Designing a Fair Pay Agreements System
Submission Form

October 2019

New Zealand Government

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE)

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Submission Form

How to provide us with feedback

The Ministry of Business, Innovation and Employment is collecting written submissions to gather a range of views on how Fair Pay Agreements might work in practice and how they could impact different groups.

We need to hear what you think about the options for an FPA system by **no later than 5pm on 27 November 2019.**

This submission form brings together all the questions asked throughout the discussion document, with page references, so you can go back and look at the relevant topic as necessary.

We know there are a few questions – but you don't have to answer them all if you don't want. If you only feel the need to comment on a few areas of the consultation that are relevant to you, that's OK.

When you're finished, email the completed submission form to: **FairPayAgreements@mbie.govt.nz**

If you can't email the submission, you can post it to:

Employment Relations Policy

Ministry of Business Innovation and Employment

PO Box 1473

Wellington 6145

If you email us your submission, there is no need to post a hard copy as well.

Use and release of information

Your feedback will contribute to the final design of the FPA system.

Your submission will be kept by the Ministry of Business, Innovation and Employment (MBIE) and will become official information. This means that a member of the public may request a copy of your submission from us under the Official Information Act. We may publish the submissions, and any submission summary or analysis report we create as a result of this process may also mention your submission.

If you do not want all or part of your submission to be released or included in an MBIE submission summary or analysis report, please tell us which parts and the reasons why. For example, you may not want members of the public knowing something that happened to you personally. Your views will be taken into account:

- in deciding whether to withhold or release any information requested under the Official Information Act; and
- in deciding if, and how, to refer to your submission in any submission summary or analysis report we create.

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The Privacy Act governs how we collect, hold, use and disclose personal information provided in your submission. You have the right to access and correct this personal information.

Any personal information you supply to MBIE in the course of making a submission will be used by MBIE only in conjunction with matters covered by this document.

Please clearly indicate if you do not want your name to be included if MBIE publishes the submissions or a summary of submissions.

Submitter information

What is the name of the person completing this submission?

Richard Wagstaff, President

If you are submitting on behalf of an organisation, what is the name of that organisation?

New Zealand Council of Trade Unions (NZCTU)

Please indicate if you would like your name and/or organisation details to remain confidential if we publish your submission or a summary of submissions.

☐ Yes, do not publish my name with my submission.
☒ No, publish my name with my submission.

Please provide us with at least one method of contacting you, in case we need to discuss your submission further.

Email	richardw@nzctu.org.nz - President avalonk@nzctu.org.nz – Legal Officer
Phone	04 385 1334
Postal address	PO Box 6645, Wellington 6141
Alternative	Lvl 5, Education House, 178 Willis Street, Wellington 6011

What sector(s) does your submission most closely relate to, if applicable? (for example, which sector you may work, operate or be a representative in)

☐ Agriculture, forestry and fishing
☐ Mining
☐ Manufacturing
☐ Electricity, gas, water and waste services
☐ Construction
☐ Wholesale trade
☐ Retail trade
☐ Accommodation and food services
☐ Transport
☐ Information media and telecommunications
☐ Financial and insurance services
☐ Rental, hiring and real estate
☐ Professional, scientific and technical services
☐ Administrative and support services
☐ Public administration and safety
☐ Education and training
☐ Health care and social assistance
☐ Arts and recreation services
☐ Other _____ (*please specify*)
☒ N/A

Which of the following most closely describes your perspective as a submitter?

☐ Employer
☐ Union representative
☐ Employer body
☐ Employee
☐ Sector representative
☐ Local government
☒ Other – Peak council of trade union movement (*please specify*)

We want to ensure we are hearing views from a range of stakeholders. If you or your organisation identifies with an ethnicity, you can choose to indicate this below.

☐ Māori
☐ Samoan
☐ Tongan
☐ Chinese
☐ New Zealand European
☐ Cook Island Māori
☐ Niuean
☐ Indian
☒ Other The NZCTU incorporates a Maori representative structure, the rūnanga. (*please specify*)

1 Initiation

Questions that relate to initiating an FPA

When an FPA can be initiated	
1.	**Do you think that either a representation or a public interest test is needed to initiate an FPA? Or do you think that applicants should need to pass both a public interest test and a representation test to initiate an FPA? If not, what would you recommend instead?**
	The CTU endorses the expert tripartite Fair Pay Agreement Working Group(FPAWG) recommendations on initiation in their entirety, as follows: *A FPA bargaining process should be initiated by only workers and their union representatives.* *There should be two circumstances where a FPA collective bargaining process may be initiated:* *a. Representativeness trigger: in any sector or occupation, workers should be able to initiate a FPA bargaining process if they can meet a minimum threshold of 1000 or 10 per cent of workers in the nominated sector or occupation, whichever is lower.* *b. Public interest trigger: where the representativeness threshold is not met, a FPA may still be initiated where there are harmful labour market conditions in the nominated sector or occupation.* *The representativeness threshold should cover both union and non-union workers.* It is important to stress that the FPAWG recommended either 'a' or 'b' (above) but not both.
The representation threshold test	
2.	**Is 10% a reasonable threshold to ensure that applicants have some support from their sector or occupation before negotiating an FPA? If not, what do you think a reasonable threshold would be?**
	The CTU adopts the FPAWG recommendations that the representative trigger to commence negotiations is met when at least ten per cent or 1000 (whichever is lower) of workers in the sector or occupation (as defined by the workers) indicate their wish to trigger FPA bargaining. The FPAWG reached the consensus of 10% or 1000 workers (whichever is lower) as an achievable and practical litmus test to initiate the process of FPA negotiations. Requiring a figure higher than 10% would encroach on the territory of enterprise or multi-employer level collective bargaining. FPA bargaining is to sit alongside and not interfere with enterprise or multi-employer level collective bargaining. It is important to distinguish between initiation and the process of negotiation and settlement to which all those covered will be encouraged and invited to participate in.

3.	**How should an applicant group need to prove that they have reached a representation threshold? (such as through signatures, membership etc.)**
	The CTU adopts the FPAWG recommendations that either signatures **or** union membership are the mechanism to prove reaching a representation threshold.
4.	**Do you think applicants should be able to trigger bargaining by gaining a set number of supporters? If so, what do you think an appropriate number would be?**
	Refer to response to question 2. The FPAWG recommended that a numerical figure of 1000 workers be adopted as sufficient to indicate support to commence FPA negotiations. The set figure of 1000 workers gives certainty and avoids the burden of having to perform potentially complicated calculations in large industries, where it might be difficult pragmatically to agree on total workforce numbers and satisfy a 10% threshold.
5.	**Do you think that employers should be able to initiate an FPA bargaining process in their sector?**
	The CTU endorses the FPAWG recommendations which clearly state that the FPA bargaining process should be initiated by only workers and their union representatives. The expert tripartite FPAWG did not consider it appropriate, nor recommend that employers have the ability to initiate FPA bargaining. Employer initiation was discounted by the FPAWG. The FPA model is distinct and separate to the current enterprise or multi-employer collective bargaining system under the Employment Relations Act 2000 (ER Act). Under the ER Act, employers are able to initiate collective bargaining under certain circumstances and a union initiation advantage in specified in that Act. Both of these elements are not contemplated for FPA bargaining.
6.	**How should employers be counted in a representation test – by number or by proportion of the relevant employees that they employ?**
	The CTU endorses the FPAWG recommendations which clearly state that the FPA bargaining process should be initiated by only workers and their union representatives.
7.	**If employers are counted by number, what do you think would be the best way to classify and count them?**
	The CTU endorses the FPAWG recommendations which clearly state that the FPA bargaining process should be initiated by only workers and their union representatives.
The public interest test	
8.	**What problems do you think an FPA is best suited to address?**
	The expert tripartite FPAWG undertook the policy assessment work to identify the policy rationale for FPAs, and the relevant public interest matters underpinning the FPA mechanism. The problems are identified in the FPAWG report.
9.	**What do you think should need to be demonstrated by an applicant group to prove that an FPA will be in the public interest?**
	The decision maker in the appropriate body with the expertise to hear and determine these matters should have discretion to require and receive evidence as it determines appropriate. Likewise the parties to the process should have discretion to pursue their case and the evidence they consider appropriate. Requirements as to the standard or quantity of evidence to satisfy the test should not become a barrier to use of the test and of FPAs. Definitive evidence will be difficult to gather in many cases, and this may be exacerbated by the nature of the sector. For

	example if it is deunionised, fragmented or suffers from poor employment practices, workers in the industry may be difficult to contact and afraid of coming forward with evidence. Public sources of information about sectors often do not cover crucial elements or are too imprecise to be definitive. Proxies should be acceptable. For example poor health and safety practices or outcomes are often an indication of poor employment practices and working conditions generally. It should not be necessary for all or even most criteria to be satisfied, both because of the difficulty in gathering definitive evidence, and because there may be aspects of a sector that are sufficiently egregious (such as high levels of migrant exploitation) that it is in the public interest to take action, and an FPA may be all or part of that action. For these reasons, the decision making body should have a responsibility to gather evidence and verify its veracity.
10.	**What do you think of the criteria about problematic outcomes and potential for more sectoral coordination? If you disagree, please indicate which other criteria you think should be included or if a different approach would be better.**
	The matters identified as 'problematic outcomes and potential for more sectoral coordination' in the public consultation document are captured by the public interest trigger factors in the FPAWG report. The relevant factors were set by the expert tripartite FPAWG and are set out in their recommendations. While we may not disagree with the proposed factors, it should be seen as augmenting the factors the FPAWG recommended. The first indicator is presumably referencing the fact that real wage growth has fallen behind labour productivity growth. As it is written it is unclear what is intended. It could be simply put as "Real wage growth has fallen behind labour productivity growth or wages have an unreasonably low share of the value added in the sector". Other indicators of lack of coordination include: • Widespread lack of training to advance employees' generic skills levels other than that of a routine nature such as familiarisation with an existing job or task (often due to employers being concerned trained employees will leave); • Widespread lack of recognition of skills in pay and conditions; • Lack of recognition of skills shortages in pay; • Lack of a sector or occupation strategy that is effective in addressing the above issues; • Competitive undercutting of wages.
11.	**How much evidence should the applicants be responsible for providing, and what should need to be collected independently by the assessing authority?**
	Refer to response to question 9.
12.	**What indicators do you think a decision maker should take into account when applying the public interest test?**
	Refer to response to question 9.
13.	**Should the list of indicators be open, providing the decision maker flexibility to look at other factors to assess the two broad criteria?**
	The list of indicators identified by the FPAWG should be prescribed in statute. In addition, there should be an overarching statement of objectives that guides the decision making body as to what they are determining. For example, whether there are practices that are harmful for workers in the sector or more broadly plus an "other relevant matters" reference which allows the decision making body to include consideration of other harmful practices as it determines appropriate.

14.	**Is there a particular indicator, or a group of indicators, that should be given extra weight when deciding if a sector or occupation is in need of an FPA?**
	Weighting of indicators should not be prescribed in statute. The decision maker in the appropriate body with the expertise is to determine the weight of indicators, if any, in its decision-making process.
15.	**Should the indicators be updated regularly? If so, how regularly, and by whom?**
	The indicators as outlined in the FPAWG report should be prescribed in statute and not subject to regulatory amendment.
16.	**Do you think the decision maker should have absolute discretion to decide that the public interest has been met? If not, why not? What do you think the threshold should be?**
	The decision maker in the appropriate body with the expertise to hear and determine these matters should have discretion to require and receive evidence as it determines appropriate and be empowered to determine if the public interest test has been met.
17.	**Do you think the public interest test should be available on-demand to anyone, or should a list of allowed sectors or occupations be set in the law?**
	The CTU endorses the FPAWG recommendations. The expert tripartite FPAWG recommended that parties can apply to initiate bargaining on the basis of meeting a public interest test. The expert tripartite FPAWG did not recommend that a list of allowed sectors or occupations should be set in law.
18.	**If the sectors and occupations able to bargain for an FPA are pre-selected in law, which sectors and occupations do you think we should assess against the test first? Are there any that should not be selected? Why?**
	The CTU endorses the FPAWG recommendations. The tripartite FPA Working Group did not consider it appropriate, nor recommend that there be pre-selected sectors and occupations in law.
19.	**If a pre-selected list of sectors and occupations was re-evaluated periodically, how often do you think this should be done?**
	As per response to question 18.
Affected employers and employees will need to be notified that bargaining has been intiated	
20.	**Do you think that the government, employers, employer organisations and unions should all play a role in notifying people that FPA bargaining has been initiated?**
	Unions and the body set up to oversee Fair Pay Agreement bargaining should have primary responsibility for informing employees that an FPA has been initiated. As the expert tripartite FPAWG recommended, there should be statutory provisions on: • Employers' obligations to distribute union materials and to provide unions the names of workers and contact details of those covered in the initiation; and, • Union access to workers for the purposes of voting on bargaining representatives, claims ratification and settlement ratification.
21.	**Do you think that employers should have responsibility for informing employees that an FPA has been initiated? Why or why not? If not, who do you think should do this instead?**
	As per response to question 20.

2 Coverage: deciding who an FPA should apply to

Questions that relate to coverage of an FPA

Defining and renegotiating who will be covered by the terms of the new agreement	
22.	**Do you think that applicants should need to define the coverage of their proposed FPA in terms of the occupations and sectors concerned?**
	Initiation of an FPA will necessarily be a pragmatic exercise and boundaries should not be rigid. The FPAWG recommendations acknowledge that coverage of an FPA may need to be finessed during negotiations, and proposes a dispute settlement mechanism where the parties require an independent assessment. Initiation of an FPA should not be arbitrarily limited by the use of compulsory ANZSCO and ANZSIC codes which do not always reflect on-the-ground experience of industry and occupational coverage across New Zealand workplaces and industries. For example an employee may work across two or more occupational or industry classifications, and the system should not prevent them being covered in any one of them. Job titles of individuals should not determine their classification. The system should allow for multiple classifications to be covered (e.g. cooks, chefs and kitchen hands) and subsets (e.g. clerical staff in the retail industry). To the extent that standard classifications are used, numbers in in each class should be determined (annually or at each census) and fixed for the purposes of determining coverage. By way of further practical example, affiliates inform the CTU that the use of ANZSCO codes became problematic in pay equity bargaining because the ANZSCO codes are based on qualification expectations, so they do not provide an accurate assessment of the level of skill / experience needed for a particular job. CTU affiliates found there were inconsistencies in levels meaning that the ANZSCO descriptions did not accurately represent the actual role. ANZSIC codes may not capture emerging industries or keep up with developments in the future of work at a pace required for FPA bargaining. ANZCO and ANZSIC codes can be used as interpretive guides but should not be compulsory.
23.	**Do you have any comments on the use of ANZSCO and ANZSIC to define coverage? Do you think that there are better alternatives?**
	As per response to question 23. The CTU considers that the compulsory use of ANZCO and ANZSIC codes is restrictive and will create hurdles to successfully initiating bargaining and has the potential to create unnecessary disputation.
24.	**Do you think that parties should be able to bargain different coverage, with any significant changes needing to pass the initiation tests? If so, should there be any restrictions to prevent the test being used to delay an FPA?**
	The NZCTU endorses the FPAWG recommendation that coverage can be renegotiated. Renegotiation of coverage is not to be used as a tactic to stall bargaining, therefore bargaining around substance should continue whilst coverage renegotiation or arbitration is taking place. As impasses over coverage is able to be referred for arbitration more easily than for collective bargaining under the ER Act, and this incentivises parties to resolve disputes over coverage efficiently.
25.	**Should there be restrictions on the permissable grounds for changing coverage during bargaining? If so, what should they be?**
	No. The expert tripartite FPAWG did not recommend restriction of the grounds for changing coverage during bargaining. Settling coverage needs to be a pragmatic and flexible process able to evolve over the life of negotiations, where necessary.

Parties bargaining for limited time-bound exemptions from an FPA	
26.	**In what circumstances do you think a temporary exemption from an FPA may be warranted?**
	The NZCTU endorses the FPAWG recommendations which provide the following parameters for exemptions: • the subject matters of permissible exemptions are to be limited by statute, such as exemptions only from pay rates where a business faces imminent insolvency; • exemptions limited to maximum duration in statute; • exemptions to be agreed by the parties; and, • the establishment of an administrative procedure for application and approval by the relevant body.
27.	**If included, should exemption clauses be mandatory, or permissible?**
	As per response to question 26, any exemption process must meet the criteria outlined.
28.	**Should the bargaining parties be allowed to negotiate additional, more specific exemptions above those set in law?**
	As per response to question 26, any exemption process must meet the criteria outlined.
29.	**What do you think is a reasonable maximum length of time that an employer should be exempted from the terms of an FPA?**
	6 months, or not more than 12 months.
30.	**Should an exemption be able to apply to an entire FPA, or just certain terms?**
	As per response to question 26, any exemption process must meet the criteria outlined. This precludes exemption from an entire FPA.
Allowing parties to negotiate for regional variations in a national FPA	
31.	**Do you think that parties should be allowed to negotiate regional variations in the minimum terms of an FPA?**
	The CTU does not support the proposal of regional variations to minimum terms of FPAs, nor regional FPAs. The point of an FPA is to set a standard and regional variations mean that it is no longer a standard. Just as there are no regional variations in the minimum wage, there should be no regional variations in FPAs. In addition there are real practical difficulties. Regional demarcations will create anomalies where two people working near the border between regions and doing similar jobs could have different pay and conditions for no reason other than where the job is situated. The CTU is not convinced that there are in any case large and widespread regional differentials. To the extent that they exist it is important to ask what the reasons for them might be. A likely factor is the limited employment opportunities in many regions, and particularly in small towns, giving employers additional bargaining power over their employees. Both limited numbers of employers and limited number of jobs for a specific skill will contribute to this. If the reason is lower productivity of regional businesses, that is the problem that should be addressed rather than subsidising poor business performance by requiring employees to be paid less. In any of these cases, it would not be in the public interest to reinforce a situation where many people feel they have to leave the regions to earn a decent living.

32.	**If they are included, what do you think a good level for regional variations could be – regions (regional councils and unitary authorities), territorial authorities (city and district councils) or something else? Should this specificity be set in law or left to the parties to decide?**
	The CTU does not support the proposal of regional variations to minimum terms of FPAs.
Allowing separate regional FPAs	
33.	**Do you think that parties should be able to initiate bargaining towards an FPA for specific regions? What, in your view, are the risks of allowing this?**
	The CTU does not support the proposal of regional FPAs.
34.	**If regional FPAs are allowed, should parties be able to change the regional coverage during bargaining?**
	See response to question 33. The CTU does not support the proposal of regional FPAs.
35.	**Do you think there are particular sectors or occupations which could benefit from, or be harmed by, regional FPAs?**
	See response to question 33. The CTU does not support the proposal of regional FPAs.

3 The Bargaining Process

Questions that relate to the bargaining process

Parties must bargain in good faith	
36.	**Do you think that a duty of good faith should apply to bargaining parties in their dealings with each other and any government bodies as part of the FPA process?**
	Yes, good faith bargaining duties and requirements as per the ER Act should apply in the same manner to FPA bargaining.
37.	**Should a duty of good faith for FPA bargaining involve the same responsibilities as under the current Employment Relations Act? What new responsibilities, if any, will be needed?**
	The good faith bargaining duties and requirements under the ER Act, and as expressed in the Code of Good Faith in Collective Bargaining, should be adopted.
The scope of terms and conditions to be included in agreements could be set in law	
38.	**What do you think of having mandatory and excluded categories?**
	The CTU endorses the expert tripartite FPAWG recommendations for mandatory and permissible matters in FPAs. The FPAWG recommended that the following matters be mandatory in FPAs: • the objectives of the FPA, • coverage, • wages and how pay increases will be determined, • terms and conditions, namely working hours, overtime and/or penal rates, leave, • redundancy, and flexible working arrangements, • skills and training, • duration e.g. expiry date, and • governance arrangements to manage the operation of the FPA and ongoing dialogue • between the signatory parties. Note, flexible working arrangements should be mandatory as per the recommendations in the FPAWG. Flexible working arrangements were not included as mandatory in the public consultation document. The CTU also considers health and safety should be a mandatory matter. Any other matters not listed as mandatory are permissible and for the parties to determine. The expert tripartite FPAWG did not recommend excluded categories of matters in an FPA.
39.	**What do you think of the mandatory topics?**
	The mandatory topics should include health and safety and flexibility.
40.	**What terms, if any, should be in the excluded category?**
	There should be no excluded category. The expert tripartite FPAWG deliberately did not recommend excluded categories of matters in an FPA.

41.	**What do you think of the alternative option to have only mandatory and permissible categories?**
	This is not an alternative option, this is the model recommended by the expert tripartie FPAWG. The CTU endorses the recommendations of the FPAWG that there be mandatory and permissible categories.
42.	**Should any of the items in the permissible and mandatory lists be in a different category?**
	As per response to question 38.
43.	**Do you think that in the event of a bargaining stalemate, the determining body should only be able to set the mandatory terms of the FPA?**
	The determining body should be empowered to arbitrate and fix all terms of an FPA as the principal outcome of any dispute resolution system is that the entire dispute between the parties, however described, should be able to be resolved to finality. Additionally, if only mandatory terms can be arbitrated there will be insufficient incentives for the parties to reach agreement on these matters. This is particularly the case in a system which prohibits the taking of industrial action. Not being able to access arbitration of all terms is counterintuitive to the objectives of FPA bargaining and also administratively unfeasible.
Who can represent affected parties at the bargaining table	
44.	**Do you think that unions and employer organisations should be the major bargaining representatives as is normal?**
	The CTU endorses the recommendations of the expert tripartite FPAWG which recommended that the bargaining parties to FPAs be unions and employers organisation. The CTU opposes the representation of workers by non-union organisations. It is crucial that worker representatives are, and are seen to be, independent from employers, have the necessary skills, and have democratic processes for election of officers. That is what unions are required to be. In addition bargaining outcomes are worse for workers where non-union bargaining representatives are used. There is experience in Australia of representation in collective bargaining by non-union organisation. Pennington (2018)[1] found that for the period 2010-17, private sector enterprise collective agreements negotiated with union representation provided average wage increases around 1 percentage point higher than in non-union agreements, with the difference reaching 1.6 percentage points in 2016. Security and predictability of wage increases was also greater in union-represented enterprise collective agreements, with increases most frequently left to employer discretion in non-union agreements, which were also longer in duration, locking in the lower wage increases.
45.	**Should there be a limit on the number of representatives at the bargaining table?**
	Unions and employers are to determine their bargaining representatives. The body overseeing bargaining will make decisions regarding bargaining efficiency.
46.	**Should other interests be represented? E.g. non-unionised workers, funders or future entrants to the market. Should this be by agreement of the major bargaining parties?**
	The expert tripartite FPAWG considered and did not recommend that there would be bargaining parties other than unions and employer representatives.

[1] Pennington, A. (2018). *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*. Pp 61-62. Retrieved from The Centre for Future Work at the Australia Institute website: https://www.futurework.org.au/on_the_brink_the_crisis_in_private_sector_collective_bargaining

47.	**How should bargaining representatives be selected? Is there a role for Government in ensuring the right mix of parties is at the table?**
	The bargaining parties themselves will determine their bargaining representatives via their own democratic processes. There should be no role for Government in interfering with such democratic processes.
How the costs of bargaining could be shared	
48.	**Which of the three options for bargaining costs do you agree with, and why? Is there another option which you consider is best?**
	The options outlined in the public consultation document are prescriptive and more limited than that advanced in the FPAWG report. The issue of resourcing unions and employer organisations to undertake FPA processes needs serious consideration. The CTU supports the following funding model: • Paid meetings for workers* to elect bargaining reps and at ratification, to be put into statute (*including contractors paid by engagers). • Government funding for travel and accommodation to attend bargaining meetings. • Employers/engagers to pay wages/costs for bargaining representatives. • Government funding for provision of sitting fee to cover indirect costs such as venue, catering and administrative burden.
49.	**If a bargaining fee or levy is introduced, how should non-members be identified?**
	The CTU prefers a model of full funding as per response to question 48. A further funding source could be derived from bargaining fees; a model with a precedent under the ER Act. Any bargaining fee systems needs careful consideration to ensure that a cost is not imposed on workers who are not receiving a benefit. As unions will represent members in good faith under the FPA bargaining model, there should be a requirement that employers provide the names and contact details of all workers of FPA bargaining to ensure that information and access is facilitated for claims and ratification purposes. If a full funding system is not going to form part of the FPA system, and a bargaining fee system will, the CTU recommends that any bargaining fee arrangement be reviewed after the first year of operation to check that the expected costs are being covered by the mechanism.
50.	**If a bargaining fee or levy is introduced, should the charge be made for all employees/employers as of a certain date? Would there need to be exceptions for certain circumstances? If so, which circumstances?**
	As per response to question 49, the CTU prefers a fully funded model.
51.	**Could there be good reasons for departing from the current situation where bargaining parties cover the costs of bargaining?**
	As per response to question 49.
Active support during the bargaining process	
52.	**Do you think that a 'navigator' should be provided to support the bargaining parties?**
	As recommended by the expert tripartite FPAWG, there should be a body overseeing bargaining, as part of the expanded facilitation function. 'Navigation' is not appropriate

	terminology for this function, was not recommended by the expert tripartite FPAWG and has no counterpart precedent internationally.
53.	**What skills do you think would be most useful for a navigator to have?**
	As per response to question 52, the facilitation function is to be conducted by persons with the following skills: • Understanding of institutional industrial relations and the socio-political settings under which bargaining occurs; • Knowledge of and experience in collective bargaining, problem solving techniques in collective bargaining negotiations, and disputes processes for collective bargaining claims; • Understanding of the history, theory and practice of New Zealand employment relations.
54.	**Do you think the navigator should have any additional functions than those described?**
	The expert tripartite FPAWG recommended an expanded facilitation model. This is to add functions to the current facilitation function under the ER Act, so that the facilitator can oversee bargaining, assist to resolve low-level bargaining disputes and, subject to further consideration on the structure of the dispute resolution system, potentially issue non-binding recommendations.
55.	**Should the navigator role be performed and resourced by the government?**
	It is essential the expanded facilitation function is resourced and performed by an independent Government entity.
56.	**Should the parties be allowed to provide their own navigator, or refuse to have one altogether, if they agree to it?**
	The independent expanded facilitation function is to apply to all FPA bargaining.
57.	**Do you agree that the bargaining representatives should have the primary responsibility for communicating with the parties they represent?**
	Yes. This should be supported by provisions in statute as identified in the response to questions 20 and 21.
58.	**At which stages of the FPA process should there a requirement to communicate with the employers and employees under coverage of the agreement? (eg. initiation, application for determination etc.)**
	A requirement to communicate with employees and employers is to occur at the stages identified in this question (ie. initiation, application for determination), however there may be multiple other junctures where communication is appropriate. Assisting the parties to determine these matters is the role of the facilitator.
59.	**How much oversight should the government have over the communication process?**
	The independent government facilitation service is to be empowered to oversee the communication process.
60.	**Do you think that the principal nationwide employer and worker organisations (BusinessNZ and the New Zealand Council of Trade Unions) should support the bargaining parties to communicate with members?**
	The social partners could have a role to play in communications, so long as this function is funded by Government.

4 Dispute resolution: resolving a bargaining stalemate

Questions that relate to dispute resolution

Overall system	
61.	**Do you think that we should make use of the existing employment relations dispute resolution system for FPAs?**
	Yes, but modified in accordance with the expert tripartite FPAWG recommendations and as appropriate to facilitate the FPA system.
Mediation: a fresh view on a bargaining stalemate	
62.	**In the event of a bargaining stalemate, should it be mandatory for parties to enter into a formal mediation process before they can seek a determination?**
	No, mediation is to be purely voluntary. Facilitation under this model will include dispute de-escalation and resolution functions.
63.	**Should mediators be able to provide non-binding recommendations to the bargaining parties? Are there any other functions which a mediator, but not a navigator, should have?**
	As per response to question 62. Although not supported, if mediation is deemed mandatory, it is crucial mediators are not able to issue non-binding recommendations. This is because the bargaining is being overseen by the facilitator. There should not be an entity empowered to make non-binding recommendations outside of the formal bargaining oversight process conducted by the facilitator.
Determination: The final process for resolving a deadlock	
64.	**What should count as a bargaining stalemate?**
	This is the be determined principally by the parties, and with assistance of the facilitator empowered to oversee bargaining.
65.	**Should circumstances be set in law, or should parties need to agree that they have reached a stalemate?**
	As per response to question 64.
66.	**Do you think that there should be a determination process in the event of a bargaining stalemate? If not, would there be sufficient incentives for parties to reach an agreement?**
	The expert tripartite FPAWG recommendations operate on the clear basis that there be access to arbitration as part of the FPA system.
67.	**Do you think that the Employment Relations Authority is the most appropriate organisation to carry out the determination function?**
	The arbitration function is to be carried out by a body with sufficient standing and expertise, as per the following: • A function resourced and equipped to exercise arbitration powers; • Persons conducting arbitration to be sufficiently skilled and knowledgeable; • Able to draw expertise from industry where relevant;

	• Functionally accessible (including not financially prohibitive); • Able to source information where relevant and appropriate; and, • With appropriate and accessible appeal pathways.
68.	**Do you think that the determining body should only be able to set terms for the mandatory topics of an FPA?**
	The determining body should have jurisdiction to fix all terms of an FPA as the principal outcome of any dispute resolution system is that the entire dispute between the parties, however described, should be able to be resolved to finality. Additionally, if only mandatory terms can be arbitrated there will be insufficient incentives of the parties to reach agreement on these matters. This is particularly the case in a system which prohibits the taking of industrial action. Not being able to access arbitration to fix all terms is counterintuitive to the objectives of FPA bargaining system.
69.	**What role do you think the determining body should have in relation to bargaining stalemates for permissible FPA terms, if any? Should the determining body be able to set terms for permissible matters with the consent of the bargaining parties? Should it be able to make recommendations?**
	As per response to question 68.

70.	**Do you think that the determining body should be able to ask for advice from experts to assist it in making its determinations?**
	As per response to question 67, the arbitration body should be able to draw expertise from industry where relevant. Government funding should be available for this purpose, where relevant.
71.	**Should the panel of experts need to be demonstrably independent from the bargaining parties?**
	It is unclear what is being proposed by 'panel of experts'. Expert evidence should be provided by independent experts.
72.	**If a panel of experts is consulted, should their advice be public or strictly confidential? Should experts be protected from liability for their advice?**
	The normal rules of use of expert evidence should apply.
Appeal rights in the dispute resolution system will be limited to matters of law	
73.	**Should appeal rights be limited in any way? If so, what sort of limitations would be appropriate?**
	The CTU endorses the recommendation of the expert tripartite FPAWG that appeals should be limited to matters of law.
74.	**Do you think that appeal rights should be limited to matters of law only?**
	As per response to question 73.

5 Anti-competitive behaviour

Questions that relate to anti-competitive behaviour

Market impact test	
75.	**Should FPAs be subject to a market impact test or should potential impacts be addressed by other means?**

The CTU emphatically does not support any process for a so-called 'market interest test' or 'tests*'. [*Market impact tests (plural) are being consulted on]. Any process for so-called 'market interest test' or 'tests' is outside the scope of the recommendations of expert tripartite FPAWG and is unparalleled in like industrial relations systems internationally or in New Zealand's history. The market interest test or tests is an unfeasible proposition which fails to take into account the context and institutional structures underpinning collective bargaining, and FPA bargaining, and radically undermines the purpose of an FPA bargaining system.

The proposal for a market impact test or tests after parties have agreed to, or a determining body has decided on an FPA, poses serious questions of constitutionality. The system would effectively allow an administrative decision to override those of the executive and judiciary. Further, there is no suggestion of an appropriate body to perform the function in the public consultation document and the CTU does not consider the Ministry of Business Innovation and Employment to have the standing or expertise to perform such a function.

The public consultation document suggests that a parallel process of a 'market interest test' is undertaken by the Commerce Commission under the Commerce Act 1986. These processes are not analogous and can be differentiated by function and process. The Commerce Commission under the Commerce Act 1986 is empowered to undertake 'competition studies' of which the only consequence is the Minister is required to respond. The Commerce Commission is required to make application to the High Court for a determination of non-compliance with the Act on specified grounds, which may result in a penalty. This is a high evidentiary bar requiring specialist evidence and expertise to determine.

If anti-competitive behaviour is possible in FPAs it is also possible from other arrangements for setting employment conditions. For example there can be actual or tacit agreement between employers to keep wages down, not "poach" the employees of others and the like. A large employer could affect competitors by its employment practices, for example by starving them of labour or undercutting them. There is plentiful evidence and theory showing that the imbalance of bargaining power in the employment relationship is in part due to anti-competitive monopsony power of employers vis a vis employees. To reduce that excess power, including market power, is one of the aims of FPAs.

Such employer behaviour is explicitly exempted from the Commerce Act 1986 which in s44(1)(f) exempts from its provisions on restrictive trade practices (Part 2 of the Act), "the entering into of a contract, or arrangement, or arriving at an understanding in so far as it contains a provision that relates to the remuneration, conditions of employment, hours of work, or working conditions of employees". In other words, it exempts employment matters from its consideration. This is for good reason, but it would be highly unjust if in mitigating one form of anti-competitive behaviour (monopsony) which has been allowed to exist for

	decades, its achievement were made significantly more difficult by a new test which applies only to FPAs. Such a test would greatly increase the potential for disgruntled employers to prevent or delay an FPA being formed or renewed, and would greatly increase the cost and complexity of the process for workers in responding to it. No evidence has been presented that FPAs would place a serious limit on competition, justifying such a radical change in employment law. We do not believe such evidence exists. The proposal of market interest test or tests should not be advanced further.
76.	**If not, is there another way to address market impacts (such as consideration during negotiations)?**
	Economic and market issues will necessarily form part of the bargaining process for an FPA. The same matters will form part of the argument and evidence in arbitration of FPAs.
77.	**Do you think that the results of the market impact test should be subject to appeal? If so, what sorts of limitations would be appropriate?**
	There should be no 'market impact test/s'. This is a proposal outside the scope of the expert tripartite FPAWG recommendations.
The scope of consideration for a market impact test	
78.	**What potential impacts of an FPA should be considered in the market impact test? What information would be required to assess these impacts? Are there any impacts which should not be considered?**
	There should be no 'market impact test/s'. This is a proposal outside the scope of the expert tripartite FPAWG recommendations.
79.	**Should there be a maximum time limit on how long the market impact test should take?**
	There should be no 'market impact test/s'. This is a proposal outside the scope of the expert tripartite FPAWG recommendations.
80.	**How feasible do you think the market impact test would be for a government body to assess?**
	Refer to response in question 75. It is unfeasible for a government body to undertake market impact test/s.
How risks and benefits could be weighted	
81.	**How do you think potential risks and benefits should be assessed? Are some negative outcomes justified if the end result will be an overall benefit?**
	Weighing risks and benefits is part of the process for negotiating and agreeing an FPA. See also CTU response to question 75.
Where the FPA fails the market impact test	
82.	**Should the government body have discretion to send agreements back to the bargaining parties or the determining body if they fail the market impact test?**
	There should be no 'market impact test/s'. The setting of the terms of an FPA are to be as agreed by the parties, subject to the requirements in the statute, or decided in finality by the determining body.

83.	**If the decision maker can send agreements back to the bargaining parties, should they be able to give recommendations?**
	This question comes under the banner of 'anti-competitive' behaviour, however, the question itself has broader reach. The CTU answers the question in the context only of a 'market impact test'. There should be no market impact test/s therefore there will be no process for a decision maker to return agreements back to the bargaining parties under this guise, nor will there be a process to issue recommendations on a 'market impact test/s'.
Is there a role for further market impact tests after agreements are enacted?	
84.	**Do you think that there should be an ongoing role for the market impact test after the agreement is put into force? If so, do you think a post-enactment market impact test would need to differ from the initial market impact test in any way?**
	Refer to response to question 75.
85.	**If there is a market impact re-evaluation test, should it be available through an application process or another way? If on-demand, should there be an application fee or some other necessary criteria to pass before the test can be requested?**
	Refer to response to question 84.

6 Conclusion: putting an agreement into force and recovering costs

Questions that relate to finalising an FPA and cost recovery

Ratification: voting to approve an FPA	
86.	**Do you think that FPAs should need to be ratified by a majority of employers and workers who will be affected?**
	Yes, as envisioned by the expert tripartite FPAWG and outlined in their recommendations. Ratification processes need to be set out in Bargaining Process Agreements, as per bargaining under the ER Act.
87.	**Do you think that a majority of voters is a more workable requirement than a majority of all affected parties?**
	Yes.
88.	**How should employer votes be counted: one vote per business, or votes as a proportion of workers employed in the covered sector?**
	Consideration needs to be given to the mechanism to strike the appropriate balance between the interests of larger firms as compared to smaller firms. Due recognition is to be given to employers with the scale of employees employed. Employers will need to develop their own binding ratification procedures and record those the Bargaining Process Agreement, as per collective bargaining under the ER Act.
89.	**How do you think the Government should support a ratification process?**
	The CTU considers that the Government should have a facilitation and communication role to support ratification of FPAs. FPA bargaining should pick up features of ratification as was used for the care and support pay equity settlement, including a mechanism to ensure employers facilitate all employees being able to attend a paid stop work for a ratification vote. The CTU understands that during the care and support settlement the Ministry of Social Development engaged directly with providers and employers to ensure such meetings occurred. The Ministry also held a series of public meetings to inform workers of the settlement process.
90.	**What should happen if an agreement does not pass ratification? Should parties return to bargaining?**
	If an agreement does not pass ratification, where the parties agree, the parties can return to bargaining, otherwise the matter can be referred for arbitration.
91.	**What should happen if some terms and conditions are determined by the determining body and others are agreed by the parties? Should the whole agreement need to be ratified, or just the terms agreed by the parties?**
	The determining body is to be empowered to arbitrate all terms of the FPA. There will not be a circumstance where parts of an FPA are expressed in a fixing determination and other parts subject to a ratification process.

	The expert tripartite FPAWG did not envision a process of referring only certain matters to arbitration. Agreed matters between the parties can be expressed as agreed in the arbitrated outcome.
Enactment: putting the agreement into force	
92.	**Should the Government be allowed to change any terms of an FPA in the process of enacting it through regulations? If so, on what grounds?**
	The determining body is the appropriate body to regulate the content of industrial instruments, including FPAs. An arbitrated FPA is an enforceable instrument under the ER Act. Expression of this instrument in regulation under the ER Act is to be an exact unaltered copy of the arbitrated decision. In relation to a settled FPA, the determining body should have certification functions and powers. The determining body should assess for minimum code breaches and unlawful terms. The expression of the certified instrument of the determining body in regulation is to be an exact unaltered copy.
93.	**What do you think is the best way to ensure that people are able to easily find information about FPAs?**
	The determining body, or other appropriate government entity, should publish FPAs.
We are seeking views on the most suitable mechanism for enforcing an FPA	
94.	**What should happen if a person or group thinks that the minimum terms set by an FPA are not being met?**
	The CTU submits that unions and employees are to have powers of enforcement of FPAs equal to that of labour inspectorate in enforcing employment standards.
95.	**Do you think the Labour Inspectorate should have the ability to enforce minimum terms set by an FPA?**
	As per response to question 95.
Cost recovery	
96.	**Do you think that the costs of dispute resolution in the FPA process should be consistent with the current system?**
	No. There should be no mechanism to recover **legal** costs for FPA bargaining or arbitration.
97.	**Aside from dispute resolution, do you think there are any functions or services in the FPA process for which it would be inappropriate to charge a fee?**
	The only fee associated with FPA bargaining should be a fee to file an application for arbitration. There should be no costs imposed on bargaining parties for the conduct of initiation tests carried out by the determining body.
98.	**What would be an appropriate share of costs between the government and bargaining parties for the other functions (excluding dispute resolution)?**
	See response to question 48.