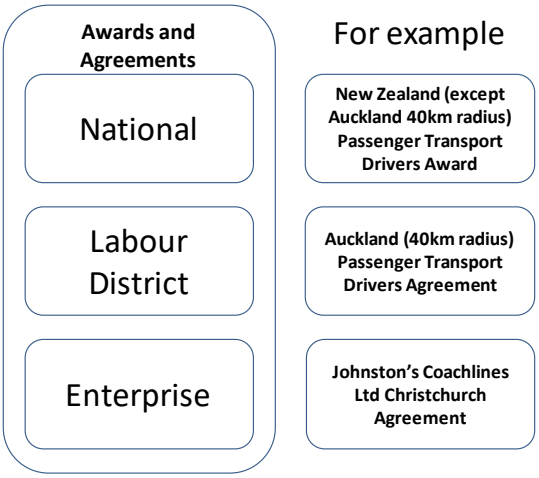
66. FPAs may take the form of "industry-based agreements" or "occupation-based agreements". An occupation-based agreement covers everyone in a specified occupation irrespective of the industry or sector in which they work. An industry-based agreement will cover all employees in specified occupations in a given industry (e.g., all butchers and bakers in the supermarket and grocery industry).

67. That said, no recognition has been given to the fact that no occupation is completely confined to one industry or sector. Nurses for instance are found in hospitals, schools and factories, and so are carpenters and electricians.

68. Taking account of the highly variable realities between these different environments will further complicate matters. Indeed, this was the very reason that awards and agreements prior to 1991 were not all encompassing; even in respect of a single occupation there were many documents, some national in scope, others regional (based on labour districts) and yet others focussed on single enterprises.

69. While some occupations were covered by only a few documents (Woollen Mills were covered by 15 awards and agreements), others were covered by many more. Drivers as an occupation were covered by nearly 200 different industrial awards and agreements; clerical workers had over 200 across national, district and enterprise levels. Appendix 1 lists 3106 awards and agreements in existence just before their abolition in 1991. This is nearly double the number of collective agreements (1988) currently registered under the present system governed by the Employment Relations Act.

70. The diagram below illustrates the basic approach.



71. Unions have indicated that the first FPAs they seek include cleaners, retail workers, security guards and bus drivers. Appendix 1 shows that each of these groups was covered by multiple documents prior to 1991, based on regional and sub occupational differences eg:

    a. Cleaners and Security guards (classified in 1990 as *Cleaners, caretakers, lift attendants and watchmen*) - 54 documents
    b. Retail workers (classified in 1990 as *shop attendants*) - 12 documents
    c. Drivers (Local body transport) – 18 documents

72. This multiplicity of documents was developed over the nearly 100 years between 1894 and 1991 and recognised the reality that "one size fits all" documents were unworkable; local and regional differences, as well as the unique features of some jobs within the generic description could not be dealt with by generic documents. This fundamental reality appears to have been either unappreciated or ignored in the Government's consideration of FPAs as a future approach to managing conditions of employment.

Government will not be able to control the rate of introduction

73. While the Prime Minister has offered several assurances that there will only be one or two FPAs in the first year, the Bill provides no means for the Government to control this. This makes it quite possible that claims will proliferate once the requisite law is passed. The long list of occupations at the back of the FPAWG report indicates just how many there could be.[6]

74. There are already strong signals that workers will not wait in a "queue" for their FPA to be settled. For instance, under the Equal Pay Act 1972, there are already over twenty pay equity claims being bargained over in the state sector, under the Equal Pay Act.

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[6] https://www.mbie.govt.nz/dmsdocument/4393-working-group-report-pdf

75. As mentioned earlier, pay equity bargaining is directly analogous to that for Fair Pay Agreements, as the outcome is a settlement covering an entire occupational group. Similarly, significantly increased levels of strike action in the transport and other sectors since the 2017 election hint at an impatience for results from workers who will not appreciate being "queued".

76. Also of relevance is the fact that the Equal Pay Act has resulted in only one pay equity settlement since the Act was amended in 2020 to allow for these, and that only after many months of difficult bargaining accompanied by threats of large-scale industrial action.

Coordination

77. Under the award system, unions were coordinated by the Federation of Labour and Council of State Unions (later merged into the CTU) while employer and industry associations were coordinated by the NZ Employers Federation (now BusinessNZ). The Bill proposes a vastly more complex approach under which the coordinating role falls on vaguely defined "bargaining parties" and "bargaining sides". The logistics historically involved in this were enormous and costly yet were not analysed by the FPAWG, nor are they addressed in the Bill. The complexities inherent in the pre-1991 system will be made several times harder by the bureaucracy imposed by the Bill.

78. For instance, it will be necessary to coordinate efforts to contact even those who are not members of a union or representative industry organisation. *This is most workers and employers, particularly in the private sector.* Other than through public media, there are currently no available reliable means for contacting non-union members and there is no guarantee that they will respond if they can be contacted. This places both worker and employer bodies in a position where there is a high probability they will breach the requirements of the Bill, exposing them to penalties.

FPAs BREACH INTERNATIONAL LAW

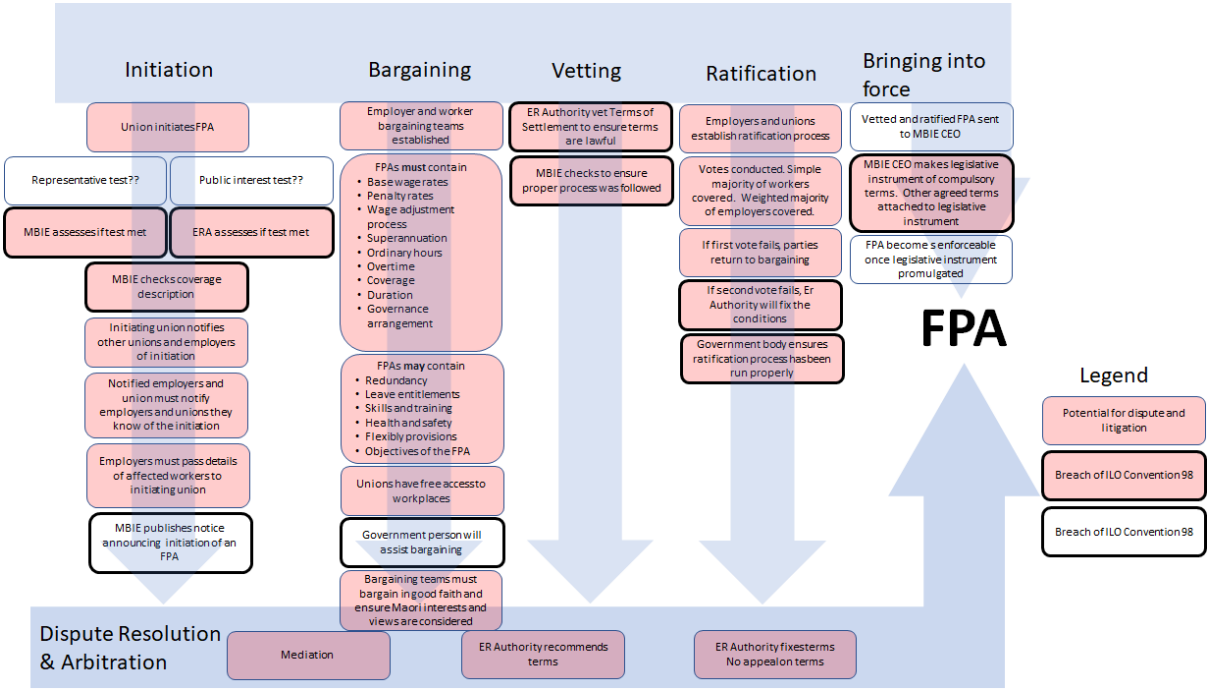
79. FPAs are inconsistent with New Zealand's international legal obligations. The FPAWG report recommended that *"the Government seek advice on the compatibility of the* [proposed] *system with New Zealand's international obligations."* This acknowledged employer concerns that the proposed approach would in fact be inconsistent with those obligations. However, no advice was sought. Instead, the Cabinet received and approved a Cabinet paper that simply noted BusinessNZ's concerns yet acknowledged that FPAs would challenge its compliance with international labour law[7].

[7] See paragraph 154 of Appendix 2

80. Since announcing its intention to introduce FPAs, the Government has steadfastly ignored numerous requests from the International Labour Organisation for an explanation of its intentions with regard to FPAs.[8]

81. In response BusinessNZ lodged a report with the International Labour Organisation regarding its FPA concerns. A copy of its arguments is attached at Appendix 2.

82. It is Business NZ's view, and that of the International Organisation of Employers (IOE), that FPAs, if enacted, would constitute a clear breach of the Right to Organise and Collective Bargaining Convention 1949 (C98), to which New Zealand is bound, and which requires bargaining systems to be consistent with the principle of free and voluntary negotiation. The diagram below indicates points in the proposed FPA process that are incompatible with C98.



83. The process embodied in the Bill is neither free nor voluntary. The compulsory arbitration mechanisms contained in the Bill have been already declared by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) to be inconsistent with C98. In its 2021 report on New Zealand's compliance with C98, the International Labour Organisation's Committee of Experts on the Applications stated:

> *"The Committee first wishes to recall that* ***compulsory arbitration in the case that the parties have not reached agreement is generally contrary to the principles of collective bargaining. In the Committee's opinion, compulsory arbitration is only acceptable in certain specific circumstances****, namely: (i)* ***in essential services*** *in the strict sense of the term, that is those the*

[8] See paragraphs 15-43 of Appendix 2

> *interruption of which would endanger the life, personal safety or health of the whole or part of the population; (ii) in the case of* ***disputes in the public service involving public servants engaged in the administration of the State****; (iii) when,* ***after protracted and fruitless negotiations****, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or (iv) in the event of* ***an acute crisis****.*

84. Furthermore, in relation to a requirement to agree to a collective agreement, the International Labour Organisation's Committee on Freedom of Association ("CFA") has found that

> *"1319. A legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations",9*

85. The CFA has made equally clear its disapproval of the notion of compulsory arbitration.[10]

> *"1416. Provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98."*
>
> *"1417. Recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population)."*

In something of an ironic contrast to its position on Fair Pay Agreements, the Government's current paper on Modern Slavery emphasises New Zealand's strong advocacy of international law and its *"involvement in the ILO and observance of international labour standards.*

86. Nor is the process contained in the Bill consistent with the idea of "extension" practised in some European countries. This concept holds that where a certain proportion of workers and employers who are already bound by a single collective agreement agree, that collective can be "extended" to cover the whole relevant industry or sector, whether the remaining employers and employees agree or not. This idea is analogous to having employers and employees covered by an existing MECA, say in the cleaning sector, agree to that collective agreement extending to cover all other workers in that sector without those other workers having a say.

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[9] See Chapter 15 paragraphs 1313 – 1321 of the Compilation of Decisions of the Committee on Freedom of Association for more http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO:::

[10] Paragraphs 1415 – 1419 (Compulsory Arbitration) of the *("CFA Compilation")* set out the CFA's views on the issue of the authorities fixing the terms of a collective agreement.

87. Extension bargaining is the model practised in France and Belgium, both of whom are making strenuous efforts to move away from the approach due to its productivity stifling results. Indeed, the EU countries that were forced to introduce the most severe "austerity measures" were mostly those with industrial regimes built on extension bargaining. Italy, Greece and Spain are notable examples. They, like France, are currently grappling with the need to open up labour market regulation, and for the same reasons. Germany, on the other hand, began a move away from national level bargaining in the early 2000s which has contributed to it becoming the economic powerhouse of Europe.

88. Nor is it valid to argue that FPAs are not true extension bargaining because they would be built from the start and not from an existing collective agreement, with "every affected firm or worker having the opportunity to be represented in bargaining and to indicate whether they wish to ratify the resulting agreement".[11]

89. While this is theoretically possible, the FPAWG report pragmatically acknowledges that not all workers and employers will have a real opportunity to be represented, by requiring those at the bargaining table to act in good faith in relation to those not formally represented.[12]

90. The reality of this requirement is impossible to escape. Less than 10% of private sector workers are represented by unions. A similarly low percentage of employers belong to industry associations and even fewer belong to employers' associations. This makes it much more likely that FPAs will follow the extension bargaining approach now being strongly rejected in Europe.

91. However, since the Global Financial Crisis, many governments in Europe have decentralised collective bargaining to reform labour market structures and improve economic performance. In fact, the OECD states that since the 1970 not a single country has moved towards more centralised bargaining. [13]

92. Ultimately, the Government's desire to introduce FPAs is nearly 50 years out of touch with the direction of travel of developed nations with regard to collective bargaining.

93. As mentioned above the principle of free and voluntary negotiation underpins New Zealand's international treaty obligations. The broad principle of voluntary collective bargaining arguably also covers the circumstances of workers and employers who, being remote from the bargaining process, have no direct voice to influence its outcomes yet are forced by default into the coverage of an agreement they may not agree with.

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[11] Taken from "New Zealand's International Obligations", an advisory document prepared on 30 October 2018 by the MBIE secretariat of the FPAWG.

[12] FPAWG Recommendations 19, "All employers in the defined sector or occupation should, as a default, be covered by the agreement; and 27, Representative bodies must represent non-members in good faith"

[13] https://www.ifo.de/DocDL/dice-report-2018-4-poutvaara-nikolka-january.pdf

94. The Government has already been challenged on this point, including in relation to the 2018 introduction of a duty to conclude a collective agreement in in the Employment Relations Act.

95. It is noteworthy that New Zealand only ratified C98 in 2003, after the award system was abolished in 1991. It had been unable to ratify it while the award system was in operation as awards were compulsory. The Government has been remiss in not resolving concerns over this point before making its recommendations. Quite simply, if something is unlawful it should not proceed.

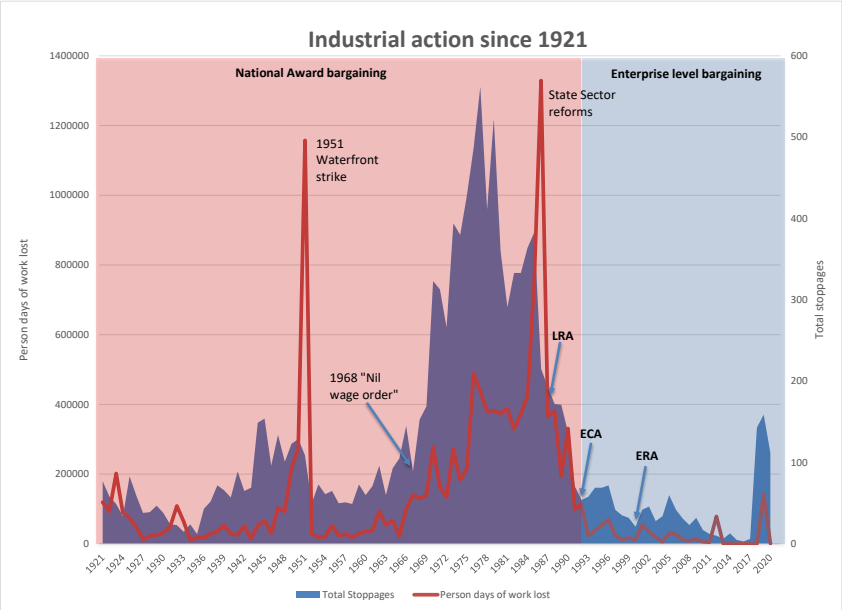
FPAs WILL LEAD TO INCREASED DISPUTES AND LITIGATION

Settlements

96. The Bill contains many aspects of the pre-1990 award system that make significant industrial action and economic disruption not only more likely, but almost certain.

97. Under the pre-1991 award system, settlements became more and more conservative in order to enable most businesses to cope with negotiated or arbitrated changes. Dissatisfied with low outcomes, workers and their unions put pressure on individual employers for "above award" settlements.

98. History (and reality) suggest that FPA settlements will need to be similarly conservative, which will create pressure for extra increases through enterprise level bargaining, thus recreating the ingredients of the disastrous industrial environment of the 1970s and 80s.



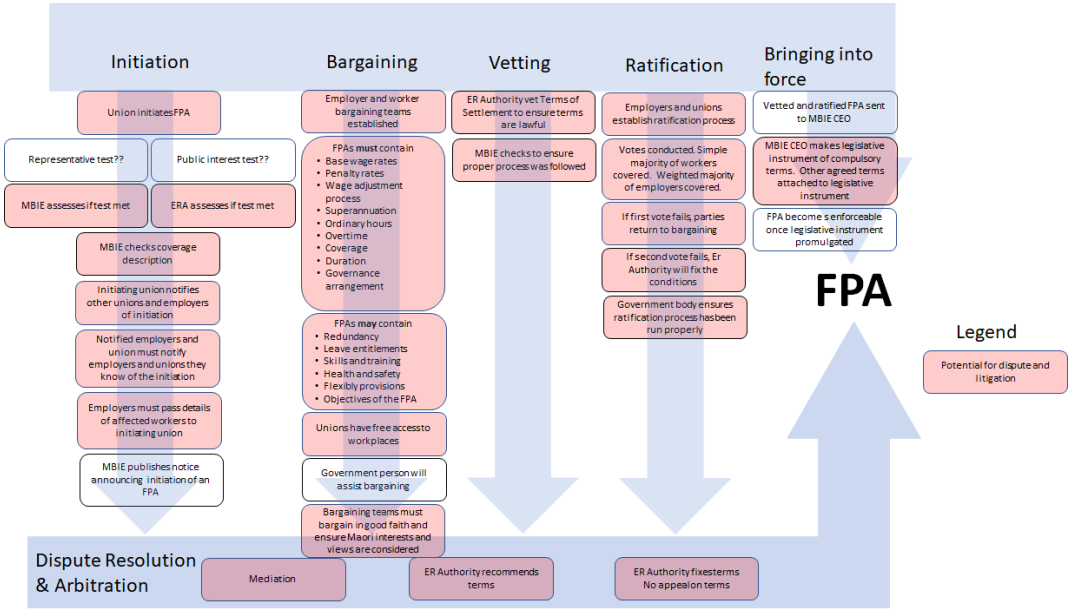
99. Furthermore, if FPAs become the vehicle for significant changes to wages and conditions, it is almost certain that many smaller businesses will be consumed, leaving mainly the larger players standing. This also opens the door to increased monopolistic behaviours by larger companies. Either way,

the prospects are bleak for smaller players and their employees, particularly those in the regions.

Disputes

100. The ability to take disputes under the Bill is extremely limited. Schedule 3 limits appeals on an ERA determination that fixes the terms of an FPA to questions of law. In most cases, this will mean the terms of an FPA cannot be challenged. The outcome will be the simple imposition of flawed outcomes to hundreds if not thousands of businesses.

101. Even without being able to appeal determinations of the ERA, the potential for disputes over other aspects of the Bill is huge. The red boxes in the diagram below indicate points in the process at which disputes may (and are expected to) occur.



Strikes

102. As can be seen in the graph in paragraph 98 above, even without Fair Pay Agreements, strike action has increased significantly since 2017.

103. This is unlikely to change despite the fact the Bill prohibits strikes in relation of bargaining for an FPA, because the current right to strike for a collective agreement that is not an FPA remains. This enables a right to strike over collective bargaining for "above award" enterprise level agreements.

104. The most significant and economically costly strikes since Labour was elected in 2017 have been in the state, involving doctors, teachers and nurses, who are all on national level collective agreements (i.e. analogous to FPAs).

105. From 1894, the ability to be part of the award system was premised on unions and workers giving up the right to strike and submitting to compulsory

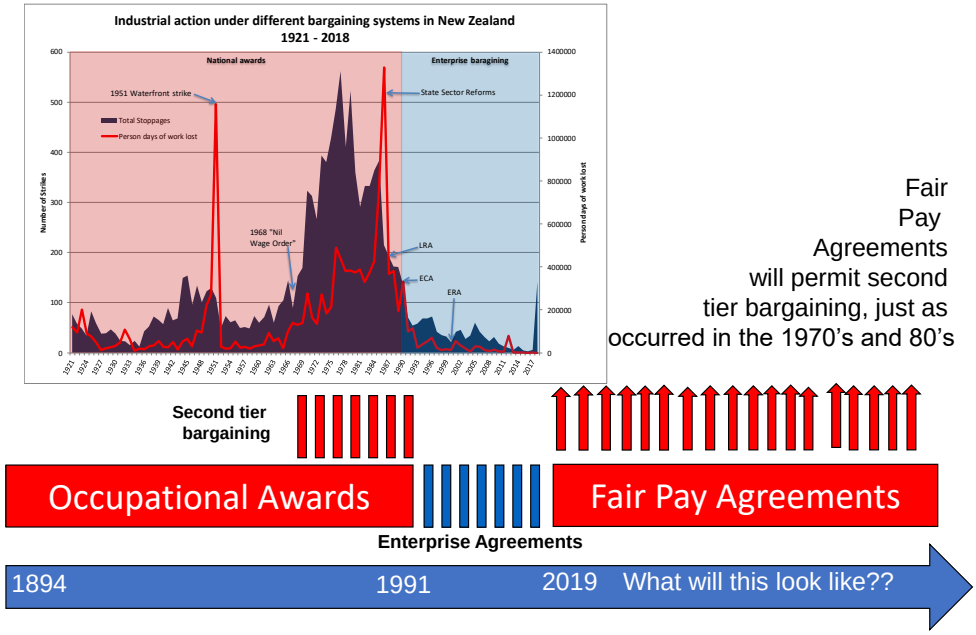
arbitration to resolve differences. Under the pre-1991 award system, strikes were not permitted in pursuance of a settlement, by virtue of trade unions being registered under Industrial Conciliation and Arbitration Act 1894 (and its successors) which, until the Labour Relations Act of 1987, bound unions registered under the Act to the award system.

106. This was unpopular with both unions and employers. The larger and more powerful unions disliked giving up the right to strike even for the benefits the award system offered. For their part, employers opposed placing decisions on wages and working conditions in the hands of a judge, instead of relying on the labour market.

107. From about 1902, the Arbitration Court became bogged down in so many cases that could take up to a year to be heard. Dissatisfaction became widespread and in 1906, the country "without strikes" saw its first strike since the Act was passed 12 years before.

108. Following the infamous "nil wage order" of 1968, unions began pursuing "above award" deals outside of the prohibition against strike action. It was this second-tier bargaining that gave rise to the phenomenally high level of strikes and lockouts during the 1970s and 80s (see the graph below).

109. Unlike the award system, the proposed FPA model openly envisages "above FPA" deals being used to supplement FPAs. The diagram below illustrates the history and the probable consequences.



FPAs WILL BE ECONOMICALLY DAMAGING

110. The FPAWG argued that workers' incomes are diminishing as a share of productivity, i.e., wages are going backwards compared to the value

produced. However, this is highly debatable, even refutable. The NZ Initiative for instance has found that workers' wages in fact have done the opposite.

111. In its paper "Work in Progress – Why Fair Pay Agreements would be bad for productivity," [14] the Initiative found that:

a. While the labour share of income declined in the 1960s and 70s (a period of intense industrial action driven by low wage increases under the award system) the decline ceased then reversed upon the introduction of enterprise-based wage bargaining in the 1990s

b. Wage inequality and a "hollowing out" of middle-income wages" in NZ has actually declined since 1990

c. That the "race to the bottom is somewhat mythical given that average wages have risen faster than inflation across all income deciles.

d. The NZs lack of productivity relative to other countries' dates back to the 1970s and cannot be directly attributed to economic practices since the 1990s.

112. Increased productivity in economic terms requires an increase in the *value* of the productive economy, not simply more output. In these terms, FPAs arguably are a recipe for economic decline, in both pure economic terms and in the circumstances of the average worker and employer. There are several reasons for this view.

113. First, history suggests that wage gains for workers via FPAs will be constrained by a realistic need to ensure that increases are sustainable for as many businesses as possible.

114. History also suggests that this will increase pressure for enterprise level "top ups", which in turn will increase the incidence of industrial action (depriving workers of incomes and employers of production).

115. History therefore suggests that FPAs will do little or nothing to improve productivity. Instead, they will reduce it. Illustrating this point, unions have been pushing for shorter working weeks for decades[15]. In simple terms, this equates to "more money and less pressure". However, this simply adds cost for employers and reduces the availability of employees. The current labour shortages will not help.

116. By definition, higher wages and shorter, more flexible, "family friendly" hours do not of themselves add up to improved productivity. In these circumstances, rather, improved productivity is likely drive employers to seek

[14] https://www.nzinitiative.org.nz/reports-and-media/reports/work-in-progress-why-fair-pay-agreements-would-be-bad-for-labour/

[15] https://www.stuff.co.nz/business/110814060/worklife-balance-an-issue-thats-time-has-come

smarter work practices (with fewer employees) and increased investment in technology (also with fewer employees). This was also recognised by the FPAWG who said:

> *"we note raising wage floors may make capital investment more attractive for firms; that is, it may speed up employer decisions to replace some jobs with automation."*

117. When it came to increasing productivity, however, the FPAWG took an overly simplistic view, saying that collective bargaining:

> *"would have the potential to increase aggregate productivity by setting higher wage floors and better conditions; forcing unproductive firms to exit; and lifting overall productivity of the sector."*

118. In other words, the FPAWG felt that productivity could be improved by compelling payment of higher wages thus forcing weaker firms out of business while the strongest (usually also the biggest) survive. This is very debatable. Weaker firms are not weak just because they are not efficient. More often they are weak because they lack scale or are in vulnerable stages of an otherwise successful development.

119. Smaller firms are often relatively more innovative than their larger counterparts, whereas monopolies often "rest on their laurels". Being essentially anti-competitive, they can simply charge (and pay) more.

120. A likely early effect of this is an increase in stronger firms developing monopolistic strategies to consolidate their position. While this may reduce competition that leads to a "race to the bottom", it paradoxically also strengthens the ability of the stronger firms to dictate terms, including lower wages.

121. Irrespective of which outcome emerges, nowhere in the world does reducing competition result in improved productivity or sustainable economic growth. Such an approach does nothing for the workers who lose their jobs or for the size of the economy. Ultimately, while (according to the FPAWG) FPAs may reduce wage-based competition they will not improve the ability of an employer to pay the increased costs, unless they can commensurately improve productivity. Nor should it be forgotten that, while New Zealand's productivity was at a notably high level during the 1980s so also was the level of unemployment.

122. Wages are paid for by the productive value of workers' work. Imposing increased costs beyond the value produced by workers incentivises or even necessitates employers to restructure costs and/or take on debt, at least in the short term. In such circumstances, a focus on increased productivity is usually delayed while the employer comes to grips with the immediate demands of sustaining the viability of the business. Worker layoffs are also an all-too-common by-product of such exercises.

123. Overseas experience, for instance in the UK, suggests that rises in the minimum wage correlate with increases in unemployment for young people and minority groups. They also correlate to a slowdown in the creation of new jobs, a further blow to the employment aspirations of these groups

124. For other low paid jobs, raising wages through FPAs or any other means may have no effect at all, as the lowest paid jobs usually remain sufficiently unattractive that only those with no other options are likely to compete for them. Historically, migrant workers have filled these roles. However, current restraints on immigration, and the current shortages of labour in traditionally low paid sectors suggest that even higher wages will not solve the problem.

125. Furthermore, while increasing low pay levels eventually forces up all pay rates, this can have unintended consequences. Employees in jobs requiring a high level of skill and knowledge rightly expect a higher rate of pay than a worker in a job requiring little skill and/or knowledge. Pressure on wage levels above the minimum wage adds to inflationary pressures, ultimately resulting in increased costs and interest rates, both of which ironically impact most on the lowest paid.

126. It has been observed that *as the minimum wage rate rises so too does the number of people paid the minimum wage*. At its present level (nearly 60% of the average wage and 70% of the medium wage) the minimum wage now influences wage levels generally, particularly those covered by collective bargaining. This is more marked in sectors with relatively higher proportions of the lowest paid workers (e.g., hospitality and retail).

127. Ultimately, unless all effects are managed, *forcing employers to increase wages can marginalise the very people the increase is designed to assist, low paid New Zealanders*.

128. FPAs arguably will accelerate and exacerbate these effects.

FPAs promote equality over productivity and growth

129. The FPAWG recognised that while sector and industry-based approaches to collective bargaining may assist in reducing inequality they are less effective in terms of economic productivity, growth and prosperity. For example;

> *"The difference in wages found by the OECD may also signal higher productivity in companies with enterprise level bargaining than those in a context with a high degree of centralised bargaining"* [16]

and

[16] FPAWG Report, page 16

> *"the evidence in the research literature suggests wages tend to be less aligned with labour productivity in countries where collective bargaining institutions have a more important role."* [17]

130. However, and paradoxically, while acknowledging New Zealand's relatively poor productivity the FPAWG promoted (and the Government agreed to) equality over productivity and growth. While this makes little sense economically, it is consistent with the Labour Party Policy Platform (May 2017) which states:

> *"Our vision of a just society is founded on equality and fairness. Labour believes that social justice means that all people should have equal access to social, economic, cultural, political, and legal spheres regardless of wealth, gender, ethnicity, sexuality, gender identity, or social position. Labour says that no matter the circumstances of our birth, we are each accorded equal opportunity to achieve our full potential in life.* ***We believe in more than just equal opportunities—we believe in equality of outcomes".***

131. Nowhere did the FPAWG (or the Government) identify possible other options to address the unsubstantiated "race to the bottom" argument, e.g, the targeted use of tools such as the minimum wage and improved detection and enforcement of exploitative and non-compliant practices.

132. Nor is there any recognition of the fact that New Zealand's ever-increasing minimum wage, and strong underlying minimum employment code, is one of the most generous in the world.

133. Nor was there any examination of New Zealand's nearly 100 years' experience of centralised bargaining, culminating, ultimately, in two decades of industrial and economic disruption.

Relativity issues will drive up prices

134. Under the award system, awards were negotiated in a strict hierarchy based on "fair relativity"; settlements were reflective of the perceived historical relationship between one award and another.

135. The private sector Metal Trades Award traditionally set the scene for all other trades occupations. Settlements would not disturb the overall wage relativity between awards. In the state sector, secondary school teachers headed a long chain of over a dozen relativities that ended with school audiologists. Considerable care was taken to ensure that settlements did not disturb the overall wage relativity between awards.

136. Occupational relativities disappeared as the basis for wage setting upon the introduction of the Employment Contracts Act in 1991, and awards as such vanished. However, the FPAWG recommendations would reinstate the

[17] FPAWG Report, page 17

concept of fair relativity, because an FPA for truck drivers will not escape comparison with similar agreements for bus drivers or train drivers; agreements for retail workers will be compared with those for bank tellers and so on.

137. History suggests that once the first FPA is settled, other occupations will formulate claims based on the perceived value of the precedential FPA. Unchecked this will promote wage inflation and spiralling prices.

138. Industrial pressure played a large part in driving the Muldoon government to introduce price controls in the early 1980s and caused the near collapse of the economy in 1983, when the "wage freeze" was lifted and wage claims spiralled out of control. Mortgage interest rates and food prices spiked and created enormous pressure on workers and employers alike.

139. Nowhere in the preparatory work for the Bill does the Government deal with the critical issue of relativities although it dies recognise that the advent of pay equity claims under the forthcoming Equal Pay Act will add a new dimension, as pay equity settlements will recalibrate historical relativities between classes of work.

140. For instance, a female-dominated group that achieves a pay increase as a result of being compared with a male-dominated group doing work of equal value will in future be "pegged" to that male-dominated group.

141. The Equal Pay Act further requires that claimant group wages be kept in line with the comparator group once a pay equity settlement is achieved. If the comparator group's wages are subsequently adjusted by an FPA settlement, the pay equity claimant group's wages will have to be similarly adjusted even though they are not covered by an FPA.

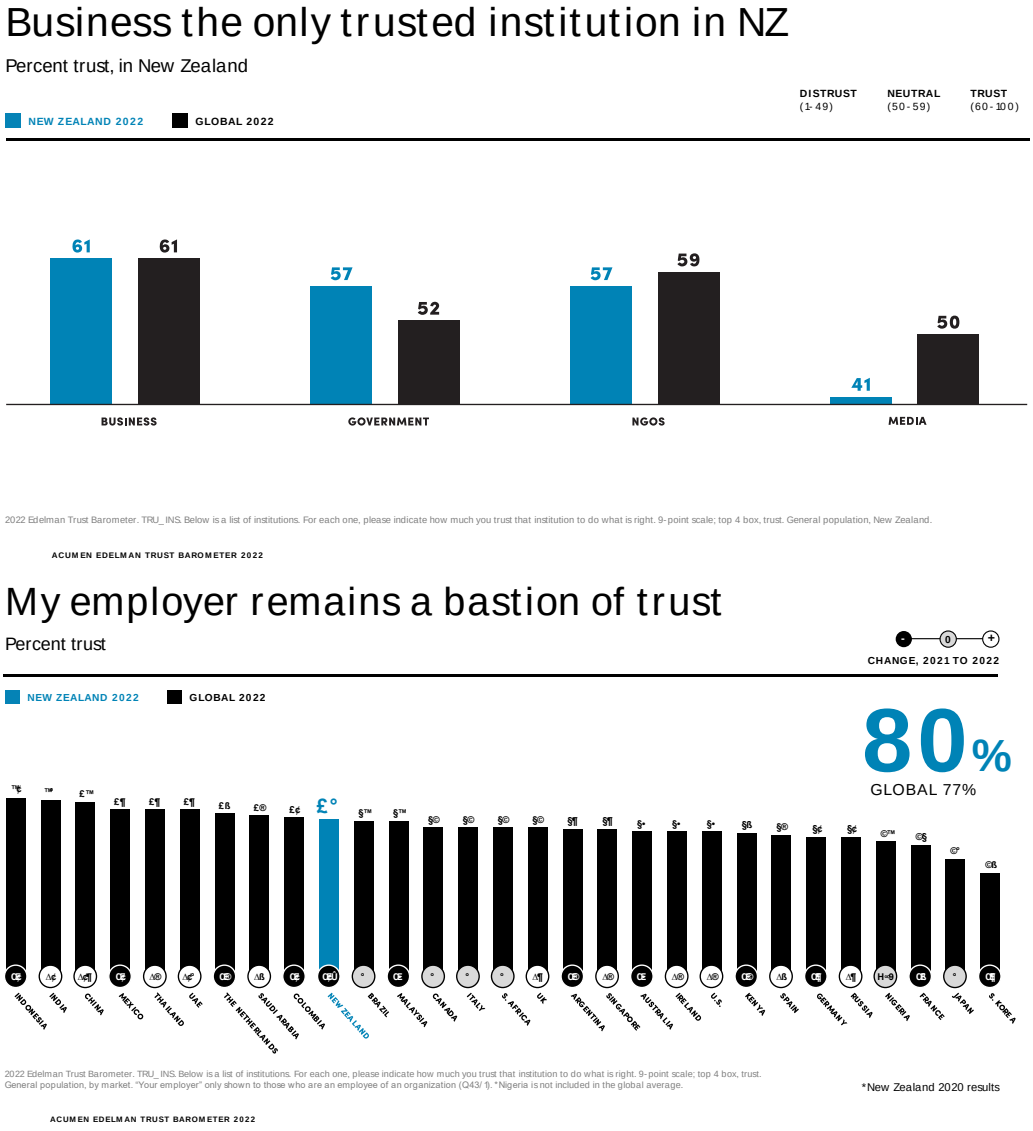
142. FPA settlements therefore may cause relativity "ripples" to flow into sectors, industries and occupations not covered by FPAs, causing relativity issues in those areas, and putting pressure on employers and their businesses to respond to stimuli they cannot control.

There is no evidence of a national appetite for FPAs

143. The law already provides for multi-employer collective agreements. However, there are very few of these and almost all are in the state sector (e.g., teachers, doctors and nurses). Neither the FPAWG report nor the subsequent Discussion Paper analyse the Government's statements as to why FPAs might be needed.

144. Further evidence of a lack of need for FPAs is the relatively harmonious employment relations that have existed between workers and their employers since the abolition of the award system in 1991. The graph in paragraph 98 clearly illustrates a drastic reduction in industrial action following this event.

145. Perceptions of industrial harmony have been reinforced more recently with surveys indicating that employers are now among the most trusted of groups in society.



Source: Acumen

146. Lack of evidence supporting a need or desire was flagged by the Treasury when commenting on the Cabinet Paper proposing the establishment of the FPAWG and its proposed terms of reference. It said in part;

> *"The paper does not, however, identify empirical evidence indicating that imbalances in bargaining power are causing the highlighted wages and productivity concerns. Nor does the paper make a strong case that a system of industry- or occupation-level bargaining would be the most effective policy response to address these concerns……the paper does not refer to an evidence base for these potential impacts. Initial work by officials from the Ministry of Business, Innovation and Employment (MBIE) has not identified an occupation or industry in which the proposed system would address the highlighted wage and productivity concerns."*

147. The Government has introduced the Bill despite this lack of evidence. In so doing it risks criticism for an approach that most mature economies now seek to either avoid or exit.

148. Credit rating agencies are likely to be among those who will scrutinise the Government's actions with concern.

A VOLUNTARY APPROACH WOULD BE BETTER

149. The Fair Pay Agreement Working Group (FPAWG) report acknowledged OECD evidence that while sector and industry-based approaches to collective bargaining may assist in reducing inequality they are less effective in terms of economic productivity, growth and prosperity. Despite this, the Government has chosen to push equality over productivity and growth. Employers on the other hand favour an approach that deals with both equity and economic performance.

150. The negative economic impacts of FPAs stem predominantly from their compulsory and all-encompassing nature. The employer members of the FPAWG suggested a voluntary alternative to the approach taken in the FPAWG report on the basis that a voluntary approach would be more responsive to areas of need and more consistent with New Zealand's obligations under international law.

151. Overarching principles of an alternative approach are:

    a. Participation is voluntary.
    b. Approaches are targeted at areas where poor practices have developed
    c. A "Code of Practice" model, developed only in "problem areas", that becomes binding only on parties that sign it voluntarily (effectively a variation of current MECAs).

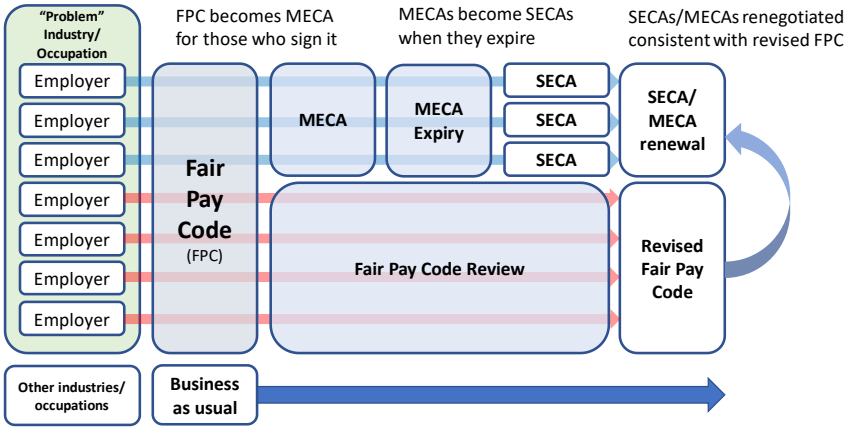
152. This approach is very consistent with recommendations for a more targeted approach made by MBIE in its Regulatory Impact Statement accompanying the Cabinet paper seeking approval to draft FPA legislation.[18] Specifically, MBIE recommended;

    a. empowering 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, and

    b. strengthening 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.

[18] https://www.mbie.govt.nz/dmsdocument/15512-fair-pay-agreements-regulatory-impact-statement-pdf

153. The diagram below illustrates how a voluntary approach could work[19].



154. This approach is built on the idea that industries with clearly demonstrated undesirable labour outcomes or practices could be encouraged to develop a "code of practice" setting out an agreed view of a reasonable approach to terms and conditions of employment in that environment.

155. The resulting code could be signed up to by (and would become binding on) willing employers (effectively becoming a MECA) but used as non-binding guidance by those who choose not to sign on[20]. Over time, those employers who sign on would generate labour market pressure on wages and conditions of those who have not signed. Such pressure should dampen if not disincentivise the "race to the bottom" effect commented on by the FPAWG. Non-"problematic" industries or occupations would be unaffected.

156. In addition, the suggested voluntary approach would revert to enterprise level agreements over time, allowing control over conditions of employment to return to the workplace level after they had been "recalibrated" by agreeing to the FPA code-based conditions. This would not prevent employers from renewing their commitment to the FPA code if they choose to.

COMMENTARY ON THE BILL

157. The Bill is long and complex. Every step of the proposed process of establishing an FPA is lengthy, bureaucratically cumbersome, costly and fraught with the risk of litigation. Given BusinessNZ's opposition to the whole idea of the Bill, this section of its submission will not deal with every clause in the Bill. Instead, it focusses on what BusinessNZ regards as the most egregious provisions, particularly those that breach international law, infringe basic democratic rights or are simply impracticable.

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[19] MECA – Multi Employer Collective Agreement, SECA – Single Employer Collective Agreement

[20] Codes of Practice, while not binding in themselves, are used as influential guidance by the courts. Thus, they still have "teeth", as employers need to show that they have good reasons for not following a Code.

Part 2 General principles and obligations

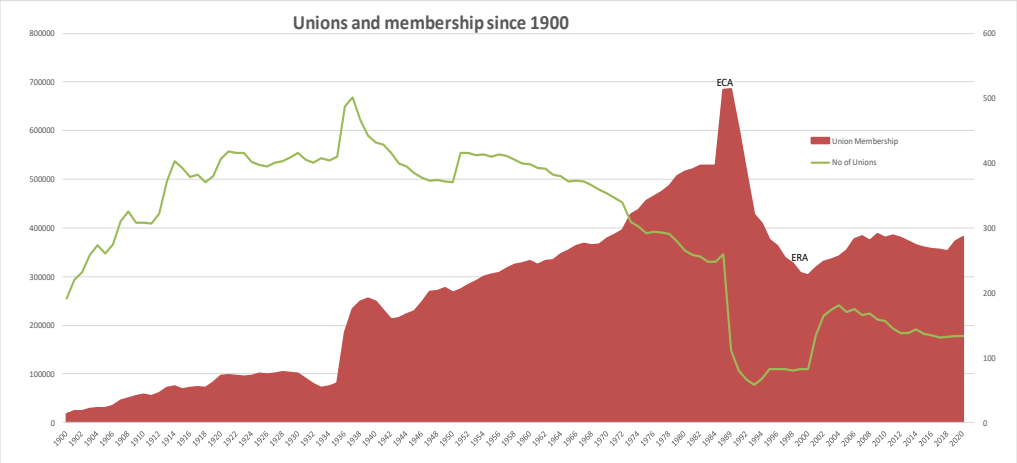
158. *Clause 12* provides that only an employer bargaining party (which must be an incorporated society) may represent the collective interests of covered employers. This is a dangerous and anti-democratic requirement which essentially deprives many employers a direct voice in matters that affect them deeply. Many, and particularly small, businesses are not members of associations. These businesses are particularly vulnerable to deals struck by the employer bargaining party which, almost inevitably, will include larger and better resourced businesses as members.

159. *Clause 13* prohibits an FPA from giving preference because of whether or not the person is a union member. Yet, an FPA may provide for an employee to be paid a union member payment, which must be no more than the employee's annual union membership fees. In other words, no preference may be given unless it is given to a union member with the effect of partially or fully refunding their union fees.

160. In essence, such a requirement would have employers paying the union fees of those of their employees who are already union members or who join a union after an FPA is settled. This would constitute potentially significant and uncontrolled cost escalation for employers with large numbers of currently non-unionised employees (currently nearly 80% of the New Zealand workforce). For a union, financially at least, this would be analogous to compulsory unionism.

161. Indeed, there are very significant benefits to the union movement in permitting the payment of "union fees" to be included in FPAs. It would represent a significant income and growth opportunity for unions at no cost to employees who join them because employers would be paying their union fees.

162. It is not hard to understand why unions might be keen on this clause. Union membership has nearly halved since awards were abolished in 1991.



163. Diminishing membership means most unions are resource constrained and many can offer only basic services. The non-unionised workforce (nearly 80% of the national workforce) therefore represents significant untapped financial potential for the union movement

164. However, this proviso contributes nothing to the purpose of the Bill, which is to "*provide a framework for collective bargaining for fair pay agreements that specify industry-wide or occupation-wide minimum employment terms*". It should be **struck out**.

165. *Clause 22* provides that where an obligation is imposed on a bargaining side, each bargaining party on the bargaining side must ensure that at least 1 of the parties on the bargaining side complies with the obligation. Essentially only one of the bargaining parties (i.e. organisations) in the bargaining side must comply with the specified obligations in order to comply with this clause. This appears nonsensical in the face of the general requirement to act in good faith. This clause should be **struck out**.

Part 3 Initiating bargaining for proposed FPA

Tests for initiating bargaining

166. Both the representativeness and public interest triggers allow a minority of workers in a sector or industry to initiate bargaining for an FPA, without any ability on the part of employers to argue. Employers will not be able to opt out if the proposed FPA covers them.

167. Since workers can only be represented by unions, this effectively means unions can initiate bargaining in any sector or industry, whether or not they have members there. For all practical purposes, once an FPA is created, unions will control the dialogue over working conditions under the FPA.

168. This is a classic tail wags the dog scenario and is the same scenario that European countries, e.g., France, are trying hard to get away from after many decades of constant industrial unrest and poor economic performance. In this regard, the OECD has noted that since the 1970s there has been no expansion of sector level bargaining, the general trend is towards enterprise level bargaining.

169. *Clause 33* provides that the chief executive [of MBIE] may, in certain circumstances, invite public submissions when deciding whether to approve an application to initiate bargaining. Whilst the representativeness trigger is relatively straightforward, decisions over public interest are complex, even with guiding criteria. Essentially officials will be making decisions over the economic prospects of an entire industry or sector. This is economically unsound at best.

170. At the very least, where the public interest criteria is invoked, it **should be mandatory for MBIE to seek public submissions** on whether there is indeed in the public interest for an FPA to be established. Without such a requirement "public interest" is a misleading description for this criterion because it simply circumvents an inability to establish an FPA via representative means. As such it becomes a device permitting self-interested parties to initiate the process of establishing an FPA in any occupation they feel might benefit.

171. The representative triggers of either 10% or 1000 (whichever is lower) of all workers in the sector or occupation are simply farcical and strike against the very notion of democracy; for instance, hundreds of thousands of clerical workers could be subjected to an outcome in which they had no objective input because 1000 of them asked for an FPA. Both criteria should be **struck out or amended to substantially higher thresholds.**

Employer bargaining side

172. *Clause 43* provides that, once the chief executive has approved a union's application to initiate bargaining for an FPA, an eligible employer association must apply for approval to form or join the employer bargaining side. And *Clause 45* provides that an employer bargaining side is formed 3 months after the chief executive notifies approval of a union's application to initiate bargaining.

173. This is a prime example of a Bill that is not rooted in reality. Furthermore, as these provisions compel an employer organisation to join bargaining, they are inconsistent with New Zealand's obligations under international law. Specifically, they offend Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (No 98) which requires that bargaining systems be voluntary (which, as has previously been noted, New Zealand has ratified). These clauses should be **struck out** or replaced with a voluntary form.

174. *Clause 46* provides that an employer bargaining party must endeavour to represent the collective interests of all covered employers, not just those employers who are members of the employer association. And *Clause 48* requires each employer bargaining party for a proposed FPA to ensure effective representation of Māori employers.

175. These requirements completely ignore the immense challenges inherent in them. Bargaining for an FPA is likely to affect many hundreds, even thousands, of employers, many if not most of whom will not be members of any association let alone one that is a bargaining party for an FPA. And there is no definition of Maori employer. This means the bargaining party must first know who they may be representing, notify them of the existence of bargaining and create a meaningful opportunity for their thoughts and concerns to be taken into account. The logistics, time and costs of this are not recognised in the Bill

176. Nor is there any opportunity in the Bill for an employer, including a Maori employer who feels they have been improperly or not fairly represented, to seek redress. There is wide scope here for claims of discrimination as well as allegations of breaches of good faith obligations. Such risks should not be built into modern legislation. The fact they are, without recognition of the consequences, suggests that the requirement to represent the interests of non-members or Maori employers is somewhat token in nature, which aligns with the notion that the essential aim of the Bill is to enable unions to gain control over wide swathes of the labour force. This clause should be **struck out.**

Default bargaining parties

177. In late 2021, BusinessNZ notified the Government that it was not prepared to be compulsorily cast as the default employer bargaining party for FPAs. While the Bill currently does cast BusinessNZ as the default employer bargaining party, the Government has announced via a Parliamentary Paper that it intends to make changes to the Bill that make the use of default parties a voluntary option. However, in the same breath, it also introduces even more draconian alternatives.[21]

178. Essentially if no representative employer bargaining party can be found, and BusinessNZ or any other organisation is unable or unwilling to act as a default bargaining party, then the Employment Relations Authority will set the terms of the FPA without any bargaining taking place. The ERA will be required make a binding determination on mandatory to agree topics unless there is good reason not to.

179. Should this happen, unions will be able to provide input into the Authority's determination, but employers will not be directly represented. Instead, the Authority will be empowered to seek information about a specific industry or occupation from an independent advisor to assist its understanding of the impact(s) of a union claim for an FPA.

180. Appeal rights in these circumstances will be limited to questions of law only and only the union will be able to appeal the determination to the Employment Court while the non-represented employers will be able to seek a judicial review. For appeals, the Employment Court will be required appoint a third party to represent employers, but employers will have no say in who that might be.

181. These provisions are frightening in their import. Most industry organisations in New Zealand are not built around their employer role, and certainly are not continuously active in the process of negotiating wages and conditions of

[21] https://www.parliament.nz/resource/en-NZ/PAP_121464/a141b142e6532b7aa40dedfb2c024177e9292a47

workers in their industries. This makes the possibility of there being no suitably representative employer bargaining party to negotiate a claim for an FPAs reasonably high. This commensurately increases the risk that bargaining for FPAs will in fact not be bargaining at all but simply a claim taken to the ERA by a union for determination. Enabling this possibility offends every tenet of New Zealand's obligations under international law to ensure that collective bargaining is free and voluntary.

182. No organisation should be forced to the bargaining table to participate in, let alone lead, bargaining it does not support. To force one to do so in the face of penalties for non-compliance arguably is unlawful at both the domestic and international levels. Quite simply, if there is no one to bargain with, no bargaining should take place. Furthermore, forcing an outcome is contrary to international law under which New Zealand is bound. Provisions relating to default parties should therefore be **struck out.**

Part 4 FPA meetings and union access to workplaces

FPA meetings

183. *Clause 82* provides that employees are entitled to attend 2 FPA meetings in relation to a proposed FPA, 1 meeting in relation to a proposed variation, and 2 meetings in relation to a proposed renewal or proposed replacement. Meetings must last no longer than 2 hours. *Clause 86* provides the right for a representative of an employee bargaining party to enter a workplace without the employer's consent to discuss bargaining or a fair pay agreement. And *Clause 87* sets out the conditions that apply when a representative of an employee bargaining party enters a workplace.

184. Given the wide coverage of FPAs, meetings will not be enterprise based. They are more likely to involve all affected employees in a given town or district. Employee meetings under the pre-1991 award system typically were "town hall" meetings where affected employees would gather to be briefed on the union position and progress in bargaining.

185. Such meetings essentially deprive the local economy of labour in a given occupation for the duration of the meeting. This is not conducive to productivity. Provisions that meetings be organised to ensure businesses can be kept operating have historically proved only marginally effective. For instance, an FPA meeting for grocery and supermarket employees would deprive all such businesses in a given area of the bulk of their employees for the duration of the meeting.

Part 5 Bargaining

Good faith obligation to provide information

186. Clause 92 sets out the process for a bargaining side to request information from the other bargaining side during bargaining. A bargaining side must provide the requested information to the requesting bargaining side or to an independent reviewer. If the parties are unable to agree whom to appoint as an independent reviewer, they may apply to the Authority for a determination.

187. The provision of information in bargaining has long been a source of contention even under the present system of enterprise based collective bargaining. Bargaining for an FPA presents even greater difficulties as competing employers who will be covered by a proposed FPA will be asked for, and may be required to provide, information that may affect their relative competitiveness.

188. The use of an independent reviewer arguably is of only marginal use in an FPA situation. At the enterprise level, the issue of provision of information is generally restricted to how much information a given business will give to the union representing its employees in collective bargaining.

189. However, with respect to FPAs, bargaining sides will comprise only a few of the employers who will be covered by an FPA, and almost certainly will include some of the largest. Information sought by unions from the employer bargaining side will necessarily include information from and about many employers, some of whose information is likely to be competitively beneficial to other members of the employer bargaining side.

190. At the very least the **Bill should provide means to protect the commercial confidentiality of information** that is to be provided. Currently it does not do this

Coverage, overlap, consolidation and addition of occupation

191. *Clauses 105* and *135* provide that if there is coverage overlap the Authority must review the terms of the overlapping agreements and determine which provides the covered employees with the better terms overall. This is easier said than done

192. For instance, is a supermarket employee who delivers online orders to customers a retail worker or a driver? Depending on the answer to that question, are they even covered by the proposed FPA? If two FPAs exist, does the one with "better conditions overall" then define the role played by the worker? In Australia, such disputes have been tied up in the courts for months at a time.

Part 6 Content of FPAs

193. *Clause 114* provides a list of terms that must be included in each fair pay agreement. These are unremarkable and typical of any collective agreement. However, *Clause 115* provides a list of topics that bargaining sides must at least discuss whether to include in a proposed FPA, a proposed renewal, or a proposed replacement. These are topics are:
    a. the objectives of the proposed FPA
    b. health and safety requirements
    c. arrangements relating to training and development
    d. arrangements relating to flexible working
    e. leave entitlements
    f. arrangements relating to redundancy

194. The bargaining sides are not required to agree to include provisions on any of these topics. However, a lack of agreement to include them can be overridden by the ERA if the matter is taken to arbitration. This possibility adds to the pressure employers will face in trying to negotiate a deal they can live with.

195. FPA conditions will override corresponding existing statutory and contractual minimum provisions in the affected industry or sector. This enables them to be vehicles for advancing government or union agendas on such things as minimum redundancy compensation across whole sectors, on businesses large and small, successful or marginal.

196. FPAs may also impact on the fundamental right of employers to manage their business, e.g through provisions requiring employees and unions to be involved when making important business decisions.

Differentiation

197. *Clause 122* permits fair pay agreements to include terms that apply to a class of employees that differ from terms that apply to another class of employees. *Clause 123* permits a fair pay agreement to include terms that apply differently in different districts in New Zealand.

198. The ability to agree regional and other variations within sectors raises many issues of relativity and demarcation (both terms intrinsic to the pre-1990 award system), e.g. if Auckland is to be better treated than elsewhere, where does "elsewhere" begin? Do "Elsewherians" resolve their consequent angst at a sub sector, regional or enterprise level?

199. The Bill proposes a construct that is guaranteed to produce conflict, as it creates a framework for "ratchetting" wages and conditions across geographic regions as well as creating occupational relativity tensions within and between sectors and industries.

200. Regional and intra occupational variation is not new in collective bargaining. This is a key reason the pre-1991 award system began to fail in the 1970s and 80s. Over time, in the face of the reality that one size does not fit all, more and more awards began to break into smaller more focused documents. This is apparent in the number of documents that existed with respect to occupational groups by 1991.[22]

201. Overall, the economic reality of FPAs is that settlements will need to reflect the capacity of the "weaker" (not necessarily the "weakest") employers to cope with the outcomes. The alternative is that only the strongest (usually the largest) employers survive, which is a recipe for monopolistic outcomes to flourish. Moreover, driving settlements to lowest common denominator levels is fine for equality of outcomes but not for productivity and is counterintuitive in preventing a "race to the bottom", if that is intended, because it places everyone at the bottom to start with. History indicates that it will be mainly low paid workers who seek to "top up" meagre FPA outcomes.

202. Even worse, unlike the 1970s and 80s where unions had to "opt out" of coverage of the Industrial Relations Act to undertake second tier bargaining, the Bill effectively promotes second tier bargaining as part of the process. Second tier bargaining did and will lead to an escalation of industrial action to unprecedented heights. As illustrated by the diagram in paragraph 98, that is not a recipe for economic success.

Part 7 Finalisation of FPAs

Compliance Assessment

203. *Clause 132* provides that when bargaining for a proposed agreement is complete, the agreement must be submitted to the Authority for a compliance assessment. *Clause 135* provides that, as well as assessing a proposed agreement for compliance, the Authority must also check for coverage overlap. If the Authority decides there is coverage overlap, it must determine which agreement provides the better terms overall. *Clause 138* explains how the Authority determines which agreement provides the better terms overall.

204. As mentioned in relation to coverage, determining which of competing FPAs has better conditions overall may also impact on the occupation a worker is deemed to be engaged in. Thus, an ambulance medic may be classified as a driver if a drivers' FPA has "better conditions overall". The risks of misclassification or inappropriate classification of work have not been considered at any point by the FPAWG or the Government. The risks include implications for pay equity, as inappropriately classified workers have the ability to seek redress through this mechanism. This can only complicate matters for employers and employees alike.

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[22] See Appendix 1

Ratification

205. *Clause 141* requires the bargaining sides to notify "covered" employees and covered employers that a ratification vote will soon be held and provide related information. Employers must provide additional information to their covered employees. *Clause 144* sets out the details for holding a ratification vote. Covered employees are entitled to 1 vote each in the employee vote, and covered employers are entitled to a number of votes determined by the number of covered employees they employ (1 vote per employee over 20 employees, or for 20 or fewer employees, the number specified in Schedule 2). *Clause 145* requires a bargaining side that completes a ratification vote to notify the other bargaining side of the outcome of the vote. If the first ratification vote for a proposed agreement is against ratification, the bargaining sides must restart bargaining. If the second ratification vote is against ratification, either bargaining side may apply to the Authority to fix the terms of the proposed agreement. *Clause 146* requires each bargaining side to retain records of a ratification vote to demonstrate that the vote was held in accordance with the Bill

206. This process cannot be described as anything other than a farce, one in which employers cannot succeed. As proposed, ratification will be a simple majority vote of employers and employees to be covered by the FPA. While employees will get 1 vote each, employers will be treated differently. Smaller employers' votes are to be weighted according to the number of employees they have.[23] From a practical point of view it is almost impossible to conduct a vote in this way with any degree of integrity because of the difficulties in:

    a. determining that every employee or employer entitled to vote knows they have a right to vote.

    b. ascertaining that the number of employees employed by each employer to be covered by the FPA has been accurately counted. Most small employers do not belong to any organisation let alone one that might represent them in bargaining for an FPA. Identifying and contacting them is difficult in any circumstances. The more employees covered by a proposed FPA the harder this problem gets.

207. More relevant, however, is the fact that ***it will not be possible for a vote against FPAs to succeed.*** Two "failed" ratification votes will result in an arbitrated outcome being imposed, without a right of appeal.

208. A lack of fairness is also evident in the makeup of the voting strength of employers. Nearly 80% of all employees are employed by larger employers. This translates to a small number of larger employers potentially having a controlling vote in the outcome of an FPA.

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[23] Employers with less than 20 employees will have their vote weighted on the basis that an employer with 1 employee will get two votes, an employer with 2 employees will get 1.95 votes and so on until an employer with 21+ employees gets 1 vote per employee.

209. In all these circumstances, ratification appears more like window dressing for an inevitable result. If unions want an FPA they will get one irrespective of a potentially overwhelming weight of opinion against them. This is unacceptable in a functioning democracy. It clearly is not consistent with the principle of free and voluntary collective bargaining enshrined in international law.

210. Nor is the proposed FPA ratification process consistent with domestic law, specifically the object and good faith obligations of the Act, which will still govern collective bargaining in general. Section 3 of the Act requires the promotion of "the principles underlying International Labour Organisation Convention 98 on the Right to Organise and Bargain Collectively." This clear attachment of international law to domestic obligations could give rise to the NZ courts overturning aspects of FPAs for breaching the Act. In addition, section 4 of the Act sets out extensive good faith obligations which will also be hard to meet with respect to ratification, and with similar results.

MBIE assessment of overlapping coverage

211. *Clause 151* requires MBIE, after verifying a proposed agreement, to assess whether there is coverage overlap between the proposed agreement and any fair pay agreement. This is despite the fact that an assessment for overlapping coverage has already been carried out by the ERA at the compliance assessment stage. It is illogical that MBIE should undertake such an assessment after the same assessment has been carried out by the ERA, which has sole jurisdiction to fix the terms of an FPA. The clause therefore **should be struck out.**

Part 8 Variation, renewal and replacement of FPAs

Effect of FPA on existing agreements

212. *Clause 162* provides that an FPA will override any other applicable employment agreement to the extent that its terms are more favourable than the existing agreement.

213. This has very significant implications for employers who will be required to assess the impact of an FPA on each of their employees who will be covered by it, and to ensure that employees understand the implications of changes to their conditions of employment. An employer whose employees" current terms are based on individual agreements with a variety of terms may end up with employees whose employment agreements are an inconsistent mix of FPA and current terms, with the FPA prevailing where terms are more favourable and individual agreements prevailing where the FPA terms are less favourable.

214. Employees will not be able to bargain over the impact of an FPA term on them. While it is possible for individual employers and their employees to agree terms that are different that those in an FPA these cannot be less

favourable than those of the FPA. Analysis of the relative favourableness of a given condition is often a complex exercise and is thus fertile ground for misunderstandings and disputes.

215. Overall, the Bill will place significant constraints on the existing ability of individual employers and their employees to agree terms that suit their specific circumstances both in terms of what is possible and of an employer's willingness to do so. In such circumstances, it may be expected that relationships between employers and employees will suffer accordingly.

Variations

216. *Clause 166* provides that bargaining for a proposed variation may start only if both bargaining sides agree to do so. If a bargaining side withdraws its agreement to bargain, the bargaining ceases.

217. In other words, unless both sides agree otherwise, the terms and conditions contained in an FPA are locked for the duration of its term, i.e., at least 3 years.

218. Employers are unlikely to agree to variations that increase their costs during a period in which costs have been locked in. Conversely workers are unlikely to agree to make additional flexibility available to employers without something in return.

219. Industrial relations reality suggests that variations will occur rarely, leaving both parties effectively moribund for the duration. This is another key reason awards were abolished in 1991, i.e. to free enterprise up to be more agile in today's increasingly fast moving and challenging economic conditions.

Renewal and replacement

220. The processes set out in the Bill for variation, renewal and replacement of an FPA are complex and time consuming (as indeed is the entire process for establishing FPAs). It is hard to conceive of a framework that is more labour intensive and potentially costly than that set out in the Bill. The Government should instead look at the mechanisms already available under the Employment Relations Act for the establishment and renewal of multi-employer collective agreements (MECAs). This is the mechanism proposed in paragraphs 149-156 of this submission.

Part 10 Institutions

Bargaining support services

221. *Clause 207* requires MBIE to employ or engage persons to provide bargaining support services to support bargaining under the Bill. This seems to make it

clear that the provision of such services is at the Government's cost, unless bargaining parties make their own arrangements.

222. However, the nature of support is only vaguely defined in the Bill and may well stop well short of the needs of organisations that have minimal experience of collective bargaining at any level let alone bargaining at the national level. Without some understanding of the Government's capabilities in this regard, it must be questionable whether the Bill's provisions provide any security to inexperienced employers required to bargain for FPAs.

223. Moreover, given that New Zealand's last experience of the model now proposed is over 30 years old, the pool of expertise in New Zealand in such things is now very small. It is therefore very likely that the Government provided support available under the Bill will be of marginal use, forcing employers to spend time and money on sourcing expertise from the private sector which is also largely devoid of experience in national level bargaining.

Employment Relations Authority

224. *Clause 213* provides that the Authority has exclusive jurisdiction to make determinations relating to fair pay agreements.

225. *Clause 220* sets out what the Authority must consider when recommending or fixing terms of a proposed FPA. It requires that the ERA must consider each of, and the relationship between:

a. what the parties have actually agreed in bargaining
b. industrial practices and norms (including their evolution)
c. the likely impact and benefit on employees, particularly low paid and vulnerable workers as well as the likely impact on employers.
d. relativities within the proposed FPA and with other relevant employment standards and agreements.
e. The ease with which the proposed FPA will be understood by those it covers, and
f. any other relevant considerations

226. The ERA may also consider the likely impacts on the New Zealand economy or society.

227. *Clause 222* provides that terms fixed by the Authority are binding and enforceable and are not required to be assessed or ratified under subparts 1 and 2 of Part 7.

228. The requirements the Bill places on the ERA are extremely significant and therefore fraught with risk. Indeed, the complexity of the criteria in *clause 220* that must be considered by the ERA in fixing the terms of an FPA is at a level that would tax the Supreme Court let alone a tribunal level jurisdiction such as the ERA.

229. The fact that the ERA decision will be binding, enforceable and all but unappealable, simply increases both the risks of poor decision making affecting entire sectors and the significant challenges already faced in today's challenging economic environment.

230. In addition to the complexity of the obligations placed upon the ERA, and as has been mentioned earlier in this submission, it is also the case that compulsory arbitration is inconsistent with the Right to Organise and Collective Bargaining Convention 1949 (C98), which New Zealand ratified in 2003.[24] In its 2021 report on New Zealand's compliance with C98, the International Labour Organisation's Committee of Experts on the Applications stated:

> *"The Committee first wishes to recall that compulsory arbitration in the case that the parties have not reached agreement is generally contrary to the principles of collective bargaining. In the Committee's opinion, compulsory arbitration is only acceptable in certain specific circumstances, namely: (i) in essential services in the strict sense of the term, that is those the interruption of which would endanger the life, personal safety or health of the whole or part of the population; (ii) in the case of disputes in the public service involving public servants engaged in the administration of the State; (iii) when, after protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or (iv) in the event of an acute crisis.*

231. It is clear that none of the acceptable reasons for requiring compulsory arbitration exist in the context of FPAs. **Clauses 218-225 should be struck out**.

CONCLUSION

232. **BusinessNZ opposes the introduction of the Fair Pay Agreements Bill** on a number of premises, including that they

a. *are unfair to workers and employers* and will almost certainly not deliver the kind of benefits proponents claim. History amply demonstrates that increases for workers covered by national level agreements will necessarily be conservative in order to ensure that most if not all employers can afford them. Workers will then need to wait at least 3 and as long as five years before being able to negotiate another increase. And low paid workers who currently receive support such as Working for Families are likely to see the take home value of any wage increase reduced by the abatement mechanisms of such transfer payments.

b. *are unworkable in practice*. The system proposed to manage FPAs is excessively bureaucratic and contains many steps at which challenges

[24] See Appendix 2

may be mounted. Even without challenges, following the time frames prescribed for the core steps will take many months to complete. Add to this the inexperience of today's employers in negotiating national level collective agreements and it becomes almost certain that no FPAs will be settled before the next general election in 2023.

c. *breach international law* because they are compulsory, impose compulsory arbitration and insert the Government into core processes. All of these have been found to be inconsistent with the provisions of the Right to Organise and Collective Bargaining Convention 1949 (No 98) to which New Zealand is a signatory.

d. *will lead to a significant increase in disputes and litigation*. Especially in the early stages of their introduction, it can be expected that a multiplicity of legal challenges to the introduction of FPAs will eventuate. A non-exhaustive list of examples includes challenges on
   i. the integrity of information used to justify initiating an FPA
   ii. who will be covered by a proposed FPA
   iii. the rights of employers to have a say in the formation of bargaining teams and subsequent negotiations.
   iv. the adequacy and fairness of mechanisms used to inform employers of the existence of a claim for an FPA and of progress in bargaining
   v. the requirement to provide personal information of workers who are not union members to unions.
   vi. whether or not exclusions from coverage (or their denial) are fair
   vii. the accuracy of vote counting for ratification votes
   viii. points of law relating to determinations of the Employment Relations Authority in fixing the terms of an FPA.

233. *will be economically damaging.* New Zealand's pre-1990 history amply demonstrates that FPAs will do little or nothing to improve productivity.

234. By definition, higher wages and shorter, more flexible, "family friendly" hours do not of themselves add up to improved productivity. In these circumstances, rather, the drive to improve productivity is likely to incentivise employers to seek smarter work practices (with fewer employees) and increase investment in technology (also with fewer employees).

235. New Zealand's experience of the pre-1990 system of national awards instructs us that workers who feel frustrated at the inability of FPAs to deliver meaningful change will seek more from their employers directly. This is exactly what caused the enormous levels of industrial disruption that characterised the 1970s and 80s. Early signs are already evident in the form of the industrial action now being taken by nurses and others seeking pay equity deals (which are analogous to Fair Pay Agreements in that they also

cover whole occupations). Industrial action at such levels and on such a large scale does nothing to incentivise higher productivity.

236. For all the reasons set out in this submission, **BusinessNZ recommends that the Bill not proceed** or, in the alternative, be replaced by a system of voluntary collective bargaining built on present provisions for codes of practice and multi-employer collective agreements

ENDS

Appendix 1 – Awards and Agreements in 1990

Industry group	Sub group	Covered by:			
		National awards and agreements	District awards and agreements	Composite awards and agreements	Total awards and agreements
Abattoir employees		0	21	0	**21**
Aerated Water and Cordial Workers		1	0	0	**1**
Aircraft workers		4	5	0	**9**
Arts and crafts		0	0	1	**1**
Bakers and pastry cooks		3	0	0	**3**
Biscuit and confectionery workers		2	0	0	**2**
Brewery workers, malthouse and bottling house workers		6	0	0	**6**
Brick, tile, clay, pottery and porcelain workers		9	2	0	**11**
Bricklayers		3	0	0	**3**
Brush and broom trade employees		1	0	0	**1**
Building tradesmen and related workers		1	3	18	**22**
Butchers (Retail Shops)		1	0	1	**2**
Canister workers		1	0	0	**1**
Canvas workers		1	0	0	**1**
Carpenters and joiners		0	5	27	**32**
Chemical manure and acid workers		2	1	0	**3**
Childcare workers		4	1	0	**5**
Cleaners, caretakers, lift attendants and watchmen		3	13	38	**54**

Clerical workers	Airways	1	2	0	**3**
Clerical workers	Banks	1	5	0	**6**
Clerical workers	Chartered accountants	6	0	0	**6**
Clerical workers	Freezing companies	1	0	1	**2**
Clerical workers	General	3	38	31	**72**
Clerical workers	Hotels	2	1	1	**4**
Clerical workers	Insurance companies	3	0	0	**3**
Clerical workers	Legal employees	1	2	0	**3**
Clerical workers	Librarians and their assistants	1	0	1	**2**
Clerical workers	Local authorities	0	115	0	**115**
Clerical workers	Nurse receptionists	2	0	0	**2**
Clerical workers	Rental cars	1	0	0	**1**
Clerical workers	Shipping companies	3	0	0	**3**
Clerical workers	Stock and station agents	1	0	0	**1**
Clerical workers	Taxi telephonists	1	0	0	**1**
Clerical workers	Timber supervisors	1	0	0	**1**
Clerical workers	Totalisator agency board	1	0	0	**1**
Clerical workers	***Total***	**29**	**163**	**34**	**226**
Clothing trade employees	Clothing trade employees	3	0	0	**3**
Clothing trade employees	Tailoring trade employees	2	0	0	**2**
Clothing trade employees	***Total***	**5**	**0**	**0**	**5**
Coachworkers		1	10	9	**20**
Coal carbonisation employees		1	0	0	**1**
Commercial travellers ands sales representatives		1	0	0	**1**
Community and voluntary service organisations		1	0	0	**1**
Concrete and Pumice goods making etc, workers		2	0	0	**2**
Cooks and stewards	Air	6	0	0	**6**

Cooks and stewards	Marine	3	0	0	**3**
Cooks and stewards	***Total***	**9**	**0**	**0**	**9**
Cycle workers		1	0	0	**1**
Dairy and cheese factories, pasteurising, and bottling factories, and milk roundsmen	Dairy chemists	1	0	0	**1**
Dairy and cheese factories, pasteurising, and bottling factories, and milk roundsmen	Dairy factory employees	1	2	0	**3**
Dairy and cheese factories, pasteurising, and bottling factories, and milk roundsmen	Dairy factory managers and assistant managers	1	0	0	**1**
Dairy and cheese factories, pasteurising, and bottling factories, and milk roundsmen	Milk pasteurising and bottling (factory) employees	1	0	0	**1**
Dairy and cheese factories, pasteurising, and bottling factories, and milk roundsmen	Milk roundsmen and depot heads	1	2	0	**3**
Dairy and cheese factories, pasteurising, and bottling factories, and	***Total***	**5**	**4**	**0**	**9**

milk roundsmen					
Dental employees	assistants and technicians	3	0	0	**3**
Drivers (Motor and horse)	Ambulance	5	0	0	**5**
Drivers (Motor and horse)	General	10	30	41	**81**
Drivers (Motor and horse)	Local bodies	1	8	9	**18**
Drivers (Motor and horse)	Passenger transport (other than taxi)	1	6	0	**7**
Drivers (Motor and horse)	Taxi	1	0	0	**1**
Drivers (Motor and horse)	Van salesmen	0	1	0	**1**
Drivers (Motor and horse)	***Total***	**18**	**45**	**50**	**113**
Electrical goods makers		1	0	0	**1**
Electrical workers	Electric supply authorities power-station (switchboard) operators	1	0	0	**1**
Electrical workers	Electric supply authorities: electricians, inspectors, linemen etc	1	10	0	**11**
Electrical workers	General electrical	5	18	49	**72**
Electrical workers	Radio and associated electronics	2	0	0	**2**
Electrical workers	***Total***	9	28	49	**86**
Engine drivers, firemen etc	General and local bodies	2	42	16	**60**
Engine drivers, firemen etc	Pulp and paper industry	3	0	0	**3**
Engine drivers, firemen etc	***Total***	**5**	**42**	**16**	**63**
Engineering	Battery manufacturing employees	1	0	2	**3**
Engineering	Bluff aluminium smelter employees	0	0	1	**1**
Engineering	Boilermakers	1	2	21	**24**
Engineering	Draughtspersons	1	0	1	**2**
Engineering	Factory engineers	1	10	4	**15**
Engineering	Farm machinery servicepersons	1	0	0	**1**

Engineering	General metal trade employees	4	52	61	**117**
Engineering	Industrial mechanics	1	1	0	**2**
Engineering	Moulders	1	0	1	**2**
Engineering	Shift engineers	3	7	0	**10**
Engineering	***Total***	**14**	**72**	**91**	**177**
Ferry employees		0	0	1	**1**
Firemen		2	2	0	**4**
Fish trades employees		6	0	0	**6**
Fishermen		1	6	0	**7**
Flax mill employees		1	0	0	**1**
Flight services officers		1	0	0	**1**
Flour mill, oatmeal and pearl barley mill employees		1	0	0	**1**
Foodstuffs, chemicals, drugs, toilet preparations and related products makers		4	17	0	**21**
Footwear workers	Footwear repairers and bespoke workers	1	0	0	**1**
Footwear workers	Rubber footwear employees	1	0	0	**1**
Footwear workers	***Total***	**2**	**0**	**0**	**2**
Forestry workers		1	3	0	**4**
Fur workers	Dressers and dyers	1	0	0	**1**
Fur workers	Garment workers	1	0	0	**1**
Fur workers	***Total***	**2**	**0**	**0**	**2**
Furniture trade employees	Furniture makers and upholsterers, bedding and wire mattress makers, flock, felt and feather workers	1	1	4	**6**
Gas workers	Coal gas works employees	5	0	1	**6**
Gas workers	Compressed gas workers	4	0	0	**4**
Gas workers	***Total***	**9**	**0**	**1**	**10**

Gelatine and glue workers		1	0	0	**1**
Glassworkers	Glass bevelling, silvering and leadlight workers	1	0	0	**1**
Glassworkers	Glass manufacturing workers	3	0	0	**3**
Glassworkers	***Total***	**4**	**0**	**0**	**4**
Glove workers		2	0	0	**2**
Grocery and supermarket employees		1	0	0	**1**
Hairdressers		1	0	0	**1**
Harbour board employees		2	1	2	**5**
Hatters		1	0	0	**1**
Herd testers		1	0	0	**1**
Hospital domestic employees (private)		1	0	0	**1**
Hotel, restaurant and club employees	Chartered club employees	1	0	0	**1**
Hotel, restaurant and club employees	Licensed hotel employees	2	0	0	**2**
Hotel, restaurant and club employees	Private hotel employees	2	2	0	**4**
Hotel, restaurant and club employees	Rest home employees	1	0	0	**1**
Hotel, restaurant and club employees	Tea rooms and restaurant employees	1	11	21	**33**
Hotel, restaurant and club employees	***Total***	**7**	**13**	**21**	**41**
Ice cream factory and frozen products manufacturing employees		2	2	0	**4**
Jewellers, watchmakers, engravers and die sinkers		1	0	0	**1**
Journalists		2	8	3	**13**

Labourers, gardeners, greenkeepers, nurserymen etc	Builders, contractors and general	3	8	39	**50**
Labourers, gardeners, greenkeepers, nurserymen etc	Cement, shingle, sand and coal, coke and firewood merchants	1	0	3	**4**
Labourers, gardeners, greenkeepers, nurserymen etc	Greenkeepers, bowling clubs and other sports bodies	2	0	1	**3**
Labourers, gardeners, greenkeepers, nurserymen etc	Local bodies	1	17	10	**28**
Labourers, gardeners, greenkeepers, nurserymen etc	Miscellaneous	3	2	1	**6**
Labourers, gardeners, greenkeepers, nurserymen etc	Nurserymen and gardeners	1	0	1	**2**
Labourers, gardeners, greenkeepers, nurserymen etc	Oil exploration workers	3	0	0	**3**
Labourers, gardeners, greenkeepers, nurserymen etc	Oil production workers	1	0	0	**1**
Labourers, gardeners, greenkeepers, nurserymen etc	Racing and trotting clubs	1	0	0	**1**
Labourers, gardeners, greenkeepers, nurserymen etc	***Total***	**16**	**27**	**55**	**98**
Laundry, dry cleaning and dyeing workers		5	1	0	**6**
Lime and cement manufacturing workers	Cement manufacturing workers	9	0	0	**9**
Lime and cement manufacturing workers	Lime manufacturing workers	1	0	0	**1**

Lime and cement manufacturing workers	***Total***	**10**	**0**	**0**	**10**
Marine engineers		1	5	7	**13**
Match factory employees		1	0	0	**1**
Meat, poultry and game processors, packers and preserving	Bacon workers	3	1`	0	**3**
Meat, poultry and game processors, packers and preserving	Boning packaging and smallgoods workers	1	26	0	**27**
Meat, poultry and game processors, packers and preserving	Freezing workers: meat processing workers	2	11	0	**13**
Meat, poultry and game processors, packers and preserving	Game packing house workers	1	6	0	**7**
Meat, poultry and game processors, packers and preserving	Poultry processing workers	1	4	0	**5**
Meat, poultry and game processors, packers and preserving	***Total***	**8**	**47**	**0**	**55**
Merchant service officers	Ships masters and officers	6	9	0	**15**
Merchant service officers	Tugmasters, dredge masters and launch masters	2	6	4	**12**
Merchant service officers	***Total***	**8**	**15**	**4**	**27**
Mine workers	Coal mine workers	3	0	0	**3**
Mine workers	General	18	0	2	**20**
Mine workers	Gold mine workers	3	0	0	**3**

Mine workers	***Total***	24	0	2	**26**
Motor mechanics and garage employees	Motor mechanics and garage and petrol station employees	1	2	0	**3**
Musicians		1	0	0	**1**
Nursing staff (including private hospitals)		5	3	1	**9**
Optical dispensers and opticians		2	0	0	**2**
Paint and varnish and related workers		6	3	32	**41**
Paper workers	Packaging and associated printing	1	0	0	**1**
Paper workers	Paper mills, wood pulp and paper product workers	6	0	4	**10**
Paper workers	Waste paper processing workers	2	0	0	**2**
Paper workers	***Total***	**9**	**0**	**4**	**13**
Pharmacists assistants (retail)		2	0	0	**2**
Photo engravers		2	0	0	**2**
Photographic processing workers		1	0	0	**1**
Piano tuners and repairers		1	0	0	**1**
Pilots (air)		2	7	0	**9**
Plasterers	Plaster manufacturing employees	1	0	0	**1**
Plasterers	Plaster wallboard makers	1	0	0	**1**
Plasterers	Solid and fibrous plasterers and tile fixers	1	0	0	**1**
Plasterers	***Total***	**3**	**0**	**0**	**3**
Plumbers		2	9	29	**40**
Power project employees		1	0	0	**1**
Printing trade employees	General	2	1	8	**11**
Printing trade employees	Wallpaper manufacturing	1	0	0	**1**
Printing trade employees	***Total***	**3**	**1**	**8**	**12**
Public passenger transport workers	General	1	3	1	**5**

Public passenger transport workers	Officials and foremen	1	0	0	**1**
Public passenger transport workers	***Total***	**2**	**3**	**1**	**6**
Roofing materials (bituminous process) makers		1	0	0	**1**
Rope and twine manufacturing workers		1	0	0	**1**
Rubber workers		3	4	0	**7**
Rural workers	Agricultural workers	4	1	3	**8**
Rural workers	Gardens and orchards workers	2	0	0	**2**
Rural workers	***Total***	**6**	**1**	**3**	**10**
Saddlery and canvas workers		2	0	1	**3**
Sales advertising representatives		1	0	0	**1**
Seamen and firemen		4	2	3	**9**
Shearers, shed hands and cooks		1	0	0	**1**
Ship builders and repairers		2	1	2	**5**
Shop employees	Cake	1	0	0	**1**
Shop employees	Dairy, confectionery and mixed business	1	0	0	**1**
Shop employees	Fish	1	0	0	**1**
Shop employees	Fruit and vegetables	1	0	0	**1**
Shop employees	Other retail shops	4	0	4	**8**
Shop employees	***Total***	**8**	**0**	**4**	**12**
Soap, candle etc workers		2	9	0	**11**
Sports goods makers and repairers		5	0	0	**5**
State workers	Education services	20	0	0	**20**
State workers	General	0	66	3	**69**

State workers	Health services	56	0	1	**57**
State workers	***Total***	**76**	**66**	**4**	**146**
Stonemasons		1	0	0	**1**
Stores and warehouse employees	Cool store and cold storage workers	1	1	0	**2**
Stores and warehouse employees	Fruit and produce stores employees and packers	3	0	0	**3**
Stores and warehouse employees	Oil stores employees	1	0	0	**1**
Stores and warehouse employees	Storepersons and packers	5	15	50	**70**
Stores and warehouse employees	Warehouse employees	4	0	0	**4**
Stores and warehouse employees	Wine and spirit merchants employees	1	0	0	**1**
Stores and warehouse employees	Wool, grain, hide, manure etc stores employees	2	0	0	**2**
Stores and warehouse employees	***Total***	**17**	**16**	**50**	**83**
Sugar workers		1	0	0	**1**
Tallymen		1	0	0	**1**
Tanners and fellmongers	Fellmongers	2	0	0	**2**
Tanners and fellmongers	Tanners	4	0	0	**4**
Tanners and fellmongers	***Total***	**6**	**0**	**0**	**6**
Technicians	Bowling centres	1	0	0	**1**
Technicians	University	1	0	0	**1**
Technicians	***Total***	**2**	**0**	**0**	**2**
Theatres, places of amusement and sports bodies employees	Actors and actresses	3	0	0	**3**
Theatres, places of amusement and sports bodies employees	Front of house (theatre)	1	0	0	**1**

Theatres, places of amusement and sports bodies employees	Motion picture projectionists	2	0	0	**2**
Theatres, places of amusement and sports bodies employees	Racing, trotting and hunting clubs,	1	0	0	**1**
Theatres, places of amusement and sports bodies employees	Sports bodies, agricultural societies, billiard rooms, skating rinks, dance halls etc	4	1	3	**8**
Theatres, places of amusement and sports bodies employees	Stage employees	3	0	0	**3**
Theatres, places of amusement and sports bodies employees	***Total***	**14**	**1**	**3**	**18**
Threshing, chaffcutting, clover shelling and agricultural contractors employees		1	0	0	**1**
Timber workers	Timber workers	3	9	4	**16**
Timber workers	Wood pulp workers	1	0	3	**4**
Timber workers	***Total***	**4**	**9**	**7**	**20**
Tobacco workers		2	1	0	**3**
Umbrella makers		2	0	0	**2**
Waterside workers	Dock labourers (chipping, cleaning, painting etc)	1	0	0	**1**
Waterside workers	Waterside workers	1	2	0	**3**
Waterside workers	Wharf foremen (carriers)	3	6	0	**9**
Waterside workers	***Total***	**5**	**8**	**0**	**13**

Woollen mills, synthetic fibre and hosiery factories employees	5	10	0	**15**
Woolscourers	1	0	0	**1**
				3106

Appendix 2

NEW ZEALAND

ARTICLE 22 OF THE ILO CONSTITUTION

BUSINESS NEW ZEALAND COMMENT ON THE NEW ZEALAND GOVERNMENT REPORTS FOR 2021

Comment by Business New Zealand

Right to Organise and Collective Bargaining Convention 1949 (C98)

Article 4

Measures appropriate to national conditions shall be taken, where necessary, 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.

BusinessNZ comment:

1. Business New Zealand (BusinessNZ) states that sections 31, 33 and 50J of the Employment Relations Act 2000 (the Act) and the proposed introduction of Fair Pay Agreements (FPAs) are clearly inconsistent with the principle of free and voluntary collective bargaining enshrined in Article 4 of the Right to Organise and Collective Bargaining Convention 1949 (C98). BusinessNZ accordingly draws the attention of the Committee of Experts on the Applications of Conventions and Recommendations (CEACR) to these provisions.

2. Sections 31, 33 and 50J of the Act and FPAs variously:

    a. require parties to bargaining for a collective agreement to conclude one, unless there are genuine reasons not to (s31 and s33).

    b. permit the courts to compulsorily fix the terms of a collective agreement where the parties to bargaining for it cannot agree (s50J), and

    c. introduce compulsory national level industry or occupational instruments negotiated centrally and applied arbitrarily to all workers in a specific industry or occupation (FPAs).

3. The introduction of Fair Pay agreements will effectively remove the right of freedom of association for employers and employees who will be compulsorily covered by employment agreements negotiated by organisations they are not a member of. Compulsory arbitration will apply to all instances of disagreement. A ratification vote against the adoption of an FPA will be overridden by compulsory arbitration with no right of appeal.

BACKGROUND

4. On 19 August 2000, the Employment Relations Act 2000 was passed. An object of the Act is to *"promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively."*[25] Section 4 of the Act introduced the requirement for the parties to an employment relationship to act in good faith.

5. On 6 June 2003, New Zealand ratified Convention 98, obliging NZ to ensure its domestic legislation complies with the Convention.

6. On 1 December 2004, the New Zealand Parliament passed sections 31, 33 and 50J of the Act, which respectively require a collective agreement to be agreed to unless there are genuine reasons not to and permit the Employment Relations Authority to fix the terms of a collective agreement where it has not been possible for the parties to agree to one.[26] BusinessNZ (BusNZ) opposed the amendments, including arguing that section 50J constituted compulsory arbitration and sections 31 and 33 were subsequently repealed following a change of government.

7. On 10 October 2018, following an Official Information Act request from the NZ Council of Trade Unions regarding the advice received from officials on C98, the Minister provided a letter to BusNZ purporting to contain that advice. This made it clear that, in reaching its decision to change sections 31 and 33, the Government had relied significantly on the conclusions of the ILO's Committee on Freedom of Association ("CFA") on the meaning of C98 Article 4. However, the Government's advice contained no supporting information or analysis.

8. On 12 October 2018, BusNZ made a request under the Official Information Act for:

> *"Copies of all material, whether held physically or electronically, including notes, drafts, emails and texts, and anything else that was relied upon by you or officials to research, analyse and conclude that C98 is not breached by clauses 9-11 and 13 of the Employment Relations Amendment Bill."*

9. On 12 November 2018, the Minister advised BusNZ that its request was too complex to meet within the statutory 20-day limit and delayed a response until 11 December 2018 (the same day the offending changes were enacted). However, when it became apparent that the information sought by BusNZ had already been provided to others, BusNZ appealed the Minister's decision to delay a response to the Ombudsman.

10. On 11 December 2018, the Government supplied information, some of which was the same as supplied earlier to others and the remainder of which was commentary on information previously supplied by BusNZ to the Government after the decision to introduce a duty to conclude was taken.

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[25] The titles of Conventions 87 and 98 are wrongly stated in the Act. The correct title of Convention 87 is the *Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87)*. The correct title of Convention 98 is the *Right to Organise and Collective Bargaining Convention 1949 (No 98).*

[26] Sections 31 and 33 were repealed in December 2015 but were reinserted on 11 December 2018.

11. On 11 December 2018, the Employment Relations Amendment Act 2018 (the Act), was passed. Inter alia, it reinstated sections 31 and 33 of the Act requiring a collective agreement to be agreed to unless there are genuine reasons not to. In submissions to the NZ Parliament's Workforce and Education Select Committee in 2018, BusNZ argued that the changes to sections 31 and 33 were inconsistent with Article 4 of C98 in that they offend the principle of free and voluntary negotiation enshrined in that article.[27] The New Zealand Government ignored BusNZ's submission in 2004 and dismissed BusNZ's concerns in 2018. In a generic letter to concerned correspondents, the Minister of Workplace Relations and Safety justified the changes saying, "The ILO itself has said that the Act's requirement doesn't breach any of its conventions". This is despite the ILO itself having previously stated categorically that it has no mandate to make such authoritative statements.

12. On 12 January 2019, the NZ Government welcomed a report from the Fair Pay Agreements Working Group ("FPAWG"). The report recommended that wages and conditions of employment be compulsorily set on a sector, industry or occupational basis, giving only workers the power to initiate such agreements. FPAs would be applicable to all employers and workers within the scope of the agreement irrespective of their willingness to be covered by such arrangements, or their membership of a representative union or employer organisation.

13. On 4 February 2019, the Ombudsman responded to BusNZ's appeal. His response advised that, because of the work required by officials to respond, the delay was reasonable. BusNZ responded to the Ombudsman on 5 February 2019, pointing out that, on face value, none of the information supplied was used to inform the Government's decision to introduce a duty to conclude a collective agreement or to support the introduction of FPAs. Rather, it all appeared to be information generated to justify that decision after it had been challenged. BusNZ had (and has) still to receive any analysis supporting the Government's decision prior to it having been taken. However, given that the Act became law on 11 December 2018, BusNZ discontinued its request under the Official Information Act in favour of taking its concerns to the ILO.

14. On 5 February 2019, BusNZ responded to the Ombudsman, pointing out that none of information supplied to BusNZ was used to inform the government's decision to introduce a duty to conclude a collective agreement or to support the introduction of FPAs. Rather, it was information generated to justify that decision after it had been challenged. However, given that the Act had become law on 11 December 2018, BusNZ discontinued its request under the Official Information Act in favour of taking its concerns to the ILO.

15. On 31 July 2019, BusNZ wrote to the Director General of the ILO, with a copy to the International Organisation of Employers (IOE). The letter expressed the view that sections 31,33 and 50J of the Employment Relations Act 2000 breached the principle of free and voluntary negotiation in C98, and that the proposed introduction of FPAs would similarly breach C98.

[27] https://www.businessnz.org.nz/__data/assets/pdf_file/0019/143605/180329-Employment-Relations-Amendment-Bill.pdf

16. On 6 August 2019, the ILO acknowledged receipt of BusNZ's 31 July letter and gave an assurance that the ILO had intervened immediately with the NZ authorities. The ILO undertook to transmit any information received from the NZ Government to BusNZ.

17. On 6 August 2019, the ILO wrote to the NZ Government (MBIE) asking for an explanation.

18. On 7 August 2019, the International Organisation of Employers (IOE) wrote to the Director General of the ILO supporting BusNZ's concerns and requesting that the ILO intervene accordingly with the NZ Government.

19. On 14 February 2020, BusNZ wrote to the ILO asking if any response had yet been received from the NZ Government.

20. On 14 February 2020, the ILO responded to BusNZ advising that no response had yet been received and undertaking to again intervene with the NZ Government.

21. On 20 October 2020, BusNZ again wrote to the ILO asking if a response had been received from the NZ Government to the concerns first raised on 31 July 2019.

22. On 20 October 2020, the ILO replied to BusNZ advising that it was still awaiting any reply from the NZ Government and reiterating the commitment made on 6 August 2019 to immediately share any response with BusNZ.

23. On 21 October 2020, BusNZ replied to the ILO asking that it again intervene with the NZ Government to seek a response to BusNZ's concerns.

24. On 22 October 2020, the ILO wrote again to the NZ Government (Ministry of Business, Innovation and Employment, (MBIE)) repeating its request for an explanation.

25. On 27 October 2020, MBIE responded to the ILO letter of 22 October. This offered no explanation for its actions but did note that BusNZ had made representations about its concerns at the various stages of the government legislative and policy process. MBIE also claimed to have not received earlier correspondence from the ILO and asked for it to be resent.

26. On 30 October 2020, the ILO acknowledged receipt of MBIE's 27 October 2020 communication and attached copies of earlier correspondence. The ILO offered assistance in any way required by the NZ Government.

27. On 3 November 2020, MBIE thanked the ILO for its offer of assistance.

28. On 6 November 2020,

    a. an MBIE official contacted BusNZ advising of the receipt of the 22 October 2020 request from the ILO, and that this was the only request that had been received. BusNZ was advised that any earlier requests (i.e. the requests

alluded to in the ILO correspondence of 6 August 2019 and 14 February 2020) had not been received by MBIE.

b. BusNZ forwarded to MBIE a copy of the original information sent to the ILO on 31 July 2019.

c. The ILO acknowledged MBIE's thanks for its offer of assistance.

29. On 7 November 2020, MBIE advised the ILO that it had been in contact with BusNZ and would engage with it directly.

30. On 8 November 2020, the ILO acknowledged MBIE's advice that it had contacted BusNZ.

31. On 17 December 2020, an MBIE official met BusNZ to discuss the material provided. BusNZ pointed out that only the ILO and the International Court of Justice can make definitive interpretations of compliance with Conventions. MBIE agreed that more discussion would take place in 2021. No further discussions on this topic have eventuated.

32. On 7 May 2021, the Government announced detailed plans to implement FPAs. Details were contained in a Cabinet paper released publicly by the Minister of Workplace Relations and Safety.[28] The paper acknowledged that the Government's proposals would challenge principles of freedom of association and voluntary negotiation, but also that these breaches were deemed necessary to achieve the Government's objectives.

33. On 2 June 2021, BusNZ wrote again to the ILO advising that, on 7 May 2021, the Government had announced detailed plans to implement FPAs in a form that would clearly breach C98 and expressing serious concerns at the lack of any earlier responses.

34. On 14 June 2021, the ILO replied to BusNZ's letter of 2 June advising that it had *"once again intervened immediately with the New Zealand authorities and drawn attention to the concerns raised that the Government proposal: would solely grant to unions the choice of the level, scope and coverage of the FPA; there would be no ability for employers or employees to opt out of bargaining for an FPA; and in the absence of an agreement, any disputes would be submitted to compulsory arbitration. In accordance with the regular procedure concerning informal interventions, any comments or observations made by the Government on this matter will be transmitted to your organization for information."*

35. On 14 June 2021, the ILO wrote to the NZ Government (MBIE) repeating its earlier requests and asking for an explanation. The ILO noted that, without pre-empting the views of the supervisory bodies of the ILO, C98 called for the encouragement and promotion of machinery for voluntary negotiations and therefore that it was

[28] Cabinet Paper: Fair Pay Agreements: Approval to draft – 19 April 2021, Paras 156-167

contrary to the principles of collective bargaining to introduce compulsory arbitration (in the manner proposed by the NZ Government).

36. On 22 June 2021, BusNZ wrote to the ILO advising that, in answer to several parliamentary written questions, the Minister of Workplace Relations and Safety denied knowledge of correspondence between the ILO and the NZ Government on the topic of C98.[29]

37. On 24 June 2021, the ILO emailed MBIE advising that it had received the 22 June request from BusNZ and that it intended to advise BusNZ that previous communications dated 6 August 2019, 22 October 2020 and 14 June 2021 had been sent from ILO to the NZ Government.

38. On 24 June, MBIE responded to the ILO email of the same date. MBIE advised that it had attempted to engage with BusNZ "throughout the balance of 2020 and into 2021 without success until April 2021 when it briefed BusNZ on the proposed legislation and sought feedback." Regarding the correspondence the Minister of Workplace Relations claimed to have not received, MBIE stated that, since the correspondence was addressed to MBIE, the Minster was correct in his assertion. MBIE indicated that it was open to a virtual conversation with the ILO at its convenience. MBIE also committed to responding "next week" to the ILO's letter of 14 June 2021.

39. On 25 June 2021, the ILO replied to BusNZ stating that its interventions in question had been sent to the International Labour Policy, Labour and Immigration Policy Branch of the Ministry of Business, Innovation and Employment on 6 August 2019, 22 October 2020 and 14 June 2021.

40. On 30 June 2021, MBIE emailed the ILO suggesting a virtual meeting on 2 July 2021.

41. On 2 July 2021, the ILO sent a virtual meeting invitation to MBIE for a meeting the same day.

42. On 6 July 2021, MBIE responded to the ILO letter of 14 June 2021. It stated that it had been attempting to engage with BusNZ since 2020. It suggested that since it was BusNZ's intention to lodge an Article 24 representation that MBIE's formal response (to the ILO's queries) should await that event.

43. On 7 July 2021, the ILO acknowledged MBIE's response of 6 July 2021.

The Government has refused to engage

44. As is evident in the comments above, the NZ Government has failed to engage meaningfully with the ILO's repeated requests for an explanation of its actions and proposals. Artifices such as the Minister denying knowledge of correspondence

[29] Parliamentary written questions 23235 (2021), 23236 (2021) and 23237 (2021) refer.

because it was not addressed to him do nothing to alter this view. Claims that it has been unable to engage with BusNZ do not explain its failure to engage with the ILO. In the same vein, and taken on top of all the preceding non-responses, MBIE's 6 July 2021 indication that it would wait for BusNZ to lodge an Article 24 representation before responding to any of the concerns raised over the preceding 2 years (i.e. since 31 July 2019) suggests a deliberate strategy of avoidance. The very experienced NZ officials would know that this approach would mean no consideration of the substantive issues could occur until after the proposed enactment of FPAs.

45. The overwhelming impression is that the Government does not want to engage on an issue on which it knows it is wrong. This is of very serious concern. Here it must be noted that it is extremely rare and commensurately noteworthy for a government to openly declare its intention to breach Conventions previously ratified by that government. By any measure, this is not something the CEACR, nor indeed the ILO and its members, can afford to ignore.

46. BusNZ calls upon the CEACR to regard this report with the utmost seriousness, and accordingly to double foot note its observations so that they may be examined with appropriate urgency at the earliest opportunity.

WHY ARE THE ACT AND FPAs INCONSISTENT WITH CONVENTION 98?

Convention 98, Article 4

47. New Zealand ratified C98 in June 2003 and has been bound by its provisions since June 2004.

48. Article 4 of C98 provides that:

> *"Measures appropriate to national conditions shall be taken, where necessary, 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."*

The meaning of Article 4

49. The wording of Article 4 of C98 is the starting point for BusNZ's belief that sections 31, 33 and 50J and FPAs are inconsistent with C98.

50. A plain construction of Article 4, consistent with Article 31 of the Vienna Convention on the Law of Treaties,[30] makes it clear that the primary object of "*encourage and promote*" is the "*full development and utilisation of machinery for voluntary negotiation.*"

[30] An international treaty that governs interpretation of international treaties.

51. The outcome sought as a result of this voluntary approach to negotiation is expressed by the words *"with a view to the regulation of terms and conditions of employment by means of collective agreements."*

52. The words "*encourage and promote*" and *"with a view to"* are key to the interpretation of Article 4. Most importantly, they are not absolute, i.e. they qualify a process rather than prescribing a specific outcome. Jointly and severally, they strongly suggest that while the *desired* outcome of Article 4 is the regulation of terms and conditions of employment by means of collective agreements, it is not a *required* outcome. This is an important distinction.

53. This idea is further supported by the fact that the words "*encourage and promote*" effectively separate the government from actually directing the outcome which is to be achieved by voluntary means. In the same vein, the words "*encourage*" and "*promote*" both connote persuasion rather than compulsion. This suggests that C98 does not envisage the government simply dictating what the outcome is and how it is to be achieved.

54. This interpretation is consistent with conclusions reached over many years on complaints presented before the CFA over violation of the principles mentioned in paragraph 11, yet contrasts starkly with the provisions of sections 31, 33 and 50J of the Act or the proposed provisions governing FPAs.[31]

55. It is also consistent with the documented intent of participants at the 32nd International Labour Conference (1949) ("ILC"), at which C98 was adopted[32].

56. The record of proceedings of the 1949 ILC support a view that the object of C98 is to encourage governments to establish mechanisms that will lead to issues over conditions of employment being resolved via voluntary negotiation between workers and employers (through their representative organisations) rather than being set by government (or employer) fiat.

57. The record shows that the employer's group and many governments were particularly concerned to ensure that the Convention should not be so prescriptive as to require a specific outcome, which is why the ILC adopted Article 4 in a form that does not *require* resolution of issues in bargaining to be in the form of a collective agreement. This theme has been continued in subsequent relevant international instruments.

Other relevant international instruments

58. The Collective Bargaining Convention, 1981 (C154) was adopted in part to encourage greater efforts to achieve the objectives of existing international standards generally[33] and, in particular, the general principles set out in Article 4 of the Right

[31] See Chapter 15, 6th Edition Compilation of Decisions of the Committee on Freedom of Association

[32] https://labordoc.ilo.org/primo-explore/collectionDiscovery?vid=41ILO_V1&collectionId=8146619180002676&lang=en_US

[33] the Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organise and Collective Bargaining Convention, 1949, the Collective Agreements Recommendation, 1951, the Voluntary Conciliation and Arbitration Recommendation, 1951, the Labour Relations (Public Service) Convention and Recommendation, 1978, and the Labour Administration Convention and Recommendation, 1978

to Organise and Collective Bargaining Convention, 1949 (C98), and paragraph 1 of the Collective Agreements Recommendation, 1951 (R91).

59. Article 6 of C154 states:

> *"The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate".*

60. On its face this suggests that even participation in collective bargaining is voluntary, which does not support a more rigid view that a collective agreement should result from collective bargaining or that a collective agreement may be fixed arbitrarily by a third party.

61. Article 7 of C154 states:

> *"Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations."*

62. This is consistent with the practices of most countries to consult both informally with the social partners and formally through the legislative process. However, Article 7 does not identify or imply a requirement to conclude a collective agreement or establish a right for third parties to arbitrarily fix the terms of a collective agreement.

63. Article 8 of C154 states:

> *"The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining".*

64. Article 8 is an injunction upon governments to ensure they do not constrain the ability of any parties who wish to engage in collective bargaining to do so freely. Like Articles 6 and 7, it contains no message of compulsion.

65. And paragraph 1 of Ro 91 – Collective Agreements Recommendation, 1951 (No. 91) states:

> *"(1) Machinery appropriate to the conditions existing in each country should be established, by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements, or to be available to assist the parties in the negotiation, conclusion, revision and renewal of collective agreements.*
>
> *(2) The organisation, methods of operation and functions of such machinery should be determined by agreements between the parties or by national laws or regulations, as may be appropriate under national conditions."*

66. Like its convention counterparts, R91 does not require settlement of collective agreements or give rights to non-bargaining parties to fix them. Rather it encourages governments to ensure the establishment of mechanisms for effective collective bargaining, without being specific as to how the establishment process or the settlement mechanisms should manifest themselves.

67. None of these supplementary international labour standards creates or implies a duty to conclude, or compel the conclusion of, collective agreements. The emphasis throughout is on voluntary participation, consistent with the apparent intent of the drafters of C98.

68. Supporting C154, the Collective Bargaining Recommendation 1981 (R163), also gives further guidance on the intended application of Article 4 of C98.

69. Clause 6 of R163 states:

> *"Parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations."*

70. On its face, clause 6 simply requires that negotiators turn up to the bargaining table with authority from their respective constituencies to reach an agreement, (usually within pre-agreed parameters).

71. "Mandate", in this context, cannot be absolute since R163 makes the mandate subject to any requirements on the parties at the table to "check in" with their constituents before and during bargaining, presumably in part to ensure that the mandate remains valid.

72. A mandate to settle therefore is a dynamic authority which can be influenced by the state of bargaining on key issues, including any views the parties' constituents may have on the desirability of concluding a collective agreement at all.

73. Ultimately, clause 6 of R163 cannot be taken to support a general requirement to conclude a collective agreement where bargaining for one is initiated. And, similarly, if a collective agreement is concluded, it cannot (as proposed for FPAs) be taken to cover workers and employers who had no attachment to the bargaining process.

Sections 31, 33 and 50J of the Employment Relations Act 2000

74. Act section 31 states:

> ***31 Object of this Part***
> *The object of this Part is—*
> *(a) to provide the core requirements of the duty of good faith in relation to collective bargaining; and*
> *(aa) to provide that the duty of good faith in section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to; and*
> *(b) to provide for 1 or more codes of good faith to assist the parties to understand what good faith means in collective bargaining; and*
> *(c) to recognise the view of parties to collective bargaining as to what constitutes good faith; and*
> *(d) to promote orderly collective bargaining; and*
> *(e) to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement.*

75. Act section 33 states:

> ***33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to***
>
> *(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.*
>
> *(2) For the purposes of subsection (1), genuine reason does not include—*
> *(a) opposition or objection in principle to—*
> *(i) bargaining for, or being a party to, a collective agreement; or*
> *(ii) including rates of wages or salary in a collective agreement; or*
> *(b) disagreement about including a bargaining fee clause under Part 6B in a collective agreement.*

76. Act section 50J states:

> **50J *Remedy for serious and sustained breach of duty of good faith in section 4 in relation to collective bargaining***
>
> (1) *A party to bargaining for a collective agreement may apply, on the grounds specified in subsection (3), to the Authority for a determination fixing the provisions of the collective agreement being bargained for.*
> (2) *The Authority may fix the provisions of the collective agreement being bargained for if it is satisfied that—*
> (a) *the grounds in subsection (3) have been made out; and*
> (b) *it is appropriate, in all the circumstances, to do so.*
>
> (3) *The grounds are that—*
> (a) *a breach of the duty of good faith in section 4—*
> (i) *has occurred in relation to the bargaining; and*
> (ii) *was sufficiently serious and sustained as to significantly undermine the bargaining; and*
> (b) *all other reasonable alternatives for reaching agreement have been exhausted; and*
> (c) *fixing the provisions of the collective agreement is the only effective remedy for the party or parties affected by the breach of the duty of good faith.*
>
> (4) *The Authority may make a determination under this section whether or not any penalty for a breach of good faith has been awarded under section 4A in relation to the same bargaining and whether or not the breach is the same breach.*
>
> (5) *The effect of a determination of the Authority fixing the provisions of a collective agreement is to make the collective agreement binding and enforceable as if it had been—*
> (a) *ratified as required by section 51; and*
> (b) *signed by the parties under section 54(1)(b).*
>
> (6) *Section 59 applies to the determination as if it were a collective agreement.*
>
> (7) *If the bargaining for the collective agreement was subject to facilitation under sections 50A to 50I, the member of the Authority who makes a determination under this section must not be the member of the Authority who conducted the facilitation if a party to the bargaining objects.*

Sections 31 and 33 add compulsion to the law

77. Sections 31 and 33 *require* a union and an employer bargaining for a collective agreement *to conclude a collective agreement* unless there is a genuine reason, based on reasonable grounds, not to.

78. A requirement to conclude a collective agreement, especially in light of the fact that a collective agreement may be initiated by a union on behalf of as few as two unionised employees (a minuscule proportion of a large workplace), clearly constrains voluntariness in all cases and removes it entirely if the genuine reasons criterion cannot be met.

79. Prior to the enactment of the changes complained of, employers and unions were required to bargain in good faith towards a collective agreement, where bargaining for one had been initiated.

80. Previously and now, there is a very low threshold for initiation; only two union members in a workplace are required for initiation to be valid.

81. Good faith requires the parties to not mislead or deceive each other, to actively consider and respond to each other's positions and to meet for the purposes of bargaining. These good faith requirements apply to all collective bargaining.

82. Previously, the bargaining for a collective agreement could terminate without agreement being reached if it was clear that all matters had been considered and responded to in good faith.

83. As it stands, the Act very clearly does not enable an employer to escape collective bargaining once begun, or to avoid it. Once bargaining is initiated, the process mandated by the good faith obligations must be followed to its logical conclusion no matter how many or few employees may be affected by the outcome.

Other jurisdictions

84. Overseas practice provides a helpful insight here. For instance, there are parallels between the situation prior to the introduction of a duty to conclude and the provisions of the Canadian Federal Labour Code, with which much of New Zealand's good faith approach to bargaining is comparable. Section 50 of that code states:

> *50. Where notice to bargain has been given under this Part*
> *(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall*
> *(i) meet and commence, or cause authorised representatives on their behalf and commence, to bargain collectively in good faith, and*
> *(ii) to make every reasonable effort to enter into a collective agreement*

85. Here the obligation is to meet, to bargain and to make every reasonable effort to enter into a collective agreement. This is consistent with the obligations of the Employment Relations Act 2000 prior to the introduction of sections 31-33, albeit the Canadian version is framed around process whereas the New Zealand version is framed around outcomes. "Old" section 33 stated:

> ***33. Duty of good faith does not require collective agreement to be concluded***
> *(1) The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement—*
> *(a) to enter into a collective agreement; or*
> *(b) to agree on any matter for inclusion in a collective agreement.*
> *(2) However, an employer does not comply with the duty of good faith in section 4 if—*
> *(a) the employer refuses to enter into a collective agreement; and*
> *(b) the employer does so because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement.*

86. The Canadian and New Zealand versions are also consistent with the CFA's conclusions on the principle of bargaining in good faith: e.g.,

> *"1328 It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties."*

87. The Canadian and CFA approaches of "*making every effort to enter into a collective agreement*" are both consistent with the prior approach of the Act, being focused on the parties working in good faith towards a desired outcome without requiring it. All these provisions support an interpretation that good faith bargaining towards a collective agreement is mandatory, but settlement of a collective agreement is voluntary.

88. Conversely, section 33 now takes the approach of requiring the conclusion of a collective agreement unless genuine reasons can be found to not conclude. This makes the provisions of sections 31 and 33 all the more onerous, as they overlay a requirement to settle a collective agreement onto the already strict requirement to remain at the bargaining table until all issues are considered and responded to.

89. These changes lean directly and heavily in the direction of requiring rather than encouraging and promoting the creation of collective agreements. They therefore add a distinct degree of compulsion not hitherto present.

90. The essence of BusNZ's view is that *weakening the right to not conclude* a collective agreement, and the *addition of a requirement to conclude* a collective agreement, are both actions inconsistent with the principle of free and voluntary collective bargaining enshrined in Article 4 of C98.

91. On these grounds, BNZ also argues that the duty to conclude does not have to be absolute to be inconsistent with Article 4 of C98.

92. Any counter argument, that the requirement to conclude a collective agreement is consistent with C98's object of promoting such an outcome and that the ability to not agree for genuine reasons based on reasonable grounds is sufficient to maintain this view, is a tenuous one. "Promoting" is clearly not the same as "requiring". Neither is "encouraging" the same as "requiring". "Requiring" constrains the ability of the parties to not agree and therefore diminishes the voluntary nature of bargaining.

Section 50J also adds compulsion

93. Technically, concerns over s50J have existed since 1 December 2004 when it was first enacted. However, it was not an issue in practical terms until February 2019 when it was invoked for the first time.

94. The decision of the Employment Court to return the *Jacks Hardware* case to the Employment Relations Authority arguably is in breach of Article 4 of the Right to Organise and Collective Bargaining Convention C98.[34] This is because section 50J arguably constitutes compulsory arbitration, which the CFA believes is incompatible with the principle of free and voluntary collective bargaining enshrined in Article 4 of C98.

95. When 50J of the Act was enacted on 1 December 2004, BusinessNZ observed in its submission to the New Zealand Parliament's then Transport and Industrial Relations Select Committee that:

> *"New sections 50A to 50J (clause 15) insert a bargaining facilitation process as well as a process whereby the Employment Relations Authority can determine collective agreements in the event of a serious and sustained breach of good faith that has significantly undermined the bargaining. These sections represent a return to third party intervention in the bargaining process at the behest of only one party, both in respect to facilitation and in allowing the Employment Relations Authority to determine the collective agreement if agreement cannot otherwise be reached. In the latter situation a high threshold is set but the process itself constitutes compulsory arbitration. Unions should not be able to enforce collective bargaining when they cannot achieve collective agreements through their own efforts."*

96. While no mention was made of C98, it was clear even then that section 50J constituted a form of compulsory arbitration. The lack of mention may have been due in part to the fact that C98 only came into force in New Zealand in June 2004[35], and its import was not well understood in general employment circles at that time.

97. Paragraphs 1415 – 1419 (Compulsory Arbitration) of the Compilation of Decisions of the Committee on Freedom of Association ("CFA Compilation") set out the CFA's views on the issue of the authorities fixing the terms of a collective agreement. Of particular relevance are paragraphs 1416 – 1417. These make clear the CFA's disapproval of the notion of compulsory arbitration.

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[34] Jack's Hardware and Timber Limited v First Union Incorporated [2019] NZEmpC 20 (28 February 2019)

[35] It was ratified in June 2003.

> *1416. Provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98.*
>
> *1417. Recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).*

Fair Pay Agreements

98. New Zealand ratified this fundamental convention on 6 June 2003. New Zealand had not ratified it previously because, from 1894 until 1990, the country's industrial relations system was covered by compulsory national occupational awards which were, for all practical purposes, identical to what is now proposed and therefore not C98 compliant.

99. From the inception of C98 in 1949, successive New Zealand governments saw the award system as an obstacle to ratification as the compulsory nature of awards and the arbitration mechanisms that created them clearly offended the principle of voluntariness embodied in Article 4 of C98.

100. Ratification was finally approved in 2003, on the recommendation of the Foreign Affairs Defence and Trade Select Committee[36]. The select committee noted in its report that:

> *"Existing New Zealand law, policy and practice are consistent with the Convention. Specifically, the Employment Relations Act 2000 has an objective 'to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively' 1. These principles include the development of productive employment relationships through the promotion of collective bargaining and employees having the freedom to choose whether or not to form a union to further their collective employment interests, as well as protection from discrimination in employment based on their membership or non-membership of a trade union."*

101. Despite noting in 2003 that the current law was consistent with C98, in 2004 the Labour Government introduced sections 31, 33 and 50J now complained of. BusNZ objected at the time, saying:

> *"Compulsion of this kind ignores the fact that a system of voluntary compliance, leaving the parties free to reach their own agreements, is likely to be more durable than one based on the threat of compulsory arbitration and fines."*

102. BusNZ's view ultimately became academic when the offending provisions were removed by the National Party-led government in 2015.

[36] https://www.parliament.nz/resource/mi-NZ/47DBSCH_SCR2393_1/f89ef426bf34d8341a4f487884ab86e7aac9d479

103. The historical reluctance to ratify C98 because of the existence of awards is in direct contrast to the NZ Government's current proposals to introduce FPAs.

104. On 7 May 2021, the New Zealand Government announced its intention to introduce Fair Pay Agreements (FPAs). Like pre-1991 national occupational awards, these will be either national industry or occupational collective documents covering all employees and employers in that industry or occupation.[37]

105. Only unions will be allowed to initiate bargaining for an FPA, and unions will specify whether the document is to be an industry-based or occupationally-based one, as well as the document's scope and coverage.

106. There is no ability for employers or employees to opt out of bargaining for an FPA. The NZ Government will oversee the bargaining process and ensure compliance.

107. Any disputes will go to compulsory arbitration which, in the absence of agreement, ultimately will fix the terms of the agreement. A failure to ratify a settlement will also result in the terms of the FPA being fixed by the arbitration body. This makes the proposed process of employers and employees voting to ratify a settlement meaningless and, arguably, a sham. There will be no right of appeal against terms that are fixed.

108. Even more than a duty on the parties to bargaining to conclude a collective agreement, FPAs will arbitrarily impose collective bargaining outcomes on hundreds if not thousands of employers and their employees whether or not they seek such coverage or are represented by a union or employer organisation.

109. Many of the proposed provisions of FPAs are physically cumbersome, unworkable and will be ultimately ineffective. Many also exemplify the removal of rights of freedom of association and the principle of free and voluntary collective bargaining.

110. Two particularly egregious examples are the proposed processes for initiating and ratifying an FPA.

Initiation

111. Only a union may initiate an FPA. A union may initiate bargaining for an FPA if it can show that:

    a. it represents at least 1000 workers or 10% of the workers who would be covered by the FPA, or

    b. it is in the public interest to have an FPA for that industry of occupation. The government will administer the public interest test, thus inserting itself into the FPA bargaining process.

[37] The Government has stated that it intends eventually to have FPAs cover all workers, not just employees. However, coverage of contractors etc has been deferred while a separate review of contracting arrangements is completed. This is expected to be sometime in 2022.

The initiating union will also specify whether the FPA is to cover an industry or an occupation, and the scope of that coverage.

112. Union density is very low in New Zealand, particularly in the private sector where it is around 9%. The extremely low threshold for initiation means almost any industry or occupation can be forced into bargaining for an FPA by a union that represents a tiny fraction of the workforce that would be covered. This offends the very essence of the concept of freedom of association

Ratification

113. As proposed, ratification will be a simple majority vote of employers and employees to be covered by the FPA. However, smaller employers' votes are to be weighted according to the number of employees they have.[38] From a practical point of view it is almost impossible to conduct a vote in this way with any degree of integrity because of the difficulties in:

    a. determining that every employee or employer entitled to vote knows they have a right to vote.

    b. ascertaining that the number of employees employed by each employer to be covered by the FPA has been accurately counted. Most small employers do not belong to any organisation let alone one that might represent them in bargaining for an FPA. Identifying and contacting them is difficult in any circumstances. The more employees covered by a proposed FPA the harder this problem gets.

114. More relevant to C98, however, is the fact that ***it will not be possible for a vote against FPAs to succeed.*** The Government has decided that two "failed" ratification votes will result in an arbitrated outcome being imposed, without a right of appeal.

115. In these circumstances, ratification is simply window dressing for an inevitable result. If unions want an FPA they will get one irrespective of a potentially overwhelming weight of opinion against them. This is unacceptable under any interpretation of C98 let alone in a functioning democracy. It clearly is not consistent with the principle of free and voluntary collective bargaining enshrined in C98.

116. Nor are the proposed FPA initiation or ratification processes consistent with domestic law, specifically the object and good faith obligations of the Act, which will still govern collective bargaining in general. Section 3 of the Act requires the promotion of "the principles underlying International Labour Organisation Convention 98 on the Right to Organise and Bargain Collectively." This attachment of international law to domestic obligations could give rise to the NZ courts overturning aspects of FPAs for breaching the Act. In addition, section 4 of the Act

[38] Employers with less than 20 employees will have their vote weighted on the basis that an employer with 1 employee will get two votes, an employer with 2 employees will get 1.95 votes and so on until an employer with 21+ employees gets 1 vote per employee.

sets out extensive good faith obligations which will also be hard to meet with respect to ratification, and with similar results.

The Government has misinterpreted Article 4 of C98

Cabinet paper on first 100 days

117. In an undated Cabinet paper presented shortly after the 2017 election, the Minister of Workplace Relations and Safety sought the approval of Cabinet colleagues to amend the Employment Relations Act 2000, in order to give effect to Labour Party manifesto commitments made during the election campaign.

118. Entitled "*100-Day Commitments: A Fairer Workplace Relations System",* the Cabinet paper set out the changes the minister sought to make in the first 100 days of the new Government's tenure[39]. These changes included the requirements eventually set out in sections 31 and 33 of the Act.

119. Only paragraph 78 of that Cabinet paper dealt with the issue of compliance with international labour law, specifically C98. It stated;

> *"The International Labour Convention (ILO) 98 requires that workers enjoy the right to organise and Collective Bargaining in their employment. One of the purposes of the Convention is to ensure adequate protection against acts of anti-union discrimination in employment. Another is that ratifying states should promote the setting of terms and conditions by way of collective bargaining. The proposals in this paper are consistent with ILO Convention 98."*

120. As is apparent, the Cabinet paper described C98 in only the broadest terms and did not refer to its legally specific requirements. No supporting evidence was given for the statement that *"the proposals in this paper are consistent with ILO Convention 98."* In other words, the cabinet paper simply stated an unsupported belief that the proposed changes to the Act were consistent with C98. Arguably, this belief was wrongly held.

121. As mentioned earlier, the Government has not provided any information used to inform its decision to introduce a duty to conclude, although it has supplied information after making its decision, in a seemingly belated attempt to justify that decision.

Cabinet paper on Fair Pay Agreements

122. Subsequent to the Cabinet paper on the programme for first 100 days, the Minister of Workplace Relations and Safety again recognised the importance of C98, when he authorised proposals for the introduction of Fair Pay Agreements. This included the endorsement of paragraph 35 of an undated paper to the Cabinet Economic Development Committee[40], which stated that;

[39] https://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/pdf-library/cabinet-paper-one.pdf

[40] https://www.mbie.govt.nz/assets/dc5a233b69/improving-the-employment-relations-and-standards-system-fair-pay-agreements.pdf

> *"It is arguable that New Zealand's weak collective bargaining settings constitute a failure to meet our international obligations under ILO Convention 98 to fully*[41] *develop "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."*

123. However, this interpretation of C98 is not only wrong, for the reasons stated in earlier paragraphs but is arguably misleading. Cabinet may not have reached this view had the requirements of Article 4 been properly reflected.

124. C98 does **not** require a government to "*fully develop machinery for voluntary negotiation…*". It actually requires governments to *"encourage and promote the full development and utilisation of machinery for voluntary negotiation…",* which is an entirely different proposition. As already argued, it keeps governments at arm's length from the process which undermines any proposition that government can direct the outcome of collective bargaining.

125. This view is not affected by the CFA's views on restrictions that might be placed on who can bargain. Paragraph 1318 of the CFA Compilation illustrates this point; viz,

> *"1318 Although nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization, as such an intervention would clearly alter the voluntary nature of collective bargaining, this does not mean that governments should abstain from any measure whatsoever aiming to establish a collective bargaining mechanism".*

126. Here the CFA is saying that while governments cannot dictate who the bargaining parties will be, as that would constrain the ability of any given organisation to bargain voluntarily with another, this does not mean they are not permitted to do anything at all by way of promoting or encouraging the establishment of collective bargaining mechanisms. However, the issue of who can bargain for a collective agreement does not intrude upon the issue of what the outcome of bargaining should or must be.[42] The CFA's views on that point are equally specific, e.g.,

> *"1319 A legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations.*

Departmental Report to the Workforce and Education Select Committee on the 2018 Employment Relations Amendment Bill

127. While the Cabinet paper on Fair Pay Agreements was of relevance to the duty to conclude a collective agreement, it did not address this issue directly.

128. But, in the Departmental Report on the Employment Relations Amendment Bill, officials advised the Workforce and Education Select Committee in relation to the proposed duty to conclude a collective agreement that:

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[41] The word "fully" was emphasised in italics in the original cabinet paper

[42] Here it should be noted that the Compilation of CFA Decisions covers a range of scenarios under a given heading. Thus, individual paragraphs in the Compilation are complementary; individually they cover particular points while together they are supportive of the underlying principle characterised by the headings and subheadings of the chapter in which they are found.

> *"We consider that the amendment is consistent with the ILO Convention 98 of the Right to Organise and Collective Bargaining. Article 4 of the Convention states that:*
>
> > "Measures appropriate to national conditions shall be taken, where necessary, 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."
>
> *The amendment seeks to encourage the full utilisation of the collective process in the Act by putting a mechanism in place that requires parties to make every effort to conclude an agreement. It retains the principle of voluntary negotiation as there are instances where bargaining may not result in a collective agreement. This is where there is a genuine reason based on reasonable grounds not to conclude an agreement. This is an objective test based on the circumstances of the bargaining, rather than an opinion or view held by one of the parties.*
>
> *Additionally, the ILO Committee on Freedom of Association has also commented further on Article 4, indicating that it is not contrary to the convention to "oblige social partners within the framework of the encouragement and promotion of the full development and utilisation of collective bargaining machinery, to enter into negotiations on terms and conditions of employment."*

129. This same statement was further relied upon by the Minister of Workplace Relations and Safety when, on 10 October 2018, he provided information under the Official Information Act to BusNZ on his reasons for believing that C98 was not breached by the provisions of the Act.

130. Like the Cabinet paper on Fair Pay Agreements, the Departmental Report misrepresented C98 Article 4.

131. First, it does **not** "*retain the principle of voluntary negotiation*". Rather, it offends it. Whereas the law previously made it clear that good faith bargaining did not have to result in a concluded collective agreement, the law now expects this and leaves little room for not concluding an agreement.

132. The establishment of an "objective test" for not concluding a collective agreement (i.e., a genuine reason, based on reasonable grounds) does not mitigate the fact that the introduction of a duty to conclude a collective agreement very significantly increases the expectation that a collective agreement will be concluded on each occasion bargaining for one is initiated. It also commensurately diminishes the right to not agree.

133. At the very least, this substantially reduces any scope for voluntariness and therefore cannot reasonably be argued to "retain the principle of voluntary bargaining. " Thus, and notwithstanding the "objective test", the change is inconsistent with C98 Article 4.

134. The Departmental Report draws upon the views of the CFA to further justify the requirement to conclude a collective agreement, absent a genuine reason not to, by

stating that it is not contrary to the convention to *"oblige social partners within the framework of the encouragement and promotion of the full development and utilisation of collective bargaining machinery, to enter into negotiations on terms and conditions of employment."*

135. However, if the Government wishes to rely upon the views of the CFA to support its own view, it needs to properly represent the CFA's views. In this instance it very clearly has not, for three separate reasons.

136. First, the quoted passage says nothing about concluding collective agreements. Rather, it says that it is not inconsistent with the Convention to oblige social partners to *enter into negotiations*, which is exactly what the Employment Relations Act 2000 provided for prior to the changes now complained of.

137. The imposition of a requirement to conclude an agreement, unless there is a genuine reason based on reasonable grounds not to, is a clear and significant step beyond simply requiring bargaining to take place.

138. As argued earlier, the CFA's conclusions on the importance of making every effort to reach an agreement effectively require employers and unions to enter into negotiations and to bargain in good faith, but do not specifically require the conclusion of a collective agreement.[43] Thus, bargaining towards a collective agreement is mandatory but settlement of a collective agreement is voluntary.

139. Second, the quote in the Departmental Report is only part of what is said in paragraph 1317 of the CFA Compilation[44] which, in its entirety, paints a very different picture to that portrayed by its partial quotation. In particular, the Government omitted the underlined portions of paragraph 1317.

> *"1317 Article 4 of Convention No. 98 in no way places a duty on the government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public authorities should however refrain from any undue interference in the negotiation process."*

140. The omissions are serious, because they materially impact the interpretation of the quoted middle section of the paragraph. In fact, the omissions reverse the intended meaning of the middle section.

141. Paragraph 1317 begins by making it clear that C98 *"in no way places a duty on the government to enforce collective bargaining."* This is in clear contrast to the view expressed in the Cabinet paper on Fair Pay Agreements (referred to earlier) which stated;

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[43] 1328 It is important that both employers and trade unions bargain in good faith and make every effort to reach an agreement; moreover genuine and constructive negotiations are a necessary component to establish and maintain a relationship of confidence between the parties.

[44] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO:::

> *"It is arguable that New Zealand's weak collective bargaining settings constitute a failure to meet our international obligations under ILO Convention 98 to fully develop "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."*

142. Taking the above points into account, it seems clear that neither C98 Article 4 nor the CFA's conclusions on the principle of voluntary bargaining contemplate a requirement to conclude a collective agreement or provide a right to arbitrarily determine the terms of a collective agreement.

143. This view is further strengthened by the fact that, as argued earlier, the words "encourage" and "promote" separate the Government from the actual process of negotiation. The CFA's conclusions in paragraph 1317 of the CFA Compilation underscore this point with the words "*the public authorities should however refrain from any undue interference in the negotiation process."* This aspect also appears to have been conveniently ignored.

144. While it could be argued that the introduction of a duty to conclude a collective agreement does not insert the Government directly into the negotiation process, the imposition of the duty to conclude effectively is government restricting and controlling the parties' freedom to bargain voluntarily. This arguably does constitute an instance of "undue interference".[45]

145. Third, and significantly, the Departmental Report fails to mention that its partial quote of paragraph 1317 is but one of a number of passages dealing with the voluntary nature of C98 Article 4.

146. CFA Compilation Chapter 15, paragraphs 1313 - 1321 deal with the "principle of free and voluntary negotiation". These paint a starkly contrary picture to that portrayed by the Departmental Report. Paragraph 1319 is particularly clear and compelling, but disturbingly was not cited in the Departmental Report instead of an arguably misleading partial quotation of paragraph 1317.[46]

> *1313 The voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association.*
>
> *1314 The Committee emphasizes the importance of respecting the autonomy of the parties in the collective bargaining process so that the free and voluntary character thereof, established in Article 4 of Convention No. 98, is ensured.*
>
> *1315 Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.*
>
> *1316 Nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining.*

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[45] When it comes to FPAs, however, interference is plain to see. The Government has inserted itself into every step of the FPA bargaining process including turning settlements into legislation that it will take responsibility for drafting.

[46] It is possible that officials referenced an outdated version of the Compilation that did not include this paragraph but that does not excuse the lack of reference to other applicable findings or the incomplete reference to the finding it relied upon.

> *1317 Article 4 of Convention No. 98 in no way places a duty on the government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public authorities should however refrain from any undue interference in the negotiation process.*
>
> *1318 Although nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization, as such an intervention would clearly alter the voluntary nature of collective bargaining, this does not mean that governments should abstain from any measure whatsoever aiming to establish a collective bargaining mechanism.*
>
> *1319 A legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations.*
>
> *1320 Legislation which lays down mandatory conciliation and prevents the employer from withdrawing, irrespective of circumstances, at the risk of being penalized by payment of wages in respect of strike days, in addition to being disproportionate, runs counter to the principle of voluntary negotiation enshrined in Convention No. 98.*
>
> *1321 The opportunity which employers have, according to the legislation, of presenting proposals for the purposes of collective bargaining provided these proposals are merely to serve as a basis for the voluntary negotiation to which Convention No. 98 refers cannot be considered as a violation of the principles applicable in this matter.*

147. Each of the CFA Compilation paragraphs is extracted from country specific cases. However, that is where the relationship stops. Paragraph 5 of the CFA Compilation states:

> *"The conclusions issued by the CFA in specific cases are intended to guide the governments and national authorities for discussion and the action to be taken to follow-up on its recommendations in the field of freedom of association and the effective recognition of the right to collective bargaining."*

148. Extracts from country specific cases are included in the CFA Compilation because they are also representative statements of principle having general application to cases of similar import. They have been selected to cover a range of scenarios under the headings that precede them.

149. However, while CFA Compilation paragraphs can stand alone as statements of principle it is often instructive to also look at the underlying cases to better understand the specific scenario the CFA conclusion is dealing with.

150. For instance, paragraph 1319 is a summary of CFA case 2460 (USA) where the CFA said at paragraph 990 of its 344th Report:

> *990. With regard to the finding of the federal court in the Atkins case that the statutory ban on collective bargaining is acceptable under the US Constitution because there is nothing in the Constitution, including the First Amendment right to associate freely, that compels a party to enter into a contract with any other party, the Committee, while recalling the importance which it attaches to*

> *the obligation to negotiate in good faith for the maintenance of the harmonious development of labour relations, would like to emphasize that the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association. Collective bargaining, if it is to be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining. Nothing in Article 4 of Convention No. 98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would clearly alter the nature of bargaining [Digest, op. cit., paras 925–927 and 934]. Thus, while a legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations, a legislative provision, such as NCGS §95-98, which prohibits public authorities and public employees, even those not engaged in the administration of the State, from concluding an agreement, even if they are willing to do so, is equally contrary to this principle.*[underlining added]

151. The CFA's conclusions in this case make it quite clear that, while there is a clear requirement to negotiate in good faith, without restriction on who may bargain, both the imposition of a duty to conclude a collective agreement and its corollary (the prohibition of the ability to conclude) are inconsistent with Article 4 of C98.

152. Paragraph 1319 states principles clearly capable of general application. It would not have been included in the current version of the CFA Compilation if its application was intended to be restricted to the facts of the originating case involving state level government in the United States.

153. Overall, it is arguable that the Government has fundamentally misinterpreted C98 and is contemplating further breaching the Convention.

NZ Government position regarding C98

154. Arguably, the Government's FPA proposals intentionally breach C98, ostensibly on the grounds that breaches are necessary. This intention is discerned clearly in the statements below, which are taken from the New Zealand Minister of Workplace Relations and Safety's paper seeking Cabinet approval to draft FPA legislation[47]; viz,

Universal coverage of FPAs

> **161.** Once in force, FPAs will apply to all employees and employers within coverage (i.e., in a particular occupation or industry). This means there will likely be employers and employees bound by the terms of an FPA negotiated by unions or employer organisations they are not affiliated with. This aspect of the FPA system will engage rights and obligations related to **freedom of association**.

Representation

> **164.** The FPA system does not require bargaining sides to demonstrate their ability to represent employers and employees within coverage, beyond having at least one member within coverage of the proposed FPA. This engages rights and obligations related to **freedom of association**. Employees are required to be

[47] Cabinet Paper: Fair Pay Agreements: Approval to draft – 19 April 2021, Paras 156-167

represented by unions, even if they are not a member or if they would prefer a different entity to represent them, or to represent themselves.

165. The ILO requires "most representative organisations" to negotiate collective agreements before they can be extended across an entire sector. FPAs can be distinguished because they are bargained with universal coverage from the outset, as opposed to extending the coverage of an existing collective agreement. I am concerned that tightly construing representativeness requirements for bargaining sides could frustrate the entire FPA system, if sufficiently representative parties do not exist. In addition, the FPA system also does not prevent parties from joining bargaining if they have members within coverage of a proposed FPA (noting this may be affected by subsequent decisions about requirements for employer bargaining representatives).

Compulsion to agree

166. Once FPA bargaining has been initiated, the intention is that an FPA will result, either through successful ratification, or by having its terms fixed by the ER Authority. Initiation also only requires assent from employees—employers do not have a say. These aspects could challenge the **principle of voluntary collective bargaining**. However, I consider these features essential to ensure that enforceable minimum terms are produced at the end of FPA bargaining. For example, if employer consent in some form was required to initiate FPA bargaining, I believe this would significantly reduce the instances of successful initiations. Also, without the ability for the ER Authority to fix terms if bargaining sides cannot agree/successfully complete ratification, bargaining sides could invest significant time and resources in bargaining, without it amounting to any actual change. The absence of these two features would frustrate the reason for creating an FPA system in the first place: improving labour market outcomes at the industry/occupation level.

Compulsory arbitration

167. The FPA system allows the ER Authority to fix FPA terms if bargaining sides cannot agree, with a significantly lower threshold for triggering this than exists under present law the Act. This could be seen to amount to **compulsory arbitration**. I consider this feature necessary to prevent bargaining from being stalled, because parties do not have recourse to industrial action.

The ILO position on C98

155. Central to C98 is the principle of free and voluntary collective bargaining. Over many years, the ILO's CFA has made numerous decisions upholding this principle. Below are illustrative excerpts from Chapter 15 (Collective Bargaining) of the 6th (current) edition of the *Compilation of Decisions of the Committee on Freedom of Association*. The manner in which the NZ Government is alleged to breach the principle of free and voluntary collective bargaining is in bolded italics at the end of each excerpt.

Free and voluntary negotiation

1317. Article 4 of Convention No. 98 in no way places a duty on the government to enforce collective bargaining, nor would it be contrary to this provision to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public

authorities should however refrain from any undue interference in the negotiation process. ***Comment: the Government will oversee the process including inserting itself at critical stages to certify eligibility, vet compliance and legislate outcomes.***

1319. A legislative provision that would oblige a party to conclude a contract with another party would be contrary to the principle of free and voluntary negotiations. ***Comment: settlement of FPAs is compulsory and inevitable, either via agreement or arbitration.***

1320. Legislation which lays down mandatory conciliation and prevents the employer from withdrawing, irrespective of circumstances, at the risk of being penalized by payment of wages in respect of strike days, in addition to being disproportionate, runs counter to the principle of voluntary negotiation enshrined in Convention No. 98. ***Comment: Employers cannot opt out of bargaining for an FPA, or from a decision of an arbitration authority. Temporary exemptions from coverage of an FPA may be agreed only if an employer may suffer financial hardship. Disagreement over exemptions will be arbitrated, with decisions being non appealable.***

Mechanisms to facilitate collective bargaining

1325. The bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis. ***Comment: Recourse to arbitration will be compulsory if agreement cannot be reached in bargaining. A failure to agree in bargaining will result in a settlement being imposed by the arbitration body, as will a failure to successfully ratify a settlement by a majority vote.***

Level of bargaining

1404. According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority. ***Comment: Only unions can initiate bargaining for an FPA. They also have the right to specify the scope and coverage of an FPA. Disagreements will be settled by compulsory arbitration.***

1405. The determination of the bargaining level is essentially a matter to be left to the discretion of the parties. Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association. ***Comment: The union that initiates bargaining for an FPA will specify the scope, coverage level of bargaining in the first instance. Disagreements will be settled by compulsory arbitration.***

Restrictions on the principle of free and voluntary bargaining

1416. Provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98. ***Comment: Failing agreement, arbitration will be compulsory. There will be no appeal against the decision of the arbitration authority in relation to contractual terms set by the arbitration body.***

1417. Recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population). ***Comment: Failing agreement, arbitration will be compulsory for all bargaining, not just essential services. There will be no appeal against the decision of the arbitration authority in relation to contractual terms set by the arbitration body.***

Intervention by the authorities in collective bargaining

1424. State bodies should refrain from intervening to alter the content of freely concluded collective agreements. ***Comment: drafting of key clauses will be undertaken by the Government and passed as legislation.***

1425. State bodies should refrain from intervening in free collective bargaining between workers' and employers' organizations. ***Comment: the Government has written itself into the bargaining process, including at the initiation, bargaining and ratification stages. It will also oversee the general bargaining process.***

1428. The intervention by a representative of the public authorities in the drafting of collective agreements, unless it consists exclusively of technical aid, is inconsistent with the spirit of Article 4 of Convention No. 98. ***Comment: drafting of key clauses will be undertaken by the Government and passed as legislation.***

Administrative approval of freely concluded collective agreements and the national economic policy

1438. Making the validity of collective agreements signed by the parties subject to the approval of these agreements by the authorities is contrary to the principles of collective bargaining and of Convention No. 98. ***Comment: FPAs will be certified by the arbitration authority and the Government before being brought into force.***

PRIOR CONSIDERATION BY ILO SUPERVISORY SYSTEM

The Committee of Experts on the Application of Conventions and Recommendations ("CEACR")

156. The CEACR has never made an observation regarding New Zealand's proposals to introduce FPAs. It has made only one observation on New Zealand's more general compliance with C98 since ratification in 2003. At page 115 of its report to the 2006 ILC the CEACR[48], commenting on New Zealand's very lengthy first Article 22 report on its compliance with C98, all the CEACR said was:

> *"The Committee takes note of the Government.s (sic) first report. It takes note with satisfaction of the provisions of the Employment Relations Act (ERA) and its 2004 amendment which give effect to the provisions of the Convention and constitute the primary legislation providing recognition of the right to organize and Collective Bargaining in New Zealand."*[49]

[48] https://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1a.pdf

[49] This was the entire observation made on NZ's compliance with C98 in 2006

157. While ostensibly supportive of the legislation, it seems, from the brevity of the observation, that only the most cursory attention had been paid to the New Zealand Government's lengthy and very detailed Article 22 report which contained only a single sentence mentioning a duty to conclude a collective agreement[50]. The apparently cursory nature of the examination is all the more evident when account is taken of the facts that:

    a. New Zealand's Article 22 report references multiple legislative and regulatory sources, whereas the CEACR mentions only the Employment Relations Act.

    b. most other countries' reports were commented on at much greater length and in greater detail, including requests for clarification of some aspects.

158. It is therefore at least arguable that the importance of the provision requiring a collective agreement to be concluded, or the introduction of a compulsory arbitration mechanism, was not appreciated in the CEACR's examination of the report. Certainly, there is no evidence to support such a consideration having been given.

159. While it is possible that New Zealand's report was so comprehensive as to warrant no specific comment, this is also not supported by evidence.

160. While the opinions and recommendations of the CEACR are non-binding, its views provide important guidance to ILO members and the Committee on the Application of Standards ("CAS") and its views are commensurately carefully considered. This requires a full knowledge of what aspects were considered and how the CEACR viewed them. It is not possible to derive this depth of understanding from the short comments made in 2006.

161. Moreover, any argument that the brevity of the CEACR's observation was a result of their general approval of New Zealand's comprehensive report rather than an inadequate examination does not mean that the CEACR was correct. Ultimately, there is insufficient evidence to support a view one way or the other.

Committee on Application of Standards

162. New Zealand's proposal to adopt FPAs has never been discussed before the CAS.

163. With respect to the current duty to conclude and the power to fix the terms of a collective agreement, following the repeal in 2015 of the 2004 Act's requirement to conclude a collective agreement, there has been no need until now to bring the duty to conclude a collective agreement to the attention of the ILO supervisory system. Similarly, the fact that the power to fix the terms of a collective agreement under section 50J of the Act has been used only once since its enactment in 2004 has contributed to a lack of attention to its status in law. Its use for the first time in 2019 has brought it back under scrutiny.

[50] "Good faith also requires the parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to conclude the agreement."

WHY IS THE NZ GOVERNMENT POSITION ON FPAs SO EGREGIOUS?

164. The alleged breaches of C98, particularly those relating to the proposed introduction of FPAs, are too significant to ignore. Four issues in particular stand out.

a. **The NZ Government is openly acknowledging that it intends to breach the principles of a fundamental ILO Convention it ratified in 2003 and has committed in its principal employment legislation to upholding.**

b. **The NZ Government arguably has used multiple artifices to avoid and delay explaining its actions and the reasons for them to the ILO.**

c. **The proposed FPA process tramples on workers' and employers' rights of freedom of association and shatters the principle of free and voluntary bargaining enshrined in C98.**

d. **The nature of the alleged breaches is so significant that a failure to address them risks weakening the integrity of the ILO standards supervisory system.**

CONCLUSION

165. Based on the points above, it seems clear that sections 31, 33 and 50J of the Act, as well as FPAs, are inconsistent with Article 4 of C98. They are arguably also inconsistent with the principles of freedom of association and the effective recognition of the right to collective bargaining contained in the Preamble of the ILO Constitution and the ILO Declaration of Philadelphia, with which all ILO member states must comply by virtue of their membership of the ILO.

166. It would therefore be appropriate for the New Zealand Government to:

a. Remove the duty to conclude from sections 31 and 33 of the Employment Relations Act 2000
b. Remove provisions that permit the courts to fix the terms of a collective agreement (s50J), and
c. Ensure that any application of FPAs is purely voluntary

167. It would also be appropriate that the CEACR double footnote its observations on this report.