NZCTU
Te Kauae Kaimahi

Submission to the Education and Workforce Select Committee

Fair Pay Agreements Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi, P.O Box 6645, Wellington
19th May 2022.

IN UNION, TOGETHER.
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1. Executive summary

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The CTU welcomes the opportunity to submit before the Select Committee on the **Fair Pay Agreement Bill** ('the Bill'). This Bill represents a longstanding hope of the union movement for an effective policy response to some crucial failures of the current labour market. Accordingly, the CTU and its affiliates are deeply invested in the success of the proposed legislation and, it is from

perspective of positivity and hope that we make the following submission.

2. This submission

2.1. The Union Movement emphatically endorses the principle and purpose underlying the Fair Pay Agreements Bill.

2.2. The need for this legislation has been clearly identified in the recommendations of the 'Fair Pay Agreement Working Group', which during tripartite discussions found:

"New Zealanders work longer hours and produce less per hour than in most Organisation for Economic Co-operation and Development (OECD) countries. Our productivity growth has largely been driven by increased labour force participation, rather than by labour productivity.

Wages in New Zealand have grown, but much more slowly for workers on lower incomes than those on high wages; and they have grown more slowly than labour productivity. Income inequality has been rising in many developed countries in recent decades and the OECD has warned that high inequality has a negative and statistically significant impact on economic growth.

We have both an inequality and a productivity challenge".[1]

2.3. The Bill, if enacted carefully and in the spirit that it is intended has the potential to vastly improve and uplift the quality of life for all working people in Aotearoa New Zealand.

2.4. The Bill has the potential to achieve better labour market outcomes by developing tailored systems of minimum standards and conditions for workers in particular industries and occupations. This is vastly better than adopting a generalised approach to setting

[1] "Recommendations from the Fair Pay Working Group", 2018, at 2

minimum standards and recognises that the labour market and the working population of Aotearoa is not monolithic.

2.5. Furthermore, the bargaining mechanism embedded in the scheme gives worker and employer representatives unprecedented ability to have a stake in setting minimum standards for their own spheres of work. In this past, the only way for setting minimum standards has been through parliament legislating these standards for the whole economy. While this can be done following some consultation with unions, businesses, and the public it has had limited effectiveness in being able to address specific issues that affect certain industries and occupations.

3. Key issues

3.1. This submission will begin by focusing on 6 key issues that underpin the Fair Pay Agreement scheme. These issues are foundational to the proposed legislation and how they are dealt with and resolved will define the character, effectiveness, and longevity of this new system. These are as follows:

- Stating the policy objective.
- Proper exercise of MBIE's functions.
- Effectiveness of fixing.
- Challenges, appeals and judicial review.
- Timeframes.
- Mandatory terms.

3.2. Following these 6 key issues, this submission will elaborate on other significant issues that relate to the workability of the proposed

scheme and offer recommendations on how these issues can be addressed and resolved.

3.3. Finally, the submission will end by listing several issues that the Union movement view as non-contentious drafting issues or matters in the text of the Bill that require further clarification or explanation.

STATING THE POLICY OBJECTIVE

3.4. The text of the Bill is introduced by an 'explanatory note'. The first section of that note outlines the Bill's 'policy objective'.[2]

3.5. The policy objective identifies significant weaknesses in the current labour market that clarifies that the purpose of this Bill will be to address these systemic failures:

> *"...significant prevalence of jobs with inadequate working conditions, low wages, and low labour productivity. For example, Māori, Pacific peoples, young people, and people with disabilities are over-represented in jobs where low pay, job security, health and safety, and upskilling are significant issues. Barriers to good labour market outcomes are particularly prevalent for people who fall within more than 1 of those groups. The Bill will help address these issues".*

3.6. One significant labour market failure that has not been included in the policy analysis above relates to inadequate pay, conditions and outcomes for women and sectors of the labour market that are dominated by women.

3.7. Notwithstanding this important omission, which we say should be included in the analysis as a fundamental problem to be addressed, the union movement endorses the identification of systemic labour market failures made in the explanatory note and considers that addressing these failures should be the formally stated purpose of the proposed legislation.

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[2] Fair Pay Agreements Bill 2022 (115-1) (explanatory note) (at pg. 1)

3.8. However, clause 3 of the Bill that defines the 'purpose' of the proposed legislation makes no reference to the systemic failures identified in the explanatory note.

3.9. Clause 3 of the Bill is critically important. The definition of purpose in the substance of the proposed legislation will be the most important text for interpreting all other provisions in the Bill.

3.10. The current definition of the Bill's purpose is sparse, especially when compared to the stated policy objective.[3] And indeed to other employment relations legislation.

3.11. The CTU submits that the substantive definition of the Bill's purpose be expanded to reflect the underlying policy objective of the Bill and to explicitly encompass the fundamental economic and societal issues that the Bill is intended to address.

3.12. Specifically, the definition of the Bill's purpose must do two things. It must identify the 'systemic labour market failures' that parliament intends to resolve and, it must define the purpose of the FPA scheme as being to uplift the conditions of workers who are affected by those failures.

PROPER EXERCISE OF MBIE'S FUNCTIONS

3.13. MBIE is given a significant role in the process of creating a Fair Pay Agreement (FPA). Many of these roles are not consistent with MBIE's usual functions as a part of executive government.

3.14. MBIE's oversight at both the start and end of the FPA process can be described as 'quasi-judicial' and inconsistent with the notion of 'separation of powers.'

[3] Fair Pay Agreements Bill 2022 (115-1), cl 3

3.15. For example, MBIE has a role in administering both 'threshold tests'[4] as part of its function to approve any application for FPA bargaining. Administering these tests requires MBIE to exercise evidence gathering and determinative functions.[5]

3.16. In considering an application by an initiating union, MBIE must require and qualitatively assess the evidence provided by the union to show that it meets either threshold test.[6]

3.17. Furthermore, MBIE can require the initiating union to provide additional information or evidence[7] to substantiate that a union has met the relevant threshold test.

3.18. Assessing evidence and determining whether an applicant meets a statutory test is traditionally the role of a body like the Employment Relations Authority.

3.19. MBIE's own advice has been against vesting the administration of the 'public interest' threshold with the Ministry.[8]

3.20. MBIE's reluctance to administer the public interest test is understandable. In determining whether an application to initiate has met this test, the chief executive of MBIE must be satisfied that

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[4] Ibid. cl, 29- the chief executive of MBIE 'must be satisfied' that either of the threshold tests is mt.
[5] 32
[6] 29 (2) & (5)
[7] 32 (2)-

"The chief executive [of MBIE] *may require the applicant to provide additional information or evidence if the chief executive considers the application does not contain enough information for the chief executive to decide whether to approve the application."*

[8] MBIE Briefing, *Further advice on public interest test*, 17 March 2021 pg. 1 [e].
MBIE Briefing, Operationalising the representation and public interest test, 22 January 2021, pg. 6 [20]; MBIE Briefing *Timeframes* pg. 6, 7 &12.

the factual evidence put by the applicant meets several qualitative criteria.[9]

3.21. In addition to the threshold tests, the quasi-judicial nature of what MBIE is required to do is replicated elsewhere in the Bill. The requirement that MBIE determine that there is no coverage overlap raises a similar problem of an executive body determining whether statutory intent has been met.[10] Deciding on the appropriate criteria by which to define coverage and determine whether there is any problematic overlap is properly a judicial function and has traditionally been treated as such.

3.22. Towards the end of the FPA process, MBIE's role in verifying ratification before an FPA can move towards validation raises similar problems with quasi-judicial functions. At this finalisation stage, MBIE gathers up and assesses evidence that is put before it.[11]

3.23. The problem of breaching a separation of powers is a serious one with important public law implications. The integrity and legitimacy of institutions that interpret statutory intent rests on their independence from other branches of government. An executive institution does not have this independence, nor does it have the intrinsic expertise to carry out such functions.

3.24. Further, vesting improper functions with an institution that is not qualified to carry them out will likely cause unhelpful delays in the process.

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[9] 29 (4) & (5)
[10] 32 (3)- MBIE may consider coverage in an initiation application to be not defined with 'sufficient clarity', 104- MBIE must notify initiating party of coverage overlap before the Authority settles the issue.
[11] 147 (2)- verification process.

3.25. MBIE's role in verifying successful ratification votes raises an additional issue over the degree of MBIE's oversight over the democratic processes of unions.

3.26. Unions are independent and essentially democratic workers' institutions. They are bound by legal obligations to register and to have democratic and representative structures.[12] The independence of unions to promote workers' democracy is a cornerstone of a healthy civil society.

3.27. If a union (or employer bargaining side) misrepresented a successful ratification vote, then they would be liable for breaching good faith under the provisions of the Bill. Additionally, a union would be exposed to reputational damage in the eyes of its own members and the union's leadership can be held democratically accountable. Accordingly, there are already mechanisms for ensuring that a union bargaining side does not misrepresent a ratification vote.

3.28. Ratification votes held pursuant to the provisions of the Employment Relations Act 2000 are not subjected to similar scrutiny. Where a collective agreement is duly ratified, a copy of that collective must be sent to the chief executive of MBIE[13] but MBIE does not scrutinise or standardise a union's democratic processes. There is no apparent public interest argument in including such scrutiny for FPA ratifications when they are not required for similar processes under the Employment Relations Act.

3.29. It is our submission that all MBIE powers that are quasi-judicial in nature, along with those that give improper oversight over the

[12] Employment Relations Act 2000, s 14- sets out the requirements for unions be registered under the Act. Among them there is a requirement for unions to have an objective of furthering the collective employment interests of their members, to have democratic rules and to operate at an 'arm's length' from any employer.
[13] Ibid. s 59

independent and democratic functions of unions, be removed from the Bill.

3.30. The CTU also submits that the discretion of the chief executive to unilaterally make 'editorial changes' to a finalised FPA be removed from the proposed legislation.[14]

3.31. Unilaterally changing an agreed upon FPA creates a risk that what the chief executive perceives as an 'editorial change' will in fact be a substantive one. The sides to the agreement are best placed to decide the editorial form and content of an FPA. Changes to a finalised agreement should only be made with the consent of the bargaining sides and only when necessary.[15]

EFFECTIVENESS OF FIXING

3.32. The fixing mechanism is vitally important to the functioning of this scheme.

3.33. Where bargaining sides are not able to resort to traditional industrial tactics (namely, strikes and lockouts) it is the fixing mechanism that is tasked with resolving impasses in bargaining.[16]

3.34. Accordingly, fixing should be an active, responsive, and accessible mechanism to compensate bargaining sides for the inability to use conventional industrial tactics and to efficiently resolve bargaining impasses that will occur from time to time.

3.35. The current Bill has thresholds for fixing which are too high.[17]

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[14] Fair Pay Agreements Bill (115-1) 2022, cl 159
[15] Changes to the text of an agreed FPA should only be permissable where the meanining of wording used is unclear.
[16] 218
[17] 218 (2)

3.36. In cases where bargaining is at an impasse, *either side* may make an application to the Authority for terms to be fixed. Such an application must meet one of two statutory thresholds.

3.37. While an application to access the fixing mechanism under the circumstances of an impasse can be made by either bargaining side individually, the thresholds require that 'both bargaining sides' must have taken reasonable steps to resolve the impasse 'before making an application'.

3.38. The threshold requirement that before an application for fixing can be made by one side, both sides must have taken all reasonable steps to resolve a bargaining impasse is a very high and difficult standard. An applicant side may be able to show that they have taken all reasonable steps towards resolution, however it cannot control the actions of the other bargaining side.

3.39. The requirement that *both sides* take all reasonable steps may also enable a vexatious or unreasonable bargaining party to hamper access to fixing by refusing or failing to make reasonable attempts to resolve a bargaining impasse.

3.40. For example, the applicant side may have made all reasonable efforts to resolve an impasse, while the other party may have only engaged in 'surface bargaining' and thus protracted bargaining. In such cases, vexatious and unreasonable actions on the part of the non-applicant side can prevent the Authority from using the fixing mechanism to resolve an impasse.

3.41. The two thresholds for accessing the fixing mechanism where bargaining is at an impasse also appear to express the same standard. Accordingly, it is not clear why there are two thresholds for resolving an impasse through fixing and not one.

3.42. The first threshold requires that both sides must have; *"exhausted all other reasonable alternatives for reaching agreement"* [18]and the second requires that; *"for a reasonable period,* [both parties] *used their best endeavours to identify and use reasonable alternatives to agree the terms of the proposed FPA, the proposed renewal, or the proposed replacement."*[19]

3.43. Both thresholds effectively require that reasonable steps are taken to resolve an impasse before an application is made. They express the same standard. Accordingly, it is not clear why there are two thresholds for resolving an impasse through fixing and not one.

3.44. The CTU submits that these two pathways be reduced to one.

3.45. Further, the CTU submits that this pathway sets too high a threshold and should be simplified to make access to the fixing mechanism when an impasse has occurred more attainable. The practical effect of this will not be to drive "fixing" but to drive settlements.

3.46. These issues can be addressed by removing the requirement that an applicant side can only make a valid application for fixing where 'both sides' have taken reasonable steps to resolve the impasse. This simplification will ensure that successful applications do not require an applicant to rely on the actions of the other [non-applicant] side, which is outside of the applicant's control and protects against vexatious bargaining tactics being used by one side to hamper access to the fixing mechanism.

3.47. The CTU also very strongly submits that a further pathway be established for resolving impasses that solely relies on the passing of a prescribed period of protraction. In relying on this pathway, an

[18] 218 (2)(a)
[19] 218 (2) (b)

applicant side may need only show that a fixed amount of time has passed without any settlement.[20]Again this will drive settlement.

3.48. A pathway to accessing the fixing mechanism after a defined period of protraction will provide certainty to bargaining sides that an impasse will not effectively defeat the creation of an FPA. Under the Employment Relations Act, there have been instances of collective bargaining where undue protraction has effectively overwhelmed the creation of a relevant collective agreement.[21] Such a problem should be safeguarded against in the FPA scheme.

3.49. The Bill permits the Authority to fix any 'mandatory' term.' However, a non-mandatory term may only be fixed if both sides agree to its inclusion in the FPA. This means non-mandatory terms can be effectively excluded from fixing, and consequently the final FPA, if one side refuses to agree to their inclusion or withdraws previous agreement.[22]

3.50. Terms that are not listed in the Bill as mandatory to agree or discuss may still have special significance to a particular occupation or industry.

3.51. The CTU submits that the Authority ought to be able to fix a term where, on the particular facts, it can be shown that the inclusion of the term will promote the purpose of the legislation.

3.52. As stated at paragraphs 3.11 and 3.12 of this submission, that purpose should also be clearly defined as being to uplift the conditions of

[20] The timeframe should not exceed 3 months.
[21] *First Union Inc v Jacks Hardware and Timber Ltd* [2018] NZERA Christchurch 2- The Authority would not fix terms despite more than 5 years of protracted bargaining if there were 'reasonable alternatives' to fixing.
[22] Fair Pay Agreements Bill (115-1) 2022, cl 219 (c)

workers by addressing systemic failures in the current labour market.[23]

3.53. The Bill provides a list of seven criteria that the Authority must consider when fixing a term for an FPA.[24] Additionally a discretionary criterion is also provided for at clause 220 (b) of the Bill.[25]

3.54. The list of criteria that the Authority must (and may) consider is broad and open to interpretation. Out of all the criteria provided, only one of them (cl 220 (a)(iii)) relates to the purpose of addressing the systemic weaknesses of the labour market.[26]

3.55. Such broad criteria provide a fertile ground for dispute and litigation, which is not suitable for a fixing system that is geared towards generating industrial outcomes and not litigious outcomes.

3.56. Of particular concern are mandatory considerations (iv) that requires the Authority to consider the 'likely impact of the terms [being fixed] on covered employers'[27] and (vii) that requires consideration of 'any other relevant considerations.'[28]

3.57. One problem with these criteria is that the Authority [and the court] does not have expertise or standing to determine matters on such broad, evaluative criteria. The determinative functions of the Authority should be guided by a clear indication of parliamentary intent as to the purpose of the legislation. The Authority and the

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[23] Upliftment of conditions for workers who suffer from the systemic failures identified by parliament must be the central purpose of the proposed legislation.
[24] Fair Pay Agreements Bill (115-1) 2022, cl 220 (a)
[25] 220 (b)- "[The Authority] *may consider any likely impacts on New Zealand's economy or society.*"
[26] 220 (a)(iii)- *"the likely impact and potential benefits of the terms on covered employees and, in particular, on covered employees who are low-paid and vulnerable employees…"*
[27] 220 (a) (vi)
[28] 220 (a) (vii)

court should not be left to determine what these legislative purposes are on their own.

3.58. The mandatory criteria to consider 'any other relevant considerations' on top of the existing list of mandatory criteria leaves it open for the Authority or the court to enumerate any number of additional mandatory criteria through this provision. While at once undermining the traditional role of the Authority in fixing terms, such broad criteria also invite excessive litigation.

3.59. The danger that excessive litigation will undermine the effectiveness of the fixing system is a very real one as 'incorrect application' of any of these criteria to determining a fixed term is ground for challenging that determination as a 'question of law'.[29] These challenges can mean that Authority determinations that fix FPA terms can be litigated through the court system.[30]

3.60. Schedule 3 of the Bill allows for 'incorrect application' of the discretionary consideration at cl 220 (b) to be challenged as a 'question of law', meaning that the discretionary criterion is effectively mandatory. [31]

3.61. The 'discretionary' consideration at cl 220 (b) provides that the Authority '*may consider any likely impacts on New Zealand's economy or society'*. However, decisions on what is best for the economy and society are not traditionally within the scope of the Authority or the court and best left for other institutions.

3.62. As with the mandatory considerations, the discretionary consideration also exposes fixed terms to being challenged in the

[29] Schedule 3, Part 2, cl 12 (2) & (3)(b)
[30] Ibid. cl 11
[31] Ibid. cl 12 (3)(b)

courts on the ground that it was not 'correctly applied' by the Authority.

3.63. The CTU submits that the considerations listed at cl 220 of the Bill should be reformulated to provide the Authority with effective parameters for fixing terms of an FPA. The considerations should not require the Authority to determine matters of public policy in fixing FPA terms. Instead, they should reflect a clear and sufficiently defined statutory purpose.

3.64. Further, it is the CTU's submission that these principles for guiding and constraining the Authority in fixing FPA terms should be based on the policy objectives contained in the explanatory note that is attached to the Bill (and that are summarised at paragraphs 3.5 and 3.6 of this submission).

3.65. These policy objectives identify the current and systemic weaknesses of the prevailing labour market and state that Fair Pay legislation is intended to address these failures. Principles based on these objectives will bind the Authority to considering these underlying purposes and ensure that fixed terms will reflect the parliamentary intention of uplifting terms and conditions for workers who are impacted by those labour market failures.

3.66. Currently, the passing of an FPA may be stayed by the Authority or the court where proceedings have been issued.[32] Safeguards should be embedded in the Bill to ensure that challenges to the Authority's fixing determinations cannot delay or prevent the creation of FPAs.

3.67. Accordingly, the CTU submits that schedule 3 of the Bill should be reworked to prevent the possibility that a challenge to an Authority

[32] Ibid. cl 13

determination (or any action taken by any participant pursuant to creating an FPA) can stay the FPA process.

CHALLENGES, APPEALS AND JUDICIAL REVIEW

3.68. In the absence of legislative safeguards, there is a real concern that litigation may substitute industrial action as a tactic for applying pressure on bargaining sides to resolve FPAs in a particular way. Such a result would have a devastating impact on the efficiency and integrity of the FPA system and must be carefully avoided.

3.69. The only way to challenge an action under the FPA scheme should be by judicial review in the manner outlined at paragraphs 3.72-3.75 below.

3.70. In addition to disputes over the fixing, the Bill permits a range of institutions and parties to be subject to judicial review.[33] The range of actions carried out by MBIE and the Authority, including approval of initiation, certification of compliance, settling of coverage, verification of ratification and the handling of public submissions, may all be subject to judicial review.

3.71. Additionally, the actions of union and employer bargaining sides and parties may also be judicially reviewable [34] to a greater degree than what is permissible under the processes of the Employment

[33] Ibid. cl 19 (2)-
For the purposes of **subclause (1)**, the persons are—
(a) the Authority; or
(b) an officer of the Authority or the court; or
(c) an employer, or that employer's representative; or
(d) a union, or that union's representative; or
(e) an employer association; or
(f) an employee bargaining side; or
(g) an employer bargaining side; or
(h) the chief executive; or
(i) any other person.

[34] Ibid.

Relations Act, as the processes carried out by these agents will result in secondary legislation and regulatory minimums.[35]

3.72. The CTU submits that any action taken (by any participant) in the process of creating an FPA only be subject to a single type of challenge. That challenge being a judicial review in the ground that an action taken was 'ultra vires' and outside the lawful exercise of power. While cl 17 of schedule 3[36] does place a limit on the ability to review the Authority, the possibility to challenging the application of cl 220 through the operation of cls 11,12 and 16 [of schedule 3] means that potentially disruptive litigation is not adequately guarded against.[37]

3.73. The CTU emphasises the need to fundamentally re-draft cl 220 of the Bill so that it relates to the purpose of the proposed legislation and sets workable parameters for the Authority to issue determinations within. However, if cl 220 is not redrafted, the considerations contained within that provision must not be characterised as 'questions of law' or otherwise subject to appeal or challenge.

3.74. In such circumstances (and cl 220 of the Bill remains in its current form), the CTU submits that clauses 11,12 and 16 be removed from schedule 3 of the proposed legislation and that consequently the provisions at cl 17 (2) (b) & (c) of schedule 3 be removed as they relate to the operation of those clauses.

3.75. The CTU views the possibility that union and employer bargaining sides may be subject to judicial review as posing a potentially significant risk to the FPA process[38]. Bargaining in the FPA creation

[35] Members of public may review handling of public submission
[36] This provision reflects the restriction on review found at s 184 of the Employment Relations Act.
[37] 17 (2)
[38] 19 (2)

process is a mechanism through which parties can engage with each other freely and robustly, in hope of setting minimum standards for occupations or industries. The freedom and robustness of this process will be hampered if union and employer sides face the risk that their actions will be subject to judicial review.

3.76. The Bill already sets parameters for what bargaining sides and parties must do and achieve through a bargaining process. There are mechanisms that allow bargaining sides to be held accountable to each other and to the institutions involved in the FPA creation process.[39] Accordingly, the CTU submits that the ability to judicially review the actions of bargaining sides should not be permitted in the proposed legislation.

3.77. The CTU emphasises again the critical importance of the fixing mechanism within the proposed legislation. The fixing mechanism plays a vital role in supporting the entire FPA scheme.

3.78. The effectiveness of the fixing mechanism, as well as the effectiveness of the entire statutory process for creating an FPA, hinges significantly on the ability of the Authority to decisively resolve bargaining impasses. Fixing should be geared towards keeping the bargaining sides well on track to creating viable FPAs within a reasonable timeframe.

3.79. The steps taken by the Authority, as well as all sides, parties and institutions involved in the FPA process must be subject to clear parameters. Each participant in the FPA process must have a clear

[39] Part 2, subpart 2 outlines obligation to act in 'good faith' with **cl 20** providing a penalty for breaching good faith-

The Bill has numerous penalties for breaches of obligation: For example, intentionally or recklessly providing inaccurate information to substantiate a threshold test at **cl 30 (3)** and obstructing lawful access to a workplace for an employee bargaining party is penalised at **cl 91.**

understanding of what they must do and what can be expected from the others involved.

3.80. The ability to dispute, challenge, review and appeal the exercise of a power or discretion under the FPA process is important in keeping all participants accountable. However, such rights must be balanced against the need for a FPA process that is fundamentally designed to generate industrial outcomes, not litigious ones.

TIMEFRAMES

3.81. Currently, there is no overarching timeframe in the Bill that specifies how long the entire FPA process will take.

3.82. As the FPA scheme is a system for generating legal minimum standards that apply across industries and occupations, those covered by these standards must have certainty as to how and when these minimums come into force.

3.83. An overarching timeframe for the creation of an FPA would provide such certainty.

3.84. The CTU submits that there should be an overarching timeframe of **12 months** for an FPA to come into force as a minimum standard. This timeframe should come into force from the time that an application for initiation has been lodged.

3.85. The Bill does provide specific timeframes for certain actions to be taken, such as notification of covered parties that an application to initiate bargaining is approved, the passing on of employee contact details, the formation of inter-party side agreements etc.

3.86. These action-related timeframes must provide all participants in the process with a legitimate expectation as to when an important step towards the creation of an FPA will be completed. At the same time,

the timeframe must be sufficient for the action to be properly fulfilled.

3.87. The Bill provides no timeframe for MBIE to complete its assessment of an application to initiate bargaining other than to require that the action must be completed 'as soon as practicable'[40].

3.88. There is also no effective time limit for making public submissions or for MBIE to consider these submissions. If MBIE calls for public submissions in relation to any application for an initiation to bargain,[41] MBIE must set a date for the submissions to be made that is 'at least 20 days after the date of the invitation [for submissions].'[42]

3.89. Assessing and approving an application for the initiation of bargaining is an important preliminary step. Protraction at this early stage should be avoided.

3.90. The CTU submits that MBIE should be required to complete its assessment of any application to initiate bargaining within a defined timeframe. The making and consideration of public submissions should be contained within this timeframe for assessment.

3.91. Another protracted timeframe stems from the requirement that union and employer bargaining sides cannot form until three months **after** the issuance of the chief executive [of MBIE's] notification of approval to bargain.[43]

3.92. The CTU submits that bargaining sides should be allowed to form **as soon as possible** after approval for initiation has been notified. Furthermore, there should be a limit on how long a bargaining side can take to form.

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[40] 32 (1)
[41] 33
[42] 33 (2)
[43] 35 & 45

3.93. There is no good reason why parties should wait three months before constituting their respective bargaining sides. Giving bargaining sides the earliest opportunity to form will ensure bargaining begins as soon as possible and will advantage all bargaining parties.

3.94. The Bill requires that the chief executive of MBIE wait three months after notification of approval to initiate before disclosing to each bargaining party the name of each other bargaining party.[44]

3.95. The CTU submits that the chief executive ought to disclose this information to all bargaining parties as soon as they are able to do so. There is no good public policy reason for the chief executive to delay the disclosure of the names of bargaining parties to each other and this delay is likely to unduly protract the bargaining process.

3.96. There are some timeframes that are too strictly defined. For example, 15 working days after notification of approval for initiation has been issued, an initiating union must notify all unions and employers that it **considers likely** to have members or employees under coverage of the fact that approval to initiate has been given[45].

3.97. Given the scope of this obligation, 15 working days is a truncated timeframe, especially for notifying all employers who are likely to fall within coverage, as unions are not likely to have easy access to all these employer contact details.

3.98. The standard of having to 'consider likely' that an employer has workers covered by a proposed FPA also creates difficulties. Unions

[44] 56
[45] 36

must try to approach all these employers with limited employer data and apply a highly subjective test.

3.99. The CTU submits that the 15 working day timeframe provided for unions to fulfil this subjective and potentially highly complex notification obligation is not sufficient.

3.100. Further, the CTU submits that unions may not be best placed to notify all 'likely' employers of approval to initiate bargaining. Instead, MBIE as a Ministry for business is more likely to have information stored about all employers who may fall under a proposed FPA's coverage. We submit that the role of notifying all likely employers should be vested in the Ministry and that such a facilitating role would be consistent with MBIE's regulatory and administrative functions.

3.101. Currently, the Bill requires that '*an initiating union must*' fulfil its obligation to notify employers. This absolute standard may be impossible for a union to comply with and may allow for pernicious litigation over the degree of union compliance.

3.102. The CTU submits that if this notification requirement is left with the initiating union,[46]the obligation must be relaxed from being an absolute standard to requiring unions to make 'reasonable efforts' to notify.

3.103. Another timeframe that requires more flexibility relates to the formation of inter-party side agreements for each bargaining side.[47] The Bill requires each side to create an inter-party bargaining side agreement within 20 working days of either 3 months after public notification of approval of an application to initiate or the date at

[46] The CTU emphasises its preference that this obligation be vested with MBIE.
[47] 59, 60

which the chief executive of MBIE provided each bargaining party with the names of the other parties [whichever is later].[48]

3.104. This may be a tremendously complex exercise, especially for some employer sides that may have to deal with a plethora employer bargaining parties who are eligible to join the employer bargaining side.

3.105. The CTU submits that formation of inter-party bargaining sides be allowed certain degree of flexibility to reflect the potential complexity of the exercise and to allow bargaining sides sufficient time to fulfil this obligation.

3.106. One thing that can be done to assist in the formation of these inter-party side agreements is to remove the obligation for parties to wait for a period after public notification before these agreements can be worked out.[49] Instead, bargaining parties should be allowed to develop these agreements as soon as possible between themselves.

3.107. Another rigid timeframe is expressed at clause 184 of the Bill, where an application to initiate bargaining for a renewal of an FPA can be made by an initiating union, **no earlier** than 180 days before the expiration of the old FPA.[50]

3.108. The timeframe for initiating a renewal of an FPA should allow for more flexibility, especially in the early days of the FPA system where all participants and actors in the scheme are still developing their internal bargaining infrastructure.

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[48] 59 (1) (a) & (b)
[49] Ibid. Bargaining parties must wait for **(a)** the date that is 3 months after the date on which the chief executive publicly notified that the chief executive had approved a union's application to initiate bargaining for the proposed FPA or; **(b)** the date on which the chief executive provided each bargaining party with the name of each other bargaining party in accordance with **section 56** before creating an inter-party side agreement [within 20 days].
[50] 184 (1)(a)

3.109. Minimum standards are extremely important to defining an occupation or industry. The Bill should safeguard against the possibility that workers may suddenly be left without minimum standards where a strict timeframe for initiating a renewal has not been met.

3.110. The CTU submits that there should be a more flexible timeframe for unions to initiate a renewal of an FPA, especially in the early days of the system. Specifically, unions should have the flexibility to initiate for a renewal of an FPA before the 180 days preceding expiration of an existing FPA.

3.111. Flexibility should also be applied to ensure that minimum standards expressed in an FPA do not evaporate as soon as an FPA has expired. In fact, minimum regulatory standards (that are enforceable as secondary legislation and not private law) should not 'expire' as if they had the nature of contractual terms.

3.112. The CTU submits that where a renewal or replacement for an FPA is not initiated within a timeframe, the regulatory provisions therein should continue until a new set of minimum standards are put in place.

3.113. The Bill is commendable in that it prescribes clear timeframes for each bargaining side to carry out ratification votes.[51]

3.114. While there is a duty for bargaining sides to inform each other as to outcome of their respective ratification votes, there are no clear timeframes for doing so (aside from requiring that it is done 'as soon as reasonably practicable' after the ratification vote).

3.115. Bargaining sides will ascertain knowledge of whether a ratification vote has been successful very quickly after the process is carried out.

[51] 142

Accordingly, the CTU submits that bargaining sides should disclose this information to each other 'as soon as possible' and within a clearly defined timeframe following the holding of each ratification vote.

3.116. As the employer bargaining side will hold its ratification vote before the union bargaining side, it ought to be able to inform the union side of the outcome of its voting process before the union holds its vote. This will give the union side valuable insight into how close the FPA process is towards concluding.

3.117. Furthermore, this timely disclosure will not disadvantage the employer side.

3.118. Arguably the most important step to be taken in the FPA creation process is the issuing of a notice by the chief executive of MBIE to validate the FPA and make it enforceable.[52] This is the final step in the creation of an FPA and occurs after all other participants in the process have fulfilled their obligations.

3.119. However, the final validation of an FPA by MBIE is not subject to any timeframe.

3.120. By the time an FPA can be validated, it has completed several checks by both the Authority and MBIE and been ratified by both sides. The Ministry is not required to perform any further checks. Accordingly, there is no reason as to why validation should not occur rapidly at this point of the process.

3.121. The CTU submits that the chief executive of MBIE validate FPAs as soon as possible and within 5 working days following the successful ratification of an FPA.

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[52] 156

3.122. Where an employee starts a new role that is covered by an established FPA and, where bargaining for a variation to that FPA is underway, employers effectively have a 60 working day timeframe for passing on full information of coverage and bargaining [53]

3.123. The CTU submits that this timeframe is too long. There is no reason why a new employee cannot be advised of relevant FPA coverage or bargaining as part of their induction into the new role.

MANDATORY TERMS

3.124. There are two types of 'mandatory' term under the Bill. Firstly, there is mandatory content for each FPA (called 'mandatory to agree' terms)[54] and secondly, there are 'mandatory to discuss' topics.[55]

3.125. The mandatory to agree terms are quite limited in scope, focusing on minimum rates of pay, penalty rates, when and to what classes of workers these rates apply, mechanisms for the calculation of pay rates and the administrative mechanisms of an FPA (for example, the beginning and end dates for an FPA, coverage, governance provisions etc.).

3.126. Mandatory to agree terms are very important, however many of the issues that unions have hoped FPAs will directly address are not listed in this category. Instead, the mandatory to discuss category contains many of these issues, such as: the objectives of the FPA (or renewal or proposed replacement); health and safety requirements; training and development; arrangements relating to flexible working; leave entitlements; and arrangements relating to redundancy.

[53] 172 (3)
[54] 114
[55] 115

3.127. All the mandatory discussion topics are deeply significant issues for working people and, in certain areas of work, these issues are in vital need for occupational or industry-wide regulation. For example, unions have long raised the issue of unsafe or ineffective health and safety practises in industries such as the forestry sector[56].

3.128. Furthermore, many workers in industries with low bargaining power are completely devoid of redundancy compensation for workers, while lack of career progression, training and development, adequate provision for leave and flexible work arrangements are endemic problems in many of the areas of work where FPA agreements are hoped to have an impact.

3.129. The CTU supports the ability for the Authority to fix mandatory to discuss topics as FPA terms, where (upon application) it determines that there is a 'good reason' for the inclusion of such a term.

3.130. In such a way, it is possible for an applicant side to ensure that an important 'mandatory to discuss topic' may be included as an effective regulatory minimum in an FPA.

3.131. However, many of these mandatory to discuss topics will form the core basis for an application to initiate bargaining in the first place.

3.132. The CTU submits that all the topics listed as 'mandatory to discuss' be given the same gravity and significance as those listed as 'mandatory to agree' and that there should be one expanded mandatory content list in the proposed legislation.

3.133. In addition, workloads and work measurement systems are an essential topic that must be considered mandatory to agree. That is because, without the effective management of workloads, industry

[56] New Zealand Council of Trade Unions- Response to the Public Consultation Document of the Independent Forestry Review (2014), pgs. 1,2

or occupation wide standards of pay, penalty rates, overtime and the like will be ineffective in halting the 'race to the bottom' in the competition for contracts for services or other forms of commercial competition. While pay per hour may be determined across the board by an FPA, if workloads per hour are not determined to any degree employers will compete by increasing workloads.

3.134. This is something that may already be observed in some service industries where workers' pre-existing pay rates are protected under Part 6A of the Employment Relations Act 2000.[57]Workloads simply keep increasing with each renewal of the contract for services.

3.135. Setting base wage rates will be an important function of FPAs and the Bill should be credited for its emphasis on wages, penalty rates, overtime, calculation mechanisms and superannuation.

3.136. Clause 114 (1)(d) (ii) of the Bill provides that employer contribution towards employer superannuation may be included as part of a worker's minimum base wage rate (either by agreement of the bargaining sides or through fixing).[58]

3.137. A base wage rate should express the minimum wage entitlement that a worker will receive 'in the hand' (before tax). While superannuation is an independently important consideration, wage rates should be set in reference to a worker's needs and quality of life. Allowing superannuation contributions to be counted as part of a minimum base wage rate may misrepresent how much workers are receiving to live off and may inadvertently function to lower actual wages.

[57] Employment Relations Act 2000, s 69A- workers specified under Schedule 1A.
[58] Fair Pay Agreements Bill 2022 (115-1), c114 (1)(d)(ii): [Mandatory to agree] whether the minimum base wage rates include or exclude the employer's contribution for superannuation (if any).

3.138. The CTU submits that while superannuation contributions should be encouraged in the proposed legislation, minimum base wage rates should never be treated as being made up partly by these contributions.

3.139. Clause 114 (3) of the Bill allows for an FPA to deal with the setting of a 'minimum entitlement provision'[59] by merely referring to legislation that expresses those statutory minimums without otherwise specifying the minimum entitlement in the agreement.

3.140. This provision does not prevent statutory minimums from being 'contracted out of' by an FPA. The protection against this practice is clearly expressed elsewhere in the Bill.[60] Instead, this provision will relieve bargaining sides from having to consider setting tailored minimum standards that are relevant to an industry or occupation by allowing them to simply refer to and rely on existing statutory minimums.

3.141. The CTU submits that clause 114 (3) of the Bill be removed from the proposed legislation.

[59] 117- Minimum entitlement provisions: A term of a fair pay agreement that relates to 1 or more of the following topics is, in relation to a covered employee,
a minimum entitlement provision for the purposes of the Employment Relations Act 2000:

(a) minimum base wage rates:
(b) how minimum base wage rates, overtime rates, or penalty rates may be adjusted by applying a calculation or a specified amount:
(c) increases to the minimum entitlements provided under the Holidays Act 2003:
(d) payment for any increases to the minimum entitlements provided under the Holidays Act 2003:
(e) rates of payment for any overtime worked:
(f) penalty rates

[60] 119 (1): A FPA provision cannot be below a regulation set in: The Holidays Act 2003, The Minimum Wage Act 1983 and The Wages Protection Act 1983.

4. Significant issues

CONTRACTORS

4.1. Contractors remain outside of the scope of FPAs.

4.2. The Bill expressly penalises deliberate misclassification of employees as contractors where an employer is found to have engaged a worker as an independent contractor for the purpose of preventing that worker from being covered by an FPA.[61]

4.3. The CTU supports the Bill's effort to discourage deliberate misclassification of employees as contractors.

4.4. However, misclassification of employees as independent contractors is a widespread and systemic problem in the labour market. Separately, the government has begun important work to address this issue.[62] However, that work has not yet been completed.

4.5. The passage of FPA legislation, which currently excludes all contractors, without having first addressed the issue of systemic misclassification will mean that many vulnerable employees will be improperly excluded from the protection of the scheme.

4.6. The CTU submits that contractor law reform be made an absolute priority of the government.

4.7. The completion of this work will mean that thousands of vulnerable workers who need minimum employment standards can be clearly

[61] 21
[62] Tripartite Working Group on Better Protections for Contractors: Report to the Minister for Workplace Relations & Safety, 22 December 2021.

identified and brought into the scope of FPAs and other legal protections.

4.8. There are certain industries where misclassification is endemic. These are also the areas of work that are most in need of tailored minimum employment standards. The forestry industry, with its deep-rooted health and safety issues, is an example of one such industry.

4.9. The CTU submits that certain industries and occupations should be identified and carved out as being eligible for FPA coverage, regardless of whether the covered workers are labelled as contractors or employees.

4.10. This way, some of the most vulnerable workers in New Zealand, who are systematically misclassified in their sector of work, can be given the minimum standards protection that they urgently need.

DEFAULT BARGAINING PARTIES

4.11. Default bargaining parties are provided for at Part 3, subpart 3 of the Bill.

4.12. The CTU strongly supports the use of default bargaining as a mechanism for ensuring that an FPA creation process will not be defeated by the failure of a bargaining side to constitute and engage in the bargaining process.

4.13. The CTU endorses the parliamentary paper issued by Minister Wood on 31 March 2022[63] where the identity of the default bargaining parties is confirmed. The CTU agrees with the nomination of relevant peak bodies (the CTU and Business New Zealand) as default bargaining parties.

[63] Parliamentary paper "Proposed policy change to the Fair Pay Agreements Bill" (31 March 2022) G.46C

4.14. The CTU also endorses the backstop processes outlined in the paper. That process outlines 3 triggers that will enable the Authority to step in and fix the terms of an FPA.[64] The triggers are situations where, for whatever reason, FPA bargaining has ceased or not taken place and is unable to result in the creation of an FPA. In these situations, the default bargaining parties have one month to decide whether to take on bargaining. If this does not occur, then the Authority will fix the terms of an FPA.[65]

4.15. This approach gives certainty that any valid initiation for the creation of an FPA will result in a binding and enforceable Fair Pay Agreement.

4.16. In setting minimum standards, certainty of outcome and terms is vitally important.

4.17. The CTU submits that the details contained in the parliamentary paper be brought into the substantive text legislation. Namely, the identities of the default bargaining parties, and the triggering of a backstop process should be expressly stated in the proposed legislation.

4.18. While the Bill currently contemplates that these details will be expressed in further regulations[66] the CTU emphasises the need to make these details intrinsic to the text of the proposed legislation so that they are embedded as part of the internal mechanism of the Act.

4.19. The CTU also submits that the backstop should be triggered where all bargaining parties have withdrawn from bargaining, except for a 'specified bargaining party' who remains at the table. Specified

[64] Ibid. at [10]
[65] Ibid, at [11], [12]
[66] Fair Pay Agreements Bill 2022 (115-1), cl 5 (3)(4)

employers cannot represent other covered employers; therefore, default bargaining and backstop mechanisms must be triggered where specified employers are the sole party on a bargaining side.

PROTECTION OF PERSONAL INFORMATION

4.20. At clause 39 (1) the employers who are notified of the approval to initiate bargaining are required to provide a list of employee contact details to the employee bargaining side. The collection and disclosure of information between bargaining sides, which includes personal information, is also required during the bargaining process.[67]

4.21. These provisions are supported by the CTU and are essential to the ability to effectively engage in an open and 'good faith' bargaining process.

4.22. However, disclosure of personal information must be under prescribed forms and processes to ensure that the information is securely collected, stored, and transferred to the relevant side.

4.23. Currently, the Bill does not specify how information is stored (by the employer)[68] and delivered. Some information will be highly sensitive, such as the disclosure of names and contact details of employees.

4.24. The CTU submits that the proposed legislation must prescribe secure modes for disclosing personal information as well as processes for disclosure that will reduce the risk that information will fall into the wrong hands.

[67] 39,101,102,141(3),171(4), 172(2)(c),173(4) & 193(8)
[68] 41 Storage of employee contact details- only regulates union storage of information not employer storage.

4.25. Further, information disclosed to unions must be in a form that is easily usable and processable. The CTU submits that the proposed legislation specifies that the disclosable information be provided to the union in a digital format.

4.26. The proposed legislation should protect against the unwarranted collection, storage and disclosure of employee details that are already available to unions due to their existing union membership. Any lawful purpose in collecting and disclosing personal information should be narrowly construed[69] as being to involve un-unionised employees in the process of FPA creation. As union members are already in touch with their representative unions, there is no need to collect and disclose their personal information.

4.27. The CTU submits that the personal information of workers who are members of a union bargaining party must not be collected and disclosed under the provisions of the proposed Act.

REPRESENTATION TEST

4.28. The Bill does not allow for unions to rely on union membership numbers to meet the representation threshold test.[70] Instead, support for the initiation of an FPA for the purposes of this test expressly requires something different to union membership.

4.29. While allowing non-union members to show support for the initiation of an FPA should be permissible, the CTU submits that union membership should count as support for initiation.

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[69] Privacy Act 2020- s 22 (2):

If the lawful purpose for which personal information about an individual is collected does not require the collection of an individual's identifying information, the agency may not require the individual's identifying information.

[70] Fair Pay Agreements Bill 2022 (115-1), cl 29 (3)

4.30. Counting union membership as a sign of union member support is consistent with the longstanding democratic principle that unions have a mandate to act in the collective interests of their members. The membership of a union endorses this representation by paying union dues and can influence the union through its internal democratic structures.

4.31. An equivalent degree of support for collective bargaining is not required from union members under the Employment Relations Act. While FPAs operate under a different statutory scheme, the same principle of collectively applies in terms of the unions ordinary right to represent the collective interests of its membership.

4.32. Allowing unions to count their membership numbers towards meeting the representation threshold test will remove an unnecessary fetter and greatly simplify the process of initiating FPAs and allow for unions to focus their attention on obtaining active support from un-unionised workers.

TEST FOR DETERMINING COVERAGE

4.33. The Authority has an important function to perform in settling coverage of FPAs where an overlap between two agreements an issue is.[71]

4.34. The Bill requires the Authority to settle issues of coverage by determining which agreement offers covered workers the 'best terms overall'.

4.35. This is essentially a 'substantiality test' that requires the Authority to balance whole agreements against each other and enforce the application of one agreement over the other on a 'all or nothing' basis.

[71] cls 105,135,138,154 and 155

4.36. This approach is not good for resolving which minimum standards apply in an industrial or occupational context. This is especially true when the purpose of FPAs, that is to provide bespoke regulations for certain areas of work that generalised regulations cannot express.

4.37. A similar test is applied in Australia by the Fair Work Commission under that jurisdiction's award setting scheme, where it is somewhat derisively referred to as the BOOT test (Better off overall test).[72] The experience of Australian unions with this test has been negative as it undermines the ability to awards to be responsive to specific industrial or occupational contexts.

4.38. Using our own version of the BOOT test will mean that workers may miss out on specific regulations that are catered to circumstances of their work. Thus, contrary to the intention of providing regulations that are contextually relevant, this test may serve as a blunt instrument.

4.39. The CTU submits that a 'better individual terms' test should be applied.

4.40. The Authority should look at where an overlap in coverage means that certain regulations compete. The Authority should consider the context of the workers whose coverage is being established and determine on that basis which of the conflicting regulations should prevail.

4.41. This way, the Authority does not need to completely rule out the application of one FPA in favour of another and workers will not be disadvantaged by being excluded from individually better terms.

[72] Sally McManus "Speech to AIRAANZ" (February 2018) ACTU Australian Council of Trade Unions, https://www.actu.org.au/

DIFFERENTIATION BASED ON 'DISTRICTS'

4.42. Employees 'in a district' may be subject to different FPA provisions from those that apply to employees 'in another district'.[73]

4.43. 'Districts' for the purposes of the Bill are defined as 'a territorial authority listed in Part 2 of Schedule 2 of the Local Government Act 2002'. [74]

4.44. The rationale for differentiating between employees on this basis is not clear.

4.45. Relying on administrative boundaries to justify a disparity in conditions for workers performing the same work is arbitrary. It is also open to abuse as some employers may seek to improperly exclude workers from more favourable FPA terms by defining them or restricting them to a certain district.

4.46. An employee will be covered by district terms if they spend a 'majority of the time' performing work in a district where a variation is applicable.[75] This approach is complicated for workers who routinely travel between districts.

4.47. The CTU submits that district variations should not be permitted in the FPA scheme.

4.48. If not removed, penalties should be added for employers who seek to disadvantage workers by offering unfavourable district-based terms and add a requirement that district terms only apply where there is a demonstrable 'good reason' for such differentiation.

[73] 123
[74] 5 (1)
[75] 124 (2)

4.49. The ‘good reason’ cannot be an employer’s preference to pay their workers at a lower rate for work that is otherwise prescribed a higher rate under an FPA.

VEXATIOUS CHANGE OF BARGAINING SIDE ADVOCATE

4.50. A bargaining side has 20 working days to appoint a new lead advocate if the existing lead advocate stops performing their role for ‘any reason’.

4.51. Not only is this a long timeframe for re-appointing an advocate, but there are also no safeguards or remedies against a change in advocate that is frivolous, vexatious, or tactical.

4.52. The CTU submits that the proposed legislation requires changing of a bargaining advocate to be for ‘good reasons’ and that a penalty should be provided for vexatious changes.

4.53. The timeframe for appointing a new bargaining advocate should be shortened so that such changes do not unduly protract bargaining.

5. Clarifications & Drafting issues

LAWFUL STRIKES UNDER THE EMPLOYMENT RELATIONS ACT

5.1. The Bill provides that strikes and lockouts are unlawful in relation to FPA bargaining ‘unless otherwise lawful under section 84 of the Employment Relations ACT 2000 (‘lawful strikes and lockouts on grounds of health and safety’).[76]

5.2. Despite only referring to the lawfulness of ‘health and safety’ strikes (and lockouts), it has never been the purpose of the Bill to restrict

[76] 25

any lawful strikes that occur under the provisions of the Employment Relations Act.

5.3. In only specifying that section 84 strikes are lawful, the text implies that other strikes that are normally permitted under the Employment Relations Act are unlawful.

5.4. The provision preventing strikes and lockouts pursuant to FPA bargaining must be urgently clarified. Parliament must express unambiguously in the text of the proposed legislation that strikes relating to collective bargaining under the separate Employment Relations Act are not restricted by the FPA scheme.

5.5. It is accepted that legislative intent behind the Bill is to not permit a strike in support of a position taken in FPA bargaining.

5.6. However, the fact that FPA bargaining may be occurring at the same time as collective bargaining under the Employment Relations Act does not restrict the ability of workers to strike separately and unconnectedly pursuant to a position, dispute or tactic that relates to collective bargaining.

ACCESS TO WORKPLACES

5.7. The CTU supports robust access provisions for union representatives to enter worksites and talk to workers under the FPA scheme. [77]

5.8. Such provisions are essential for ensuring that unions can represent the collective interests of workers who are covered by a proposed FPA and carry out effective bargaining.

5.9. The conversations that union representatives and workers have where access to worksites is used may take the form of individual discussions between one worker and the official, or group

[77] 86, 87

discussions where several workers participate. Both types of discussion will be useful depending on the context.

5.10. However, aspects of the 'access' provisions in the Bill may implicitly suggest that the form of discussion between workers and union representatives on site does not encompass discussions that involve groups of workers.

5.11. For example, the wording at clause 86 (6) of the Bill frames the discussions that are allowable under the provision as being 'A discussion in a workplace between **an employee** and **a representative**'. A strict and overly literal interpretation of this provision might posit that only discussions between a singular worker and a singular representative is legitimate and protected under the proposed Act.

5.12. The CTU submits that this reading cannot be consistent with the purpose of the Bill, which must be to promote fulsome and effective discussions between workers and their representatives. This objective is not met by prohibiting group discussions that can be held in a reasonable manner as prescribed by the Bill.

5.13. The CTU submits that clauses 86 and 87 be redrafted to clarify that union representatives (in the plural) may discuss relevant matters with groups of workers where the conditions for lawful access and conduct are met.

MBIE's READINESS AT COMMENCEMENT

5.14. The FPA Act is set to come into force 1 month after the Bill receives royal assent.[78]

[78] 2

5.15. Given MBIE's significant role in the process, the Ministry must have the capacity to fulfil its functions under the FPA scheme by the time of commencement.

5.16. MBIE must have the ability to receive applications from initiating unions as soon as the Act comes into force.

5.17. Well before the commencement of the Act, unions must also be made aware of how applications for initiation and accompanying evidence can be delivered to MBIE.

5.18. The CTU asks that all matters relating to MBIE's capacity, as well as the requirements of application and evidentiary disclosure, be settled no later than three months before the commencement of the Act.

EMPLOYEES TO SEEK PENALTIES

5.19. Part 9 of the Bill deals with penalties and enforcement. The Bill clearly contemplates that those penalties may be sought where there is non-compliance with an FPA obligation once the Act is in force.[79]

5.20. The Bill is not clear whether individual employees are able to pursue the enforcement of penalties and claims for compensation[80] where breaches of employer obligations have impacted them.

5.21. The CTU submits that employees ought to have individual standing to pursue claims and seek the enforcement of penalties.

[79] Part 9- cls 196-205
[80] 200- receipt of compensation or reparation mentioned as a factor in determining penalty suggesting that a jurisdiction for granting these remedies exists.

5.22. Furthermore, the right of unions to represent covered workers in pursuing any causes of action (including the enforcement of penalties) must be clearly defined in the proposed legislation.

CONTACT FOR ENGAGING BARGAINING SERVICES

5.23. Currently the Bill is vague as to who should be contacted if a person seeks to engage bargaining support services. The Bill says that such a person '*...must contact **an office of the department** that deals with employment relations issues*.

5.24. The Bill ought to identify who to contact for accessing bargaining support services.

THE AUTHORITY MUST FIX TERMS WHERE THERE IS A VALID APPLICATION

5.25. Clause 219 of the Bill suggests that the Authority has a discretion to fix terms even where it has received a valid application for fixing.

5.26. The CTU considers that the Authority 'must' fix terms where a valid application to access the fixing mechanism is made.

5.27. The CTU submits that the wording at clause 219 be slightly amended with the words '***If** the Authority decides to fix the terms...*' being replaced with '***When** the Authority fixes terms...*'.

RESTRICTION OF PANEL MEMBERS HEARING DISPUTES ABOUT FIXED TERMS

5.28. The CTU understands clause 225[81] of the Bill as having the purpose of ensuring that a panel made up of Authority members that fixes a particular term cannot be the same panel that interprets or applies that provision.

5.29. The CTU agrees with this purpose as it ensures that separate functions of the Authority are not improperly blurred.

[81] 225- Panel member not permitted to hear disputes about same fair pay agreement.

5.30. However, further wording may be useful in emphasising within that provision that the Authority does have jurisdiction to hear genuine disputes (and questions) over the interpretation and application of an FPA term and that such determinations should be made on a cost-free basis.

6. Summary of recommendations

6.1 That clause 3, the purpose of the proposed legislation be drafted to state the policy objective of the Bill.

6.2 That redressing negative impacts on women workers be incorporated into the policy objective of the Bill.

6.3 That MBIE not be given quasi-judicial powers and not have the ability to scrutinise and oversee the internal democratic processes of unions.

6.4 The chief executive of MBIE must not unilaterally make editorial changes to the content of an agreed FPA without the express consent of the bargaining sides.

6.5 That the threshold for accessing the fixing mechanism in cases of impasse be lowered.

6.6 That the two pathways currently proposed for judicial fixing in cases of an impasse be reduced to one, since these two pathways express essentially the same standard.

6.7 That an additional pathway for fixing terms in case of impasse be added, namely that terms may be fixed where 3 months have passed, and no resolution has been reached over disputed terms.

6.8 The Authority ought to fix 'non-mandatory' terms on the application of one bargaining side in certain circumstances.

6.9 That the considerations listed at cl 220 of the Bill be replaced with considerations that state and support the purpose of the FPA scheme (namely, to uplift the working conditions of workers in particular occupations or industries).

6.10 That schedule 3, clause 13 be amended so that any challenge to an action taken as part of an FPA process does not stay the creation of an FPA.

6.11 Challenges to any action (by any participant) taken as part of an FPA creation process should only be allowed on the grounds that the action is 'ultra vires'.

6.12 If the recommendation summarised at paragraph 8 (above) is not adopted, that clauses 11, 12 and 16 of schedule 3 be removed along with cl 17 (2) (a) & (b) of that schedule to ensure that none of the considerations listed in cl 220 are contestable as 'questions of law'.

6.13 That the actions of bargaining sides and parties are not subject to review, appeal, or challenge. To this end the list of reviewable persons at clause 19 (2) of schedule 3 have paragraphs c, d, e, f, g and i, removed.

6.14 That all FPAs are created within 12 months from the time that an application to initiate bargaining is made.

6.15 That MBIE's timeframe for completing an assessment of an application to initiate bargaining be subject to a timeframe that encompasses the calling for, hearing and consideration of public submissions.

6.16 That bargaining sides be allowed to form as soon as possible after approval to initiate is notified, without having to wait 3 months after approval and, that a timeframe be placed on how long a bargaining side may take to form.

6.17 That chief executive of MBIE not wait 3 months after notification of approval to initiation to disclose the names of each bargaining party and that MBIE disclose this information as soon as it is able to do so.

6.18 That 15 working day timeframe for unions to notify all 'likely employers' following approval to initiate should be extended.

6.19 Further, that the obligation to notify 'likely employers' be vested with MBIE, not the initiating union.

6.20 That if unions retain the obligation to notify 'likely employers' of approval to initiate, the proposed legislation specify that making 'reasonable efforts' will satisfy the duty.

6.21 That bargaining sides be allowed flexibility in settling inter-party side agreements and, that they be allowed to create these agreements 'as soon as possible'.

6.22 That unions be permitted to initiate for renewal of an FPA before 180 days prior to expiration of an establish agreement.

6.23 That the expiry of an FPA not mean that FPA terms cease. That FPA provisions continue even after the expiry of an FPA as minimum occupational or industrial standard until replaced or renewed.

6.24 That bargaining sides inform each other of the result of ratification votes as soon as possible and within a defined timeframe and, that the employer side should notify unions of the result of their ratification vote in advance of the union ratification vote.

6.25 That the chief executive of MBIE validate an FPA and issue an FPA notice as soon as possible and no later than 5 working days following a successful ratification process.

6.26 That the 60-day timeframe at cl 172 (3) for passing on information to new employees that relates to applicable FPA coverage and

bargaining for variation be removed. That relevant information be provided at the induction of the new employee.

6.27 That all topics currently listed as ‘mandatory to discuss’ be re-classified as ‘mandatory to agree’.

6.28 That workloads and work management systems be added to the list of topics that are ‘mandatory to agree’.

6.29 That minimum base wage rates never be treated as being partly made up on employer superannuation contributions.

6.30 That clause 114 (3), which allows an FPA to deal with minimum entitlement provisions by referring to relevant legislation, be removed from the Bill.

6.31 That contractor law reform be made an absolute priority by the government.

6.32 That certain industries where contracting models predominate be carved out as eligible for FPA coverage.

6.33 That the identities of default bargaining parties and, the backstop processes be detailed in the substantive text of the proposed legislation.

6.34 That the backstop process be triggered in situations where a ‘specified employer’ is the sole party on an employer bargaining side.

6.35 That personal information about employees that is collected, stored, and disclosed by employers be subject to secure processes designed to protect personal information.

6.36 That disclosure of employee information to the employee side be in a digital format.

6.37 That the personal information of workers who are members of a union bargaining party is not collected, stored or disclosed under the provisions of the proposed legislation.

6.38 That an initiating union be able to count union membership for the purposes of meeting the representation test.

6.39 That in settling issues of overlapping coverage between FPAs, the Authority uphold ‘better individual terms’ and not apply the ‘better off overall test’ that is currently prescribed in the Bill.

6.40 That variations in FPA terms based on ‘districts’ are not permitted under the proposed legislation and if permitted, that such variations only be allowed where there is a demonstrable ‘good reason’.

6.41 That changes to bargaining side advocates be allowable for ‘good reasons’ and not ‘any reason’ as currently permitted under the Bill. That there be penalty for vexatious changes in advocate and that a new advocate must be appointed ‘as soon as possible’ and within a shorter timeframe than 20 working days.

6.42 Confirm that industrial action that is permissible under the Employment Relations Act remains lawful where the conditions of that Act are met, and that FPA processes do not restrict established these rights.

6.43 That the provisions outlining union access to worksites under the Bill be re-worded to avoid a strict literal interpretation that prohibits discussions between groups of workers and union representatives.

6.44 That MBIE’S capacity to carry out its functions under the Bill as well as the requirements that must be met by applicants for initiation be settled and promulgated at least 3 months before the date of commencement.

6.45 That employees have individual standing to pursue claims for breach of FPAs and seek enforcement of statutory penalties.

6.46 That the right of relevant unions to represent covered workers in pursuing causes of action (including seeking penalties) be clearly defined in the proposed legislation.

6.47 The office or person who should be to access 'bargaining support services' be indicated in the proposed legislation.

6.48 That the wording of clause 219 be amended from ***'If*** *the Authority decides to fix the terms…*' to '***When*** the *Authority fixes terms…*'

6.49 That wording be added to clause 225 to confirm that the Authority does have jurisdiction to hear genuine disputes and questions over the interpretation and application of FPA terms and that such determinations be issued on a cost-free basis.